



Date and Time: Tuesday, October 17, 2023 10:55:00 AM CST

Job Number: 208210863

## Documents (100)

1. [Maryland Staffing Servs. v. Manpower, Inc., 936 F. Supp. 1494](#)

**Client/Matter:** -None-

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2. [Hyde v. Abbott Labs., Inc., 123 N.C. App. 572](#)

**Client/Matter:** -None-

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3. [Tops Mkts., Inc. v. Quality Mkts., Inc., 1996 U.S. Dist. LEXIS 12432](#)

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4. [Discon, Inc. v. NYNEX Corp., 93 F.3d 1055](#)

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5. [Discon, Inc. v. NYNEX Corp., 1996 U.S. App. LEXIS 28747](#)

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6. [Khan v. State Oil Co., 93 F.3d 1358](#)

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7. [Massachusetts Sch. of Law at Andover v. ABA, 937 F. Supp. 435](#)

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8. [Union Carbide Corp. v. Montell N.V., 944 F. Supp. 1119](#)

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9. [United States v. Nippon Paper Indus. Co., 944 F. Supp. 55](#)

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10. [Alpha Lyracom Space Comms. v. Comsat Corp., 968 F. Supp. 876](#)

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11. <a href="#"><u>Dill v. Board of County Comm'rs, 928 P.2d 809</u></a>	
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12. <a href="#"><u>In re Disposable Contact Lens Antitrust Litig., 170 F.R.D. 524</u></a>	
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13. <a href="#"><u>Wilson v. Mobil Oil Corp., 940 F. Supp. 944</u></a>	
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14. <a href="#"><u>Chicago Professional Sports Ltd. Pshp. v. NBA, 95 F.3d 593</u></a>	
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15. <a href="#"><u>Aurora Gas Co. v. Presque Isle Elec. &amp; Gas Co-op, 1996 U.S. Dist. LEXIS 21815</u></a>	
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16. [Crosby v. Hospital Auth., 93 F.3d 1515](#)

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17. [In re Potash Antitrust Litig., 954 F. Supp. 1334](#)

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18. [Stewart Glass & Mirror v. U.S.A. Glas, 940 F. Supp. 1026](#)

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19. [California CNG v. Southern Cal. Gas Co., 1996 U.S. App. LEXIS 35321](#)

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20. [White v. Central Vt. Pub. Serv. Corp., 958 F. Supp. 174](#)

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21. [Baker's Carpet Gallery v. Mohawk Indus., 942 F. Supp. 1464](#)

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22. [Borschow Hosp. & Medical Supplies v. Cesar Castillo Inc., 96 F.3d 10](#)

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23. [Johnson v. Hospital Corp. of Am., 95 F.3d 383](#)

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24. [Delta Dental v. Blue Cross & Blue Shield, 942 F. Supp. 740](#)

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25. [In re Medical X-Ray Film Antitrust Litig., 946 F. Supp. 209](#)

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26. [Roma Constr. Co. v. aRusso, 96 F.3d 566](#)

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27. [Little Caesar Enters. v. Smith, 172 F.R.D. 236](#)

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28. [Heritage Home Health, Inc. v. Capital Region Health Care Corp., 1996 U.S. Dist. LEXIS 22387](#)

**Client/Matter:** -None-

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29. [In re Citric Acid Antitrust Litig., 1996 U.S. Dist. LEXIS 16409](#)

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30. [United States v. Delta Dental, 943 F. Supp. 172](#)

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31. [Winston v. American Medical Int'l, 930 S.W.2d 945](#)

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32. <a href="#"><u>Trugman-Nash, Inc. v. New Zealand Dairy Bd., 942 F. Supp. 905</u></a>					
<b>Client/Matter:</b> -None-					
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33. <a href="#"><u>Tower Air v. Federal Express Corp., 956 F. Supp. 270</u></a>					
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34. <a href="#"><u>Jackson v. W. Indian Co., 944 F. Supp. 423</u></a>					
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35. <a href="#"><u>Duke v. Browning-Ferris Indus., 1996 U.S. Dist. LEXIS 20769</u></a>					
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36. <a href="#"><u>Cost Mgmt. Servs. v. Washington Natural Gas Co., 99 F.3d 937</u></a>					
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37. [Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc., 1996 U.S. Dist. LEXIS 22287](#)

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38. [State ex rel. Ieyoub v. Bordens, Inc., 684 So. 2d 1024](#)

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39. [Cyber Promotions v. America Online, 948 F. Supp. 456](#)

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40. [In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493](#)

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41. [Peters v. Saunders, 50 Cal. App. 4th 1823](#)

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42. [United States v. Alex. Brown & Sons, Inc., 169 F.R.D. 532](#)



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43. [345 Benham Ave. v. Madison Square Assocs., L.P., 1996 Conn. Super. LEXIS 3157](#)

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44. [Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc., 946 F. Supp. 495](#)

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45. [Gaebler v. New Mexico Potash Corp., 285 Ill. App. 3d 542](#)

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46. [Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324](#)

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47. [Amarel v. Connell, 102 F.3d 1494](#)

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48. [Classic Communs. v. Rural Tel. Serv. Co., 956 F. Supp. 896](#)

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49. [Hairston v. Pacific 10 Conf., 101 F.3d 1315](#)

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50. [Pharmacare v. Caremark, 965 F. Supp. 1411](#)

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51. [Westport News v. Minuteman Press, 1996 Conn. Super. LEXIS 3295](#)

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52. [Paddock Publs. v. Chicago Tribune Co., 103 F.3d 42](#)

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53. <a href="#"><u>Philip Morris Inc. v. Blumenthal, 949 F. Supp. 93</u></a>	
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54. <a href="#"><u>Watts v. Clark Assocs. Funeral Home, 234 A.D.2d 538</u></a>	
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55. <a href="#"><u>Hawaii Newspaper Agency v. Bronster, 103 F.3d 742</u></a>	
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56. <a href="#"><u>Columbia Steel Casting Co. v. Portland GE, 111 F.3d 1427</u></a>	
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57. <a href="#"><u>Wisconsin v. Kenosha Hosp., 1996 U.S. Dist. LEXIS 20215</u></a>	
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58. [Bijan Designer for Men v. Katzman, 1997 U.S. Dist. LEXIS 1426](#)

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59. [McIver v. General Mills, 1997 Cal. App. Unpub. LEXIS 5](#)

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**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

60. [Roncari Dev. Co. v. Gmg Enters., 45 Conn. Supp. 408](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

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Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

61. [PSI Repair Servs. v. Honeywell, Inc., 104 F.3d 811](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

62. [Exxon Corp. v. Superior Court, 51 Cal. App. 4th 1672](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

63. [Westowne Shoes, Inc. v. Brown Group, Inc., 104 F.3d 994](#)



**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

64. [Albani v. Southern Ariz. Anesthesia Servs., P.C., 1997 U.S. Dist. LEXIS 16245](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

65. [United States v. Time Warner, 1997 U.S. Dist. LEXIS 2752](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

66. [Yeager's Fuel v. Pennsylvania Power & Light Co., 953 F. Supp. 617](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

67. [Godavari v. Abbott Labs., 1997 D.C. Super. LEXIS 69](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

68. [Bogan v. Northwestern Mut. Life Ins. Co., 953 F. Supp. 532](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"



**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

69. [Gross v. New Balance Ath. Shoe, 955 F. Supp. 242](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

70. [Johnson v. Nyack Hosp., 954 F. Supp. 717](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

71. [S. Megga Telecomms. v. Lucent Techs., 1997 U.S. Dist. LEXIS 2312](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

72. [Florida Seed Co. v. Monsanto Co., 105 F.3d 1372](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

73. [Retina Assocs., P.A. v. Southern Baptist Hosp., 105 F.3d 1376](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**



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

74. [Delaware Health Care v. MCD Holding Co., 957 F. Supp. 535](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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

75. [Mandat v. Community Mut. Life Ins. Co., 1997 U.S. App. LEXIS 3757](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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

76. [Maddock v. Greenville Retirement Community, L.P., 1997 Del. Ch. LEXIS 24](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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

77. [ABC Internat. Traders, Inc. v. Matsushita Electric Corp., 14 Cal. 4th 1247](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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

78. [Morrison v. Viacom, 52 Cal. App. 4th 1514](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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

79. [Doe v. Norwest Bank Minn., N.A., 107 F.3d 1297](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

80. [Allergan Sales v. Pharmacia & Upjohn, 1997 U.S. Dist. LEXIS 7648](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

81. [Rebel Oil Co. v. Atlantic Richfield Co., 957 F. Supp. 1184](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

82. [Nursing Registry v. Eastern N.C. Regional Emergency Medical Servs. Consortium, 959 F. Supp. 298](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

83. [Rozema v. Marshfield Clinic, 1997 U.S. Dist. LEXIS 8261](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022



84. [American Professional Testing Serv. v. Harcourt Brace Jovanovich Legal & Professional Publs., 108 F.3d 1147](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

85. [Le Baud v. Frische, 1997 U.S. Dist. LEXIS 22474](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

86. [HTI Health Servs. v. Quorum Health Group, 960 F. Supp. 1104](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

87. [Saratoga Harness Racing v. Veneglia, 1997 U.S. Dist. LEXIS 3566](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

88. [United States v. Nippon Paper Indus. Co., 109 F.3d 1](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

89. [Natural Gas Clearinghouse v. FERC, 108 F.3d 397](#)



**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

90. [United States v. GE, 1997 U.S. Dist. LEXIS 5089](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

91. [Holmes Prods. Corp. v. Dana Lighting, 958 F. Supp. 27](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

92. [In re Independent Serv. Orgs. Antitrust Litig., 964 F. Supp. 1454](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

93. [Anti-Monopoly v. Hasbro, Inc., 958 F. Supp. 895](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

94. [Rossi v. Standard Roofing, 958 F. Supp. 976](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"



**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

95. [Rohlfing v. Manor Care, 172 F.R.D. 330](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

96. [Credit Counseling Ctrs. of Am. v. National Found. for Consumer Credit, 1997 U.S. Dist. LEXIS 4957](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

97. [In re Circuit Breaker Litig., 984 F. Supp. 1267](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

98. [DiscoVision Assocs. v. Disc Mfg., 1997 U.S. Dist. LEXIS 7507](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**

Cases

**Narrowed by**

Practice Areas & Topics: Antitrust & Trade Law; Timeline:  
Oct 01, 1991 to Dec 31, 2022

99. [In re Independent Serv. Orgs. Antitrust Litig., 964 F. Supp. 1479](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**



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

100. [Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp., 1997 U.S. Dist. LEXIS 5881](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

**Narrowed by:**

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



## **Maryland Staffing Servs. v. Manpower, Inc.**

United States District Court for the Eastern District of Wisconsin

August 19, 1996, Decided ; August 19, 1996, FILED

Case No. 95-C-1315

### **Reporter**

936 F. Supp. 1494 \*; 1996 U.S. Dist. LEXIS 12668 \*\*; 1997-1 Trade Cas. (CCH) P71,834

MARYLAND STAFFING SERVICES, INC., JOHN CHANDONNET, NANCY CHANDONNET, Plaintiffs, vs. MANPOWER, INC., MITCHELL S. FROMSTEIN, JON F. CHAIT, TERRY A. HUENEKE, DOUGLAS H. KRUEGER, JAMES J. KATTE, JOSEPH LONG, MILT BERLAND, GIL PALAY, JOHN DOES 1-4, et al., Defendants.

**Disposition:** [\*\*1] Defendants' motion to dismiss granted in part and denied in part. Plaintiffs John and Nancy Chandonnet claims DISMISSED. Counts 1, 2, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, and 19 DISMISSED.

## **Core Terms**

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Staffing, plaintiffs', motion to dismiss, overcharges, mail, Counts, cause of action, defendants', misrepresentation, fails, tying arrangement, predicate act, franchise, injuries, pattern of racketeering activity, court concludes, alleges, conversion, defraud, franchise agreement, anti trust law, wire fraud, disclose, individual plaintiff, interstate commerce, complaint alleges, particularity, racketeering activity, intangible right, allege fraud

## **LexisNexis® Headnotes**

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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** [down arrow] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) permits a district court to dismiss a claim for failure to state a claim upon which relief can be granted. In evaluating a motion filed under this rule, the court must accept as true all well-pleaded factual allegations contained in the plaintiffs' complaint and must draw all reasonable inferences in favor of the plaintiffs. The court must deny a motion to dismiss unless it appears beyond doubt that the plaintiffs are unable to prove any set of facts which would entitle them to relief.

Business & Corporate Law > ... > Remedies > Damages > Compensatory Damages

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

936 F. Supp. 1494, \*1494-996 U.S. Dist. LEXIS 12668, \*\*1

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Direct Actions

## **HN2** [] Damages, Compensatory Damages

A corporate shareholder does not have an individual right of action against third persons for damages to the shareholder resulting indirectly from injury to the corporation.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Evidence > Burdens of Proof > General Overview

## **HN3** [] Racketeering, Racketeer Influenced & Corrupt Organizations Act

To state a claim upon which relief can be granted under Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1962\(c\)](#), plaintiff must allege that the defendant (1) conducted (2) an enterprise (3) through a pattern (4) of racketeering activity.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN4** [] Racketeering, Racketeer Influenced & Corrupt Organizations Act

Before a plaintiff bringing an action under Racketeer Influenced and Corrupt Organizations, [18 U.S.C.S. § 1961 et seq.](#), alleging a pattern of racketeering activity, he must plead particular instances of racketeering activity or predicate acts.

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN5** [] Mail Fraud, Elements

In order to establish mail or wire fraud under [18 U.S.C.S. §§ 1341](#) and [1343](#), the plaintiff must ultimately prove (1) that the defendant devised a scheme to defraud the plaintiff; (2) that the defendant used the United States mails or caused interstate wire communications to take place for the purpose of executing that scheme; and (3) that the defendant did so knowingly and with the intent to defraud.

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

936 F. Supp. 1494, \*1494A 996 U.S. Dist. LEXIS 12668, \*\*1

## **HN6** Fraud Against the Government, Mail Fraud

In order to adequately allege mail or wire fraud as Racketeer Influenced and Corrupt Organizations Act predicate acts, the plaintiff must plead scienter. Plaintiff they must allege that the defendant intentionally deceived the plaintiff.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

## **HN7** Pleadings, Heightened Pleading Requirements

Under Fed. R. Civ. P. 9(b), intent, knowledge and other condition of mind of a person may be averred generally.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

## **HN8** Pleadings, Heightened Pleading Requirements

Fed. R. Civ. P. 9(b) prohibits "lumping together" all the defendants under a general accusation that they were participants in a scheme to defraud. Rather, the Rule 9(b) requires that the complaint inform each defendant of the nature of his alleged participation in the fraud and specify which defendants were involved in what activity.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN9** Racketeer Influenced & Corrupt Organizations Act, Elements

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq., defines pattern of racketeering activity as at least two predicate acts of racketeering committed within a ten-year period. 18 U.S.C.S. § 1961(5).

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN10** Racketeering, Racketeer Influenced & Corrupt Organizations Act

A plaintiff must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. Thus, to show a pattern of racketeering activity, a plaintiff must allege both continuity and relationship among the predicate acts.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN11** Racketeering, Racketeer Influenced & Corrupt Organizations Act

The determination as to whether there is continuity so as to establish a pattern of racketeering activity is a fact-specific inquiry which hinges on the four factors. The court must weigh: (1) the number and variety of predicate acts

936 F. Supp. 1494, \*1494-1996 U.S. Dist. LEXIS 12668, \*\*1

and the length of time over which they were committed, (2) the number of victims, (3) the presence of separate schemes, and (4) the occurrence of distinct injuries.

Antitrust & Trade Law > Sherman Act > General Overview

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

#### **HN12** [blue icon] Antitrust & Trade Law, Sherman Act

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. The seller uses the tying arrangement to shelter one product from an open, competitive market by increasing its sales through a coerced, tie-in purchase to a more successful product. The antitrust laws prohibit such arrangements because they restrain free competition in the market for the tied product.

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

#### **HN13** [blue icon] Tying Arrangements, Sherman Act Violations

An arrangement whereby a franchisee is required to purchase products or services from a third party can constitute an illegal tying arrangement.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Commercial Law (UCC) > General Provisions (Article 1) > General Provisions

#### **HN14** [blue icon] Public Enforcement, State Civil Actions

Under the Maryland Antitrust Act, a person may not: (1) by contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce. [Md. Code Ann., Com. Law I § 11-204\(a\)\(1\)](#). The Maryland Act defines trade or commerce as all economic activity within the state. [Md. Code Ann., Com. Law I § 11-201\(h\)](#). Further, [Md. Code Ann., Com. Law I § 11-202\(a\)](#) specifies that the purpose of the Maryland Antitrust Act is to protect the public and foster fair and honest intrastate competition.

Insurance Law > ... > Directors & Officers Liability Insurance > Insured & Insurer Obligations > General Overview

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

Torts > ... > Contributory Negligence > Limits on Application > Intentional Torts

#### **HN15** [blue icon] Directors & Officers Liability Insurance, Insured & Insurer Obligations

A failure to disclose a fact is not actionable absent a duty to disclose.

Torts > Intentional Torts > Conversion > General Overview

## [HN16](#) [L] **Intentional Torts, Conversion**

Conversion is the wrongful or unauthorized exercise of dominion or control over a chattel. A chattel is an article of personal property, a thing personal and movable. It must consist of something identifiable and tangible.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Contracts Law > Breach > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Contracts Law > Breach > Breach of Contract Actions > General Overview

Governments > Legislation > Statute of Limitations > General Overview

## [HN17](#) [L] **Defenses, Demurrs & Objections, Affirmative Defenses**

Under Wisconsin law, a contract cause of action accrues at the moment the contract is breached, regardless of whether the injured party knew or should have known that the breach occurred.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > Redundant Matters

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > General Overview

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

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

## [HN18](#) [L] **Motions to Strike, Redundant Matters**

A motion to strike is disfavored by the courts and the mere presence of redundant material in a pleading does not warrant granting a motion to strike, absent a showing of prejudice to the opposing party.

**Counsel:** Attorney(s) for Plaintiffs: Eric J. Szoke, Esq., Monica & Szoke, Far Hills, NJ.

Attorney(s) for Defendants: William H. Levit, Jr., Esq., Godfrey & Kahn, Milwaukee, WI.

**Judges:** HON. ROBERT W. WARREN

**Opinion by:** ROBERT W. WARREN

## **Opinion**

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**[\*1497] DECISION AND ORDER**

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This case involves a commercial dispute over the appropriate rates of insurance to be charged by a franchisor to a franchisee. In crafting their lawsuit against the defendants, the plaintiffs have chosen the shotgun approach; they have filed an 84-page, 231-paragraph, nineteen-count complaint. A rifle would have provided a better model. See Gagan v. American Cablevision, Inc., 77 F.3d 951, 955 (7th Cir. 1996). The defendants might have moved to dismiss the entire prolix complaint on the ground that it fails to include a "short and plain statement of the claim showing the pleader is entitled to relief" as required by Federal Rule 8(a)(2). See Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d 771, 775-76 (7th Cir. 1994). Instead, **[\*\*2]** they have chosen a more narrowly focused approach and have asked the Court to dismiss each and every count of the complaint for reasons specific to each. For the reasons that follow, the defendants' motion will be granted in part and denied in part, and Counts 1, 2, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, and 19 of the complaint will be dismissed.

## **[\*1498] I. BACKGROUND**

According to the complaint, plaintiff Maryland Staffing Services, Inc. (Maryland Staffing) entered into a franchise agreement with defendant Manpower, Inc. (Manpower) in 1974. Under the terms of this agreement (which was renewed in 1976, 1978, 1984 and 1994), Maryland Staffing was given exclusive rights to use the corporate name and resources of Manpower and to engage in the business of providing temporary workers to customers under the corporate authority of Manpower in the State of Maryland.

Manpower compensated Maryland Staffing by paying it a percentage of Maryland Staffing's gross profit. The franchise agreement provides that gross profit is to be calculated by deducting certain expenses from Maryland Staffing's total monthly sales. Among these expenses are the costs of all necessary employer liability and workers' **[\*\*3]** compensation insurance coverage for Maryland Staffing's temporary workers. (Franchise Agreement P 5a.) According to the terms of the agreement, Manpower was obligated to provide the funds for this insurance coverage. (Franchise Agreement P 3i.) Manpower then deducted the costs of this insurance from the total sales of Maryland Staffing as part of determining Maryland Staffing's gross profit.

The complaint alleges that beginning in 1987, Manpower began overcharging Maryland Staffing for workers compensation and liability insurance. Thus, the plaintiffs allege, Manpower wrongfully reduced Maryland Staffing's compensation by artificially raising its expenses and thus reducing its gross profit.

On December 27, 1995, the plaintiffs filed this suit asserting nineteen separate causes of action. They assert that Manpower and its employees violated the Racketeer Influenced and Corrupt Organizations Act (RICO), violated federal and state antitrust laws, violated Wisconsin and Maryland franchising laws, and breached numerous common law duties. On February 26, 1996, the defendants filed this motion seeking to dismiss all of the plaintiffs' claims for various deficiencies. The motion is now fully-briefed **[\*\*4]** and ready for resolution.

## **II. LEGAL STANDARD**

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits **HN1** a district court to dismiss a claim for "failure to state a claim upon which relief can be granted." In evaluating a motion filed under this rule, the Court must accept as true all well-pleaded factual allegations contained in the plaintiffs' complaint and must draw all reasonable inferences in favor of the plaintiffs. Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); Baxter Healthcare Corp. v. O.R. Concepts, Inc., 69 F.3d 785, 787 (7th Cir. 1995); Janowsky v. United States, 913 F.2d 393, 395 (7th Cir. 1990). The Court must deny a motion to dismiss unless it appears beyond doubt that the plaintiffs are unable to prove any set of facts which would entitle them to relief. See Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Baxter Healthcare, 69 F.3d at 787.

## **III. DISCUSSION**

### **A. Standing of Individual Plaintiffs.**

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The defendants first move to dismiss the claims of individual plaintiffs John and Nancy Chandonnet, the owners and officers of Maryland Staffing, on the ground that they [\*\*5] lack standing to pursue these claims.

"As a general principle, [HN2](#) a corporate shareholder does not have an individual right of action against third persons for damages to the shareholder resulting indirectly from injury to the corporation." [Flynn v. Merrick, 881 F.2d 446, 449 \(7th Cir. 1989\)](#). See also [Twohy v. First Nat. Bank of Chicago, 758 F.2d 1185, 1194 \(7th Cir. 1985\)](#). There are certain exceptions to this general rule, "such as where a special contractual duty exists between the wrongdoer and shareholder or where the shareholder suffers an injury separate and distinct from that suffered by other shareholders." [Twohy, 758 F.2d at 1194](#) (citations omitted).

The plaintiffs claim that the Chandonnets fit within this latter exception; they claim to have suffered numerous injuries independent from those suffered by the corporation, Maryland Staffing. According to the [\*1499] plaintiffs, "In every count of the complaint, the individual Plaintiffs allege personal pain, suffering, humiliation, emotional distress and mental anguish. These claims arise from mental and physical injuries sustained by the individual plaintiffs as a result of the Defendants' alleged conduct." (Plaintiffs' [\*6] Brief in Opposition to Defendants' Motion at p. 8.)

The Court rejects the plaintiffs' characterization and concludes that the injuries alleged by the individual plaintiffs are not separate and distinct from those suffered by the corporation. The individual plaintiffs' alleged injuries are derivative of the alleged injuries to Maryland Staffing; the complaint alleges that the individual plaintiffs suffered mental and physical injuries as a result of the financial damages incurred by the corporation. Obviously investors in a firm suffer when the firm incurs a loss, "yet only the firm may vindicate the rights at issue." [Flynn, 881 F.2d at 449](#) (quoting [Carter v. Berger, 777 F.2d 1173, 1175 \(7th Cir. 1985\)](#)). As was the case in [Flynn](#), here "it is clear that the alleged injury is an injury to the corporation -- an injury to the shareholders was an indirect result of the damage done to the corporation as such, it does not create the necessary direct and independent harm required to maintain shareholder standing." [Flynn, 881 F.2d at 449](#). Maryland Staffing is the only party authorized to vindicate its rights vis a vis Manpower. Accordingly, the defendants' motion will be granted [\*7] in this regard, and the Chandonnets' claims will be dismissed.

## B. Plaintiffs' RICO Claims.

[HN3](#) To state a claim upon which relief can be granted under RICO, 18 U.S.C. § 1962(c), plaintiffs must allege that the defendants (1) conducted (2) an enterprise (3) through a pattern (4) of racketeering activity. [Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 \(1985\)](#). The defendants move to dismiss the plaintiffs' RICO claims (Counts 1, 2, 6, and 7) because the plaintiffs have failed to adequately allege the third and fourth elements of the RICO cause of action.<sup>1</sup>

### [\*\*8] 1. Racketeering activity.

"Before [HN4](#) a RICO plaintiff can allege a 'pattern of racketeering activity,' he must plead particular instances of 'racketeering activity' or 'predicate acts.'" [Grove Holding v. First Wisconsin Natl. Bank, 803 F. Supp. 1486, 1501 \(E.D.Wis. 1992\)](#). Here, the plaintiffs allege mail and wire fraud by the defendants as the predicate acts of racketeering activity to support their RICO claims.

[HN5](#) In order to establish mail or wire fraud under [18 U.S.C. §§ 1341](#) and [1343](#), the plaintiffs must ultimately prove (1) that the defendants devised a scheme to defraud the plaintiffs; (2) that the defendants used the United

<sup>1</sup> The defendants also move to dismiss the plaintiffs' RICO claims on the ground that they are barred by the applicable statute of limitations. The Court rejects this argument, and concludes that the plaintiffs filed this action within the four-year statute of limitations applicable to RICO claims. See [Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143, 156, 97 L. Ed. 2d 121, 107 S. Ct. 2759 \(1987\)](#) (four-year statute of limitations applies to RICO claims). The plaintiffs did not discover (nor did they have reason to discover) the alleged insurance overcharges until 1994; they filed their complaint in 1996. See [McCool v. Strata Oil Co., 972 F.2d 1452, 1464-65 \(7th Cir. 1992\)](#).

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States mails or caused interstate wire communications to take place for the purpose of executing that scheme; and (3) that the defendants did so knowingly and with the intent to defraud. See Pereira v. United States, 347 U.S. 1, 8-9, 98 L. Ed. 435, 74 S. Ct. 358 (1954); United States v. Walker, 9 F.3d 1245, 1249 (7th Cir. 1993), cert. denied, 511 U.S. 1096, 128 L. Ed. 2d 485, 114 S. Ct. 1863 (1994). The defendants claim that the complaint fails to adequately allege these elements because it fails to allege that the defendants acted with the requisite [\*\*9] intent to defraud and because it fails to allege fraud with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure.

#### **a. Intent to defraud.**

**HN6**[<sup>1</sup>] In order to adequately allege mail or wire fraud as RICO predicate acts, the plaintiffs must plead scienter; they must allege that the defendants intentionally deceived the plaintiffs. See Grove Holding, 803 F. Supp. at 1501. In support of their motion to dismiss, [\*1500] the defendants claim that "Maryland Staffing does not allege that any one of the individual defendants possessed the requisite scienter. Rather, it simply claims that, by virtue of their positions with Manpower, one or more of the defendants . . . knew Manpower was overcharging for insurance." (Memorandum of Defendants at p. 8.) Therefore, according to the defendants, the "Complaint does not allege which defendants allegedly had the necessary criminal intent. Thus, it does not afford a basis for believing that Maryland Staffing could prove scienter on the part of any of the individual defendants." (Id.) In response, the plaintiffs claim that the complaint does allege "knowledge on the part of the Defendants as to the fraudulent and/or misleading nature [\*\*10] of the mailings, and [has] identified the source of this knowledge, namely the Defendants' participation in the decision to issue the burden rate notifications." (Plaintiffs Brief in Opposition at p. 13.)

Based upon our review of the complaint, we conclude that the plaintiffs have adequately alleged that the defendants acted with the requisite intent to defraud. Although their claims of intent to defraud are broad and nonspecific, **HN7**[<sup>1</sup>] under Rule 9(b) of the Federal Rules, "intent, knowledge and other condition of mind of a person may be averred generally." Fed.R.Civ.P. 9(b). This is only fair; the plaintiffs cannot be expected to know the defendants' state of mind until they have an opportunity to conduct pretrial discovery. See Emery v. American General Finance, Inc., 71 F.3d 1343, 1347 (7th Cir. 1995). The plaintiffs have generally averred intent to defraud and have thus satisfied this requirement. Accordingly, the court concludes that failure to plead scienter with greater specificity does not provide a basis for dismissing these RICO counts.

#### **b. Federal Rule 9(b) particularity.**

Rule 9(b), however, does require a RICO plaintiff who relies on mail and wire fraud as predicate [\*\*11] acts to plead the circumstances constituting the alleged fraud "with particularity." Fed.R.Civ.P. 9(b). Particularity "means the who, what, when, where, and how: the first paragraph of any newspaper story." DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990), cert. denied, 498 U.S. 941, 112 L. Ed. 2d 312, 111 S. Ct. 347 (1990). Moreover, "the caselaw and commentary agree that the reference to 'circumstances' in the rule requires 'the plaintiff to state "the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.'"'" Vicom, 20 F.3d at 777 (quoting Uni\* Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 923 (7th Cir. 1992)(and in turn quoting Bankers Trust Co. v. Old World Republic Ins. Co., 959 F.2d 677, 683 (7th Cir. 1992)). In a case such as this where there are multiple defendants, Rule 9(b) **HN8**[<sup>1</sup>] prohibits "lumping together" all the defendants under a general accusation that they were participants in a scheme to defraud. Rather, the rule requires that the complaint inform each defendant of the nature of his alleged participation in the [\*\*12] fraud and specify which defendants were involved in what activity. See 20 F.3d at 778 (citations omitted).

The defendants argue that the complaint fails to set forth the particulars of the alleged misrepresentations (who made them, when they were made, what the misrepresentations were etc.). Instead, claim the defendants, the complaint merely alleges that one or more of the individual defendants made the decision to overcharge Maryland Staffing for insurance, and that one or more of the defendants knew of the overcharges. The plaintiffs dispute this, arguing (without citing specific paragraphs of the complaint) that the "complaint identifies every relevant aspect of the alleged fraud in great factual detail." (Brief in Opposition at p. 16.)

Upon careful review of the complaint, the Court concludes that the plaintiffs have not pleaded the circumstances constituting the alleged fraud with the particularity required by [Rule 9\(b\)](#). The complaint alleges that Manpower concocted a scheme to defraud Maryland Staffing by overcharging it for insurance. It does not indicate who made that decision, when the decision was made, or any of the circumstances surrounding the alleged scheme. Rather, [\[\\*\\*13\]](#) the complaint simply [\[\\*1501\]](#) reiterates the generic allegation that one or more of the individual defendants and/or unknown individuals within their control either made the decision or participated in the process by which the decision to execute the alleged scheme was made. These broad, general allegations fail to provide any of the defendants with notice of the nature of their participation in the alleged scheme. The complaint fails to indicate who did what, when, or where. As such, it is insufficient to satisfy [Rule 9\(b\)](#). Accordingly, the plaintiff's RICO claims will be dismissed on this basis.

## **2. Pattern of Racketeering Activity.**

In addition to challenging the RICO counts for their failure to adequately allege racketeering activity, the defendants also move to dismiss these claims for failure to allege that the racketeering activity amounted to a pattern. Specifically, the defendants argue that "the Complaint alleges one victim and one scheme which allegedly took place over an unidentified period of time, on an unidentified number of occasions, through an unidentified number of mailings and wirings." (Defendants' Memorandum at p. 11.) This, they contend, is insufficient to establish [\[\\*\\*14\]](#) a pattern of racketeering activity as that term is defined under Seventh Circuit precedent.

[HN9](#) RICO itself defines "pattern of racketeering activity" as at least two predicate acts of racketeering committed within a ten-year period. [18 U.S.C. § 1961\(5\)](#). In an attempt to "sharpen the contours of this pattern requirement . . . the [Supreme] Court has stated that, because Congress enacted RICO not out of concern for a sporadic fraudulent act but out of concern for long-term conduct, 'a [HN10](#) plaintiff . . . must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.' [Vicom, 20 F.3d at 779](#) (quoting [H.J. Inc., v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 106 L. Ed. 2d 195, 109 S. Ct. 2893 \(1989\)](#)). Thus, to show a pattern of racketeering activity, a plaintiff must allege "both continuity and relationship among the predicate acts." [Morgan v. Bank of Waukegan, 804 F.2d 970, 975 \(7th Cir. 1986\)](#).

There is clearly a sufficient relationship among the predicate acts alleged in the complaint: All of the allegedly fraudulent acts relate to the insurance overcharges. Thus, continuity is the central question in [\[\\*\\*15\]](#) this case. "Continuity is 'both a closed-and-open-ended concept.'" [Midwest Grinding Co., Inc., v. Spitz, 976 F.2d 1016, 1022 \(7th Cir. 1992\)](#)(quoting [H.J. Inc., 492 U.S. at 241](#)). Here, we are concerned with closed-end continuity because the complaint alleges racketeering activity which has come to a close, not conduct which by its nature projects a future criminal activity. [See id.](#)

The Seventh Circuit has indicated that [HN11](#) the determination as to whether there is continuity so as to establish a pattern of racketeering activity is a fact-specific inquiry which hinges on the four factors identified in the [Morgan](#) case. The Court must therefore weigh: (1) the number and variety of predicate acts and the length of time over which they were committed, (2) the number of victims, (3) the presence of separate schemes, and (4) the occurrence of distinct injuries. [See Gagan, 77 F.3d at 962-63](#).

First, we look at the number, variety, and time-span of the alleged predicate acts, the most important of the four [Morgan](#) factors. [See Gagan, 77 F.3d at 963](#). The plaintiffs allege a substantial number of predicate acts of mail and wire fraud over the course of nearly seven years. [\[\\*\\*16\]](#) This clearly weighs in favor of a finding of a sufficient allegation of a pattern of racketeering activity. However, the plaintiffs do not allege any variety in the types of predicate acts upon which they rely for this cause of action. All the predicate acts alleged consist of mail and wire fraud in effectuating the alleged insurance overcharge scheme. The lack of variety itself weighs against a finding of a pattern; the fact that the complaint relies exclusively on instances of mail and wire fraud is especially problematic for the plaintiffs because the Seventh Circuit "does not look favorably on relying on many instances of mail and wire fraud to form a pattern." [Vicom, 20 F.3d at 781](#) (quoting [Hartz v. Friedman, 919 F.2d 469, 473 \(7th Cir. 1990\)](#)). This sensible skepticism is based upon the fact that under the mail and wire fraud statutes, each mailing [\[\\*1502\]](#) or wiring is a separate act of mail fraud, even if each relates to the same scheme to defraud. [See Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1278 \(7th Cir. 1989\)](#). "Thus, the number of offenses is only tangentially related to the

underlying fraud, and can be a matter of happenstance." *Id.* This in turn "encourages bootstrapping [\*\*17] of ordinary civil fraud cases into RICO suits." *Id.*

In addition, both the second and third Morgan factors militate against a finding of a pattern. The pattern of racketeering alleged involves only one scheme -- overcharging for insurance -- and one victim -- Maryland Staffing. See *Vicom, 20 F.3d at 781-82*. Although this, in and of itself, does not preclude a finding of an allegation of a pattern, see *Morgan, 804 F.2d at 975-76*, these factors further tip the scales against a finding of an adequate allegation of a pattern.

Finally, the Court concludes that the fourth Morgan factor weighs against a finding of a pattern. Although the plaintiffs claim that they suffered a separate and distinct injury each and every time Manpower billed them for the inflated insurance rates, the Court concludes that this does not allege separate and distinct injuries. There appears to be a divergence in authority within the Seventh Circuit as to whether each alleged overcharge constitutes a separate and distinct injury. The recently-decided Gagan case noted that under a similar scheme to the one alleged here, "each instance of false billing inflicted an injury separate and independent [\*\*18] of the previous and succeeding instances of false billing." *Gagan, 77 F.3d at 963* (citing *Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1305 (7th Cir. 1987)*, cert. denied, 498 U.S. 917 (1989)). In contrast, in the Vicom case, the Seventh Circuit reached the following conclusion reaffirming the holding of *United States Textiles v. Anheuser-Busch Co., 911 F.2d 1261 (7th Cir. 1990)*: "In *United States Textiles*, we did not find that the defendant suffered [a distinct] economic injury each time [the plaintiff] ordered and it shipped . . . under the [contract] terms." *Vicom, 20 F.3d at 782* (quoting *United States Textiles, 911 F.2d at 1269*). Thus, the Vicom court concluded that economic injuries arising out of the same original contract and similar predicate acts are not separate and distinct injuries for the purpose of establishing a pattern of racketeering activity. *Id.*

In our view, the Vicom approach makes more sense. We agree that the "natural and common sense approach to the pattern element of RICO would instruct that identical economic injuries suffered over the course of [several] years stemming from a single contract were not the type [\*\*19] of injuries which Congress intended to compensate via the civil provisions of RICO." *Vicom, 20 F.3d at 782* (quoting *United States Textiles, 911 F.2d at 1269*). Accordingly, we conclude that Maryland Staffing has failed to allege separate and distinct injuries.

Even accepting all the allegations in the plaintiffs' complaint as true, the Court cannot conclude that the RICO counts allege a pattern of racketeering activity. The only Morgan factors weighing in the plaintiffs' favor are the length of time during which the alleged fraudulent acts occurred and the number of predicate acts alleged. As discussed above, all other factors weigh against a finding of a pattern of racketeering activity. As the Seventh Circuit concluded after analyzing its post-Sedima civil RICO jurisprudence, "What seems clear from these cases is that multiple acts of mail fraud in furtherance of a single episode of fraud involving one victim and relating to one basic transaction cannot constitute the necessary pattern." *Tellis v. U.S. Fidelity & Guaranty Co., 826 F.2d 477, 478 (7th Cir. 1986)*. Accordingly, the Court concludes that the plaintiffs' failure to allege a pattern of racketeering activity [\*\*20] provides an independent basis for dismissing the RICO claims in the complaint.

### **3. RICO Summary.**

In our view, Maryland Staffing has attempted to "fit a square peg in a round hole by squeezing [a] garden-variety business dispute[] into [a] civil RICO action." *Midwest Grinding, 976 F.2d at 1025*. Not every commercial dispute is remediable under the RICO: "While it is clear that the scope of civil RICO extends beyond the prototypical mobster or organized crime syndicate, it is equally evident that RICO has not federalized every state common-law cause of action [\*1503] available to remedy business deals gone sour." *Id.* (citations omitted). This complaint fails to allege a violation of RICO because it fails to allege fraud with particularity and fails to adequately allege a pattern of racketeering activity. Accordingly, Counts 1, 2, 6, and 7 will be dismissed.

### **C. Plaintiffs' Antitrust Claims.**

The plaintiffs have asserted a total of six separate state and federal antitrust claims against Manpower. Counts 3 and 8 of the complaint allege conduct that violates federal antitrust law; Counts 4 and 9 allege violations of

Maryland's antitrust laws; and Counts 5 and 10 allege [\*\*21] violations of the Wisconsin antitrust laws. The defendants move to dismiss all of these counts for failure to state a claim upon which relief can be granted.

## 1. Federal Antitrust Claims.

The Third and Eighth Count of the complaint allege violations of the Sherman Act, [15 U.S.C. § 1, et seq.](#) The plaintiffs contend that the agreement between Maryland Staffing and Manpower -- whereby Manpower allegedly forced Maryland Staffing to buy excessively overpriced insurance as a condition of using the Manpower name -- constitutes an unlawful tying arrangement which violates [§ 1](#) of the Sherman Act. The defendants move to dismiss these counts on the grounds that (1) the complaint fails to allege a tying arrangement, and (2) the complaint fails to allege an antitrust injury.

[HN12](#)[] 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." [Northern Pacific Railroad Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). The seller uses the tying arrangement to shelter one product from an open, competitive market by increasing its sales through a coerced, tie-in purchase [\*\*22] to a more successful product. [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). The antitrust laws prohibit such arrangements because they restrain free competition in the market for the tied product.

In support of its motion to dismiss these claims, Manpower contends that the complaint does not allege an illegal tying arrangement. First, Manpower contends that there is no tying arrangement because Maryland Staffing does not actually purchase insurance from it; rather, the expense deductions for workers' compensation and liability insurance from Maryland Staffing's monthly sales constitutes a "passing on" of costs to the branch and representative offices. We reject this argument. The fact that Manpower did not directly sell the insurance to Maryland Staffing does not place the arrangement outside the scope of the Sherman Act. [HN13](#)[] An arrangement whereby a franchisee is required to purchase products or services from a third party can constitute an illegal tying arrangement. See [Tire Sales Corp. v. Cities Service Oil Co., 637 F.2d 467, 474 \(7th Cir. 1980\)](#), cert. denied, [451 U.S. 920, 68 L. Ed. 2d 312, 101 S. Ct. 1999 \(1981\)](#). However, [\*\*23] in order for the plaintiffs to maintain this claim, they will have to establish that Manpower had some economic interest in the third party suppliers (i.e. the insurance companies): "There is no illegal tying arrangement where a 'tying' company has absolutely no financial interest in the sales of a third company whose products are favored by the tie-in." [Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc., 585 F.2d 821, 835 \(7th Cir. 1978\)](#)(citations omitted), cert. denied, [440 U.S. 930, 59 L. Ed. 2d 486, 99 S. Ct. 1267 \(1979\)](#).

Manpower next argues that there is no tying arrangement because the insurance provided to Maryland Staffing temporary employees was merely a component of the franchise agreement. In order to establish the existence of an illegal tying arrangement, Maryland Staffing must demonstrate that there are two separate and distinct products or services; if the products or services are simply component parts of a single product, no tying arrangement exists. [Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756 \(7th Cir. 1996\)](#)(sale of a computer operating system that contains numerous component silicone chips cannot be considered an illegal [\*\*24] tying arrangement); [Jack Walters & Sons Corp. v. Morton Building, J\\*15041 Inc., 737 F.2d 698, 704 \(7th Cir. 1984\)](#)(a building exists as a single product, not a number of parts that can illegally be tied together), cert. denied, [469 U.S. 1018, 83 L. Ed. 2d 359, 105 S. Ct. 432 \(1984\)](#).

[Jefferson Parish](#) presented the general approach for determining whether products are separate or components for tie-in purposes: products are separate if there are separate markets for each product. [Jefferson Parish, 466 U.S. at 21](#). However, the Seventh Circuit noted that this approach is not particularly helpful; for example, while sugar and cereal may be different markets, no one would consider "sugary cereal" a tie-in product. [Jack Walters & Sons, 737 F.2d at 704](#). Thus, besides employing the "separate market" analysis, the Court must consider the overall efficiency and benefit to competition that might result by selling parts together. [Digital Equipment, 73 F.3d at 761](#).

While temporary staffing and insurance certainly appear to constitute different markets, the wording of the contract, the interaction between the markets, and the efficiency for both parties of building the insurance [\*\*25] clause into the contract creates a considerable amount of ambiguity as to whether this purchase of insurance is a component

part of the representative contract. This ambiguity makes it impossible for the Court, at this time, to rule on whether or not insurance existed as a component part of the agreement. Accordingly, the Court concludes that the complaint adequately alleges an illegal tying arrangement.

The second basis for the defendants' motion to dismiss is that the plaintiffs have failed to allege an antitrust injury. 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)* (emphasis in original)(quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*). At first glance, Maryland Staffing appears to be claiming an injury relevant only to them, not to competition in the insurance market generally. However, at this stage of the proceedings, the Court cannot determine the exact impact of this transaction on competition within the markets. Manpower is not an insurance provider; it purchases insurance [\*\*26] from an insurance provider to protect, under the terms of the agreement, its temporary employees. We doubt that Manpower's alleged overcharging of Maryland Staffing has a substantial effect on the insurance market, although it is certainly possible that Manpower exercises oligopsonistic buying power in the market. This possibility forecloses dismissal at this stage of the proceedings. Therefore, the Court will reserve passing judgment until the evidentiary record is more fully developed.

Although the Court is somewhat skeptical of the plaintiffs' ability to establish a violation of the Sherman Act, drawing all inferences in the plaintiffs' favor, it is conceivable that they will be able to maintain these causes of action for illegal tying arrangements. Accordingly, the defendants' motion to dismiss Counts 3 and 8 will be denied.

## 2. State Antitrust Claims.

Counts 4, 5, 9, and 10 of the complaint all allege either Maryland or Wisconsin state antitrust violations. The defendants move to dismiss all four counts because the complaint alleges an interstate injury, whereas Maryland and Wisconsin antitrust laws are concerned only with intrastate injuries.

It is clear that Maryland [\*\*27] **antitrust law** is concerned exclusively with intrastate commercial activity. [HN14](#) Under the Maryland Antitrust Act, a "person may not (1) by contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce." *Maryland Commercial Law Code Ann. § 11-204(a)(1)*. The Maryland Act defines trade or commerce as "all economic activity within the state." *Maryland Commercial Law Code Ann. § 11-201(h)*(emphasis added). Further, the statute specifies that the purpose of the Maryland Antitrust Act is to "protect the public and foster fair and honest intrastate competition." *Maryland Commercial Law Code Ann. § 11-202(a)*(emphasis added).

Wisconsin law will likewise only punish intrastate antitrust violations. At the beginning of the century, the Wisconsin Supreme [\*1505] Court held that an alleged conspiracy to fix prices relating to shipping wood in Wisconsin and Michigan was subject to federal law only because the transaction involved interstate commerce. See Pulp Wood Co. v. Green Bay Paper & Fiber Co., 168 Wis. 400, 170 N.W. 230, cert. denied, 249 U.S. 610, 63 L. Ed. 800, 39 S. Ct. 291 (Wis. 1919); Pulp Wood Co. v. Green Bay Paper & Fiber Co., [\*\*28] 157 Wis. 604, 615, 147 N.W. 1058, 1062 (Wis. 1914). Recent case law has continued to reaffirm this proposition of Wisconsin **antitrust law**. *Grams v. Boss, 97 Wis. 2d 332, 346, 294 N.W.2d 473, 480 (Wis. 1980)* (the Wisconsin **antitrust law** "was intended as a re-enactment ... of the federal Sherman Antitrust Act ... with application to intrastate as distinguished from interstate transactions); *State v. Waste Management of Wisconsin, Inc., 81 Wis. 2d 555, 574, 261 N.W.2d 147, 155, cert. denied, 439 U.S. 865, 58 L. Ed. 2d 175, 99 S. Ct. 189 (Wis. 1978)* (state act applies to intrastate commerce while federal act applies to interstate commerce); *John Mohr & Sons, Inc. v. Jahnke, 55 Wis. 2d 402, 410, 198 N.W.2d 363, 367 (Wis. 1972); American Medical Transp., Inc. v. Curtis-Universal, Inc., 148 Wis. 2d 294, 299, 435 N.W.2d 286, 288-89 (Wis.App. 1988), rev'd on other grounds, 154 Wis. 2d 135, 452 N.W.2d 575 (1990); Independent Milk Producers Co-op v. Stoffel, 102 Wis. 2d 1, 6-7, 298 N.W.2d 102, 104 (Wis.App. 1980)*.

The only question remaining is whether the activities in the current case constitute interstate commerce. Maryland Staffing claims that the issue of whether [\*\*29] these transactions are interstate is a question of fact to be determined at trial. The Court disagrees. "Interstate commerce," is to be defined broadly; while a contract between citizens of different states does not itself constitute interstate commerce, the correspondence and other events

which culminate in a contract will be enough to qualify as interstate commerce. *United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 547, 88 L. Ed. 1440, 64 S. Ct. 1162 (1943)*. See also *North American Co. v. Securities and Exchange Commission, 327 U.S. 686, 90 L. Ed. 945, 66 S. Ct. 785 (1946)* (a business that relies on contacts with subsidiaries through mail engages in interstate commerce); *Associated Press v. National Labor Relations Board, 301 U.S. 103, 128, 81 L. Ed. 953, 57 S. Ct. 650 (1936)* ("Interstate communications of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution.")

Here, Maryland Staffing of Maryland and Manpower of Wisconsin in all likelihood negotiated the franchise agreement across state lines. The franchise operated in Maryland. Any monitoring of the deal was done by Manpower from **[\*\*30]** its offices in Wisconsin. Payments to and from either party must have been sent via mail; any necessary communications via phone, mail or fax across state lines. The dealings between the companies certainly fall within the Supreme Court's sweeping definition of "interstate communications of a business nature." For these reasons, the Court finds that the activities conducted between Maryland Staffing and Manpower were of an interstate nature and therefore are not subject to the individual state antitrust claims. Counts 4, 5, 9, and 10 shall therefore be dismissed.

#### **D. Plaintiffs' Claims Under the Maryland Franchise Registration and Disclosure Law.**

The defendants have moved to dismiss Count 11 of the complaint on the ground that the Maryland Franchise Registration and Disclosure Law did not become effective until seven years after the franchise agreement between Manpower and Maryland Staffing was executed. The plaintiffs have failed to respond to this argument.

Upon review of the Maryland statute, it is clear that it did not take effect until July 1, 1981. See Maryland Laws of 1981, Ch. 2 (1 CCH Bus. Franchise Guide P 3200). The franchise agreement between the parties was **[\*\*31]** executed on April 29, 1974 -- seven years earlier. In addition, section 14-203(c) of the statute provides, "This subtitle does not apply to the renewal or extension of an existing franchise if there is no interruption in the operation of the franchised business;" thus, the fact that the Maryland Staffing/Manpower contract was renewed after the statute went into effect does not bring the statute **[\*1506]** into force. Accordingly, the Court concludes that the Maryland Franchise Registration and Disclosure Law does not apply to this dispute. Count 11 of the complaint will therefore be dismissed.

#### **E. Plaintiffs' Claims Under the Wisconsin Franchise Investment Law.**

Count 12 of the complaint alleges a cause of action under the Wisconsin Franchise Investment Law (WFIL), Ch. 553, Wis. Stats. The defendants move to dismiss this count on the ground that the WFIL does not apply to a franchisee (such as Maryland Staffing) located outside of the State of Wisconsin.

Section 553.51 of the WFIL grants a franchisee a cause of action against the seller of a franchise when the sale was effectuated by fraud. This provision of the statute applies "when a sale or offer to sell is made in this state or **[\*\*32]** when an offer to purchase is made and accepted in this state." Wis. Stats. § 553.59(1). The applicability provision further provides that "an offer to sell or purchase is made within this state . . . when the offer originates in this state or is directed by the offeror to this state and received by the offeree in this state." Wis. Stats. § 553.59(2). We read this section to require that (1) either the offer to sell or purchase the franchise (a) originates in Wisconsin or (b) is directed to Wisconsin and (2) the offer to sell or purchase is received in Wisconsin. This reading is supported by the legislative history of the WFIL, which makes it clear that the legislature was concerned with protecting "Wisconsin franchisees," which the state legislature believed to have suffered substantial losses as a result of unscrupulous franchisors. 1971 Wis. Laws, Ch. 241, § 1.

The plaintiffs claim that the complaint, fairly interpreted, should be read to allege that Manpower's offer to provide a franchise to Maryland Staffing must have originated in the State of Wisconsin and therefore the agreement comes within the scope of the statute. However, the complaint fails to allege that **[\*\*33]** any facts which would support an inference that the offer was received by Maryland Staffing in Wisconsin. Maryland Staffing was a Maryland

franchise, not a Wisconsin franchise. Accordingly, the Court concludes that Count 12 fails to state a claim upon which relief can be granted and therefore will be dismissed.

#### **F. Plaintiffs' Common Law Misrepresentation Claims.**

Count 13 of the complaint asserts a common law cause of action for intentional misrepresentation; Count 18 alleges negligent misrepresentation. Specifically, the plaintiffs allege that Manpower made affirmative misrepresentations (both intentionally and negligently) when it charged Maryland Staffing inflated prices for insurance. (The misrepresentation being, "Maryland Staffing owes \$ X for insurance" when in reality Maryland Staffing actually owed less than \$ X.) Plaintiffs further claim that Manpower failed to disclose facts (the actual insurance charges) that it had a duty to disclose to Maryland Staffing.

The defendants first move to dismiss the intentional misrepresentation claim on the ground that the circumstances constituting the alleged fraud have not been pleaded with particularity as required by [Rule 9\(b\) \[\\*\\*34\] of the Federal Rules of Civil Procedure](#). For the reasons discussed in section III.B.1.b., supra, the Court concludes that the plaintiffs have failed to plead the circumstances constituting the alleged fraud with the requisite particularity. The complaint fails to specify which defendant(s) made the decision to defraud the plaintiffs, when the decision was made, how the alleged misrepresentations were communicated to the plaintiffs, or any of the circumstances surrounding the alleged scheme. [See Vicom, 20 F.3d at 777-78](#). Accordingly, Count 13 of the complaint will be dismissed for failure to comply with [Rule 9\(b\)](#).

The defendants also move to dismiss the plaintiffs' negligent misrepresentation claim because it is based upon Manpower's failure to disclose the alleged insurance overcharges and that the defendants owed the plaintiffs no duty to disclose this information. While it is true that [HN15](#) a failure to disclose a fact is not actionable absent a duty to disclose, [see Ollerman v. O'Rourke Co. Inc., 94 Wis. 2d 17, \[\\*1507\] 288 N.W.2d 95 \(Wis. 1980\)](#),<sup>2</sup> the complaint in this case alleges actual misrepresentations of fact -- statements by Manpower that Maryland Staffing owed a certain [\\*\\*35](#) amount for insurance when it really owed less -- not a failure to disclose facts. Accordingly, the Court need not address the question of whether Manpower was under a duty to disclose any information to Maryland Staffing. Because the complaint adequately alleges a cause of action for negligent affirmative misrepresentations, the defendants' motion to dismiss Count 18 will be denied.

#### **G. Plaintiffs' Common Law Conversion Claim.**

In Count 14 of the complaint, the plaintiffs assert a common law conversion claim against Manpower. The plaintiffs contend that Manpower wrongfully converted money belonging to Maryland Staffing by overcharging Maryland Staffing for insurance. The defendants move to dismiss this count of the complaint on the ground that [\\*\\*36](#) it fails to adequately allege a cause of action for conversion.

"Conversion [HN16](#) is the wrongful or unauthorized exercise of dominion or control over a chattel." [Farm Credit Bank of St. Paul v. F&A Dairy, 165 Wis. 2d 360, 371, 477 N.W.2d 357 \(Wis.App. 1991\)](#), review denied, [482 N.W.2d 107 \(1992\)](#). A "chattel" is an article of personal property -- a thing personal and movable. [See](#) Black's Law Dictionary (5th Edition) at p. 215. It must consist of something identifiable and tangible.

The plaintiffs claim that the chattel converted by the defendants consists of the funds improperly taken by Manpower via the alleged insurance overcharges. This allegation would be sufficient to support a conversion claim if the complaint alleged that the defendants exercised dominion over a specific, identifiable quantity of currency belonging to Maryland Staffing. [See T.W.S., Inc. v. Nelson, 150 Wis. 2d 251, 252 n.3, 440 N.W.2d 833 \(Wis.App. 1989\)](#). The complaint does not include such an allegation, however. It instead relies on a theory that the plaintiffs' intangible right to these funds was wrongfully converted by Manpower.

<sup>2</sup> The parties apparently agree that Wisconsin law governs the plaintiffs' common law claims. Accordingly, for purposes of this motion, the Court shall apply Wisconsin law. [See Bush v. National School Studios, Inc., 139 Wis. 2d 635, 407 N.W.2d 883, 886 \(Wis. 1987\)](#).

Historically, an action for conversion was based on the legal fiction [\*\*37] that the plaintiff lost a chattel and that the defendant found it and converted it to his own use. See Prosser & Keeton on Torts (4th ed.) § 15 at pp. 79-81. Because intangible rights cannot be lost or found, "the original rule was that there could be no conversion of such property." Id. at p. 81. However, this rule has been relaxed to permit a plaintiff to recover for the full value of certain intangible rights where there is a conversion of a tangible thing in which intangible rights are merged. Restatement (Second) of Torts § 242. Thus, an action for conversion can now be maintained and a plaintiff can recover the full value of a check, a stock certificate, or an insurance policy. See Prosser & Keeton on Torts (4th ed.) § 15 at p. 83.

However, for conversion to lie -- even where intangible rights are involved -- there must be some tangible thing to which the intangible rights attach which is capable of being wrongfully controlled. There is no allegation in the complaint that the intangible right to money (which Maryland Staffing alleges Manpower converted) was represented by or connected to specific tangible objects. The complaint only alleges overcharges generally, [\*\*38] and as such fails to allege a cause of action for conversion. Accordingly, the defendants' motion will be granted in this regard and Count 14 will be dismissed.

#### **H. Plaintiffs' Claim for Intentional Infliction of Emotional Distress.**

The defendants move to dismiss Count 15 of the complaint for a failure to allege the elements of the tort of intentional infliction of emotional distress. The plaintiffs have apparently abandoned this cause of action; they have not responded to the defendants' motion in this regard. In light of this abandonment, and because the Court is satisfied that the complaint fails to allege all four elements of the tort of intentional infliction of [\*1508] emotional distress, see Alsteen v. Gehl, 21 Wis. 2d 349, 359-61, 124 N.W.2d 312 (Wis. 1963), the defendants' motion will be granted and Count 15 will be dismissed.

#### **I. Plaintiffs' Claim for Breach of Contract.**

At page 76 of the complaint, the plaintiffs at last reach what appears to be the heart of this dispute -- a claim for breach of the franchise contract between Maryland Staffing and Manpower. The defendants move to dismiss this claim on the ground that it is barred by the six-year statute of limitations [\*\*39] for breach of contract claims. Wis. Stats. § 893.43. According to the complaint, the alleged insurance overcharges began in 1987. This suit was commenced on December 27, 1994 -- nearly eight years later. Thus, according to the defendants, Count 16 must be dismissed to the extent that it depends upon acts or omissions taking place prior to December 27, 1989. In response, the plaintiffs rely upon the "discovery rule." They contend that the statute of limitations should be tolled until 1994 when they discovered the alleged overcharges. Thus, they submit, the claim is timely inasmuch as it was filed within two years of the discovery of the breach.

The plaintiffs' reliance on the discovery rule is misplaced because the rule does not apply to breach of contract actions. HN17 Under Wisconsin law, "a contract cause of action accrues at the moment the contract is breached, regardless of whether the injured party knew or should have known that the breach occurred." CLL Associates Ltd. Partnership v. Arrowhead Pacific Corp., 174 Wis. 2d 604, 607, 497 N.W.2d 115 (Wis. 1993). Thus, any breach of the contract which took place more than six years prior to the commencement of this action is barred [\*\*40] by the statute of limitations. Accordingly, to the extent Count 16 relies upon alleged breaches of the franchise agreement that occurred before December 27, 1989, it shall be dismissed. However, because the complaint alleges a series of breaches of the contract, the plaintiffs may assert a claim for damages from the date of the first breach within the period of limitation (i.e. after December 27, 1989). Segall v. Hurwitz, 114 Wis. 2d 471, 491, 339 N.W.2d 333 (Wis.App. 1983).

#### **J. Plaintiffs' Claim for Violation of the Duty of Good Faith and Fair Dealing.**

In Count 17 of their complaint, the plaintiffs assert a cause of action against the defendants for a breach of the contract duty of good faith. The plaintiffs claim that the defendants breached this contract duty by overcharging Maryland Staffing for insurance and by concealing the overcharges. The defendants move to strike this claim pursuant to Federal Rule 12(f) on the basis that it is duplicative of the plaintiffs' breach of contract claim and is therefore redundant.

Wisconsin recognizes a cause of action for breach of the duty of good faith in the performance of a contract, though its contours are ill-defined. [\*\*41] See [Market Street Associates Ltd. Partnership v. Frey, 941 F.2d 588, 593-95 \(7th Cir. 1991\)](#) ("Market Street I"). The obligation to deal with a contractual partner in good-faith is used as "a protection device to approximate terms not actually contained in the contract, but those that would have been included 'expressly if at the time of making the contract [the parties] had had complete knowledge of the future.'" [Market Street Associates Ltd. Partnership v. Frey, 21 F.3d 782, 786 \(7th Cir. 1994\)](#) ("Market Street II") (quoting [Market Street I, 941 F.2d at 596](#)). In this sense, the doctrine imposing a duty of good faith on parties to a contract amounts to the same thing as implying conditions into the contract. See [Market Street I, 941 F.2d at 596](#) ("Whether we say that a contract shall be deemed to contain such implied conditions as are necessary to make sense of the contract, or that a contract obligates parties to cooperate in its performance in 'good faith' to the extent necessary to carry out the purposes of the contract, comes to much the same thing.").

Without question, Count 17 of the complaint overlaps with Count 16 (the "straight" breach of contract claim); both [\*\*42] attempt to recover for the breach of an implied term in the franchise agreement. In all likelihood, these two Counts will constitute alternative claims for relief, permissible pleading under the Federal Rules. [Fed.R.Civ.P. 1\\*15091 8\(a\)](#). Despite this overlap, the Court cannot conclude that Count 16 and 17 are redundant so as to warrant striking Count 17. [HN18](#) ↑ A motion to strike is disfavored by the courts, see [Williams v. Jader Fuel Co., Inc., 944 F.2d 1388, 1400 \(7th Cir. 1991\)](#), cert. denied, 504 U.S. 957, 119 L. Ed. 2d 228, 112 S. Ct. 2306 (1992); [Heller Financial Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1294 \(7th Cir. 1989\)](#), and the mere presence of redundant material in a pleading does not warrant granting a motion to strike, absent a showing of prejudice to the opposing party. See Wright & Miller, Federal Practice and Procedure: Civil 2d § 1382 at pp. 705-06. There is no showing of potential prejudice here. Moreover, upon review of the complaint and drawing all inferences in the plaintiffs' favor, the Court concludes that Count 17 adequately alleges a cause of action for breach of the duty of good faith. The plaintiffs may ultimately establish that certain terms regarding [\*\*43] the insurance rates to be charged to Maryland Staffing and/or the obligation of Manpower to disclose overcharges should be read into the contract. Therefore the defendants' motion to dismiss this count will be denied.

#### K. Plaintiffs' Negligence Claim.

In Count 19 of the complaint, the plaintiffs assert a negligence cause of action based upon an alleged breach of the defendants' duty of reasonable care to the plaintiffs in the course of their business dealings. Defendants move to dismiss this count on the ground that it is barred by the "economic loss" doctrine, which prohibits a plaintiff from using tort law to recover for a commercial loss. See [Miller v. U.S. Steel Corp., 902 F.2d 573, 574-75 \(7th Cir. 1990\)](#); [Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc., 148 Wis. 2d 910, 921, 437 N.W.2d 213 \(Wis. 1989\)](#). Plaintiffs concede that the "economic loss" doctrine bars recovery in negligence for purely commercial injuries, but argue that the complaint also alleges non-economic personal injuries sustained by the individual plaintiffs. However, for the reasons discussed in section III.A., supra, the individual plaintiffs are not proper parties to this suit. [\*\*44] And the complaint does not allege that the corporation itself suffered any non-economic injury. Accordingly, the Court concludes that the plaintiffs' negligence claim is barred by the "economic loss" doctrine. Therefore, Count 19 will be dismissed.

#### IV. ORDER

The defendants' motion to dismiss is granted in part and denied in part. Based upon the foregoing analysis and pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#):

1. The Court concludes that plaintiffs John and Nancy Chandonnet do not have standing to assert individual claims against the defendants. Accordingly, **IT IS HEREBY ORDERED** that their claims be **DISMISSED**.
2. The Court further concludes that many of the causes of action asserted in the complaint fail to state a claim upon which relief can be granted. Accordingly, **IT IS HEREBY ORDERED** that Counts 1, 2, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, and 19 be **DISMISSED**.

936 F. Supp. 1494, \*1509L 1996 U.S. Dist. LEXIS 12668, \*\*44

**3. IT IS FURTHER ORDERED** that the plaintiffs are barred from recovering in contract for any losses incurred prior to December 27, 1989 under Wis. Stats. § 893.43.

4. Finally, counsel for all parties are ordered to appear at 9:00 A.M. on Monday September 9, 1996 in Room 390, U.S. [\*\*45] Courthouse, 517 East Wisconsin Avenue, Milwaukee, Wisconsin, for scheduling conference.

**SO ORDERED** this 19th day of August, 1996, at Milwaukee, Wisconsin.

**ROBERT W. WARREN**

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## *Hyde v. Abbott Labs., Inc.*

Court of Appeals of North Carolina

May 23, 1996, Heard In The Court Of Appeals ; August 20, 1996, Filed

No. COA95-1147

**Reporter**

123 N.C. App. 572 \*; 473 S.E.2d 680 \*\*; 1996 N.C. App. LEXIS 804 \*\*\*; 1996-2 Trade Cas. (CCH) P71,532

SUZANNE HYDE and LYNN MEEKS, Plaintiffs-Appellants, v. ABBOTT LABORATORIES, INC., BRISTOL-MYERS SQUIBB CO., and MEAD JOHNSON & CO., Defendants-Appellees.

**Prior History:** [\*\*\*1] Appeal by plaintiffs from order entered 27 July 1995 by Judge Janet Marlene Hyatt in Jackson County Superior Court. No. 94 CVS 500.

**Disposition:** Reversed and remanded.

## **Core Terms**

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purchasers, indirect, anti trust law, consumers, revised, damages, Clayton Act, violations, antitrust, antitrust statute, legislative intent, manufacturer, indirectly, persuasive authority, standing to sue, infant formula, instant case, construing, enacting, suits

## **LexisNexis® Headnotes**

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Civil Procedure > Appeals > Record on Appeal

Civil Procedure > ... > Service of Process > Time Limitations > Untimely Service

### **HN1[ Appeals, Record on Appeal**

The burden is on an appellant to establish that a record on appeal has been timely filed as required by the appellate rules.

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

### **HN2[ Defenses, Demurrers & Objections, Motions to Dismiss**

A Fed. R. Civ. P. 12(b)(6) motion to dismiss presents the question whether, as a matter of law, the allegations of the complaint, are sufficient to state a claim upon which relief may be granted.

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

### **HN3** [] **Defenses, Demurrs & Objections, Motions to Dismiss**

In ruling on the motion to dismiss, the allegations of the complaint must be treated as true.

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

### **HN4** [] **Defenses, Demurrs & Objections, Motions to Dismiss**

In ruling upon a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion, the complaint is to be liberally construed, and should not be dismissed unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### **HN5** [] **Private Actions, Remedies**

See [N.C. Gen. Stat. § 75-16](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > Supremacy Clause > General Overview

### **HN6** [] **Public Enforcement, State Civil Actions**

A state may, consistent with the [Supremacy Clause of the United States Constitution, U.S. Const. art. VI, § 2](#), allow an indirect purchaser to sue under the state's own antitrust laws. [N.C. Gen. Stat. § 75-16](#) allows such a suit by an indirect purchaser.

Governments > Legislation > Interpretation

### **HN7** [] **Legislation, Interpretation**

In construing a statute, the court's primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished.

Governments > Legislation > Interpretation

### **HN8** [] **Legislation, Interpretation**

Legislative purpose is first ascertained from the plain words of the statute.

## **Headnotes/Summary**

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## Headnotes

### Monopolies and Restraints of Trade § 27 (NCI4th)-- indirect purchasers -- standing to sue under state antitrust laws

By enacting the 1969 revisions to [N.C.G.S. § 75-16](#), the General Assembly clearly intended to expand the class of persons with standing to sue for a violation of North Carolina's antitrust laws, [N.C.G.S. § 75-1 et seq.](#), to include any person who suffers an injury under Chapter 75, regardless of whether that person purchased directly from the wrongdoer; therefore, the trial court erred in dismissing plaintiffs' claim alleging that defendants engaged in a conspiracy to fix the wholesale price of infant formula on the ground that plaintiffs, as indirect purchasers, lacked standing to bring this action under [N.C.G.S. § 75-16](#).

**Counsel:** Hunter & Large, P.L.L.C., by Raymond D. Large, Jr. and Diane E. Sherrill, Sylva, NC, and Heins Mills & Olson, P.L.C., by Kent M. Williams, Minneapolis, MN, for plaintiffs-appellants.

Smith Helms Mullis & Moore, L.L.P., by Larry B. Sitton, James G. Exum, Jr. and Richard A. Coughlin, Greensboro, NC, for defendants-appellees Bristol-Myers Squibb Company, and Mead Johnson & Company.

Peetree Stockton, L.L.P., by John T. Allred, Charlotte, NC, Todd A. Gale, KIRKLAND & ELLIS, Chicago, IL, for defendant-appellant Abbott Laboratories, Inc.

**Judges:** WYNN, Judge. Judges EAGLES and SMITH concur.

**Opinion by:** WYNN

## Opinion

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[\*573] [\*\*681] WYNN, Judge.

In November of 1994, plaintiffs Suzanne Hyde and Lynn Meeks filed a class action lawsuit on behalf of themselves and others similarly situated (hereinafter plaintiffs), seeking damages from defendants for alleged violations of North Carolina's antitrust [\*\*\*2] laws -- [N.C. Gen. Stat. § 75-1 et seq.](#) (1994).

Plaintiffs alleged that between 1980 and 1992, defendants violated several of the antitrust laws of this state by "engaging in a continuing conspiracy to fix the wholesale price of infant formula sold within the United States, including North Carolina." Plaintiffs further alleged that the above illegal conspiracy caused an increase in wholesale prices paid by the parties who purchased the infant formula directly from the manufacturer (hereinafter direct purchasers) above that which the direct purchasers would have paid absent any conspiracy.

[\*574] Plaintiffs, who are North Carolina residents, are indirect purchasers from the defendant [\*\*682] manufacturers because they purchased infant formula through parties other than the manufacturer. Plaintiffs contended that they paid higher prices than they would have paid but for the alleged illegal conduct.

In February of 1995, defendants moved to dismiss plaintiffs' complaint under [N.C. Gen. Stat. § 1A-1, Rule 12\(b\)\(6\)](#) (1990), alleging that plaintiffs, as indirect purchasers, lacked standing to bring this action under [N.C.G.S. § 75-16](#). In an amended order filed 27 July 1995, Superior Court Judge [\*\*\*3] Janet Marlene Hyatt agreed, and granted defendants' motion to dismiss. From this order, plaintiffs appealed.

Prior to oral arguments before this Court, plaintiffs and defendant Abbott Laboratories entered into a tentative settlement agreement which must be approved by the superior court under [N.C.R. Civ. P. Rule 23\(c\)](#) (1996). As a result, plaintiffs and defendant Abbott Laboratories jointly moved for dismissal of the appeal against Abbott Laboratories. We granted that motion. Accordingly, this appeal proceeds against the remaining defendants, Bristol-Myers Squibb and Mead Johnson (hereinafter defendants).

123 N.C. App. 572, \*574 LÁI HÀU ĐỀ CÁC Ở TỈ QUỐC GIA 1996 N.C. App. LEXIS 804, \*\*\*3

As an initial matter, we note that the record on appeal does not clearly indicate whether the proposed record on appeal was served on 7 September 1995 or 11 October 1995. If service was accomplished on the later date, the proposed record was not timely served and the appeal is subject to dismissal. *Brooks v. Jones*, 121 N.C. App. 529, 530, 466 S.E.2d 344, 345 (1996); *Wilson v. Bellamy*, 105 N.C. App. 446, 457, 414 S.E.2d 347, 353, disc. review denied, 331 N.C. 558, 418 S.E.2d 668 (1992). HN1[] The burden is on an appellant to establish that a record on appeal has been timely [\*\*\*4] filed as required by the appellate rules. However, because there is a discrepancy in the record as to the date of service and given the great public importance of the issues in this case, we elect to treat the earlier date as the correct date of service. N.C.R. App. P. 2 (1996); *Wilson*, 105 N.C. App. at 457, 414 S.E.2d at 353.

On appeal, plaintiffs contend that the trial court erred by dismissing their complaint under [N.C.R. Civ. P. 12\(b\)\(6\)](#) on the grounds that indirect purchasers lack standing under [N.C.G.S. § 75-16](#). We agree, and therefore reverse the order of the trial court.

**HN2** [↑] A Rule 12(b)(6) motion to dismiss presents the question "whether, as a matter of law, the allegations of the complaint, . . . are [\*575] sufficient to state a claim upon which relief may be granted . . ." *Harris v. NCNB, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)*. **HN3** [↑] In ruling on the motion to dismiss, the allegations of the complaint must be treated as true. *Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979)*. **HN4** [↑] In ruling upon a Rule 12(b)(6) motion, the complaint is to be liberally construed, and should not be dismissed "unless it appears to a certainty that plaintiff is entitled [\*\*\*5] to no relief under any state of facts which could be proved in support of the claim." *Davis v. Messer, 119 N.C. App. 44, 51, 457 S.E.2d 902, 906-07*, disc. review denied, 341 N.C. 647, 462 S.E.2d 508 (1995).

N.C.G.S. § 75-16 governs the determination of standing for redress of Chapter 75 violations. Cf. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 485, 350 S.E.2d 889, 892 (1986), cert. denied and appeal dismissed, 319 N.C. 459, 354 S.E.2d 888 (1987). That section **HN5** [↑] provides:

75-16. Civil action by person injured; treble damages.

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

Section 75-16 is similar to section 4 of the federal Clayton Act. Marshall v. Miller, 302 **[\*\*\*6]** N.C. 539, 542, 276 S.E.2d 397, 399 (1981).

Section 4 of the Clayton Act states:

[\*\*683]

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1991).

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061, reh'g denied, 434 U.S. 881, 54 L. Ed. 2d 164, 98 S. Ct. 243 (1977), the United States Supreme Court held that indirect purchasers, such as plaintiffs in the [\*576] instant case, are not injured in their business within the meaning of section 4 of the Clayton Act, and thus, with certain exceptions, lack standing to pursue a claim under the federal antitrust laws. *Id. at 728-29, 52 L. Ed. 2d at 714*. The Court found this holding to be required by *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968).

*Illinois Brick* held that direct purchasers suffer [\*\*\*7] the entire injury which follows from a violation of the federal antitrust laws, and are the only private parties allowed to sue for federal antitrust violations. *Illinois Brick*, 431 U.S. at 728-29, 52 L. Ed. 2d at 714. Consequently, the plaintiffs in the instant case could not pursue their claim under the federal antitrust laws unless they could demonstrate that their facts fit within an exception to *Illinois Brick*. Plaintiffs conceded this point at oral argument.

However, in *California v. Arc America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989), the United States Supreme Court held that **HN6**[<sup>1</sup>] a state may, consistent with the *Supremacy Clause of the United States Constitution*, *U.S. Const. art. VI, § 2*, allow an indirect purchaser to sue under the state's own antitrust laws. *Id. at 105-06, 104 L. Ed. 2d at 97*. The issue in this case is whether *N.C.G.S. § 75-16* allows such a suit by an indirect purchaser. We hold that it does.

**HN7**[<sup>1</sup>] In construing a statute, "our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). **HN8**[<sup>1</sup>] Legislative purpose [\*\*\*8] is first ascertained from the plain words of the statute." *Id.* "Our task is to determine whether the intent of the Legislature will be more fully served [if we construe this section in the manner argued by plaintiffs]." *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400.

Plaintiffs contend that by enacting *N.C.G.S. § 75-16* the legislature intended to grant standing to a consumer purchasing indirectly from a manufacturer or service provider to sue that manufacturer or service provider for a violation of Chapter 75, and that we should interpret this section to allow an indirect purchaser standing to sue for such violations.

Prior to a 1969 revision, *N.C.G.S. § 75-16* began: "If the business of any person, firm or corporation shall be broken up, destroyed or injured . . ." (emphasis supplied). In 1969, the General Assembly amended this section. The first sentence now begins:

[\*577] If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing . . . in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action . . . .

[\*\*\*9] (emphasis supplied). "Changes made by the legislature to statutory structure and language are indicative of a change in legislative intent and therefore provide some weight in our analysis." *Electric Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 295.

In enacting the 1969 revisions, the General Assembly intended to "enable a person injured by deceptive acts or practices to recover treble damages from a wrongdoer." *Hardy v. Toler*, 24 N.C. App. 625, 630-31, 211 S.E.2d 809, 813, modified on other grounds, 288 N.C. 303, 218 S.E.2d 342 (1975); see also *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400 (holding that by enacting *N.C.G.S. § 75-16*, "our Legislature intended to establish an effective private cause of action for aggrieved consumers in this State"); *Winston Realty* [\*684] *Co. v. G.H.G., Inc.*, 314 N.C. 90, 95, 331 S.E.2d 677, 680 (1985) (stating that the purpose of *N.C.G.S. § 75-16* was to "encourage private enforcement in the marketplace and to make the bringing of such a suit more economically feasible").

Defendants contend that by amending *N.C.G.S. § 75-16*, the General Assembly merely intended to change the law to allow standing to recover for non-business injuries. [\*\*\*10] In short, defendants contend that in enacting the

1969 revisions, the legislature sought to widen the standing provision to allow standing for additional types of injuries, but not to additional classes of persons. Defendants further contend that although the amendment was intended to protect consumers, this intent does not indicate that the General Assembly intended to allow recovery by indirect purchasers.

Defendants are correct insofar as the 1969 revisions clearly granted standing to those suffering non-business injuries. However, defendants' contention that the General Assembly somehow intended to exclude a large class of persons -- indirect purchasers -- from recovery for non-business injuries is not persuasive. Instead, we hold that by enacting the 1969 revisions to [N.C.G.S. § 75-16](#), the General Assembly clearly intended to expand the class of persons with standing to sue for a violation of Chapter 75 to include any person who suffers an injury under Chapter 75, regardless of whether that person purchased directly from the wrongdoer.

[\*578] We find it significant that the General Assembly chose to amend [N.C.G.S. § 75-16](#) by adding the phrase "if any person" to the beginning of the [\*\*\*11] section. As it is currently written, [N.C.G.S. § 75-16](#) provides standing to any person who suffers any injury, as well as for any business injury. By adding the above language, the General Assembly intended to provide a recovery for all consumers. See [Marshall, 302 N.C. at 543-44, 276 S.E.2d at 400](#).

Defendants argue that consumers are not the same as indirect purchasers, since consumers sometimes purchase directly from the manufacturer or service provider. However, consumers often purchase goods from a wholesaler or retailer, and thus are often indirect purchasers. We find it unlikely that the legislature intended to "establish an effective private cause of action for aggrieved consumers in this State" see *Id.*, but intended to exclude from this remedy all indirect purchasers, many of whom are consumers.

In addition, defendants argue that we should interpret [N.C.G.S. § 75-16](#) consistent with the United States Supreme Court's interpretation of section 4 of the Clayton Act in *Illinois Brick*. Federal case law interpretations of the federal antitrust laws are persuasive authority in construing our own antitrust statutes. [Madison Cablevision v. City of Morganton, 325 F.2d 121 N.C. 634, 656, 386 S.E.2d 200, 213 \(1989\)](#); [Johnson v. Ins. Co., 300 N.C. 247, 262, 266 S.E.2d 610, 620 \(1980\)](#); [North Carolina Steel Corp. v. National Council on Compensation Insurance, et al., N.C. App. , 472 S.E.2d 578 \(1996\)](#).

The most recent substantive revision to [N.C.G.S. § 75-16](#) took place in 1969. (The General Assembly revised this section slightly in 1977 by removing the words "by a jury." This revision did not alter the substance of this section). By contrast, *Illinois Brick* was not decided until 1977. It follows that our General Assembly could not have intended to adopt a judicial construction of [N.C.G.S. § 75-16](#) which did not exist at the time of the revision. It is a familiar canon of statutory construction that when a legislature borrows from the statutes of another legislative body, the provisions of that legislation should be construed as they were in the other jurisdiction at the time of their adoption. [Shannon v. United States, 512 U.S. \\_\\_, \\_\\_, 129 L. Ed. 2d 459, 467, 114 S. Ct. 2419 \(1994\)](#); [Carolene Products Co. v. United States, 323 U.S. 18, 25-26, 89 L. Ed. 15, 21, 65 S. Ct. 1 \(1944\)](#). Thus, in the subject case [\*\*\*13] we consider as persuasive authority federal cases interpreting the federal antitrust laws as they existed in 1969.

[\*579] The United States Supreme Court decided *Hanover Shoe* in 1968 and *Illinois Brick* in 1977. Since *Hanover Shoe* changed the manner in which direct purchasers were allowed to sue under the federal antitrust laws, and was later found by *Illinois Brick* to forbid an [\*\*685] indirect purchaser from suing, we believe that federal cases between 1968 and 1977 are most instructive in discerning the state of federal antitrust laws when the General Assembly amended [N.C.G.S. § 75-16](#) in 1969.

Prior to the United States Supreme Court's decision in *Illinois Brick*, most federal circuit courts construed section 4 of the Clayton Act to allow suits by indirect purchasers. See e.g., [In re Western Liquid Asphalt Cases, 487 F.2d 191 \(9th Cir. 1973\)](#), cert. denied, 415 U.S. 919, 39 L. Ed. 2d 474 (1974); [Illinois v. Bristol-Myers Co., 152 U.S. App. D.C. 367, 470 F.2d 1276 \(D.C. Cir. 1972\)](#); [West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 \(2d Cir.\), cert. denied sub nom. Cotler Drugs, Inc., v. Chas. Pfizer & Co., 404 U.S. 871, 30 L. Ed. 2d 115, 92 S. Ct. 81 \(1971\); Illinois v. Ampress Brick Co. \[\\*\\*\\*14\] , 536 F.2d 1163 \(7th Cir. 1976\)](#), rev'd sub nom. [Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061](#), reh'g denied, 434 U.S. 881, 54 L. Ed. 2d 164, 98 S. Ct. 243 (1977); but see

Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) (per curiam). We note further that the Fourth Circuit allowed an indirect purchaser to sue under section 4 of the Clayton Act in South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), cert. denied, 385 U.S. 934, 17 L. Ed. 2d 215, 87 S. Ct. 295 (1966). Although this decision occurred before the Supreme Court's decision in *Hanover Shoe*, it represents the Fourth Circuit's most recent pronouncement on this issue prior to the amendments to N.C.G.S. § 75-16 in 1969.

Based on the foregoing, we conclude that the great weight of federal case law authority in 1969 held that indirect purchasers were allowed standing under section 4 of the Clayton Act. Thus, insofar as we consider federal precedent as persuasive authority regarding construction of N.C.G.S. § 75-16, we find that the relevant federal precedent counsels us to allow plaintiffs standing under N.C.G.S. § 75-16.

Defendants cite [\*\*\*15] Stifflear v. Bristol-Myers Squibb Co., No. 95 CA0201, 1996 WL 219232 (Colo. Ct. App. 1996), and Abbott Laboratories, Inc. v. Segura, 907 S.W.2d 503 (Tex. 1995) in support of their argument that indirect purchasers lack standing to sue under state antitrust laws patterned after section 4 of the Clayton Act. These cases, however, are distinguishable.

[\*580] In *Stifflear*, the Colorado Court of Appeals held that indirect purchasers do not have standing to sue under the Colorado antitrust laws. *Id. at \* 7*. *Stifflear* is distinguishable from the instant case for two principal reasons.

First, Colorado's antitrust laws were modeled on Wisconsin's antitrust statute, which was itself modeled on the federal Sherman and Clayton Antitrust Acts. *Id. at \* 3*. Because the Colorado statute was patterned on the Wisconsin provision, the *Stifflear* Court stated:

Given the substantial similarity in text and purpose present in the federal and state antitrust statutes, we believe that federal decisions construing the Sherman and Clayton Acts, although not necessarily controlling on our interpretation of the Colorado law, are nevertheless entitled to careful scrutiny in determining [\*\*\*16] the scope of the state antitrust statute.

*Id.* (quoting People v. North Avenue Furniture & Appliance, Inc., 645 P.2d 1291, 1295-96 (Colo. 1982)). By contrast, our Supreme Court has stated only that federal cases are persuasive authority in construing our antitrust statutes. Madison Cablevision, 325 N.C. at 656, 386 S.E.2d at 213.

Second, Colorado substantially revised its antitrust laws in 1992. *Stifflear*, 1996 WL 219232 at \* 3. The revised Colorado antitrust law provides that: "The attorney general may bring a civil action on behalf of any governmental or public entity . . . injured, either directly or indirectly, in its business or property by reason of any violation of this article . . ." Colo. Rev. Stat. § 6-4-111(2) (1992) (emphasis supplied). Section 6-4-111(3)(a) of the Colorado statutes provides: "The attorney general may bring a civil action as *parens patriae* on behalf of natural persons residing within the state who are injured in their business or property . . ." Notably, this section does not include the language "injured, either directly or indirectly" which is found in § 6-4-111(2). [\*\*686] The *Stifflear* Court found the absence of the [\*\*\*17] phrase "either directly or indirectly" in § 6-4-111(3)(a) significant because the difference in statutory language indicated that the Colorado General Assembly considered whether to allow indirect purchasers to sue, and determined that the only indirect purchaser allowed to bring suit is a governmental agency. By contrast, our General Assembly has not substantively revised N.C.G.S. § 75-16 since the United States Supreme Court decision in *Illinois Brick*.

[\*581] Since we consider federal case law only as persuasive authority, rather than giving it "careful scrutiny," and because our General Assembly has not substantively revised N.C.G.S. § 75-16 since *Illinois Brick* was decided, we find *Stifflear* unpersuasive for this case.

*Segura* is also distinguishable from the instant case. In *Segura*, the Texas Attorney General sued the defendants seeking damages under the state antitrust act as *parens patriae* on behalf of consumers who purchased infant formula indirectly from the defendants. The Attorney General alleged that defendants engaged in price fixing and other activities which were illegal under Texas' antitrust laws. Segura, 907 S.W.2d at 504. Private plaintiffs, [\*\*\*18]

representing a class of consumers who purchased infant formula indirectly from the defendants, intervened and sought damages for the same conduct for which the State of Texas sought damages. The private plaintiffs, however, alleged that defendants' conduct violated Texas' Deceptive Trade Practices Act, [Tex. Bus. & Com. Code Ann. § 17.50\(a\)\(3\)](#) (1987). The private plaintiffs conceded that their claim would be barred under Texas' antitrust laws, because the Texas Legislature mandates that Texas antitrust laws be harmonized with federal antitrust laws. [Segura, 907 S.W.2d at 504-05](#). The Texas Supreme Court held that since the private plaintiffs' claims would be barred under Texas antitrust laws, the claims must be barred under Texas' Deceptive Trade Practices Act as well, in order to prevent an "end run" around the policies allowing only direct purchasers to recover under Texas' antitrust laws. [Id. at 505-06](#). Unlike the Texas Legislature, our General Assembly has not mandated that our antitrust laws be construed in harmony with federal antitrust laws.

Plaintiffs cite *Blake v. Abbott Laboratories, Inc.*, No. 03 A01-9509-CV-00307, 1996 WL 134947 (Tenn. Ct. App. 1996) to support [\*\*\*19] their argument that indirect purchasers have standing to sue under state antitrust statutes. The standing provision of the Tennessee statute provides: "Any person who is injured or damaged by any . . . arrangement, contract, agreement, trust, or combination described in this part may sue for and recover . . . from any person operating such trust or combination, the full consideration or sum paid . . ." [Tenn. Code Ann. § 47-25-106](#). The *Blake* Court held that this section grants standing to any person or persons injured under Tennessee antitrust laws "whether the individual is a direct purchaser or indirect purchaser." *Blake*, 1996 WL at \* 3. *Blake* held that Tennessee antitrust laws are not identical to federal antitrust laws, and the *Illinois Brick* limitation did not apply in Tennessee. *Id.* at \* 3-4.

[\*582] Since we are not required to construe our antitrust statute in harmony with the federal antitrust laws, we likewise find that the *Illinois Brick* limitation does not apply in North Carolina.

Defendants further contend that the General Assembly's failure to explicitly amend [N.C.G.S. § 75-16](#) to allow an indirect purchaser standing to sue for violations of our antitrust [\*\*\*20] laws demonstrates that the General Assembly accepted the *Illinois Brick* rule. We disagree. In [Styers v. Phillips, 277 N.C. 460, 472, 178 S.E.2d 583, 590-91 \(1971\)](#), our Supreme Court stated:

The rule is that ordinarily the intent of the legislature is indicated by its actions, and not by its failure to act . . . .

In [James v. Young, 77 N.D. 451, 43 N.W.2d 692](#), it was held that the legislature's failure to pass a bill "cannot be said to indicate any intent on the part of the legislature. A public policy is declared by the action of the legislature, not by its failure to act . . ." In [Moore v. Board of Freeholders of Mercer County, 76 N.J. Super. 396, 184 A.2d 748](#), the defendants argued that the failure of the [\*\*687] legislature to pass a bill specifically authorizing a citizen to photocopy public records indicated a denial of the right. The court said, "We decline to attribute any such attitude to the legislature. Defendant's conclusion can be nothing more than conjecture. Many other reasons for legislative inaction readily suggest themselves."

*Id.* See also *Blake*, 1996 WL at \* 3 (holding that the failure to enact legislation is not at [\*\*\*21] all indicative of legislative intent).

The rule in North Carolina is clear that the intent of the General Assembly may only be discerned by its actions, and not its failure to act. As a result, the failure of the General Assembly to amend [N.C.G.S. § 75-16](#) to allow an indirect purchaser to sue is of no consequence to the case *sub judice*.

We note further that the concerns which underlie the United States Supreme Court decision in *Illinois Brick* are less worrisome in the instant case. *Illinois Brick* set out several reasons why federal antitrust laws disallowed suits by indirect purchasers.

First, the *Illinois Brick* Court was concerned with the possibility of multiple liability. [Illinois Brick, 431 U.S. at 730, 52 L. Ed. 2d at 715](#). The Court expressed belief that both a direct and an indirect purchaser would recover the full amount of the overcharge, thus subjecting [\*583] a defendant to liability greater than three times the amount of its

antitrust violation. *Id.* However, there are few, if any, reported instances of a defendant paying treble damages to two different classes of purchasers based on a single antitrust violation. Thomas Greene, *Should Congress Preempt* [\*\*\*22] *State Indirect Purchaser Laws? Counterpoint: State Indirect Purchaser Remedies Should be Preserved*, 5 WTR Antitrust 25, 26-27 (1990).

In addition, the United States Supreme Court in *Arc America* stated that *Illinois Brick* was concerned solely with the construction of federal antitrust laws, and not at all with state court constructions of state antitrust laws. *Arc America*, 490 U.S. at 102-03, 104 L. Ed. 2d at 95-96. The *Arc America* Court further stated, "Nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws." *Id. at 103, 104 L. Ed. 2d at 96*. Regarding the possibility of state law remedies resulting in multiple liability for antitrust defendants, *Arc America* held that there is no federal policy against states imposing liability in addition to that imposed by federal law. *Id. at 105, 104 L. Ed. 2d at 97*. In short, our appellate courts are free to interpret North Carolina antitrust laws in a manner we believe to be most consistent with the purposes behind our antitrust laws. We find that a slight risk of multiple liability is greatly outweighed [\*\*\*23] by the benefit of advancing the aforementioned policies of *N.C.G.S. § 75-16*.

Second, the *Illinois Brick* Court was concerned that "requiring direct and indirect purchasers to apportion the recovery [in a proceeding under section 4 of the Clayton Act] would result in no one plaintiff having a sufficient incentive to sue under that statute." *Arc America*, 490 U.S. at 104, 104 L. Ed. 2d at 96-97. However, "State indirect purchaser statutes pose no similar risk to the enforcement of the federal law." *Id. at 104, 104 L. Ed. 2d at 97*. This is true because a defendant guilty of an antitrust violation would face paying damages to indirect purchasers under state antitrust laws as well as paying any damages awarded to direct purchasers under federal antitrust laws. As a result, both direct and indirect purchasers would have a sufficient incentive to sue for violations of Chapter 75 under our construction of *N.C.G.S. § 75-16*.

Finally, the *Illinois Brick* Court was concerned that allowing a suit by indirect purchasers would lead to highly complex litigation, due to the necessity of determining the proportion of the overcharge [\*584] which was passed on to indirect purchasers. *Illinois* [\*\*\*24] *Brick*, 431 U.S. at 732, 52 L. Ed. 2d at 716-17. As plaintiffs conceded at oral argument, this concern is valid. It is clear that a suit by indirect purchasers under our antitrust laws will be complex. However, when asked at oral argument whether "chaos reigned" in states which have allowed indirect purchaser suits, defendants were unable to cite a single example. This failure to cite a single indirect purchaser case in which a court has been faced with an impossibly [\*\*688] complex suit counsels us that a fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser, given the intent of the General Assembly to "establish an effective private cause of action for aggrieved consumers in this State." *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400.

The United States Supreme Court has stated that its interpretation of section 4 of the Clayton Act must "promote the vigorous enforcement of the antitrust laws." *Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 214, 111 L. Ed. 2d 169, 184, 110 S. Ct. 2807 (1990). The *Utilicorp* Court implied that it would have allowed indirect purchaser suits in the case before it if the Court was convinced that indirect purchaser suits would better [\*\*\*25] promote the goals of the antitrust laws. *Id.*

We believe that allowing indirect purchasers to sue for Chapter 75 violations will best advance the legislative intent that such violations be deterred, and that aggrieved consumers have a private cause of action to redress Chapter 75 violations. Accordingly, we hold that indirect purchasers have standing under *N.C.G.S. § 75-16* to sue for Chapter 75 violations.

For the foregoing reasons, the decision of the trial court is reversed, and this case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges EAGLES and SMITH concur.

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## Tops Mkts., Inc. v. Quality Mkts., Inc.

United States District Court for the Western District of New York

August 21, 1996, Decided ; August 21, 1996, OPINION FILED

93-CV-0302E(F)

### **Reporter**

1996 U.S. Dist. LEXIS 12432 \*; 1996-2 Trade Cas. (CCH) P71,586

TOPS MARKETS, INC., Plaintiff, -vs- QUALITY MARKETS, INC., THE PENN TRAFFIC COMPANY, SUNRISE PROPERTIES, INC. and JAMES V. PAIGE, JR., Defendants.

**Notice:** [\*1] NOT FOR PUBLICATION

**Subsequent History:** As Amended November 21, 1996. As Amended March 3, 1997.

**Disposition:** Defendants' motions for summary judgment granted as to Counts I and II in the Complaint and that, insomuch as supplemental jurisdiction over the state-law claims declined, state-law claims in Counts III-VI dismissed without prejudice

### **Core Terms**

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competitors, supermarket, site, monopolization, parcels, monopoly power, Sherman Act, market power, antitrust, parties, anti trust law, market share, counterclaims, state-law, prices

### **LexisNexis® Headnotes**

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

#### **HN1[] Summary Judgment, Entitlement as Matter of Law**

A motion for summary judgment will be denied unless the court determines, after reviewing all the evidence presented, 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. A genuine issue of fact requires such evidence that a reasonable jury could thereupon return a verdict for the non-moving party and, when determining if a genuine factual issue exists, the court must consider the substantive evidentiary burdens assigned to each party. Although all reasonable inferences must be drawn most favorably to the non-moving party, antitrust law limits the range of permissible inferences that may be drawn. A claimant alleging antitrust violations must set forth facts that tend to preclude an inference of permissible conduct.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > General Overview

## **HN2** Sherman Act, Claims

Section 1 of the Sherman Act, codified at [15 U.S.C.S. § 1](#), prohibits every contract or conspiracy in restraint of trade or commerce among the several states. A plaintiff claiming a violation of such statute must establish some form of concerted action between at least two legally distinct entities, and that such action constitutes an unreasonable restraint of trade. In the usual case, the plaintiff must prove an antitrust injury using the "rule of reason" approach. Under this approach, a plaintiff bears the initial burden of showing that the challenged action has 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. Disputes between business competitors are not to be elevated to the status of an antitrust action. The reasonableness of the restraint is gauged by evaluating the particular facts of each case to determine the effect such has or will have on the competition as a whole. The structure of and competitive conditions in the relevant geographic area and product markets, the relative competitive positions of the parties, and the presence of economic barriers inhibiting the ability of competitors to effectively respond to the challenged practice are some, but not the totality, of the factors that help guide the analysis.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

## **HN3** Sherman Act, Claims

To establish monopolization, a plaintiff must demonstrate (1) that the defendant possesses monopoly power in the relevant market and (2) that it willfully acquired or maintained that power.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

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

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

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

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

## **HN4** Scope, Monopolization Offenses

The offense of attempted monopolization under [§ 2](#) of the Sherman Act, codified at [15 U.S.C.S. § 2](#), requires a plaintiff to prove that (1) the defendant engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) that there existed or exists a dangerous probability that it would or will achieve monopoly power.

**Counsel:** ATTORNEYS FOR THE PLAINTIFF: John H. Stenger, Esq., c/o Stenger & Finnerty, Buffalo, NY.

ATTORNEYS FOR THE DEFENDANT: Quality, Penn & Sunrise -- Samuel Goldblatt, Esq. and Charles C. Swanekamp, Esq. and Gary L. Mucci, Esq., c/o Saperston & Day, Buffalo, NY. Kenneth N. Hart, Esq. and Richard J. DeMarco, Jr., c/o Donovan, Leisure, Newton & Irvine, New York, NY. Paige - David Kowalski, Esq., Buffalo, NY.

**Judges:** John T. Elfvin, U.S.D.J.

**Opinion by:** John T. Elfvin

## Opinion

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### MEMORANDUM and ORDER

Tops Markets, Inc. ("Tops") brought this action alleging violations of federal and state antitrust laws -- *viz.*, [Sections 1](#) and [2](#) of the Sherman Act <sup>1</sup> and New York's Donnelly Act, General Business Law ("GBL") § 340 -- and asserting state law claims of, *inter alia*, tortious interference with and breach of a contract. Presently before this Court are the motions for summary judgment brought by Quality Markets, Inc. ("Quality"), The Penn Traffic [\[\\*2\]](#) Company ("Penn") and Sunrise Properties, Inc. ("Sunrise") (collectively referred to as "the Quality defendants") and by James V. Paige, Jr. Jurisdiction is proper pursuant to [15 U.S.C. § 15\(a\)](#) and [28 U.S.C. §§ 1331, 1337\(a\)](#) & [1367\(a\)](#) and venue is proper pursuant to [15 U.S.C. §§ 15\(a\)](#) & [22](#) and [28 U.S.C. § 1391\(b\)](#). The motions will be granted in part.

Tops -- a New York Corporation -- is in the supermarket retail business and a leading food retailer in western New York, operating fifty-three supermarkets and eighty-seven convenience stores.<sup>2</sup> Quality -- also a New York corporation -- operates supermarkets in western New York and western Pennsylvania.<sup>3</sup> Quality is a division of Penn -- a Pennsylvania corporation -- which owns and operates two-hundred sixty-seven supermarkets throughout various eastern states including New York.<sup>4</sup> Sunrise is a wholly owned Pennsylvania subsidiary of Penn which owns and develops commercial real estate.<sup>5</sup> For the purposes of this motion, the [\[\\*3\]](#) parties do not dispute that the relevant geographic market area consists of an area extending approximately seven to ten miles in all directions from the City of Jamestown which area includes sixteen other municipalities ("Jamestown area") and that the pertinent product and services market consists of the retail sale of predominantly food items as well as general household merchandise by "supermarkets" as that term is used by the parties.<sup>6</sup>

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<sup>1</sup> [15 U.S.C. §§ 1 & 2](#), respectively.

<sup>2</sup> Hart Afft, Exh 9; Tops also operates ten discount drugstores and has seven independent supermarket franchises and eleven franchised convenience stores (*id.*).

<sup>3</sup> Stenger Afft, Exh 21 (Response 1).

<sup>4</sup> Stenger Afft, Exhs 5 (p. 1) & 21 (Response 2).

<sup>5</sup> Stenger Afft, Exhs 21 (Response 3).

<sup>6</sup> A "supermarket" is in turn defined by the parties as a "retail store of at least 7,500 square feet of retail or 'selling' floor space which sells predominantly perishable and non-perishable food items from both self-service merchandise display aisles and specialty departments, including at least meat, produce, bakery, and frozen food departments, and which also sells general household merchandise." Hart Afft, Exh 22 (Response nos. 3 & 9).

[\*4] Up until 1984, Tops had operated a supermarket in the Jamestown area, but in that year had determined that the operations then were "unsuccessful" and closed the store.<sup>7</sup> In 1991 Tops decided to take steps to re-enter the Jamestown market.<sup>8</sup> Tops had market studies performed evaluating approximately five potential sites and projecting sales figures and profitability of such sites and determined that certain property located on Washington Street in Jamestown ("the Washington site") was the best based upon, *inter alia*, suitability for development of a supermarket and availability for purchase.<sup>9</sup> The Washington site was made up of several parcels, four of which were owned by Paige, four by other private parties and two relatively small parcels -- *viz.*, making up less than ten percent of the total acreage of the site -- owned by the municipality.<sup>10</sup>

In 1992 there were approximately [\*5] nine supermarkets in the Jamestown area, at least five operated by Quality and four operated by two competitors -- "Bells" and "Super Duper."<sup>11</sup> [\*7] In March of that year Tops allegedly entered into a binding agreement with Paige whereby he was to convey his aforementioned four parcels to Tops in consideration of \$ 475,000. However, such was subject to Paige obtaining enforceable contracts or options to purchase the remaining Washington-site parcels held by the non-municipal parties by March 15, 1992, after which time and failing such condition subsequent, Tops had an apparently unilateral option to terminate.<sup>12</sup> In late spring of 1992 Quality became aware of Tops' intent to re-enter the Jamestown market and of negotiations ongoing between Paige and Tops and communicated to Paige its interest in acquiring a portion of the Washington site.<sup>13</sup> Paige then entered into a "Back-Up" agreement dated June 30, 1992 in which he agreed to convey to Sunrise two of his parcels that were not contiguous and had no frontage on Washington Street in consideration for \$ 225,000, but that such agreement was conditioned upon the prior termination of Paige's contractual relations with Tops.<sup>14</sup> The Back-Up [\*6] agreement was amended and restructured November 4, 1992 pursuant to Sunrise's request such that Sunrise would acquire the option to purchase the two parcels in exchange for \$ 335,000 and could exercise such option and purchase the parcels at a "strike price" of \$ 25,000. Sunrise and Paige entered into a third and superseding agreement dated January 27, 1993 whereby Sunrise agreed to pay \$ 740,000 in exchange for a substantially similar option to purchase the same two parcels, and the strike price remained at \$ 25,000.<sup>15</sup> By letter dated that same day, Paige notified Sunrise that the prior contract with Tops had been terminated.<sup>16</sup> Sunrise exercised its option and acquired title to the two parcels in April of 1993. Sometime in January of 1993, Quality had acquired both Bells stores and closed one immediately and the second within the year.<sup>17</sup> In April of 1995 Quality acquired and immediately closed both Super Duper stores.<sup>18</sup> In May of 1995 Wegmans opened a large -- *i.e.*, approximately 100,000 square feet -- supermarket and garnered between eighteen and twenty-six percent of the Jamestown market within less than six months of operation.<sup>19</sup>

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<sup>7</sup> Hart Afft, Exhs 13 (p.19) & 15 (p.14).

<sup>8</sup> Stenger Afft, Exh 10.

<sup>9</sup> Hart Afft, Exhs 1-3.

<sup>10</sup> Stenger Afft, Exh 20.

<sup>11</sup> Stenger Afft, Exh 1 (pp. 1, 10, 12-13).

<sup>12</sup> Complaint, Exh A (copy of Tops-Paige agreement).

<sup>13</sup> Hart Afft, Exh 14 (pp. 16-18).

<sup>14</sup> Hart Afft, Exh 4.

<sup>15</sup> Hart Afft, Exh 7.

<sup>16</sup> Hart Afft, Exh 6.

<sup>17</sup> Stenger Afft, Exhs 4 & 6 (pp. 29-31).

<sup>18</sup> Stenger Afft, Exhs 4 & 6 (pp. 29-31).

<sup>19</sup> Stenger Afft, Exh 6; Kennedy Afft, Exh A.

Tops alleges that the Quality defendants induced Paige to breach his contract with Tops for the sale of land and that they conspired to prevent the construction of a Tops supermarket and thereby prevent Tops' entry as a competitor of Quality's in the Jamestown market area in violation of antitrust laws, that the Quality defendants tortiously interfered with the Tops-Paige contract, that Paige breached such contract, that Paige breached his fiduciary duty to act as Tops' agent and that Paige's conduct was fraudulent.

**HN1[]** A motion for summary judgment will be denied unless the court determines, after reviewing all the evidence presented, "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." <sup>20</sup> A genuine issue [**\*8**] of fact requires such evidence that a reasonable jury could thereupon return a verdict for the non-moving party and, when determining if a genuine factual issue exists, the court must consider the substantive evidentiary burdens assigned to each party. <sup>21</sup> Although in general all reasonable inferences must be drawn most favorably to the non-moving party, <sup>22</sup> **antitrust law** limits the range of permissible inferences that may be drawn -- e.g., a claimant alleging antitrust violations "must set forth facts that tend to preclude an inference of permissible conduct." *Capital Imaging v. Mohawk Valley Medical Assoc.* <sup>23</sup>

[**\*9**] The first Count in the Complaint alleges that the "defendants" <sup>24</sup> violated **HN2[] Section 1** of the Sherman Act which pertinently prohibits "every contract \*\*\* or conspiracy, in restraint of trade or commerce among the several States \*\*\*." A plaintiff claiming a violation of such statute must establish "some form of concerted action between at least two legally distinct entities \* \* \* [and that such] constituted an unreasonable restraint of trade." <sup>25</sup> In the usual case and in this case in particular, the plaintiff must prove an antitrust injury using the "rule of reason" approach. <sup>26</sup> Under this approach a "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." <sup>27</sup> Antitrust laws are not designed to protect individual business rivals but rather to protect competition as a whole. <sup>28</sup> Disputes between business competitors are not to be elevated to the status of an antitrust action. The reasonableness *vel non* of the restraint is gauged by evaluating the particular facts of each case to determine the effect such [**\*10**] has or will have on the competition as a whole. <sup>29</sup> The structure of and competitive conditions in the relevant geographic area and product markets, the relative competitive positions of the parties and the presence *vel non* of economic barriers inhibiting the ability of competitors to effectively respond to the challenged practice are some but not the totality of the factors that help guide the analysis. <sup>30</sup>

<sup>20</sup> [FRCvP 56\(c\)](#); see also [Celotex v. Catrett](#), 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

<sup>21</sup> [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 254, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

<sup>22</sup> [Ramseur v. Chase Manhattan Bank](#), 865 F.2d 460, 465 (2nd Cir. 1989).

<sup>23</sup> [996 F.2d 537, 542](#) (2nd Cir.), cert. denied, **510 U.S. 947** (1993).

<sup>24</sup> Complaint, P29.

<sup>25</sup> [Capital Imaging](#), 996 F.2d at 542.

<sup>26</sup> [Capital Imaging](#), at 543. The plaintiff agrees that this is the appropriate approach (Memorandum of Plaintiff Tops Markets, Inc. in Opposition to the Motion of Defendants Quality Markets, Inc., the Penn Traffic Company and Sunrise Properties, Inc. for Summary Judgment, at fn. 7).

<sup>27</sup> [Capital Imaging](#), at 543 (emphasis in original).

<sup>28</sup> [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.](#), 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977).

<sup>29</sup> [Capital Imaging](#), at 543.

<sup>30</sup> [Harold Friedman Inc. v. Thorofare Markets](#), 587 F.2d 127, 143 (3rd Cir. 1978).

[\*11] This Court begins by noting that the plaintiff has failed to surmount the initial required threshold -- *i.e.*, that there has been an actual adverse effect on competition as a whole in the relevant market. The plaintiff urges this Court to find that Quality enjoys an extraordinarily high market share of the Jamestown market. However, there is no proof that such market share has had an actual adverse effect on the sale of food items and general household merchandise by the supermarket industry in the area. Furthermore, the acquisition of adequate land and subsequent construction of a large store by Wegmans -- a competitor of both Tops and Quality -- demonstrate that there are no geographic or economic barriers inhibiting the ability of competitors from entering the market. However, in the absence of a showing of adverse market effects, courts also examine the ability *vel non* of the parties alleged to be engaging in anti-competitive conduct to raise prices above those that would prevail in a competitive environment -- *to wit*, "market power."<sup>31</sup> Market share, although a significant factor, is not determinative of and is distinct from market power.<sup>32</sup> In this case, there [\*12] is no evidence that the grocery prices in the Jamestown area are at a level which would imply Quality's inordinate market power. While the defendants do not vigorously deny that their motivation in acquiring the option to purchase the Washington site and eventually exercising such option was at least in part to prevent a direct competitor from building a store at that particular site, such intent to exclude competitors from one specific site does not establish detrimental effects on the competition as a whole in the Jamestown market, as demonstrated by Wegmans' entry into the competition, albeit at a different location, and its rapid acquisition of a significant fraction of the relevant market. Finally, this Court notes that Tops was never excluded from the Jamestown market; it voluntarily left, presumably because its departure provided it with certain economic benefits. The fact that Quality has established a firm and substantial market share through its business acumen demonstrated in part by having remained to serve a community when its competitors such as Tops departed cannot form the basis of an antitrust claim. The plaintiff has failed to establish a claim under [Section 1](#) of [\*13] the Sherman Act.

The second Count in the Complaint alleges that the "defendants"<sup>33</sup> have engaged in a monopolization, attempted monopolization and a conspiracy to monopolize in violation of [Section 2](#) of the Sherman Act. [HN3](#)<sup>↑</sup> To establish monopolization, Tops must demonstrate (1) that the Quality defendants possess monopoly power in the relevant Jamestown market and (2) that they willfully acquired or maintain that power. *United States v. Grinnell Corp.*<sup>34</sup> The first element, monopoly power, is to be distinguished from business growth or development as a consequence of, *inter alia*, superior business acumen or historic accident.<sup>35</sup> Monopoly power in the relevant market is commonly defined as the power to "control prices or exclude competition"<sup>36</sup> and [\*14] is deemed to require "something greater than [the] market power" discussed in connection with [Section 1](#) of the Sherman Act.<sup>37</sup> Inasmuch as this Court has already ruled that Tops has failed to demonstrate that Quality possesses the necessary market power to unilaterally raise prices above those that would prevail in the market in order to sufficiently support its [Section 1](#) allegations, a *fortiori* Quality does not have the monopoly power necessary to sustain a monopolization claim.

[HN4](#)<sup>↑</sup> The offense of attempted monopolization under [Section 2](#) of the Sherman Act requires Tops to prove that (1) the Quality defendants engaged in predatory or anticompetitive conduct with (2) a specific [\*15] intent to monopolize and (3) that there existed or exists a dangerous probability that they would or will achieve monopoly

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<sup>31</sup> [Orson, Inc. v. Miramax Film Corp.](#), 79 F.3d 1358, 1367 (3rd Cir. 1996).

<sup>32</sup> [Delaware Hudson Ry. v. Consolidated Rail Corp.](#), 902 F.2d 174, 179 (2nd Cir. 1990), cert. denied, 500 U.S. 928, 114 L. Ed. 2d 125, 111 S. Ct. 2041 (1991).

<sup>33</sup> Complaint, P33.

<sup>34</sup> [384 U.S. 563, 570-571 \(1966\)](#).

<sup>35</sup> [Grinnell Corp.](#), at 571.

<sup>36</sup> [United States v. Du Pont & Co.](#), 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956).

<sup>37</sup> [Eastman Kodak Co. v. Image Technical Services, Inc.](#), 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992).

power.<sup>38</sup> Again, the failure to prove market power or potential monopoly power is fatal to Tops' attempted monopolization claim. Tops argues that Quality's market share and its acquisition of smaller competitors creates a triable issue of fact with respect to the dangerous-probability element. However, in its argument, Tops completely ignores and fails to address the apparent facility with which another competitor did in fact enter the Jamestown market and, after such entry, the short time within which it garnered a significant fraction of the market. There is no evidence that Quality can exclude competition or control prices in the Jamestown market and none that will support an inference under the antitrust law standards that a dangerous probability exists that Quality will achieve monopoly power.

[\*16] Tops presented no legal argument concerning its convoluted allegation of conspiracy to monopolize.<sup>39</sup> While this could be due to inartful pleading at the Complaint stage, it is equally likely due to the abandonment of such theory. In any event, Tops has not presented any evidence to this Court from which a jury could reasonably find that the defendants "entered into [an agreement] with the specific intent of achieving [a] monopoly or unreasonably restraining trade."<sup>40</sup>

Finally, this Court notes that Tops has actually acquired the entire Washington site it desired,<sup>41</sup> which fact further confirms that no causal antitrust injury can be established in this action.<sup>42</sup>

[\*17] Having determined that Tops has failed to establish facts from which a reasonable jury could find that the defendants have violated either Section 1 or Section 2 of the Sherman Act, the defendants are entitled to judgment as a matter of law on all the federal causes of action in this litigation. Tops has also asserted two parallel state antitrust causes of action brought under GBL § 340 as well as state claims for breach of contract and for tortious interference with a contract. Although this Court has supplemental jurisdiction over such claims, having dismissed Tops' federal causes of action, the usual balance of judicial economy, convenience, fairness and comity leads this Court to decline to exercise supplemental jurisdiction over the remaining state-law claims.<sup>43</sup> Accordingly, such will be dismissed without prejudice.

Finally this Court notes that Paige asserts against Tops counterclaims [\*18] similarly arising under state-law. Answer of Defendant James V. Paige, Jr., PP71-87. Although this Court could exercise supplemental jurisdiction over such counterclaims, the same analysis leads this Court to correspondingly decline to exercise such. Consequently, Paige's counterclaims will also be dismissed without prejudice.

Accordingly, it is hereby ORDERED that the defendants' motions for summary judgment are granted as to Counts I and II in the Complaint and that, inasmuch as supplemental jurisdiction over the state-law claims and counterclaims is declined, the state-law claims in Counts III-VIII in the Complaint and the state-law counterclaims brought by Paige are dismissed without prejudice and with leave to re-file if remanded upon appeal to the United States Court of Appeals, Second Circuit.

DATED: Buffalo, N.Y.

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<sup>38</sup> [Spectrum Sports, Inc. v. McQuillan](#), 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884(1993).

<sup>39</sup> See Complaint, P33.

<sup>40</sup> [Northeastern Tel. Co. v. Am. Tel. & Tel. Co.](#), 651 F.2d 76, 85 (2nd Cir. 1981), cert denied, 455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982).

<sup>41</sup> Hart Afft, Exh 21 (Response 2).

<sup>42</sup> [Eastway Const. Corp. v. City of New York](#), 762 F.2d 243, 251 (2nd Cir. 1985), cert. denied, 484 U.S. 918, 98 L. Ed. 2d 226, 108 S. Ct. 269 (1987) (Plaintiff failed to establish antitrust injury when it failed to show anticompetitive effects on consumers resulting from its exclusion from the pertinent market.).

<sup>43</sup> [Carnegie-Mellon Univ. v. Cohill](#), 484 U.S. 343, 350 & fn 7, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988).

November 21, 1996

John T. Elfvin

U.S.D.J.

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## *Discon, Inc. v. NYNEX Corp.*

United States Court of Appeals for the Second Circuit

March 27, 1996, Argued ; August 26, 1996, Decided

Docket No. 95-7673

### **Reporter**

93 F.3d 1055 \*; 1996 U.S. App. LEXIS 21948 \*\*; 1996-2 Trade Cas. (CCH) P71,535

DISCON, INCORPORATED, Plaintiff-Appellant, v. NYNEX CORPORATION, NYNEX MATERIAL ENTERPRISES, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE, and BERNARD O'REILLY, Defendants-Appellees.

**Subsequent History:** Certiorari Granted March 23, 1998, Reported at: [1998 U.S. LEXIS 1802](#).

**Prior History:** [\[\\*\\*1\]](#) Appeal from the June 14, 1995, judgment of the United States District Court for the Western District of New York (Richard J. Arcara, Judge) dismissing plaintiff-appellant's antitrust and RICO complaint for failure to state a claim upon which relief can be granted.

**Disposition:** Affirmed in part, reversed in part, and remanded for further proceedings.

## **Core Terms**

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removal, enterprise, monopolization, supplier, Sherman Act, conspiracy, telephone, alleges, horizontal, vertical, compete, entity, group boycott, Antitrust, purchaser, conspiracy to monopolize, restraint of trade, acquisition, competitor, cause of action, predicate act, subsidiary, affiliate, pattern of racketeering activity, rule of reason, manufacturers, wholly-owned, rate-paying, conspired, employees

## **LexisNexis® Headnotes**

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

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN1\*\*](#) Vertical Restraints, Price Fixing

Under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), courts are asked to categorize various complex commercial arrangements into a rigid legal taxonomy, e.g., horizontal restraint, vertical restraint, price-fixing, market division, concerted refusal to deal, and so on.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN2\*\*](#) Vertical Restraints, Nonprice Restraints

To state a claim under [15 U.S.C.S. § 1](#) of the Sherman Act, a plaintiff must allege (1) that the defendants entered into a contract, combination, or conspiracy, and (2) that their agreement was in restraint of trade. Traditionally, restraints of trade are classified as either horizontal restraints or vertical restraints. Horizontal restraints are generally considered illegal per se if they fall within certain broad categories. Vertical restraints are illegal per se only where the agreement contains a further arrangement to fix prices, i.e., vertical price-fixing. Other types of horizontal restraints and vertical non-price restraints are assessed under the rule of reason.

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

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

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

## [\*\*HN3\*\*](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

An agreement between two firms, even in a vertical relationship, may be characterized as a horizontal restraint of trade if the agreement seeks to disadvantage the direct competitor of one of the conspiring firms.

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

#### **[HN4](#)[] Monopolies & Monopolization, Actual Monopolization**

To state a claim for monopolization, a plaintiff must allege, among other things, that the defendants possess monopoly power in a relevant market.

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

#### **[HN5](#)[] Monopolies & Monopolization, Attempts to Monopolize**

To state a cause of action for attempted monopolization, a plaintiff must allege, among other things, that there is a "dangerous probability" that the attempt will succeed.

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

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

#### **[HN6](#)[] Monopolies & Monopolization, Conspiracy to Monopolize**

To state a claim for conspiracy to monopolize, a plaintiff must allege that there was (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize.

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

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

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

#### **[HN7](#)[] Monopolies & Monopolization, Attempts to Monopolize**

A defendant may be liable for conspiracy to monopolize where it agrees with another firm to assist that firm in its attempt to monopolize the relevant market.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

#### **[HN8](#)[] Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The court has held, in the context of [18 U.S.C.S. § 1962\(a\)](#), prohibiting the "use or investment of income" derived from a pattern of racketeering activity, that the essence of a violation of [§ 1962\(a\)](#) is not commission of predicate acts but investment of racketeering income. In the context of [§ 1962\(a\)](#), therefore, the court has required that the plaintiff allege a "use or investment injury" that is distinct from the injuries resulting from predicate acts.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN9** [blue download icon] Racketeer Influenced & Corrupt Organizations Act, Elements

[18 U.S.C.S. § 1962\(c\)](#), prohibits any person employed by or associated with any enterprise to conduct such enterprise's affairs through a pattern of racketeering activity.

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

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] Regulated Practices, Price Fixing & Restraints of Trade

Where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation.

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

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

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN11** [blue download icon] Regulated Practices, Price Fixing & Restraints of Trade

Any claim under [18 U.S.C.S. § 1962\(d\)](#) based on conspiracy to violate the other subsections of [§ 1962](#) necessarily must fail if the substantive claims are themselves deficient.

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**Judges:** Before: NEWMAN, Chief Judge, OAKES and PARKER, Circuit Judges.

**Opinion by:** JON O. NEWMAN

## **Opinion**

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[\*1057] JON O. NEWMAN, *Chief Judge*:

This appeal involves an antitrust suit brought by a former supplier alleging that its purchaser and a competitor acted in violation of the Sherman Act and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiff-appellant Discon, Inc. ("Discon") appeals from the June 14, 1995, judgment [\[\\*\\*2\]](#) of the United States District Court for the Western District of New York (Richard J. Arcara, Judge). The District Court dismissed Discon's amended complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim upon which relief can be granted. Discon

argues that the District Court erred in holding that its complaint fails to allege a violation of either Section One or Section Two of the Sherman Act, [15 U.S.C. §§ 1, 2 \(1994\)](#), or RICO, 18 U.S.C. [§ 1962](#) (1994). Because we believe that the District Court prematurely dismissed two of Discon's claims, we affirm in part, reverse in part, and remand.

## Background

Discon is a New York corporation whose primary business is the provision of "removal services" to telephone companies. These removal services include salvaging and disposing of obsolete telephone central office equipment. Discon was first formed in June 1984 to meet a demand created by the court-ordered break-up of the American Telephone and Telegraph Company ("AT&T"), see generally [United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 \(D.D.C. 1982\)](#), aff'd sub nom. [Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 \(1983\)](#). Prior to 1984, AT&T was able [\*\*3] to monopolize the market for telecommunications equipment, including the market for removal services, through its ownership of the regional Bell Operating Companies ("BOCs"). AT&T would compel the BOCs to purchase supplies only from AT&T and its manufacturing affiliates, the Western Electric Co. and Bell Telephone Laboratories. In this manner, AT&T was able to extend the regulated monopoly power of its BOCs into other non-regulated markets. [Id. at 222-23](#). Pursuant to the Consent Decree of 1984, AT&T divested itself of control over the BOCs. Thereafter, each BOC was instructed to purchase its products and services from a competitive field of suppliers. [Id. at 227](#). Discon became one of those suppliers of removal services in the New York State area.

NYNEX Corp. ("NYNEX") is a successor entity that emerged out of the 1984 divestiture and replaced the BOCs that operated in New York and New England. NYNEX itself is a holding company that controls several wholly-owned subsidiaries, including NYNEX Material Enterprises ("MECo") and two local telephone service providers, New York Telephone Co. ("NYTel") and New England Telephone and Telegraph Co. ("NET").<sup>1</sup> Within the NYNEX structure, [\*\*4] MECo is a Delaware corporation whose primary business is the procurement of goods and services for NYNEX and its affiliated corporations, including NYTel. In effect, MECo serves as a purchasing agent for NYNEX and its other subsidiaries. NYTel is a New York corporation that provides local telephone service to most of New York State and some portions of Connecticut. NYTel is the dominant purchaser of removal services in the New York State area. As a regulated [\*1058] monopoly under the New York Public Service Laws, NYTel is subject to the state rate-making process. NYNEX and MECo, however, are not subject to state regulation.

AT&T Technologies is a wholly-owned subsidiary of AT&T, and is the successor entity to the Western Electric Co.<sup>2</sup> AT&T Technologies provides numerous network services, including removal services, to telephone companies throughout the United States. Within the New York State area, AT&T Technologies [\*\*5] competes directly with Discon in the market for removal services.

Discon's complaint alleges that NYNEX, MECo, and NYTel (collectively, the "NYNEX Defendants") conspired with AT&T Technologies to eliminate Discon from the market for removal services. The crux of this conspiracy was a scheme to defraud the rate-paying public. During the mid-1980s, MECo, as a non-regulated affiliate of NYNEX, would purchase removal services at inflated prices from AT&T Technologies. These removal services, along with their inflated prices, were then passed on to NYTel, a regulated affiliate of NYNEX. In turn, NYTel was able to overcharge its captive rate-paying customers pursuant to the rate-making process. MECo would then recoup its inflated costs by receiving a secret year-end "rebate" from AT&T Technologies. Thus, without being subject to any oversight from the state regulatory [\*\*6] commission, MECo and its parent company, NYNEX, were able to generate increased revenues that were essentially derived from NYTel's telephone monopoly. This scheme was replicated in numerous contexts by the NYNEX Defendants for other capital goods and services purchased by NYTel. See [In re New York Telephone Co., 5 F.C.C.R. 866 \(1990\)](#) ("FCC Order").

<sup>1</sup> NET is not named as a defendant in this lawsuit, nor is it otherwise involved in these proceedings.

<sup>2</sup> Although AT&T Technologies is alleged by Discon to be a co-conspirator with NYNEX, MECo, and NYTel, it is not named as a defendant in this lawsuit.

In an independent regulatory proceeding, the Federal Communications Commission ("FCC") found that this method of generating revenues -- using MECO as an "outside" profit center -- violated the Communications Act of 1934, [47 U.S.C. § 201\(b\) \(1988\)](#). The FCC ordered NYTel to issue a rebate to its rate-paying customers for overcharges that occurred between 1984 and 1988. [FCC Report, 5 F.C.C.R. 866](#). The FCC and NYTel subsequently entered into a consent decree. See [In re New York Telephone Co., 5 F.C.C.R. 5892 \(1990\)](#) ("FCC Consent Decree"). Without admitting any wrongdoing or violations, NYTel agreed to refund over \$ 35 million for "unreasonable rates reflecting improper capital costs and expense charges." *Id.*

Discon alleges that, as part of this conspiracy to defraud the rate-paying public, NYNEX and MECO, in purchasing [\[\\*\\*7\]](#) removal services for NYTel, discriminated against Discon in favor of AT&T Technologies because Discon refused to inflate its prices. Also, Discon would sometimes contract directly with NYTel, thus bypassing MECO altogether and undermining the basic premise of the outside profit-center scheme. Discon claims that, in retaliation for its non-cooperation, MECO and AT&T Technologies conspired to disseminate false information about Discon, to burden Discon with undue obligations under threat of economic duress, and to give preferential treatment to AT&T Technologies.

Discon filed its original complaint in the Western District of New York in May 1990, alleging that the NYNEX Defendants had violated Section One and Section Two of the Sherman Act and RICO. In June 1992, the District Court granted an initial motion to dismiss with leave to replead. Shortly thereafter, Discon filed an amended complaint, and the NYNEX Defendants moved to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). On June 14, 1995, the District Court dismissed with prejudice.

## Discussion

### I. Section One of the Sherman Act

This appeal typifies one of the primary difficulties in the judicial application of [antitrust law](#). [\[\\*\\*8\]](#) [HN1](#)<sup>↑</sup> Under Section One of the Sherman Act, courts are asked to categorize various complex commercial arrangements into a rigid legal taxonomy, e.g., horizontal restraint, vertical restraint, price-fixing, market [\[\\*1059\]](#) division, concerted refusal to deal, and so on. This initial categorization is often outcome-determinative. Under one category, the arrangement may be *per se* illegal, while under another, it may be found permissible under the rule of reason. Due to the complexity of modern business transactions, however, courts often find that commercial arrangements can be classified theoretically under a number of different categories. See [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 \(1979\)](#) ("Easy labels do not always supply ready answers.") In this case, we believe that the District Court may have been misled by a poorly drafted complaint into categorizing the arrangement as one that is presumptively legal. Since the complaint may properly be understood to allege arrangements that might be shown to be unlawful, we are obliged to reverse in part and remand. We believe that the complaint states a cause of action under Section One of the Sherman Act, though [\[\\*\\*9\]](#) under a different legal theory than the one articulated by Discon.

[HN2](#)<sup>↑</sup> To state a claim under Section One of the Sherman Act, Discon must allege (1) that the NYNEX Defendants entered into a contract, combination, or conspiracy, and (2) that their agreement was in restraint of trade. See [15 U.S.C. § 1](#).<sup>3</sup> Traditionally, restraints of trade are classified as either horizontal restraints or vertical restraints. See [Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730, 99 L. Ed. 2d 808, 108 S. Ct. 1515 \(1984\)](#) ("Sharp"). Horizontal restraints are generally considered illegal *per se* if they fall within certain

<sup>3</sup>The NYNEX Defendants devote a single footnote in their brief to the argument that Discon failed to allege a "conspiracy" in restraint of trade. See [Monsanto Co. v. Spray-Rite Co., 465 U.S. 752, 765-67, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#) (requirement of "concerted action"). Although Discon's complaint is not a model of clarity, it alleges that NYNEX, MECO, and AT&T Technologies conspired to defraud the rate-paying public and that this agreement apparently contemplated some form of discrimination against Discon. More specifically, the complaint alleges the existence of various meetings between NYNEX procurement personnel, MECO officers, and agents of AT&T Technologies. These allegations are sufficient to defeat a motion to dismiss.

broad categories. See [\*United States v. Topco Associates, Inc.\*, 405 U.S. 596, 608, 31 L. Ed. 2d 515, 92 S. Ct. 1126 \(1972\)](#) (market division); [\*Klor's, Inc. v. Broadway-Hale Stores, Inc.\*, 359 U.S. 207, 211-12, 3 L. Ed. 2d 741, 79 S. Ct. 705 \(1959\)](#) (concerted refusal to deal); [\*United States v. Socony-Vacuum Oil Co.\*, 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811 \(1940\)](#) (horizontal price-fixing). Vertical restraints are illegal *per se* only where the agreement contains a further arrangement to fix prices, *i.e.*, vertical price-fixing. See [\*Sharp\*, 485 U.S. at 724](#). Other types of horizontal restraints and vertical non-price restraints are assessed under the rule [\*\*10] of reason. [\*Id. at 726\*](#).

Discon alleges primarily that the NYNEX Defendants engaged in an unlawful horizontal restraint of trade. The complaint asserts that Discon, MECo, and AT&T Technologies were all providers of removal services to NYTel, and that MECo and AT&T Technologies entered into a conspiracy [\*\*11] to discriminate against Discon. The complaint thus alleges a classic horizontal restraint of trade -- an agreement between two potential rivals seeking to disadvantage a third competitor. See E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Economic Implications* § 4.13, at 110 (2d ed. 1994) (hereinafter "Sullivan, *Understanding Antitrust*"). In support of this theory, Discon alleges that MECo is a "supplier" of removal services, along with Discon and AT&T Technologies. The District Court, however, found this to be a mischaracterization. We agree. It is undisputed that MECo itself does not perform any removal services for NYTel. Rather, as the complaint acknowledges, "MECo's primary business function is *procuring* goods and services for New York Telephone [NYTel] . . . and for NYNEX Service Company." Thus, MECo acts essentially as a purchasing agent for NYNEX and NYTel, and in fact, it often served as an intermediary between NYTel and its actual suppliers, Discon and AT&T Technologies. See [\*Westchester Radiological Associates v. Empire Blue Cross and Blue\* \[\\*\\*1060\] \*Shield, Inc.\*, 707 F. Supp. 708, 712-13](#) (S.D.N.Y.) ("antitrust remedy" does not apply [\*\*12] "where a buyer insists on buying his services through an intermediary"), *aff'd on opinion below*, [\*884 F.2d 707, 708 \(2d Cir. 1989\)\*](#), cert. denied, 493 U.S. 1095, 110 S. Ct. 1169, 107 L. Ed. 2d 1071 (1990).

It is true that, at times, NYTel would contract directly with Discon or other suppliers, and in those situations, presumably MECo would lose the opportunity to derive a commission. Therefore, in one sense, MECo could be considered, if not a supplier, at least a competitor with Discon and AT&T Technologies. Nonetheless, we decline to adopt this line of analysis for two reasons. First, MECo by its very nature transacts business for only one purchaser, NYTel. Unlike other intermediaries, such as wholesalers, who may transfer goods and services to a number of different purchasers, MECo does not resell removal services to any other telephone company.<sup>4</sup> Thus, MECo does not compete in the overall market for removal services, but only in the "market" for a single buyer. Second, the fact that MECo and NYTel are both affiliated under the same corporate structure strengthens the analogy of MECo to that of an internal purchasing agent. If MECo were organized as a purchasing department within NYTel, rather than as a separate [\*\*13] corporate entity, it would be undisputed that MECo did not compete with Discon or AT&T Technologies. We believe it would be incongruous to apply a different rule of law simply because MECo holds its own corporate charter. Cf. [\*Continental T.V., Inc. v. GTE Sylvania Inc.\*, 433 U.S. 36, 58-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#) (courts in antitrust cases should eschew "formalistic line drawing"). The fact remains that MECo acts at the behest of NYNEX and NYTel, and its actions are guided by a single corporate consciousness. Cf. [\*Copperweld Corp. v. Independence Tube Corp.\*, 467 U.S. 752, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#) (parent corporation and wholly-owned subsidiary are "single enterprise" for purpose of conspiracy requirement under Section One). A firm does not become a competitor of one of its suppliers solely by virtue of reselling goods or services to an affiliate under common ownership.

Since MECo is not [\*\*14] a supplier of removal services and does not otherwise compete with Discon and AT&T Technologies in the overall market, Discon cannot succeed on its theory of a classic horizontal restraint of trade.<sup>5</sup>

<sup>4</sup> Discon's complaint reveals at least one other telephone company, AT&T Communications, that purchases removal services in the New York State area.

<sup>5</sup> Discon also argues that the agreement between MECo and AT&T Technologies could be characterized as a vertical agreement to fix prices. See [\*Sharp\*, 485 U.S. at 724-26; \*Dr. Miles Medical Co. v. John D. Park & Sons Co.\*, 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 \(1911\)](#). We believe, however, that Discon has not stated a cause of action under a theory of vertical price-fixing. Discon admits that its allegations merely raise the "inference" that AT&T Technologies and MECo "intended" to influence the

Nonetheless, we believe that Discon may be able to prevail under a different legal theory. In *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (*in banc*), cert. denied, 439 U.S. 946, 58 L. Ed. 2d 338, 99 S. Ct. 340 (1978), we noted that HN3 [↑] an agreement between two firms (e.g., MECO and AT&T Technologies), even in a vertical relationship, may be characterized as a horizontal restraint of trade if the agreement seeks to disadvantage the direct competitor (e.g., Discon) of one of the conspiring firms. *Id. at 131-32* & n.6; see Sullivan, *Understanding Antitrust*, *supra*, § 4.13, at 110 (describing different types of concerted refusals to deal); L. Sullivan, *Handbook of the Law of Antitrust* 230-31 & n.1 (1977) (same). Oreck sought to elaborate on the Supreme Court's decision in *Klor's*, 359 U.S. at 211-12, where the Court held that a retailer may not induce its manufacturers to refrain from selling [\*1061] to a competing retailer. In *Klor's*, the agreements between the defendant-retailer [\*\*15] and its manufacturers were essentially vertical in nature. Yet the Supreme Court applied a "group boycott" theory because it found that the intent and effect of these vertical agreements was a horizontal market impact. *Id.*

[\*\*16] It is true that *Klor's* is not directly on point, because in that case numerous manufacturers participated in a group boycott, whereas here the complaint alleges only a single boycotting firm, MECO, and a single competitor, AT&T Technologies. Nonetheless, *Klor's* has been extended in the Sixth and Ninth Circuits to the situation where only a single retailer and a single manufacturer conspire. See *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404, 411-13 & nn. 13, 16 (6th Cir. 1982); *Cascade Cabinet Co. v. Western Cabinet & Millwork Inc.*, 710 F.2d 1366, 1370-71 (9th Cir. 1983); see also *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979). The Eleventh Circuit, on the other hand, has expressly declined to extend *Klor's* in such a manner. See *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 776-78 (11th Cir. 1983); see also *Westman Commission Co. v. Hobart International, Inc.*, 796 F.2d 1216, 1224 n.1 (10th Cir. 1986), cert. denied, 486 U.S. 1005, 100 L. Ed. 2d 192, 108 S. Ct. 1728 (1988).

We can understand why some courts are reluctant to extend *Klor's* to two-firm group boycotts, since such arrangements will often resemble exclusive [\*\*17] distributorship agreements, which are generally considered permissible under the rule of reason. See *Oreck*, 579 F.2d at 131. We emphasize that our decision should not be read to conflict with the holding in *Oreck* that, *in general*, two-firm vertical combinations will be scrutinized as exclusive distributorship controversies, rather than as group boycotts. *Id.*; see also *Sharp*, 485 U.S. at 725-31 & n.4 (two-firm group boycott should be judged under rule of reason); *K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co.*, 61 F.3d 123, 127 (2d Cir. 1995) (decision to use one distributor over another does not violate Section One). Yet *Oreck* cautioned that it may not always be true that two-firm group boycotts are permissible; rather, "a careful scrutiny into the business justifications for the agreement is required." *Id. at 132 n.6*.

In the vast majority of cases, the decision to discriminate in favor of one supplier over another will have a pro-competitive intent and effect. Cf. *Sharp*, 485 U.S. at 724-25. Presumably, the purchaser will have chosen a particular supplier because that firm provides certain efficiencies that allow the purchaser to [\*\*18] compete more effectively in the market for sales to the ultimate consumer. In this case, however, no such pro-competitive rationale appears on the face of the complaint. Discon alleges that the intent and effect of choosing AT&T Technologies over Discon was entirely anti-competitive. Although the NYNEX Defendants may be able to present some pro-competitive justification for choosing a more costly supplier in order to overcharge captive rate-paying customers, this justification, if it exists, remains unproven. We conclude that Discon has alleged a cause of action under, at least, the rule of reason, and possibly under the *per se* rule applied to group boycotts in *Klor's*, if the restraint of

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prices that MECO charged to NYTel. Yet this inference arises whenever a supplier sells its products to a purchasing agent. The price agreed upon between the supplier and the purchasing agent will by definition exert some influence upon the final price that the purchasing agent passes on to its client. Discon does not allege that MECO was in any way restricted in its freedom to set whatever prices it charged to NYTel. Therefore, the arrangement between MECO and AT&T Technologies cannot be characterized as one to "fix" prices. See *Sharp*, 485 U.S. at 731 (vertical price-fixing conspiracy must contain "some agreement on price or price levels").

trade "has no purpose except stifling competition." *Oreck, 579 F.2d at 131* (quoting *White Motor Co. v. United States, 372 U.S. 253, 263, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*).<sup>6</sup>

## [\*\*19] II. Section Two of the Sherman Act

Discon also alleges that the NYNEX Defendants violated Section Two of the Sherman Act by engaging in monopolization, attempted monopolization, and conspiracy to monopolize. See [15 U.S.C. § 2](#). We consider each of these claims separately.

### A. Monopolization

**HN4** To state a claim for monopolization, Discon must allege, among other things, that [\*1062] the defendants possess monopoly power in a relevant market. See *United States v. Grinnell, 384 U.S. 563, 570, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. In this case, however, none of the NYNEX Defendants competes in the relevant market for removal services. NYNEX and NYTel are purchasers, not suppliers, of removal services, and MECo, as we have noted, is only a purchasing agent for NYTel and cannot be considered a competitor in the overall market.<sup>7</sup> Thus, Discon's claim of monopolization must fail, since it is axiomatic that a firm cannot monopolize a market in which it does not compete. See *Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 925-27 (2d Cir. 1980)*, cert. denied, 450 U.S. 917, 67 L. Ed. 2d 343, 101 S. Ct. 1362 (1981); *FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1030 (2d Cir. 1976)*, cert. denied, 429 U.S. 1097, 51 L. Ed. 2d 545, 97 S. Ct. 1116 (1977).

## [\*\*20] B. Attempted Monopolization

Discon's claim of attempted monopolization fails for the same reason. **HN5** To state a cause of action for attempted monopolization, Discon must allege, among other things, that there is a "dangerous probability" that the attempt will succeed. See *International Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 790* (2d Cir.), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987). In this case, there was no "dangerous probability" that the NYNEX Defendants would succeed in monopolizing the market for removal services, since they do not even compete in that market and there is no indication that they ever sought to do so. See *FLM Collision Parts, 543 F.2d at 1030*.

### C. Conspiracy to Monopolize

**HN6** To state a claim for conspiracy to monopolize, Discon must allege that there was (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize. See *International Distribution Centers, 812 F.2d at 795*. Unlike the previous two Section Two claims, to be liable for conspiracy to monopolize, it is not necessary that the NYNEX Defendants compete directly in the market for removal services. **HN7** A defendant may be liable for conspiracy [\*\*21] to monopolize where it agrees with another firm to assist that firm in its attempt to monopolize the relevant market. We conclude that the complaint sufficiently alleges that the NYNEX Defendants conspired with AT&T Technologies and performed overt acts intending to assist AT&T Technologies in its monopolization of the market for removal services. The requirement of pleading specific intent is met insofar as Discon alleges that MECo sought the dominance of AT&T Technologies in order to ensure the suppression of other suppliers who would bypass MECo and deal with NYTel directly. Therefore, since Discon has alleged the essential elements of a conspiracy to monopolize, the District Court should not have dismissed this claim.

## III. Civil RICO

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<sup>6</sup> We do not decide at this point whether the District Court on remand should apply a *per se* rule; however, we note that the traditional rationale for applying the rule of reason to two-firm group boycotts -- the promotion of interbrand competition over intrabrand competition -- does not exist in this case. Cf. *Sharp, 485 U.S. at 724-25; Oreck, 579 F.2d at 131*.

<sup>7</sup> The only conspiring firm that competes in the market for removal services is AT&T Technologies; however, it is not named as a defendant in this lawsuit.

Finally, Discon alleges several violations of RICO, 18 U.S.C. [§ 1962](#). Discon alleges that the NYNEX Defendants violated subsections 1962(b), (c), and (d). All three of these claims were properly dismissed by the District Court.

#### A. Subsection 1962(b) -- RICO acquisition

Discon first alleges a violation of subsection 1962(b), which prohibits the "acquisition or maintenance" of an enterprise through a pattern of racketeering activity. Defining [\[\\*\\*22\]](#) the relevant "enterprise" as NYTel, Discon claims that NYNEX and MECo controlled NYTel through a number of illegal predicate acts. It is undisputed, however, that NYNEX acquired legal control over NYTel during the 1984 divestiture. Discon does not allege any facts to support a finding that this control, which exists by virtue of stock ownership in a wholly-owned subsidiary, was "acquired" or "maintained" through a pattern of racketeering activity.

Moreover, Discon has not alleged the sort of "acquisition injury" necessary to state a claim under subsection 1962(b). [HN8](#)<sup>↑</sup> We have held, in the context of subsection 1962(a), [\[\\*1063\]](#) prohibiting the "use or investment of income" derived from a pattern of racketeering activity, that "the essence of a violation of [§ 1962\(a\)](#) is not commission of predicate acts but investment of racketeering income." [Quaknine v. MacFarlane](#), 897 F.2d 75, 82-83 (*2d Cir. 1990*). In the context of subsection 1962(a), therefore, we have required that the plaintiff allege a "use or investment injury" that is distinct from the injuries resulting from predicate acts.

Similarly, other circuits have held that, in order to state a cause of action under subsection 1962(b), "plaintiffs [\[\\*\\*23\]](#) must allege an 'acquisition' injury, analogous to the 'use or investment injury' required under [§ 1962\(a\)](#) to show injury by reason of a [§ 1962\(b\)](#) violation." [Danielsen v. Burnside-Ott Aviation Training Center, Inc.](#), 941 F.2d 1220, 1231, 291 U.S. App. D.C. 303 (*D.C. Cir. 1991*); accord [Compagnie de Reassurance d'Ile de France v. New England Reinsurance Corp.](#), 57 F.3d 56, 92 (1st Cir.), cert. denied, 133 L. Ed. 2d 490, 116 S. Ct. 564 (1995); [Lightning Lube, Inc. v. Witco Corp.](#), 4 F.3d 1153, 1191 (*3d Cir. 1993*); [Old Time Enterprises, Inc. v. International Coffee Corp.](#), 862 F.2d 1213, 1219 (*5th Cir. 1989*). In this case, Discon has not alleged any injury stemming from the "acquisition or maintenance" of NYTel by NYNEX and MECo, only injuries resulting from the commission of predicate acts. Without a distinct "acquisition injury," Discon cannot state a cause of action under subsection 1962(b).

#### B. Subsection 1962(c) -- RICO conduct

Discon also alleges a violation of [HN9](#)<sup>↑</sup> subsection 1962(c), which prohibits "any person employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity . . ." [18 U.S.C. § 1962\(c\)](#).<sup>8</sup> For this claim, Discon redefines [\[\\*\\*24\]](#) the enterprise as the "NYNEX Group," which consists of the three corporations, NYNEX, MECo, and NYTel. Discon claims that these three corporate "persons" conducted the affairs of the NYNEX Group "enterprise" through a number of illegal predicate acts.

We have previously held, however, that subsection 1962(c) "clearly envisions" that the "person" and the "enterprise" will be distinct. [Bennett v. United States Trust Co.](#), 770 F.2d 308, 315 (*2d Cir. 1985*), cert. denied, 474 U.S. 1058, 88 L. Ed. 2d 776, 106 S. Ct. 800 (1986). "[A] corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity." *Id.* In [Riverwoods Chappaqua Corp. v. Marine Midland Bank](#), 30 F.3d 339 (*2d Cir. 1994*), we explained further that the [\[\\*\\*25\]](#) distinctiveness requirement of *Bennett* may not be circumvented "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant . . ." *Id. at 344*. [HN10](#)<sup>↑</sup> "Where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation." *Id.* Thus, in *Riverwoods*, we found that the activities of two loan officers "acting within the scope of their authority" could not subject them to RICO liability for conducting the affairs of the alleged enterprise-bank.

<sup>8</sup> Unlike subsections 1962(a) and (b), under subsection 1962(c), a plaintiff need not allege a distinct "racketeering injury" in order to state cause of action. See [Sedima, S.P.R.L. v. Imrex Co.](#), 473 U.S. 479, 494-95, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985).

In response, Discon cites [\*Cullen v. Margiotta, 811 F.2d 698\*](#) (2d Cir.), cert. denied, 483 U.S. 1021, 107 S. Ct. 3266, 97 L. Ed. 2d 764 (1987), for the proposition that a defendant may simultaneously be a RICO "person" and one of a number of members in the RICO "enterprise." [\*811 F.2d at 729-30\*](#). In *Cullen*, the enterprise was defined as an association of three separate entities -- a municipality, the town Republican Committee, and the county Republican Committee. [\*\*26] [\*Id. at 728\*](#). We held that any of the three individual entities could be convicted under subsection 1962(c) for its participation in the tripartite enterprise.

The difference between *Riverwoods* and *Cullen* appears to lie in the fact that *Riverwoods* involved only a single corporate entity that was associated with its employees, whereas *Cullen* involved three legally separate [\*1064] entities that could be differentiated from the enterprise-group. Moreover, in *Riverwoods*, the individual defendants were acting on behalf of the enterprise-corporation, and therefore, it would have been especially inappropriate to hold that they were "distinct" from the enterprise.

In this case, we confront a situation that lies somewhere between *Riverwoods* and *Cullen*. Like the defendants in *Riverwoods*, NYNEX, MECo and NYTel operate within a unified corporate structure. At the same time, however, they are also legally separate entities from each other and from the NYNEX Group. Although our decision is by no means dictated by clear precedent, we believe that *Riverwoods* presents the more analogous situation. The relationship between NYNEX, MECo, and NYTel in comparison to the NYNEX [\*\*27] Group is not substantially different from that between the loan officers in *Riverwoods* in comparison to the bank. In both cases, the individual defendants were acting within the scope of a single corporate structure, guided by a single corporate consciousness. It would be inconsistent for a RICO person, acting within the scope of its authority, to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable under *Riverwoods*. But see [\*Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 402 \(7th Cir. 1984\)\*](#) (wholly-owned subsidiary is technically distinct from parent corporation and may be liable under RICO), aff'd on other grounds, [\*473 U.S. 606, 87 L. Ed. 2d 437, 105 S. Ct. 3291 \(1985\)\*](#).

Discon's reference to unnamed "attorneys, accountants and other agents" as part of the enterprise does not alter this analysis. *Riverwoods* expressly applies to "agents" as well as "employees" so long as those persons act on behalf of the corporation. Although the situation might be different if the defendants were acting outside the scope of their agency, this situation is not presented here.

#### C. [Section 1962\(d\)](#) -- RICO conspiracy

Lastly, Discon [\*\*28] alleges a violation of subsection 1962(d), which prohibits any conspiracy to commit a RICO violation. Discon's complaint incorporates its prior two claims by reference and simply adds the further allegation that the NYNEX Defendants "consciously agreed to join and to enter a conspiracy" to commit these substantive acts. Since we have held that the prior claims do not state a cause of action for substantive violations of RICO, the present claim does not set forth a conspiracy to commit such violations. See [\*Lightning Lube, 4 F.3d at 1191 HN11\*](#) [↑] ("Any claim under [§ 1962\(d\)](#) based on conspiracy to violate the other subsections of [section 1962](#) necessarily must fail if the substantive claims are themselves deficient."); [\*Danielsen, 941 F.2d at 1232\*](#).

#### Conclusion

We affirm the judgment of the District Court insofar as it dismissed Discon's claims for vertical price-fixing under Section One of the Sherman Act, for monopolization and attempted monopolization under Section Two of Sherman Act, and for RICO acquisition, RICO conduct, and RICO conspiracy under RICO. We reverse the judgment of the District Court and remand for further proceedings with regard to Discon's claims of an unlawful two-firm [\*\*29] group boycott under Section One of the Sherman Act, and a conspiracy to monopolize under Section Two of the Sherman Act.



## *Discon, Inc. v. NYNEX Corp.*

United States Court of Appeals for the Second Circuit

March 27, 1996, Argued ; August 26, 1996, Decided

Docket No. 95-7673

**Reporter**

1996 U.S. App. LEXIS 28747 \*

DISCON, INCORPORATED, Plaintiff-Appellant, v. NYNEX CORPORATION, NYNEX MATERIAL ENTERPRISES, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE, and BERNARD O'REILLY, Defendants-Appellees.

**Subsequent History:** [\*1] As Corrected. Certiorari Denied October 6, 1997, Reported at: [1997 U.S. LEXIS 4602](#).

**Prior History:** Appeal from the June 14, 1995, judgment of the United States District Court for the Western District of New York (Richard J. Arcara, Judge) dismissing plaintiff-appellant's antitrust and RICO complaint for failure to state a claim upon which relief can be granted.

Original Opinion Previously Reported at: [1996 U.S. App. LEXIS 21948](#).

**Disposition:** Affirmed in part, reversed in part, and remanded for further proceedings.

## **Core Terms**

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removal, enterprise, monopolization, supplier, Sherman Act, conspiracy, telephone, alleges, horizontal, vertical, compete, entity, group boycott, Antitrust, purchaser, conspiracy to monopolize, restraint of trade, acquisition, competitor, cause of action, predicate act, subsidiary, affiliate, pattern of racketeering activity, rule of reason, manufacturers, wholly-owned, rate-paying, conspired, employees

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN1\*\*](#) [] **Vertical Restraints, Nonprice Restraints**

To state a claim under the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must allege (1) that the defendants entered into a contract, combination, or conspiracy, and (2) that their agreement was in restraint of trade. Traditionally, restraints of trade are classified as either horizontal restraints or vertical restraints. Horizontal restraints are generally considered illegal per se if they fall within certain broad categories. Vertical restraints are illegal per se only where the agreement contains a further arrangement to fix prices, i.e., vertical price-fixing. Other types of horizontal restraints and vertical non-price restraints are assessed under the rule of reason.

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

## [\*\*HN2\*\*](#) [] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A firm does not become a competitor of one of its suppliers solely by virtue of reselling goods or services to an affiliate under common ownership.

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

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

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

## [\*\*HN3\*\*](#) [] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

An agreement between two firms, even in a vertical relationship, may be characterized as a horizontal restraint of trade if the agreement seeks to disadvantage the direct competitor of one of the conspiring firms.

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

## [\*\*HN4\*\*](#) [] **Monopolies & Monopolization, Actual Monopolization**

To state a claim for monopolization, a plaintiff must allege, among other things, that the defendants possess monopoly power in a relevant market.

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

## [\*\*HN5\*\*](#) [] **Monopolies & Monopolization, Attempts to Monopolize**

To state a cause of action for attempted monopolization, a plaintiff must allege, among other things, that there is a "dangerous probability" that the attempt will succeed.

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

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

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

#### **HN6** **Monopolies & Monopolization, Conspiracy to Monopolize**

To state a claim for conspiracy to monopolize, a plaintiff must allege that there was concerted action, overt acts in furtherance of the conspiracy, and specific intent to monopolize. To be liable for conspiracy to monopolize, it is not necessary that the defendants compete directly in the market. A defendant may be liable for conspiracy to monopolize where it agrees with another firm to assist that firm in its attempt to monopolize the relevant market.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

#### **HN7** **Private Actions, Racketeer Influenced & Corrupt Organizations**

The essence of a violation of the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1962\(a\)](#), is not commission of predicate acts but investment of racketeering income. A plaintiff must allege a "use or investment injury" that is distinct from the injuries resulting from predicate acts.

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

#### **HN8** **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1962\(c\)](#), prohibits any person employed by or associated with any enterprise to conduct such enterprise's affairs through a pattern of racketeering activity.

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

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN9[ Vertical Restraints, Price Fixing**

Any claim under the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1962\(d\)](#), based on conspiracy to violate the other subsections of [§ 1962](#) necessarily must fail if the substantive claims are themselves deficient.

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**Judges:** Before: NEWMAN, Chief Judge, OAKES and PARKER, Circuit Judges.

**Opinion by:** JON O. NEWMAN

## **Opinion**

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JON O. NEWMAN, *Chief Judge*:

This appeal involves an antitrust suit brought by a former supplier alleging that its purchaser and a competitor acted in violation of the Sherman Act and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). [\*2] Plaintiff-appellant Discon, Inc. ("Discon") appeals from the June 14, 1995, judgment of the United States District Court for the Western District of New York (Richard J. Arcara, Judge). The District Court dismissed Discon's amended complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim upon which relief can be granted. Discon argues that the District Court erred in holding that its complaint fails to allege a violation of either Section One or Section Two of the Sherman Act, [15 U.S.C. §§ 1, 2 \(1994\)](#), or RICO, 18 U.S.C. [§ 1962](#) (1994). Because we believe that the District Court prematurely dismissed two of Discon's claims, we affirm in part, reverse in part, and remand.

### Background

Discon is a New York corporation whose primary business is the provision of "removal services" to telephone companies. These removal services include salvaging and disposing of obsolete telephone central office equipment. Discon was first formed in June 1984 to meet a demand created by the court-ordered break-up of the American Telephone and Telegraph Company ("AT&T"), see generally [United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 \(D.D.C. 1982\)](#), aff'd [\*3] *sub nom. Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983)*. Prior to 1984, AT&T was able to monopolize the market for telecommunications equipment, including the market for removal services, through its ownership of the regional Bell Operating Companies ("BOCs"). AT&T would compel the BOCs to purchase supplies only from AT&T and its manufacturing affiliates, the Western Electric Co. and Bell Telephone Laboratories. In this manner, AT&T was able to extend the regulated monopoly power of its BOCs into other non-regulated markets. [552 F. Supp. at 222-23](#). Pursuant to the Consent Decree of 1984, AT&T divested itself of control over the BOCs. Thereafter, each BOC was instructed to purchase its products and services from a competitive field of suppliers. [Id. at 227](#). Discon became one of those suppliers of removal services in the New York State area.

NYNEX Corp. ("NYNEX") is a successor entity that emerged out of the 1984 divestiture and replaced the BOCs that operated in New York and New England. NYNEX itself is a holding company that controls several wholly-owned subsidiaries, including NYNEX Material Enterprises ("MECo") and two local telephone service providers, New York

Telephone [\*4] Co. ("NYTel") and New England Telephone and Telegraph Co. ("NET").<sup>1</sup> Within the NYNEX structure, MECO is a Delaware corporation whose primary business is the procurement of goods and services for NYNEX and its affiliated corporations, including NYTel. In effect, MECO serves as a purchasing agent for NYNEX and its other subsidiaries. NYTel is a New York corporation that provides local telephone service to most of New York State and some portions of Connecticut. NYTel is the dominant purchaser of removal services in the New York State area. As a regulated monopoly under the New York Public Service Laws, NYTel is subject to the state rate-making process. NYNEX and MECO, however, are not subject to state regulation.

AT&T Technologies is a wholly-owned subsidiary of AT&T, and is the successor entity to the Western Electric Co.<sup>2</sup> AT&T Technologies provides numerous network services, including removal services, to [\*5] telephone companies throughout the United States. Within the New York State area, AT&T Technologies competes directly with Discon in the market for removal services.

Discon's complaint alleges that NYNEX, MECO, and NYTel (collectively, the "NYNEX Defendants") conspired with AT&T Technologies to eliminate Discon from the market for removal services. The crux of this conspiracy was a scheme to defraud the rate-paying public. During the mid-1980s, MECO, as a non-regulated affiliate of NYNEX, would purchase removal services at inflated prices from AT&T Technologies. These removal services, along with their inflated prices, were then passed on to NYTel, a regulated affiliate of NYNEX. In turn, NYTel was able to overcharge its captive rate-paying customers pursuant to the rate-making process. MECO would then recoup its inflated costs by receiving a secret year-end "rebate" [\*6] from AT&T Technologies. Thus, without being subject to any oversight from the state regulatory commission, MECO and its parent company, NYNEX, were able to generate increased revenues that were essentially derived from NYTel's telephone monopoly. This scheme was replicated in numerous contexts by the NYNEX Defendants for other capital goods and services purchased by NYTel. See [In re New York Telephone Co., 5 F.C.C.R. 866 \(1990\)](#) ("FCC Order").

In an independent regulatory proceeding, the Federal Communications Commission ("FCC") found that this method of generating revenues -- using MECO as an "outside" profit center -- violated the Communications Act of 1934, [47 U.S.C. § 201\(b\) \(1988\)](#). The FCC ordered NYTel to issue a rebate to its rate-paying customers for overcharges that occurred between 1984 and 1988. [FCC Report, 5 F.C.C.R. 866](#). The FCC and NYTel subsequently entered into a consent decree. See [In re New York Telephone Co., 5 F.C.C.R. 5892 \(1990\)](#) ("FCC Consent Decree"). Without admitting any wrongdoing or violations, NYTel agreed to refund over \$ 35 million for "unreasonable rates reflecting improper capital costs and expense charges." *Id.*

Discon alleges [\*7] that, as part of this conspiracy to defraud the rate-paying public, NYNEX and MECO, in purchasing removal services for NYTel, discriminated against Discon in favor of AT&T Technologies because Discon refused to inflate its prices. Also, Discon would sometimes contract directly with NYTel, thus bypassing MECO altogether and undermining the basic premise of the outside profit-center scheme. Discon claims that, in retaliation for its non-cooperation, MECO and AT&T Technologies conspired to disseminate false information about Discon, to burden Discon with undue obligations under threat of economic duress, and to give preferential treatment to AT&T Technologies.

Discon filed its original complaint in the Western District of New York in May 1990, alleging that the NYNEX Defendants had violated Section One and Section Two of the Sherman Act and RICO. In June 1992, the District Court granted an initial motion to dismiss with leave to replead. Shortly thereafter, Discon filed an amended complaint, and the NYNEX Defendants moved to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). On June 14, 1995, the District Court dismissed with prejudice.

## Discussion

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<sup>1</sup> NET is not named as a defendant in this lawsuit, nor is it otherwise involved in these proceedings.

<sup>2</sup> Although AT&T Technologies is alleged by Discon to be a co-conspirator with NYNEX, MECO, and NYTel, it is not named as a defendant in this lawsuit.

## I. Section One of the Sherman Act

This [\*8] appeal typifies one of the primary difficulties in the judicial application of *antitrust law*. Under Section One of the Sherman Act, courts are asked to categorize various complex commercial arrangements into a rigid legal taxonomy, e.g., horizontal restraint, vertical restraint, price-fixing, market division, concerted refusal to deal, and so on. This initial categorization is often outcome-determinative. Under one category, the arrangement may be *per se* illegal, while under another, it may be found permissible under the rule of reason. Due to the complexity of modern business transactions, however, courts often find that commercial arrangements can be classified theoretically under a number of different categories. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979) ("Easy labels do not always supply ready answers.") In this case, we believe that the District Court may have been misled by a poorly drafted complaint into categorizing the arrangement as one that is presumptively legal. Since the complaint may properly be understood to allege arrangements that might be shown to be unlawful, we are obliged to reverse in part and remand. We [\*9] believe that the complaint states a cause of action under Section One of the Sherman Act, though under a different legal theory than the one articulated by Discon.

**HN1** To state a claim under Section One of the Sherman Act, Discon must allege (1) that the NYNEX Defendants entered into a contract, combination, or conspiracy, and (2) that their agreement was in restraint of trade. See *15 U.S.C. § 1*.<sup>3</sup> Traditionally, restraints of trade are classified as either horizontal restraints or vertical restraints. See *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988) ("Sharp"). Horizontal restraints are generally considered illegal *per se* if they fall within certain broad categories. See *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972) (market division); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-12, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959) (concerted refusal to deal); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811 (1940) (horizontal price-fixing). Vertical restraints are illegal *per se* only where the agreement contains a further arrangement to fix prices, *i.e.*, vertical price-fixing. See *Sharp*, 485 U.S. at 724. Other [\*10] types of horizontal restraints and vertical non-price restraints are assessed under the rule of reason. *Id.* at 726.

Discon alleges primarily that the NYNEX Defendants engaged in an unlawful horizontal restraint of trade. The complaint asserts that Discon, MECO, and AT&T Technologies were all [\*11] providers of removal services to NYTel, and that MECO and AT&T Technologies entered into a conspiracy to discriminate against Discon. The complaint thus alleges a classic horizontal restraint of trade -- an agreement between two potential rivals seeking to disadvantage a third competitor. See E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Economic Implications* § 4.13, at 110 (2d ed. 1994) (hereinafter "Sullivan, *Understanding Antitrust*"). In support of this theory, Discon alleges that MECO is a "supplier" of removal services, along with Discon and AT&T Technologies. The District Court, however, found this to be a mischaracterization. We agree. It is undisputed that MECO itself does not perform any removal services for NYTel. Rather, as the complaint acknowledges, "MECO's primary business function is *procuring* goods and services for New York Telephone [NYTel] . . . and for NYNEX Service Company." Thus, MECO acts essentially as a purchasing agent for NYNEX and NYTel, and in fact, it often served as an intermediary between NYTel and its actual suppliers, Discon and AT&T Technologies. See *Westchester Radiological Associates v. Empire Blue* [\*12] *Cross and Blue Shield, Inc.*, 707 F. Supp. 708, 712-13 (S.D.N.Y.) ("antitrust remedy" does not apply "where a buyer insists on buying his services through an intermediary"), aff'd on opinion below, *884 F.2d 707, 708* (2d Cir. 1989), cert. denied, 493 U.S. 1095 (1990).

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<sup>3</sup>The NYNEX Defendants devote a single footnote in their brief to the argument that Discon failed to allege a "conspiracy" in restraint of trade. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764-67, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (requirement of "concerted action"). Although Discon's complaint is not a model of clarity, it alleges that NYNEX, MECO, and AT&T Technologies conspired to defraud the rate-paying public and that this agreement apparently contemplated some form of discrimination against Discon. More specifically, the complaint alleges the existence of various meetings between NYNEX procurement personnel, MECO officers, and agents of AT&T Technologies. These allegations are sufficient to defeat a motion to dismiss.

It is true that, at times, NYTel would contract directly with Discon or other suppliers, and in those situations, presumably MECO would lose the opportunity to derive a commission. Therefore, in one sense, MECO could be considered, if not a supplier, at least a competitor with Discon and AT&T Technologies. Nonetheless, we decline to adopt this line of analysis for two reasons. First, MECO by its very nature transacts business for only one purchaser, NYTel. Unlike other intermediaries, such as wholesalers, who may transfer goods and services to a number of different purchasers, MECO does not resell removal services to any other telephone company.<sup>4</sup> Thus, MECO does not compete in the overall market for removal services, but only in the "market" for a single buyer. Second, the fact that MECO and NYTel are both affiliated under the same corporate structure strengthens the analogy of MECO to that of an internal purchasing [\*13] agent. If MECO were organized as a purchasing department within NYTel, rather than as a separate corporate entity, it would be undisputed that MECO did not compete with Discon or AT&T Technologies. We believe it would be incongruous to apply a different rule of law simply because MECO holds its own corporate charter. Cf. [Continental T.V., Inc. v. GTE Sylvania Inc.](#), 433 U.S. 36, 58-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977) (courts in antitrust cases should eschew "formalistic line drawing"). The fact remains that MECO acts at the behest of NYNEX and NYTel, and its actions are guided by a single corporate consciousness. Cf. [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984) (parent corporation and wholly-owned subsidiary are "single enterprise" for purpose of conspiracy requirement under Section One). [HN2](#)<sup>5</sup> A firm does not become a competitor of one of its suppliers solely by virtue of reselling goods or services to an affiliate under common ownership.

[\*14] Since MECO is not a supplier of removal services and does not otherwise compete with Discon and AT&T Technologies in the overall market, Discon cannot succeed on its theory of a classic horizontal restraint of trade.<sup>5</sup> Nonetheless, we believe that Discon may be able to prevail under a different legal theory. In [Oreck Corp. v. Whirlpool Corp.](#), 579 F.2d 126 (2d Cir.) (*in banc*), cert. denied, 439 U.S. 946, 58 L. Ed. 2d 338, 99 S. Ct. 340 (1978), we noted that [HN3](#)<sup>6</sup> [↑] an agreement between two firms (e.g., MECO and AT&T Technologies), even in a vertical relationship, may be characterized as a horizontal restraint of trade if the agreement seeks to disadvantage the direct competitor (e.g., Discon) of one of the conspiring firms. [Id. at 131-32](#) & n.6; see Sullivan, *Understanding Antitrust*, *supra*, § 4.13, at 110 (describing different types of concerted refusals to deal); L. Sullivan, *Handbook of the Law of Antitrust* 230-31 & n.1 (1977) (same). Oreck sought to elaborate on the Supreme Court's decision in [Klor's](#), 359 U.S. at 211-12, where the Court held that a retailer may not induce its manufacturers to refrain from selling to a competing retailer. In *Klor's*, the agreements between [\*15] the defendant-retailer and its manufacturers were essentially vertical in nature. Yet the Supreme Court applied a "group boycott" theory because it found that the intent and effect of these vertical agreements was a horizontal market impact. *Id.*

[\*16] It is true that *Klor's* is not directly on point, because in that case numerous manufacturers participated in a group boycott, whereas here the complaint alleges only a single boycotting firm, MECO, and a single competitor, AT&T Technologies. Nonetheless, *Klor's* has been extended in the Sixth and Ninth Circuits to the situation where only a single retailer and a single manufacturer conspire. See [Com-Tel, Inc. v. DuKane Corp.](#), 669 F.2d 404, 411-13 & nn. 13, 16 (6th Cir. 1982); [Cascade Cabinet Co. v. Western Cabinet & Millwork Inc.](#), 710 F.2d 1366, 1370-71 (9th Cir. 1983); see also [Cernuto, Inc. v. United Cabinet Corp.](#), 595 F.2d 164, 168 (3d Cir. 1979). The Eleventh Circuit,

<sup>4</sup> Discon's complaint reveals at least one other telephone company, AT&T Communications, that purchases removal services in the New York State area.

<sup>5</sup> Discon also argues that the agreement between MECO and AT&T Technologies could be characterized as a vertical agreement to fix prices. See [Sharp](#), 485 U.S. at 724-26; [Dr. Miles Medical Co. v. John D. Park & Sons Co.](#), 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911). We believe, however, that Discon has not stated a cause of action under a theory of vertical price-fixing. Discon admits that its allegations merely raise the "inference" that AT&T Technologies and MECO "intended" to influence the prices that MECO charged to NYTel. Yet this inference arises whenever a supplier sells its products to a purchasing agent. The price agreed upon between the supplier and the purchasing agent will by definition exert some influence upon the final price that the purchasing agent passes on to its client. Discon does not allege that MECO was in any way restricted in its freedom to set whatever prices it charged to NYTel. Therefore, the arrangement between MECO and AT&T Technologies cannot be characterized as one to "fix" prices. See [Sharp](#), 485 U.S. at 731 (vertical price-fixing conspiracy must contain "some agreement on price or price levels").

on the other hand, has expressly declined to extend *Klor's* in such a manner. See [Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.](#), 710 F.2d 752, 776-78 (11th Cir. 1983); see also [Westman Commission Co. v. Hobart International, Inc.](#), 796 F.2d 1216, 1224 n.1 (10th Cir. 1986), cert. denied, 486 U.S. 1005, 100 L. Ed. 2d 192, 108 S. Ct. 1728 (1988).

We can understand why some courts are reluctant to extend *Klor's* to two-firm group boycotts, since such arrangements will often resemble exclusive [\*17] distributorship agreements, which are generally considered permissible under the rule of reason. See [Oreck, 579 F.2d at 131](#). We emphasize that our decision should not be read to conflict with the holding in *Oreck* that, *in general*, two-firm vertical combinations will be scrutinized as exclusive distributorship controversies, rather than as group boycotts. *Id.*; see also [Sharp, 485 U.S. at 725-31](#) & n.4 (two-firm group boycott should be judged under rule of reason); [K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co.](#), 61 F.3d 123, 127 (2d Cir. 1995) (decision to use one distributor over another does not violate Section One). Yet *Oreck* cautioned that it may not always be true that two-firm group boycotts are permissible; rather, "a careful scrutiny into the business justifications for the agreement is required." [579 F.2d at 132 n.6](#).

In the vast majority of cases, the decision to discriminate in favor of one supplier over another will have a pro-competitive intent and effect. Cf. [Sharp, 485 U.S. at 724-25](#). Presumably, the purchaser will have chosen a particular supplier because that firm provides certain efficiencies that allow the purchaser to [\*18] compete more effectively in the market for sales to the ultimate consumer. In this case, however, no such pro-competitive rationale appears on the face of the complaint. Discon alleges that the intent and effect of choosing AT&T Technologies over Discon was entirely anti-competitive. Although the NYNEX Defendants may be able to present some pro-competitive justification for choosing a more costly supplier in order to overcharge captive rate-paying customers, this justification, if it exists, remains unproven. We conclude that Discon has alleged a cause of action under, at least, the rule of reason, and possibly under the *per se* rule applied to group boycotts in *Klor's*, if the restraint of trade "has no purpose except stifling competition." [Oreck, 579 F.2d at 131](#) (quoting [White Motor Co. v. United States](#), 372 U.S. 253, 263, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)).<sup>6</sup>

#### [\*19] II. Section Two of the Sherman Act

Discon also alleges that the NYNEX Defendants violated Section Two of the Sherman Act by engaging in monopolization, attempted monopolization, and conspiracy to monopolize. See [15 U.S.C. § 2](#). We consider each of these claims separately.

##### A. Monopolization

**HN4** To state a claim for monopolization, Discon must allege, among other things, that the defendants possess monopoly power in a relevant market. See [United States v. Grinnell Corp.](#), 384 U.S. 563, 570, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). In this case, however, none of the NYNEX Defendants competes in the relevant market for removal services. NYNEX and NYTel are purchasers, not suppliers, of removal services, and MECO, as we have noted, is only a purchasing agent for NYTel and cannot be considered a competitor in the overall market.<sup>7</sup> Thus, Discon's claim of monopolization must fail, since it is axiomatic that a firm cannot monopolize a market in which it does not compete. See [Official Airline Guides, Inc. v. FTC](#), 630 F.2d 920, 925-27 (2d Cir. 1980), cert. denied, 450 U.S. 917, 67 L. Ed. 2d 343, 101 S. Ct. 1362 (1981); [FLM Collision Parts, Inc. v. Ford Motor Co.](#), 543 F.2d 1019, 1030 (2d Cir. 1976), cert. denied, 429 U.S. 1097, 51 L. Ed. 2d 545, 97 S. Ct. 1116 [\*20] (1977).

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<sup>6</sup> We do not decide at this point whether the District Court on remand should apply a *per se* rule; however, we note that the traditional rationale for applying the rule of reason to two-firm group boycotts -- the promotion of interbrand competition over intrabrand competition -- does not exist in this case. Cf. [Sharp, 485 U.S. at 724-25](#); [Oreck, 579 F.2d at 131](#).

<sup>7</sup> The only conspiring firm that competes in the market for removal services is AT&T Technologies; however, it is not named as a defendant in this lawsuit.

## B. Attempted Monopolization

Discon's claim of attempted monopolization fails for the same reason. [HN5](#) To state a cause of action for attempted monopolization, Discon must allege, among other things, that there is a "dangerous probability" that the attempt will succeed. See [International Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 790](#) (2d Cir.), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987). In this case, there was no "dangerous probability" that the NYNEX Defendants would succeed in monopolizing the market for removal services, since they do not even compete in that market and there is no indication that they ever sought to do so. See [FLM Collision Parts, 543 F.2d at 1030](#).

## C. Conspiracy to Monopolize

[HN6](#) To state a claim for conspiracy to monopolize, Discon must allege that there was (1) concerted action, (2) overt acts in furtherance [\*21] of the conspiracy, and (3) specific intent to monopolize. See [International Distribution Centers, 812 F.2d at 795](#). Unlike the previous two Section Two claims, to be liable for conspiracy to monopolize, it is not necessary that the NYNEX Defendants compete directly in the market for removal services. A defendant may be liable for conspiracy to monopolize where it agrees with another firm to assist that firm in its attempt to monopolize the relevant market. We conclude that the complaint sufficiently alleges that the NYNEX Defendants conspired with AT&T Technologies and performed overt acts intending to assist AT&T Technologies in its monopolization of the market for removal services. The requirement of pleading specific intent is met insofar as Discon alleges that MECO sought the dominance of AT&T Technologies in order to ensure the suppression of other suppliers who would bypass MECO and deal with NYTel directly. Therefore, since Discon has alleged the essential elements of a conspiracy to monopolize, the District Court should not have dismissed this claim.

## III. Civil RICO

Finally, Discon alleges several violations of RICO, 18 U.S.C. [§ 1962](#). Discon alleges that the NYNEX [\*22] Defendants violated subsections 1962(b), (c), and (d). All three of these claims were properly dismissed by the District Court.

### A. Subsection 1962(b) -- RICO acquisition

Discon first alleges a violation of subsection 1962(b), which prohibits the "acquisition or maintenance" of an enterprise through a pattern of racketeering activity. Defining the relevant "enterprise" as NYTel, Discon claims that NYNEX and MECO controlled NYTel through a number of illegal predicate acts. It is undisputed, however, that NYNEX acquired legal control over NYTel during the 1984 divestiture. Discon does not allege any facts to support a finding that this control, which exists by virtue of stock ownership in a wholly-owned subsidiary, was "acquired" or "maintained" through a pattern of racketeering activity.

Moreover, Discon has not alleged the sort of "acquisition injury" necessary to state a claim under subsection 1962(b). We have held, in the context of subsection 1962(a), prohibiting the "use or investment of income" derived from a pattern of racketeering activity, that "[HN7](#) the essence of a violation of [§ 1962\(a\)](#) is not commission of predicate acts but investment of racketeering income." [Quaknine \[\\*231\] v. MacFarlane, 897 F.2d 75, 82-83 \(2d Cir. 1990\)](#). In the context of subsection 1962(a), therefore, we have required that the plaintiff allege a "use or investment injury" that is distinct from the injuries resulting from predicate acts.

Similarly, other circuits have held that, in order to state a cause of action under subsection 1962(b), "plaintiffs must allege an 'acquisition' injury, analogous to the 'use or investment injury' required under [§ 1962\(a\)](#) to show injury by reason of a [§ 1962\(b\)](#) violation." [Danielsen v. Burnside-Ott Aviation Training Center, Inc., 291 U.S. App. D.C. 303, 941 F.2d 1220, 1231 \(D.C. Cir. 1991\)](#); accord [Compagnie de Reassurance d' Ile de France v. New England Reinsurance Corp., 57 F.3d 56, 92](#) (1st Cir.), cert. denied, 133 L. Ed. 2d 490, 116 S. Ct. 564 (1995); [Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1191 \(3d Cir. 1993\)](#); [Old Time Enterprises, Inc. v. International Coffee Corp., 862](#)

[F.2d 1213, 1219 \(5th Cir. 1989\)](#). In this case, Discon has not alleged any injury stemming from the "acquisition or maintenance" of NYTel by NYNEX and MECO, only injuries resulting from the commission of predicate acts. Without a distinct "acquisition injury," Discon cannot state a cause of [\*24] action under subsection 1962(b).

#### B. Subsection 1962(c) -- RICO conduct

Discon also alleges a violation of [HN8](#) subsection 1962(c), which prohibits "any person employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity . . ." [18 U.S.C. § 1962\(c\)](#).<sup>8</sup> For this claim, Discon redefines the enterprise as the "NYNEX Group," which consists of the three corporations, NYNEX, MECO, and NYTel. Discon claims that these three corporate "persons" conducted the affairs of the NYNEX Group "enterprise" through a number of illegal predicate acts.

We have previously held, however, that subsection 1962(c) "clearly envisions" that the "person" and the "enterprise" will be distinct. [Bennett v. United States Trust Co., 770 F.2d 308, 315 \(2d Cir. 1985\)](#), cert. denied, 474 U.S. 1058, 88 L. Ed. 2d 776, 106 S. Ct. 800 (1986). "[A] corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity." *Id.* In [Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30 F.3d 339 \(2d Cir. 1994\)](#), we explained further that the distinctiveness requirement of *Bennett* may not be circumvented "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant . . ." *Id. at 344*. "Where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation." *Id.* Thus, in *Riverwoods*, we found that the activities of two loan officers "acting within the scope of their authority" could not subject them to RICO liability for conducting the affairs of the alleged enterprise-bank.

In response, Discon cites [Cullen v. Margiotta, 811 F.2d 698](#) (2d Cir.), [\*26] cert. denied, 483 U.S. 1021, 107 S. Ct. 3266, 97 L. Ed. 2d 764 (1987), for the proposition that a defendant may simultaneously be a RICO "person" and one of a number of members in the RICO "enterprise." [811 F.2d at 729-30](#). In *Cullen*, the enterprise was defined as an association of three separate entities -- a municipality, the town Republican Committee, and the county Republican Committee. *Id. at 728*. We held that any of the three individual entities could be convicted under subsection 1962(c) for its participation in the tripartite enterprise.

The difference between *Riverwoods* and *Cullen* appears to lie in the fact that *Riverwoods* involved only a single corporate entity that was associated with its employees, whereas *Cullen* involved three legally separate entities that could be differentiated from the enterprise-group. Moreover, in *Riverwoods*, the individual defendants were acting on behalf of the enterprise-corporation, and therefore, it would have been especially inappropriate to hold that they were "distinct" from the enterprise.

In this case, we confront a situation that lies somewhere between *Riverwoods* and *Cullen*. Like the defendants in *Riverwoods*, NYNEX, MECO and NYTel [\*27] operate within a unified corporate structure. At the same time, however, they are also legally separate entities from each other and from the NYNEX Group. Although our decision is by no means dictated by clear precedent, we believe that *Riverwoods* presents the more analogous situation. The relationship between NYNEX, MECO, and NYTel in comparison to the NYNEX Group is not substantially different from that between the loan officers in *Riverwoods* in comparison to the bank. In both cases, the individual defendants were acting within the scope of a single corporate structure, guided by a single corporate consciousness. It would be inconsistent for a RICO person, acting within the scope of its authority, to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable under *Riverwoods*. But see [Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384, 402 \(7th Cir. 1984\)](#)

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<sup>8</sup> Unlike subsections 1962(a) and (b), under subsection 1962(c), a plaintiff need not allege a distinct "racketeering injury" in order to state cause of action. See [Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 494-95, 87 L. Ed. 2d 346, 105 S. Ct. 3275 \(1985\)](#).

(wholly-owned subsidiary is technically distinct from parent corporation and may be liable under RICO), *aff'd on other grounds*, [473 U.S. 606, 87 L. Ed. 2d 437, 105 S. Ct. 3291 \(1985\)](#).

Discon's reference to unnamed "attorneys, accountants and other agents" as part of the enterprise [\*28] does not alter this analysis. *Riverwoods* expressly applies to "agents" as well as "employees" so long as those persons act on behalf of the corporation. Although the situation might be different if the defendants were acting outside the scope of their agency, this situation is not presented here.

C. Section 1962(d) -- RICO conspiracy

Lastly, Discon alleges a violation of subsection 1962(d), which prohibits any conspiracy to commit a RICO violation. Discon's complaint incorporates its prior two claims by reference and simply adds the further allegation that the NYNEX Defendants "consciously agreed to join and to enter a conspiracy" to commit these substantive acts. Since we have held that the prior claims do not state a cause of action for substantive violations of RICO, the present claim does not set forth a conspiracy to commit such violations. See [Lightning Lube, 4 F.3d at 1191](#) ("[HN9](#)" Any claim under [§ 1962\(d\)](#) based on conspiracy to violate the other subsections of [section 1962](#) necessarily must fail if the substantive claims are themselves deficient."); [Danielsen, 941 F.2d at 1232](#).

Conclusion

We affirm the judgment of the District Court insofar as it dismissed [\*29] Discon's claims for vertical price-fixing under Section One of the Sherman Act, for monopolization and attempted monopolization under Section Two of Sherman Act, and for RICO acquisition, RICO conduct, and RICO conspiracy under RICO. We reverse the judgment of the District Court and remand for further proceedings with regard to Discon's claims of an unlawful two-firm group boycott under Section One of the Sherman Act, and a conspiracy to monopolize under Section Two of the Sherman Act.

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## Khan v. State Oil Co.

United States Court of Appeals for the Seventh Circuit

June 7, 1996, Argued ; August 29, 1996, Decided

No. 96-1309

### **Reporter**

93 F.3d 1358 \*; 1996 U.S. App. LEXIS 22504 \*\*; 1996-2 Trade Cas. (CCH) P71,546

BARKAT U. KHAN and KHAN & ASSOCIATES, INC., Plaintiffs-Appellants, v. STATE OIL COMPANY, Defendant-Appellee.

**Subsequent History:** [\[\\*\\*1\]](#) Certiorari Granted February 18, 1997, Reported at: [1997 U.S. LEXIS 1265](#).

**Prior History:** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94 C 35. Charles R. Norgle, Sr., Judge.

**Disposition:** AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

## **Core Terms**

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dealers, antitrust, supplier, vertical, suggested retail price, resale price, gasoline, margin, anti trust law, competitors, horizontal, fixing, per se rule, cases, maximum, cartel, maximum price, distributor, station, price-fixing, prices, price fixing, termination, effects, retail price, customers, charging, monopoly, receiver, ceiling

## **LexisNexis® Headnotes**

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

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

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN1\*\*](#) [] **Private Actions, Remedies**

Challenged practices that do not fall within any of the per se categories are subject to the broader-ranging inquiry into effect and motives that goes by the name of the "rule of reason" and that requires the plaintiff to prove that the defendant's conduct actually (or with a high likelihood) reduced competition.

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

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

## **HN2** Price Fixing & Restraints of Trade, Vertical Restraints

Price fixing has long been illegal per se. In its usual and most pernicious form, the term refers to an agreement or conspiracy between competing firms to fix a minimum price for their product. By a modest extension it refers also to an agreement between competitors to fix either a minimum or a maximum price for the resale of their product by their dealers.

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

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

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

## **HN3** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Maximum price fixing is illegal per se even if entirely "vertical," that is, even if the only parties in the picture are a single supplier and a single dealer.

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

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

## **HN4** Private Actions, Remedies

There is no right to maintain a suit under the antitrust laws unless the defendant's conduct has impaired the kind of interest that the antitrust laws were intended to protect. And there is no such interest in the maintenance of a monopoly price. If typically a resale price ceiling imposed by a seller merely prevents his dealers from reaping monopoly profits, the injury to the dealers from the ceiling--the loss, that is, of monopoly profits--will not support an antitrust suit. The requirement of proving antitrust injury is not waived in per se cases.

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

## **HN5** Price Fixing & Restraints of Trade, Vertical Restraints

A price ceiling is a natural and procompetitive incident to a scheme of territorial exclusivity.

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

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

## **HN6** Vertical Restraints, Price Fixing

Resale price maintenance does not impair any interest that the antitrust laws interpreted in light of modern economics could be thought intended to protect. It increases rather than reduces competition.

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

## **HN7** Procedural Matters, Preliminary Questions

A scientist, however reputable, is not permitted to offer evidence that he has not generated by the methods he would use in his normal academic or professional work, which is to say in work undertaken without reference to or expectation of possible use in litigation.

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For STATE OIL COMPANY, a corporation, Defendant - Appellee: Paul T. Kalinich, KALINICH & McCLUSKEY, P.C., Glen Ellyn, IL, USA. John Baumgartner, CHURCHILL, BAUMGARTNER & QUINN, LTD., Grayslake, IL, USA.

**Judges:** Before POSNER, Chief Judge, and FLAUM and RIPPLE, Circuit Judges. RIPPLE, Circuit Judge, concurring.

**Opinion by:** POSNER

## **Opinion**

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[\*1359] POSNER, Chief Judge. The plaintiffs (collectively "Khan") operated a gas station in DuPage County, Illinois, [\*1360] under a contract with State Oil Company, a distributor of gasoline and related products. The contract provided for the lease of the station (which State Oil owned), and the supply of gasoline and ancillary products for resale, to Khan. Mr. Khan was the actual signatory of the contract, rather than his corporation, which operated the station, so it does not appear that he is complaining about a merely derivative injury to himself, in which event he would not be a proper party. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 777 (7th Cir. 1994).

State Oil terminated the contract because Khan failed to pay the agreed-upon rent for the station. The termination precipitated this suit, which, so far as relevant to the appeal, charges price fixing in violation [\*\*2] of section 1 of the Sherman Act, 15 U.S.C. § 1, and breach of contract under the common law of Illinois. The district judge granted summary judgment for the defendant on both claims. He ruled that the legality under the Sherman Act of the alleged price fixing was to be tested by the rule of reason rather than by the per se rule, that the plaintiff had presented no evidence on essential elements of a rule of reason case (such as market power), that the study conducted by the plaintiffs' economic expert was inadmissible, and that without the study the plaintiffs could not even prove injury.

The contract between State Oil and Khan provided that State Oil would establish a suggested retail price for the gasoline (which was sold under the brand name "Union 76") and would sell the gasoline to Khan for 3.25 cents less

than that price. If Khan believed the price was too high he could ask State Oil to lower it and if State Oil complied Khan would be entitled to purchase the gasoline from State Oil at the same margin, that is, at the new price minus 3.25 cents. If State Oil refused to reduce the suggested retail price Khan could still charge a lower price, but his margin would be smaller because [\*\*3] he would not be getting a lower price from State Oil. If Khan believed the suggested retail price was too low he could ask State Oil to raise it, thus preserving his margin; but if State Oil refused and Khan went ahead and raised his price anyway, the contract required Khan to rebate the difference between his new price and the suggested price times the number of gallons sold at the new price. The contract thus required Khan to rebate the entire profit from raising his price without his supplier's permission above the retail price suggested by the supplier.

The provision concerning the charging by Khan of a price below the suggested retail price neither is price fixing nor is germane to the price-fixing charge. A supplier is under no obligation to lower his price to his customer just because the customer wants to resell the supplier's product for less than the supplier has suggested without sacrificing any of his profit margin. The contract in this case merely disclaims any such unusual obligation, and since the obligation has no basis in antitrust law the disclaimer has no antitrust significance either.

State Oil also denies that the provision in the contract pertaining to Khan's [\*\*4] charging a price above the suggested retail price is a form of price fixing. It points out that Khan was free to charge as high a price as he wishes. This is true in the sense that it would not have been a breach of contract for Khan to raise his price. But the contract made it worthless for him to do so; and, realistically, this was just an alternative sanction to termination, and probably an equally effective one. Generally when a seller raises his price, his volume falls; and if his profit on each unit sold is frozen, the effect of his raising his price will be that he loses revenue: he will sell fewer units, at the same profit per unit. The contract, incidentally, required Khan to buy all his gasoline from State Oil; so he could not merely switch to another brand if he wanted to charge a higher price.

Practices that have the same effect are not always treated the same in law. More precisely, two practices that have one effect in common may differ in their other effects. A merger between competitors and a price-fixing agreement between competitors has the same effect in extinguishing price competition between the parties, but the merger is more likely to produce offsetting cost [\*\*5] savings and it is therefore treated more leniently by the antitrust laws. So the fact that State [\*1361] Oil's rebate scheme was as effective in deterring Khan from raising his price as a threat to terminate his lease would have been does not dictate that the two practices be treated identically under the antitrust laws. But State Oil has not identified any other relevant difference between the two methods of preventing a dealer from charging more than the suggested retail price. The purely formal character of the distinction that it urges can be seen by imagining that the contract had forbidden Khan to exceed the suggested retail price and had provided that if he violated the prohibition the sanction would be for him to remit any resulting profit to State Oil. There is no practical difference between that form of words and permitting Khan to sell at a higher price but providing that if he does so the profit belongs to State Oil.

So State Oil engaged in maximum price fixing; the next question is whether this practice is illegal per se, meaning that all the plaintiff need prove to prevail is that the defendant engaged in the practice; investigation of its actual economic effects is pretermitted. [\*\*6] E.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 342-44, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982). **HN1**[<sup>1</sup>] Challenged practices that do not fall within any of the per se categories are subject to the broader-ranging inquiry into effect and motives that goes by the name of the "rule of reason" and that requires the plaintiff to prove that the defendant's conduct actually (or with a high likelihood) reduced competition. *Id. at 343*; *Business Electronics Corp. v. Sharp Electronics Corp.*, *supra*, 485 U.S. at 723. **HN2**[<sup>1</sup>] Price fixing has long been illegal per se. In its usual and most pernicious form, the term refers to an agreement or conspiracy between competing firms to fix a minimum price for their product. By a modest extension it refers also to an agreement between competitors to fix either a minimum or a maximum price for the resale of their product by their dealers. See *Arizona v. Maricopa County Medical Society*, *supra*, 457 U.S. at 348; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951). Why might competitors fix a minimum resale price? In order to make it more difficult for any of them to [\*\*7] engage in undetected violations of their agreement to fix their own (that is, the wholesale) prices; a supplier who observed that he was

losing sales because his competitor's dealers were selling the competitor's product at a low price would know that the competitor was failing to enforce the price-fixing agreement. Pauline M. Ippolito & Thomas R. Overstreet, Jr., "Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works," [39 J. Law & Econ. 285, 293-94 \(1996\)](#). Why might competitors fix a maximum resale price? The difference between what a supplier charges his dealer and what the dealer charges the ultimate customer is, functionally, compensation to the dealer for performing the resale service; so by agreeing on the resale prices of their goods competing sellers can reduce their dealers' margin below the competitive price for the dealers' service. This is a form of monopsony pricing, which is analytically the same as monopoly or cartel pricing and so treated by the law. E.g., [Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 92 L. Ed. 1328, 68 S. Ct. 996 \(1948\)](#).

The questionable next step (logically, not chronologically, **[\*\*8]** next) in the evolution of **antitrust law** was to affix the per se label to contracts in which a single supplier, not acting in concert with any of its competitors, fixed its dealers' retail prices. [Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 \(1911\)](#). Here the economic difference between fixing a minimum resale price and fixing a maximum resale price becomes more pronounced, although most economists believe that neither form of price fixing is pernicious when the supplier is neither the cat's paw of colluding distributors nor acting in concert with his competitors. A supplier acting unilaterally might fix a minimum resale price in order to induce his dealers to furnish valuable point-of-sale services (trained salesmen, clean restrooms--whatever) to customers, which they **[\*1362]** could not afford to do without a guaranteed margin to cover the costs of the services, because the customers would use the services provided by the full-service dealers but then purchase the product from a competing dealer who could sell the product at a discount because he had not borne the expense of providing the services. Lester G. Telser, "Why Should Manufacturers Want Fair Trade?" 3 J. Law **[\*\*9]** & Econ. 86 (1962); Ippolito & Overstreet, *supra*, 39 J. Law & Econ. at 294 (summarizing this and other theories of benign resale price maintenance).

As for maximum resale price fixing, unless the supplier is a monopsonist he cannot squeeze his dealers' margins below a competitive level; the attempt to do so would just drive the dealers into the arms of a competing supplier. A supplier might, however, fix a maximum resale price in order to prevent his dealers from exploiting a monopoly position. We do not know anything about the competitive environment in which Khan and State Oil operate--which is why the district judge was right to conclude that if the rule of reason is applicable, Khan loses. But suppose that State Oil, perhaps to encourage the dealer services that we mentioned, has spaced its dealers sufficiently far apart to limit competition among them (or even given each of them an exclusive territory); and suppose further that Union 76 is a sufficiently distinctive and popular brand to give the dealers in it at least a modicum of monopoly power. Then State Oil might want to place a ceiling on the dealers' resale prices in order to prevent them from exploiting that monopoly **[\*\*10]** power fully. It would do this not out of disinterested malice, but in its commercial self-interest. The higher the price at which gasoline is resold, the smaller the volume sold, and so the lower the profit to the supplier if the higher profit per gallon at the higher price is being snared by the dealer.

Despite these points, the Supreme Court has thus far refused to reexamine the cases in which it has held that resale price fixing is illegal per se regardless of the competitive position of the price fixer or whether the price fixed is a floor or a ceiling. The key precedent so far as the present case is concerned is [Albrecht v. Herald Company, 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 \(1968\)](#), a damages suit like this where the Court held over a vigorous dissent that the action of a newspaper publisher in fixing a ceiling at which its distributors could resell the newspaper to the public was illegal per se. State Oil seeks to distinguish *Albrecht* by pointing out that the initiative for the newspaper to take action against the plaintiff distributor had come from another distributor, giving the scheme a "horizontal" flavor. True, but this was not a factor on which the Court relied. It stated its holding **[\*\*11]** broadly: [HN3↑](#) maximum price fixing is illegal per se even if entirely "vertical," that is, even if the only parties in the picture are a single supplier and a single dealer, as in this case. The Court explicitly rejected the view that "contracts between a single supplier and his many dealers to fix maximum resale prices would not violate the Sherman Act." [Id. at 152 n. 8](#). The only use the Court made of the involvement of the other distributor was to show that it was not a case in which the supplier, as permitted by the *Colgate* doctrine (see below), had merely cut off a dealer for failing to adhere to a suggested price. See [id. at 149-50](#). It is not cricket to distinguish a precedent by

pointing to a fact mentioned by the court in the previous opinion but clearly given no weight by it. Otherwise no precedents would have any force, for no two cases are exactly alike.

State Oil points out that a supplier has the right to suggest a retail price and terminate a dealer who does not adhere to it. True, [United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#), but irrelevant. In such a case there is no agreement between the parties and so no basis for invoking [section 1](#) of the Sherman Act, [\\*\\*12](#) which is limited to contracts, combinations, and conspiracies, all of which involve an element of agreement. There was an explicit agreement that Khan could not make money if he sold above the suggested retail price. Had he raised its price above that level, State Oil would have had a contractual right to a rebate.

State Oil's main argument is that *Albrecht* is no longer the view of the Supreme [\\*1363](#) Court. (That argument was squarely rejected in [Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 752-54 \(1st Cir. 1994\)](#), so if we accepted State Oil's argument we would be creating a circuit split.) State Oil relies on a line of cases decided after *Albrecht* in which the Court established the concept of "antitrust injury." [HN4](#)<sup>↑</sup> There is no right to maintain a suit under the antitrust laws unless the defendant's conduct has impaired the kind of interest that the antitrust laws were intended to protect. [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#). And there is no such interest in the maintenance of a monopoly price. If typically and here a resale price ceiling imposed by a seller merely prevents his dealers from reaping monopoly profits, [\\*\\*13](#) the injury to the dealers from the ceiling--the loss, that is, of monopoly profits--will not support an antitrust suit. The requirement of proving antitrust injury is not waived in *per se* cases. In [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#), the Supreme Court held that a competitor of dealers prevented by their suppliers from raising their prices could not complain that the restriction was preventing him from raising his own prices.

We have considerable sympathy with the argument that *Albrecht* is inconsistent with the cases that establish the requirement of proving antitrust injury. In fact, we think the argument is right and that it may well portend the doom of *Albrecht*. In [Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698, 706-07 \(7th Cir. 1984\)](#), we said we regarded the continued validity of *Albrecht* as an open question, albeit for a different reason: that after *Albrecht* the Supreme Court had (reversing its previous position) recognized that exclusive dealer territories may be procompetitive. [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). As we pointed out earlier in this opinion, and as one of the [\\*\\*14](#) dissenting opinions in *Albrecht* had pointed out as well, [390 U.S. at 169, HN5](#)<sup>↑</sup> a price ceiling is a natural and procompetitive incident to a scheme of territorial exclusivity. The majority opinion in *Albrecht* had rejected this argument on the ground that price fixing cannot be "justified because it blunts the pernicious consequences of another distribution practice," [390 U.S. at 154](#), namely exclusive territories. We now know that the consequences of that other practice are not (not generally, at any rate) pernicious. So another prop beneath *Albrecht* has been knocked away, although State Oil does not make the argument from Sylvania, maybe because it does not grant its dealers exclusive territories (the record is silent on the matter).

Yet despite all its infirmities, its increasingly wobbly, moth-eaten foundations (see 8 Phillip E. Areeda, [Antitrust Law: An Analysis of Antitrust Principles and Their Application](#) PP 1635-38 (1989)), *Albrecht* has not been expressly overruled (or, what would amount to the same thing, a later case, conceded to be indistinguishable, has not been expressly overruled). And the Supreme Court has told the lower federal courts, in increasingly [\\*\\*15](#) emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are to leave the overruling to the Court itself. [Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535, 75 L. Ed. 2d 260, 103 S. Ct. 1343 \(1983\)](#) (per curiam); [Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 \(1989\)](#); [id. at 486](#) (dissenting opinion) ("indefensible brand of judicial activism"); see also [Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 734, 741-42 \(7th Cir. 1986\)](#). *Albrecht* was unsound when decided, and is inconsistent with later decisions by the Supreme Court. It should be overruled. Someday, we expect, it will be. The Supreme Court in the *Atlantic Richfield* case was willing to assume only "*arguendo*" that *Albrecht* had been correctly decided, [495 U.S. at 335 n. 5](#), and it cited at length the critical academic commentary on the case. [Id. at 343 n. 13](#). And in [Arizona v. Maricopa County Medical Society, supra](#), the Court, while reaffirming the *per se* rule against horizontal maximum price fixing, noted that *Kiefer-Stewart*, unlike *Albrecht*, had

been a [\*1364] case of horizontal maximum price fixing and that "horizontal restraints [\*\*16] are generally less defensible than vertical restraints," [457 U.S. at 348 n. 18](#), though elsewhere the opinion quotes at length from *Albrecht*, and with apparent approval, a denunciation of maximum price fixing not limited to the horizontal variety. [Id. at 347.](#)

But all this is an aside. We have been told by our judicial superiors not to read the sibylline leaves of the *U.S. Reports* for prophetic clues to overruling. It is not our place to overrule *Albrecht*; and *Albrecht* cannot fairly be distinguished from this case.

It might be distinguishable if there were a class of cases in which maximum price fixing, though wholly vertical, wholly unilateral, did cause antitrust injury, even if *Albrecht* and the present case were not members of that class. Then, while *Albrecht* itself might be decided differently today, its principle that such price fixing is illegal per se would have some domain of application. In that event affirmance here would construe *Albrecht* narrowly but not abrogate it. But State Oil is not able to identify any cases, real or hypothetical, in which the practice condemned in *Albrecht* could cause an injury to the interests protected by [antitrust](#) [\*\*17] [law](#). If proof of antitrust injury is required in cases involving the sort of price fixing involved in *Albrecht*, no such case could be brought, whether by a private plaintiff or by the Department of Justice or the Federal Trade Commission.

More to the point, the Supreme Court's conception of antitrust injury may be broader than State Oil's. The Court has never retreated from the proposition that vertical minimum price fixing (resale price maintenance) is illegal per se. See, e.g., [Business Electronics Corp. v. Sharp Electronics Corp.](#), *supra*, [485 U.S. at 725-26](#). Yet, under the dealer-service theory that we sketched, and other theories that have the support of antitrust economists, [HN6](#)↑ resale price maintenance does not impair any interest that the antitrust laws interpreted in light of modern economics could be thought intended to protect. It increases rather than reduces competition--as the Court recognized in the Sylvania decision, dealing with the closely related area of territorial and other nonprice restrictions placed by suppliers on competition among their dealers. Yet Sylvania itself reaffirms the per se rule against vertical price restrictions. [433 U.S. at 51 n. 18](#). The [\*18] Court must think that preventing intrabrand price competition harms an interest protected by the antitrust laws even if the restriction increases competition viewed as a process for maximizing consumer welfare and even if a restriction that had similar effects but was not an explicit regulation of price would be lawful. If this is what the Court believes--and it does appear to be the Court's current position, though not one that is easy to defend in terms of economic theory or antitrust policy--the Court may also think that interfering with the freedom of a dealer to raise prices may cause antitrust injury. We suspect not, but we cannot have sufficient confidence in our view to declare a decision of the Supreme Court that has not been expressly overruled nevertheless defunct, as we would have to do in order to agree with the district court's ruling that the maximum price provision in the contract between State Oil and Khan was not illegal per se. In *Atlantic Richfield*, despite the Court's evident skepticism about the continued soundness of *Albrecht*, the Court distinguished it on the ground that the dealers subject to a price ceiling imposed by their supplier, as distinct from [\*19] their competitors, were the intended beneficiaries of *Albrecht*. See [495 U.S. at 336-37](#). The implication is that the injury to a dealer like Khan from not being able to raise his price because of a restriction imposed by his supplier is antitrust injury.

But even if Khan, as we believe, is not ruled out of court by the concept of antitrust injury, he had to prove injury in fact to be able to maintain the suit. The only evidence of injury was in the report of his economic expert, so if the judge did not abuse his discretion in excluding the report we must affirm the dismissal of the antitrust count even though we think he was wrong to think that *Albrecht* made it impossible for Khan to prove antitrust injury. But we think it was an abuse of discretion.

[\*1365] The judge's ground for the exclusion was that "the report turns entirely on the experience of one receiver who operated one gas station over a five-month period." Before Khan was terminated, State Oil issued a notice of termination and, on the ground that Khan was selling inventory in which State Oil retained a security interest without reimbursing State Oil, obtained from a state court an order appointing a receiver to operate [\*20] the station. He did so for five months. (The record does not reveal what happened at the end of that period. We assume that State Oil either took over the operation of the station itself or obtained another lessee.) The plaintiffs' expert obtained the receiver's financial records and determined from the cost and revenue figures in them that the receiver must have disregarded the price ceiling in the agreement with State Oil. The figures showed that the receiver had realized a

margin on his sales of gasoline in excess of 3.25 cents. The only way he could have done this was by charging a price in excess of the suggested retail price and not rebating the higher margin generated by the higher price. The expert inferred that had Khan been allowed to raise his price above the suggested retail price, he would have had a higher income, enabling him to pay his rent and therefore avert termination.

Of course competitive conditions may have changed during the time the receiver was operating the station. A dealer's ability to raise his price depends on the demand for his product; the demand for gasoline in general, or for Union 76 relative to other brands, may have increased after the receiver [\*\*21] took over. If so, his ability to maintain a price higher than the suggested retail price would not prove that Khan had had a similar ability. And if Khan could not have maintained a price above the suggested retail price, simply because competition would not have permitted him to do so, then he wasn't hurt by the contractual provision of which he complains. There would be a violation of the antitrust laws, but no injury.

But this is just to say that the evidence presented by the expert was not conclusive on the subject of injury-- was, indeed, very far from being conclusive. That did not make it either inadmissible or devoid of probative value. The only ground on which it could be argued to be inadmissible would be that the expert, although a Ph.D. in economics from a reputable university and an experienced consultant in antitrust economics, and hence qualified to offer expert economic evidence in this case, had failed to conduct a study that satisfied professional norms. As we have emphasized in cases involving scientific testimony-- and the principle applies to the social sciences with the same force that it does to the natural HN7 sciences--a scientist, however reputable, is not permitted [\*\*22] to offer evidence that he has not generated by the methods he would use in his normal academic or professional work, which is to say in work undertaken without reference to or expectation of possible use in litigation. Braun v. Lorillard Inc., 84 F.3d 230, 234 (7th Cir. 1996); Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996); Bammerlin v. Navistar Int'l Transportation Corp., 30 F.3d 898, 901 (7th Cir. 1994). The district judge identified no basis, and State Oil can point to none, for supposing that the expert's report flunked this test. The inference regarding the receiver's profit margin, drawn from the station's cost and revenue data, was straightforward, and, so far as appears, was made in just the way that an economist interested in a firm's profit margins for reasons unrelated to litigation would make it; and likewise the inference that if Khan had enjoyed the freedom that the receiver evidently thought he had he would have charged a higher price, and made more money, than he did. If anything, the economist was overqualified to give evidence that could as easily have been given by an accountant; but overqualification is not yet a recognized basis for disqualification.

[\*\*23] Weight is different from admissibility. An expert's report might be admissible but so lacking in weight as not to block the granting of summary judgment for the other side. Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996); Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1338-39 (7th Cir. 1989); Hayes v. Douglas Dynamics, Inc., 8 F.3d 88, 92 (1st Cir. 1993). But that is not the situation here. State Oil put [\*1366] in no evidence. In the absence of contrary evidence, Dr. Bamberger's inference from his study of the receiver's experience that Khan had been hurt by the maximum price provision of the gasoline supply contract was sufficiently plausible to defeat summary judgment on the question of injury.

The antitrust claim should not have been dismissed. We turn to the breach of contract claim. Although Khan's primary complaint is that he was prevented from raising his price, he also complains that there were times when he wanted to lower his price on nonpremium gasoline. As we said at the outset, this claim has no standing as an antitrust claim. But State Oil concedes that its contract implicitly obligated it to suggest retail prices (and adjust its wholesale [\*\*24] prices accordingly, to maintain the 3.25 cents margin between wholesale and suggested retail price that the contract guarantees) that were realistic in light of competitive conditions facing Khan. The only evidence Khan presented concerning those competitive conditions was evidence that on sixteen occasions during his operation of the station he had called other dealers and been told that their retail prices were lower than the suggested retail prices fixed by State Oil. This evidence falls far short of establishing a genuine issue of material fact concerning a breach of the contract. There is no evidence that the dealers were actual competitors of Khan or that the prices charged by those dealers were prices for the same grades of gasoline sold by Khan, which, remember, sold a gasoline that has a well-recognized brand name. The evidence is perfectly consistent with an assumption that State Oil's suggested retail prices were competitively realistic.

So the contract claim was rightly dismissed but we note the absence from the record of any indication of why the district judge, having dismissed the federal claims before trial, retained rather than, as is the norm in such situations, [\[\\*\\*25\]](#) relinquished jurisdiction over the supplemental state law claim. [28 U.S.C. § 1367\(c\)\(3\); Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 \(7th Cir. 1993\)](#). (It does not appear that there is diversity of citizenship between the parties.) The presumption in favor of relinquishment when all federal claims fall out before trial is rebuttable, *id.*, but it should not be lightly abandoned, as it is based on a legitimate and substantial concern with minimizing federal intrusion into areas of purely state law. Since the absence of merit of the supplemental claim in this case is clear as a matter of elementary contractual interpretation, so that the retention of jurisdiction for purposes of dismissing the claim did not require the district judge to speculate about the meaning of state law, we think the judge was right to retain jurisdiction rather than visit upon the parties and the state courts the burden of further litigation. As we said in *Brazinski*, citing a slew of earlier cases, if the correct disposition of the supplemental claim is so clear as a matter of state law that it can be determined without a trial and without entanglement in difficult issues of state law, [\[\\*\\*26\]](#) considerations of judicial economy counsel retention and prompt decision, rather than remission to the state court. *Id.* But we remind the district courts of the presumption against retaining jurisdiction of supplemental state-law claims when the federal claims are dismissed before trial, and of the concomitant importance of stating the ground on which the court believes in a particular case that the presumption has been rebutted.

The judgment of the district court is affirmed in part and reversed in part, as explained in the opinion, and the case is remanded for further proceedings consistent with the opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

**Concur by:** RIPPLE

## Concur

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RIPPLE, *Circuit Judge*, concurring. Today the court employs a rigorous application of the rules of stare decisis and precedent in this antitrust matter. This methodology is certainly, as a general proposition, a prudent approach to antitrust decision-making in the judicial context. Antitrust issues pose crucial policy choices for the economic and, indeed, social life of the Country. Nevertheless, Congress, content with the passage of generally worded statutes, has left a great deal of policy-making [\[\\*\\*27\]](#) to the courts through the process of case by case decision-making. [\[\\*1367\]](#) In these circumstances, we ought to ensure, through the strict application of stare decisis and precedent, that the law is sufficiently predictable and certain to permit businesses to order their affairs with a clear understanding of what the law requires. I agree, therefore, with the basic methodology employed by the court in reaching the decision announced today. I write separately to note that I share my colleagues' substantive criticism of the per se rule as it has been applied to vertical maximum pricefixing and to question the extension of that rule to cases like the present one in which the threat of horizontal cartelization is absent or, at the very least, greatly diminished. It is difficult to discern the "manifestly anticompetitive effect," [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#), that justifies invocation of the per se rule.

The Supreme Court first applied the per se rule to vertical maximum price-fixing in [Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 \(1968\)](#). The defendant in that case, a newspaper publisher, set a suggested retail price for its many distributors. When one of [\[\\*\\*28\]](#) the distributors sought to charge his customers more than the suggested price, the publisher attempted to discipline him by hiring another entity to assume some of the business handled by the recalcitrant carrier. The Supreme Court held that this restraint was unlawful per se under [section 1](#) of the Sherman Act because, as the Court later recounted in [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1989\)](#), the restraint "threatened to inhibit vigorous [price]

competition by the dealers who were bound by it" and because it "threatened to become a minimum price-fixing scheme." *Id. at 335.*<sup>1</sup>

[\*\*29] The present case arises in a factual context that is far removed from the one at issue in *Albrecht*. This case, as presented to the district court and to this court on appeal,<sup>2</sup> involves a single contract between a single wholesaler and a single retailer that sets the equivalent of maximum resale price for the commodity in question. Neither the pleadings in this case nor the contract between Khan and State Oil implicate any other entities. We are confronted, therefore, with a wholly vertical arrangement; there is no hint of any concrete horizontal effect.

[\*\*30] In *Center Video Industrial Co., Inc. v. United Media, Inc.*, 995 F.2d 735 (7th Cir. 1992), we discussed the centrality of the presence or absence of horizontal effects in determining whether a particular vertical restraint ought to be prohibited by the antitrust laws. Reviewing existing Supreme Court precedent addressing vertical restraints, we noted that, in the Supreme Court's view, "only one legitimate justification exists for prohibiting vertical price restraints imposed by manufacturers who lack significant market power: a proved tendency for such agreements to facilitate the formation of horizontal cartels." *Id. at 737*. We addressed in *Center Video* the "two mechanisms" by which a vertical price maintenance [\*1368] agreement might be used to facilitate the formation of horizontal cartels. *Id.* First, we explained, vertical price maintenance arrangements facilitate cartelization at the retail level; the restraint provides a mechanism by which conspiring dealers are able to enforce the agreement against wayward members of the horizontal conspiracy. See *id. at 737*. We further noted that vertical price maintenance agreements may also assist in the formation of cartels at the [\*\*31] manufacturer level. By requiring prospective members of a manufacturer cartel to impose price restraints on their dealers, cartel members have an effective method of determining whether their partners are abiding by the rules of the cartel. "The members of the cartel then need only monitor the retail prices of their partners' distributors, secure in the knowledge that any deviation from a given retail price would indicate that a member of the cartel had broken ranks . . ." *Id. at 738*. In the absence of any allegation that the restraint at issue in this case was imposed by multiple manufacturers or upon multiple dealers, neither of these two justifications for application of the per se rule applies.

As my colleagues recognize, the anticompetitive implications of vertical price restraints are often difficult to discern. The difficulty in discovering actual injury to competition--or even the potential for such injury--is compounded where, as here, the price restraint in question is wholly vertical in nature and has been imposed by a single wholesaler upon a single distributor. It simply is not clear that the plaintiff can show an "injury of the type that the antitrust laws were [\*\*32] intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). Like my colleagues, therefore, I have serious doubts as to the continued viability of *Albrecht*--especially in the context of conduct that is devoid of horizontal anticompetitive implications. Our

<sup>1</sup> Although the Court in *Atlantic Richfield* referred to the situation in *Albrecht* as an "unadulterated vertical, maximum-price-fixing arrangement," *Atlantic Richfield*, 495 U.S. at 336 n.6, the harm identified in *Albrecht* was largely horizontal and stemmed from the fact that multiple dealers were subject to the restraint. At issue was "the manner in which [the arrangement] might restrain competition by dealers." *Id. at 335.*

<sup>2</sup> We note that Khan's complaint does contain the following allegation:

At all times relevant to this action Defendant has been engaged in the business of leasing service stations/convenience stores such as that operated by Plaintiffs, as well as in the sale of petroleum and other products to such service stations for resale to the public under the "Union 76" trademark. Plaintiffs are informed and believe that Defendant is involved in the lease and/or operation of numerous other service stations in the Chicago Metropolitan Area.

R.1, Complaint, at P 7. Although the final sentence of this paragraph arguably alleges the existence of other State Oil dealers, it is clear from the record in this case that Khan did not present the case to the district court on this theory. The summary judgment record is devoid of any evidence suggesting that other State Oil dealers also are subject to the price restraint challenged by Khan. Because the case was not presented to the district court on the theory that the restraint had been imposed by multiple wholesalers or upon multiple dealers, we do not view this unsupported allegation in Khan's complaint as sufficient to make this case factually analogous to *Albrecht*.

application of the per se rule to this limited restraint therefore marks a considerable extension of the *Albrecht* rule beyond the facts presented in that case.

Nevertheless, until the Supreme Court limits the use of the per se rule with respect to vertical price restraints, I am unable to rule out the possibility that the Justices might intend the per se rule to be broad enough to reach State Oil's conduct. Arguably, its action might be viewed as implicating some of the concerns articulated in *Albrecht*. For example, the Supreme Court in *Albrecht* explained that "maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay." [390 U.S. at 153](#). By eliminating any motive for Khan to increase his prices above the suggested [\*\*33] retail price, State Oil effectively may have relegated Khan to the discount gasoline market. See [\*Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft\*, 19 F.3d 745, 753-54 \(1st Cir. 1994\)](#) (noting that, because the plaintiff dealer was forced to keep its price below the level it preferred to set, the challenged agreement forced the plaintiff to provide less of what customers wanted, leading to potentially lower profits). One less potential entrant in the full-service gasoline market means that dealers that market are able to charge a higher price for the same package of services. See [\*Albrecht\*, 390 U.S. at 152](#) (noting that a vertical maximum-price agreement, "by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market").

The Supreme Court also noted in *Albrecht* that, by limiting the ability of small dealers to engage in nonprice competition, a maximum price-fixing agreement might "channel distribution through a few large or specially advantaged dealers." *Id.* Here, the net effect of the restraint imposed on Khan by State Oil is to limit [\*\*34] Khan's margin to \$ 0.325 per gallon--a margin which, in Khan's view, is unrealistically low. Over the long run, high-volume gasoline dealers, who are able to maintain low margins for longer periods of time, might benefit from the arrangement foisted on Khan by State Oil.

At some point in the future, the Supreme Court may revisit *Albrecht* and further define [\*1369] the scope of the per se rule in the context of vertical maximum price-fixing. Until that time, however, we cannot be sure whether the rule of *Albrecht* is broader than the facts which gave it birth. In the interim, considerations of stare decisis and precedent require us to continue to adhere to the per se rule against vertical maximum price-fixing in cases in which identifiable anticompetitive effects are present. Although the absence of concrete horizontal implications makes this a considerably closer case, State Oil's conduct does present, for the reasons outlined above and in the majority's opinion, at least the possibility of the anticompetitive effects identified by the Supreme Court in *Albrecht*. On this ground, therefore, I concur in the court's decision.



## **Massachusetts Sch. of Law at Andover v. ABA**

United States District Court for the Eastern District of Pennsylvania

August 29, 1996, Decided ; August 29, 1996, FILED; August 30, 1996, ENTERED

CIVIL ACTION No. 93-6206

### **Reporter**

937 F. Supp. 435 \*; 1996 U.S. Dist. LEXIS 13096 \*\*; 1996-2 Trade Cas. (CCH) P71,543

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC. vs. AMERICAN BAR ASSOCIATION, et al.

**Disposition:** [\*\*1] American Bar Association's motion for summary judgment granted and judgment entered in favor of the American Bar Association, Law School Admission Services (LSAS), Law School Admission Council (LSAC), and the Association of American Law Schools (AALS), and against plaintiff on all counts. Motions for summary judgment submitted by AALS, LSAS, and LSAC denied as moot.

## **Core Terms**

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law school, accreditation, graduates, bar examination, antitrust liability, government action, schools, Sherman Act, unaccredited, railroads, truckers, monopolize, sit, restraint of trade, stigma, decisions, incidental, antitrust claim, alleged injury, anti trust law, anticompetitive, stigmatized, customers, inflicted, antitrust violation, bar association, manufacturers, flows, views

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

### **HN1[] Antitrust & Trade Law, Sherman Act**

See the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

### **HN2[] Antitrust & Trade Law, Sherman Act**

See Sherman Act, 5 U.S.C.S. § 2.

Legal Ethics > Practice Qualifications

### **HN3[] Legal Ethics, Practice Qualifications**

937 F. Supp. 435, \*435L<sup>A</sup>996 U.S. Dist. LEXIS 13096, \*\*1

The American Bar Association standard 802 provides that a law school proposing to offer a program of legal education contrary to the terms of the Standards may apply to the Council for a variance. The variance may be granted if the Council finds that proposal is consistent with the general purposes of the Standards. The Council may impose such conditions or qualifications as it deems appropriate.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Torts > ... > Elements > Causation > Intervening Causation

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

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN4** [blue icon] Exemptions & Immunities, Noerr-Pennington Doctrine

The United States Supreme Court holds that where a restraint upon trade and monopolization is the result of a valid governmental action, as opposed to private action, no violation of the Sherman Act, 5 U.S.C.S. § 1, can be made out. The Court reasons that when an antitrust-plaintiff's injury is proximately caused by the government, the government's action constitutes a supervening cause that breaks the chain of causation between an antitrust-defendant's action and any anticompetitive effect. To decide whether these principles apply, a court should ask: (1) what is the harm that the plaintiff alleges it suffered?; and, (2) is that harm the proximate result of governmental action or private conduct? If the harm results from governmental action, no antitrust liability will lie. Moreover, if the plaintiff alleges two harms, one the proximate result of private conduct and the other the result of governmental action, no liability will attach to the private conduct if the harm associated with that conduct is merely incidental to the harm associated with the governmental action.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Education Law > Civil Liability > General Overview

Legal Ethics > Practice Qualifications

#### **HN5** [blue icon] Exemptions & Immunities, Noerr-Pennington Doctrine

Any competitive disadvantage that a law school suffers because some sovereign states preclude graduates of non-accredited law schools from taking their bar examinations cannot be the basis for antitrust liability. When the impact of these independent governmental decisions is viewed within the context and nature of the American Bar Association's activity, it is clear that any injury that flows from state rules governing bar admission squarely falls within the prescripts of Noerr.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

#### **HN6** [blue icon] Fundamental Freedoms, Freedom of Speech

It is axiomatic that the First Amendment protects speech, not action.

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**Judges:** JUDGE J. WILLIAM DITTER, JR.

**Opinion by:** J. WILLIAM DITTER, JR.

## Opinion

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### [\*438] OPINION AND ORDER

Ditter, J.

August 29, 1996

#### I. INTRODUCTION

For many years, the American Bar Association has evaluated law schools using a set of standards it has developed for that purpose. The Massachusetts School of Law brought this antitrust action against the American Bar

937 F. Supp. 435, \*438L<sup>¶</sup>996 U.S. Dist. LEXIS 13096, \*\*3

Association, the Law School Admission Council, Law School Admission Services,<sup>1</sup> and the Association of American Law Schools<sup>2</sup> after ABA denied it provisional accreditation. MSL alleges that the defendants violated the Sherman Act by restraining trade with anticompetitive policies<sup>3</sup> and conspiring to monopolize, and monopolizing the law school training field, the accreditation of law schools, <sup>4</sup> and the licensing of lawyers.<sup>4</sup> It seeks treble damages, interest, and costs. It does not seek accreditation as part of this lawsuit.

**[\*\*5]** MSL maintains that *some* of the standards that ABA uses to inform its accreditation decisions violate the Sherman Act. Plaintiff's restraint of trade claim rests on its contention that the ABA's adoption and approval of the standards have the purpose and effect of artificially enhancing faculty salaries, limiting the services of law school professors, imposing unnecessarily costly guidelines for law school libraries, increasing law school tuitions, and "freezing out of law school persons from lower socio-economic classes and persons in mid-life." Plaintiff's monopolization claim is based on its contention that the defendants have worked in concert, using some of the ABA's standards, to monopolize the law school training, accreditation, and licensing processes.

Before me is ABA's motion for summary judgment.<sup>5</sup> It contends that judgement should be entered in its favor for six independent reasons: (1) MSL's alleged injury stems exclusively from the bar admissions rules of the sovereign states, not the ABA standards; (2) MSL cannot demonstrate an injury to competition between or among law schools generally resulting from the ABA's decision not to accredit MSL; (3) MSL cannot demonstrate **[\*\*6]** that the ABA standards that it is challenging were the cause-in-fact of its injuries; (4) the antitrust laws do not apply to the non-commercial aspects of higher education; (5) even examining the particular challenged standards under a rule of reason analysis, no triable issue exists and judgment is proper as a matter of law; and (6) the conspiracy alleged by plaintiff is illogical and makes no economic sense. For the reasons discussed below, I will grant ABA's motion.

## II. STATEMENT OF FACTS

MSL is a Massachusetts corporation that has been operating a law school in Andover, Massachusetts, since 1988. In 1990, MSL was authorized by the board of regents of the Commonwealth of Massachusetts to award the degree of *juris doctor* to its graduates. That authority enables plaintiff's graduates to sit for several bar examinations, including Massachusetts'.

**[\*439]** In the fall of 1992, MSL applied for ABA accreditation. **[\*\*7]** Accreditation is a valuable credential for a law school because all 50 states and the District of Columbia permit graduates of ABA-accredited schools to sit for their

<sup>1</sup>The LSAC and LSAS work together under the name LSAC/LSAS. In part, they sponsor, administer, and profit from the Law School Admission Test.

<sup>2</sup>The AALS is an association of law schools. Its membership includes many ABA-accredited law schools and it participates in the ABA accreditation process.

<sup>3</sup> [Section 1](#) of the Sherman Act provides:

**HN1** Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal.

[15 U.S.C. § 1.](#)

<sup>4</sup> [Section 2](#) of the Sherman Act provides:

**HN2** Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.

[15 U.S.C. § 2.](#)

<sup>5</sup> In addition to filing separate motions for summary judgment, LSAC/LSAS and AALS have joined ABA's motion.

bar examinations. The prerequisites for taking particular bar examinations and ultimate admission to the bar are established by the states, not the ABA or any of the other defendants. MSL has its own approach to legal education, an approach that often differs sharply from ABA's more traditional views. Although it acknowledged that as a matter of policy, many aspects of its program did not comply with the ABA standards that guide accreditation decisions, MSL requested a variance for each of the standards which it had refused to follow.<sup>6</sup>

[\*\*8] Following its usual procedure when making accreditation decisions, ABA sent a site evaluation team to examine MSL's program. Based on that team's factual report about MSL and MSL's response, ABA denied MSL provisional accreditation. A series of appeals taken by MSL were fruitless.

MSL maintains that its failure to secure ABA accreditation handicaps the school in competing for students because its graduates cannot take the bar examinations of 42 states, and the school has been generally stigmatized by the denial. (Compl. PP18, 41; Velvel Dep., 8/25/94, at 30:1-15).

In summary, this case concerns the evaluation of educational philosophies, methods, and facilities. ABA's refusal to approve that of which it disapproves and MSL's demand to differ but be accepted as though it conformed -- or as though its differences did not matter -- are the bases for this suit.

### *III. DISCUSSION*

A number of courts have considered issues similar to those raised in MSL's complaint. Application of these decisions to the case at bar lead me to conclude that judgment should be entered against MSL.<sup>7</sup>

[\*\*9] A. MSL's Alleged Injury Results from Governmental Action not Private Conduct

ABA argues that MSL's alleged injury results from the independent decision of the sovereign states to preclude graduates of unaccredited law schools from taking their bar examinations. ABA's position is based on the Supreme Court's seminal decision 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). *Noerr* involved an antitrust claim brought by long distance trucking companies against, *inter alia*, an association of railroads. The plaintiffs alleged that the defendants violated sections 1 and 2 of the Sherman Act by conspiring to restrain trade in, and monopolizing the long distance freight business. *Id. at 129*. The plaintiffs claimed that the defendants had engaged in a propaganda campaign "to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business." *Id.* HN4[]. The Supreme Court held that "where a restraint upon trade and monopolization is the result of a valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Id.* \*\*10 at 136. The Court reasoned that when an antitrust-plaintiff's injury is proximately caused by the government, the government's action constitutes a supervening cause that breaks the chain of causation between an antitrust-defendant's action and any anticompetitive effect. Areeda & Hovenkamp, *Antitrust law* P201 at 14 (1994 Supp.).

To decide whether the *Noerr* principles apply, a court should ask: (1) what is \*440 the harm that the plaintiff alleges it suffered?; and, (2) is that harm the proximate result of governmental action or private conduct? If the harm results from governmental action, no antitrust liability will lie. Moreover, if the plaintiff alleges two harms, one the proximate result of private conduct and the other the result of governmental action, no liability will attach to the

<sup>6</sup> HN3[] ABA standard 802 provides that:

A law school proposing to offer a program of legal education contrary to the terms of the Standards may apply to the Council for a variance. The variance may be granted if the Council finds that proposal is consistent with the general purposes of the Standards. The Council may impose such conditions or qualifications as it deems appropriate.

<sup>7</sup> As discussed more thoroughly below, no genuine issue of material fact exists. In this regard, it should be noted that although MSL continues to seek further discovery, thus far in this litigation, there have been 44 depositions taken, many of them over multiple days, in 14 states and two countries. Moreover, more than 100,000 pages of documents have already been produced.

private conduct if the harm associated with that conduct is merely incidental to the harm associated with the governmental action. *Id. at 143.*

Courts have had several opportunities to flush out the extent of *Noerr* immunity in various contexts. In *Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992), cert. denied, 510 U.S. 992, 114 S. Ct. 551, 126 L. Ed. 2d 452 (1993), [\*\*11] the plaintiffs sued the ABA and several other bar associations. They challenged as anticompetitive certain ethical rules adopted by the Illinois Supreme Court and the Northern District of Illinois at ABA's recommendation. The plaintiffs also challenged as anticompetitive certain ethical opinions promulgated by the defendant bar associations. They alleged that the rules and ethical opinions injured them by restricting their ability to advertise and to form partnerships with non-lawyers. *Id. at 1382.*

The Seventh Circuit upheld the district court's dismissal of the plaintiffs' antitrust claim. *Id. at 1383.* Relying heavily on the Supreme Court's decision in *Noerr*, the court found that when a trade association provides information but does not constrain others to follow its recommendations, it does not violate the antitrust laws. *Lawline*, 956 F.2d at 1383 (citing *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989)). The basis for this finding is readily apparent -- when a state adopts as its own the conclusions reached by a professional association (in that case the ethical rules and opinions and in this case conclusions about the [\*\*12] quality of law school educations), it is the state and not the private party that injures the plaintiff with anticompetitive conduct. 956 F.2d at 1384. As the Sherman Act does not proscribe states from engaging in anticompetitive conduct, see *Noerr*, no antitrust claim will lie against trade associations under these circumstances.<sup>8</sup>

In *Sessions Tank Liners, Inc., v. Joor Mfg., Inc.*, 17 F.3d 295 (9th Cir.), cert. denied, 130 L. Ed. 2d 23, 115 S. Ct. 66 (1994), the Ninth Circuit rejected an antitrust claim brought against a corporation that had caused a prominent standard-setting organization to amend its influential fire code to the disadvantage of the plaintiff. Local governments either formally adopted the organization's standards, or, in some cities and towns where the [\*\*13] standards had not formally been adopted, local officials refused to issue permits for structures that did not conform with the standards. *Id. at 296.* The plaintiff alleged that the standards injured its ability to compete for customers. In rejecting the antitrust claim, the court found that the plaintiff's injuries resulted from governmental action, not the defendant's conduct. *Id. at 296.* *Noerr* principles therefore applied to shield the defendant's conduct from potential antitrust liability.

\* \* \*

Plaintiff attempts to distinguish *Noerr*, *Lawline*, and *Sessions*. It argues that the instant case is different from those cases because here, the defendants (not the government) have inflicted the alleged injury. To determine the cause of plaintiff's alleged injury, a brief exploration of that injury is first necessary.

MSL contends that its failure to be accredited has caused it competitive harm by impairing its ability to solicit prospective students. (Compl. P41). The lack of accreditation limits its ability to solicit prospective students because many states preclude graduates of non-accredited schools from taking their bar examinations<sup>9</sup> and non-

<sup>8</sup> See also *Sanjuan v. American Bd. of Psychiatry and Neurology*, 40 F.3d 247 (7th Cir. 1994) (Easterbrook, J.) (rejecting an antitrust claim brought against a trade association that declined to "certify" the plaintiff-doctors).

<sup>9</sup> An excerpt from Mr. Velvel's deposition aptly states the school's position:

Question: And it is your belief that the reason that the students are less interested in the school today is because they cannot be admitted to the bar in states other than Massachusetts?

Answer: I am certain of it to a moral certainty, Mr. Pritikin. I think there is no legitimate doubt about it. I don't think that all the fancy lawyers and economists in the world would ever be able to remotely prove the contrary 'cause the contrary is not true.

(Velvel Dep., 8/25/95, at 30:1-15; Velvel Aff., 3/22/95, at P23(a); Compl. P18).

accredited [\*\*14] [\*441] schools bear a stigma.<sup>10</sup> (Pl.'s Resp. to Mot. for Summ. J. at 28 n.12; Compl. P41). It maintains that both these factors cause it to lose students who would otherwise attend the school.

[\*\*15]  Any competitive disadvantage that MSL suffers because some sovereign states preclude graduates of non-accredited law schools from taking their bar examinations cannot be the basis for antitrust liability. This is what *Noerr*, *Sessions*, and *Lawline* say. The states decide who can sit for their bar examinations. I permitted MSL to explore this issue extensively and it has offered no evidence to show that ABA or the other defendants suggest, recommend, or decide who can sit for bar examinations or be admitted to practice in any state. When the impact of these independent governmental decisions is viewed within the context and nature of ABA's activity, it becomes clear that any injury that flows from state rules governing bar admission squarely falls within the prescripts of *Noerr*. See [Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504, 100 L. Ed. 2d 497, 108 S. Ct. 1931 \(1988\)](#).<sup>11</sup>

[\*\*16] Moreover, any competitive disadvantage that MSL suffers because it "is stigmatized in jurisdictions in which graduation from an ABA-accredited law school is *not* a prerequisite for sitting for the bar examination," also comes within the *Noerr* doctrine (Pl.'s Response to Mot. for Summ. J. at 28 n.12 (emphasis added); Compl. P41). Plaintiff alleges that in addition to the injury inflicted by the governmental restrictions, MSL suffers injury purely because of the denial of accreditation. MSL's argument here is no doubt presented in an effort to identify some independent ABA-inflicted injury thus putting this case outside of *Noerr*'s reach. While such an injury, on its face, might appear to be independent from the injury that flows from the governmental restrictions on bar admittance, the Supreme Court rejected a similar argument in *Noerr*, holding:

the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers, among the public generally [\*442] and among the truckers' customers particularly, in the hope that by doing so the overall competitive position of the truckers would be weakened, and the railroads were successful in these efforts [\*\*17] to the extent that such injury was actually inflicted. The apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable [our finding that no antitrust claim will lie where governmental action is the proximate cause of the plaintiff's injury]. But this effect is only apparent and cannot stand under close scrutiny. There are no specific findings that the railroads attempted *directly to persuade* anyone not to deal with the truckers.

<sup>10</sup> MSL also contends that it has suffered two additional injuries -- in an effort to treat its hardworking faculty fairly, to maintain faculty morale, and to "have any chance of accreditation," MSL raised the salaries of its professors and bought more books for its library. (Velvel Aff., 3/22/95, P41(a); Pl.'s Surreply Br. in Further Opp'n to ABA's Mot. for Summ. J., at 3-5). MSL admits that, notwithstanding the increase, its starting salaries lag behind those at ABA accredited schools. Despite this fact, MSL has consistently maintained that it has a highly skilled and "hardworking" faculty. (Complaint P 12; Velvel Aff., 3/22/95, P41(b)). Therefore, although it contends that ABA's standards have artificially inflated faculty salaries, MSL admits that it has been able to avoid some of these high costs without sacrificing quality. Thus, rather than injuring MSL, ABA's standards have provided it with a competitive advantage -- it can spend less on faculty than ABA schools and still purchase quality teaching services. Moreover, as these additional "injuries" result from MSL's unilateral decisions, I find that they are not an appropriate basis for potential ABA antitrust liability.

<sup>11</sup> MSL also contends that the cases like *Noerr* are inapposite because they involved situations where the plaintiff's injury resulted from governmental adoption of allegedly anticompetitive doctrines, while in the instant case the state governments have merely relied upon ABA's accreditation decisions and not officially adopted the ABA's standards. This argument also misses the mark. In *Sessions Tank Liners*, although many local governments formally adopted the challenged standards into law, in some cities and towns, the standards were enforced not through explicit codification, but rather by having local officials refuse to issue permits for structures or activities that were inconsistent with the code. [17 F.3d at 296](#). In these cities and towns, the governments accepted the conclusions that the standards produced without explicitly adopting the standards themselves. See Areeda & Hovenkamp, *Antitrust Law*, P204 at 75-76 (1994 Supp.). This is identical to the instant case, where government has accepted the conclusions that ABA's standards produce without explicitly adopting the standards themselves. The alleged injury in both circumstances, however, is the same: graduates are precluded from being admitted to the practice of law in certain jurisdictions. As discussed, this injury results from a governmental, not private, decision and cannot therefore give rise to antitrust liability.

Noerr, 365 U.S. at 142 (emphasis added).

The Court concluded that absent evidence suggesting that the railroads attempted *directly to persuade* anyone not to deal with the truckers, the loss of customer good will that the truckers suffered was merely *incidental* to the primary protected injury. In other words, if the railroads actively tried to convince people not to hire the truckers, and if as a result customers did not hire the truckers, the railroads' actions would not be protected under *Noerr* -- the railroads' actions would cause an injury independent of the protected injury inflicted by the government. If, on the other [\*\*18] hand, the railroads put negative information about the truckers into the marketplace in an effort to influence government action, and if as a result of that information customers chose not to use the truckers, the railroads' actions would be protected as incidental to the protected injury inflicted by the governmental action -- the governmental action would break the chain of causation between the railroads' actions and the truckers' harm.

Just as there was no finding in *Noerr* that the railroads attempted *directly to persuade* anyone not to deal with the truckers, I find that no factfinder could reasonably conclude that ABA has attempted *directly to persuade* prospective students not to attend MSL. Here, as in *Noerr*, even assuming that MSL's failure to become accredited resulted in "loss of prestige" or some abstract "stigma," <sup>12</sup> [\*\*19] that injury is incidental to the primary, protected injury resulting from governmental decisions to preclude MSL graduates from taking certain bar examinations.<sup>13</sup>

Plaintiff maintains that its ability to compete for students is impaired by the denial of accreditation because: (1) its graduates cannot sit for many bar examinations; and, (2) it has been stigmatized. The former injury is clearly inflicted as a result of state action. Moreover, the latter injury is incidental to the primary protected injury. Therefore, MSL's claims are barred under *Noerr*.

#### B. In Denying Accreditation, ABA Merely Expressed its Opinion which is Protected Under the First Amendment

[\*\*20] Although I conclude that MSL's claims are barred by *Noerr* immunity, even assuming that the stigma injury is not incidental to the [\*443] primary protected injury, MSL's claims still fail.<sup>14</sup> ABA contends that in refusing to

<sup>12</sup> I note that any stigma that MSL suffered as a result of ABA denying accreditation must be viewed in context. Since authorizing MSL to grant degrees, the administrative council in charge of educational standards in Massachusetts has repeatedly expressed concern over many aspects of MSL's educational program. In fact, in January of 1994, the council threatened to revoke MSL's degree-granting authority unless MSL could demonstrate that its admissions standards were reliable. (Ex. D in Supp. of ABA's Mot. for Summ. J., p.2; Fallon Dep. at 54:6). The council was concerned that MSL was matriculating unqualified students so as to finance its more qualified ones. The council also expressed concern over the unprecedented number of formal written student complaints filed against MSL. (Fallon Dep. at 15:20-17).

<sup>13</sup> This conclusion is strengthened by the Ninth Circuit's language in *Sessions*. Discussing *Noerr*, the Ninth Circuit wrote that:

The *Noerr* Court also rejected the proposition that petitioning immunity was limited to injuries flowing directly from governmental action. It held that the railroads were also shielded from liability for the harm the truckers suffered in their relationships with their customers. In the Court's view, that injury was "incidental" to the defendant's campaign to influence legislation.

*Sessions*, 17 F.3d at 299; see also Allied Tube, 486 U.S. at 499.

<sup>14</sup> MSL has presented some evidence which might be construed to mean that ABA has attempted directly to persuade potential students to attend accredited schools. For example, Mr. Velvel has testified that:

The ABA accreditors thus possess a monopoly not only because in most states it is necessary to graduate from an ABA school in order to take the bar examination and practice law, but also because *by continuous efforts they have persuaded potential law school applicants*, employers and the public that ABA accreditation is a *sine qua non* of quality and should be regarded as essential even in states (like Massachusetts) where the graduates of an unaccredited school such as MSL can take the bar examination and practice law.

accredit MSL, it merely rendered its opinion about whether the plaintiff met certain quality standards and that this opinion is protected speech under the [First Amendment](#). There is support for ABA's position. See, e.g., [Schachar v. American Academy of Ophthalmology, Inc.](#), 870 F.2d 397 (7th Cir. 1989); [Zavaletta v. American Bar Ass'n](#), 721 F. Supp. 96, 98 (E.D. Va. 1989). Plaintiff maintains that ABA's argument "is patently frivolous."

[\*\*21] **[HN6](#)** It is axiomatic that the [First Amendment](#) protects speech, not action. Thus, the speech component involved in ABA's promulgation of standards is protected by the [First Amendment](#) and, because the Constitution trumps the Sherman Act, this speech component cannot be the basis for antitrust liability. However, any *conduct* associated with the standards is not entitled to [First Amendment](#) protection. Put differently, the *conduct* forming the basis of a restraint of trade or a monopolization is outside the [First Amendment's](#) reach. This flows logically from [section 1](#) of the Sherman Act which requires "concerted action that unreasonably restrains trade." [Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania](#), 745 F.2d 248, 256 (3d Cir. 1984) (emphasis added).

Thus, in *Allied Tube*, the [First Amendment](#) did not insulate a trade association where the association's members included consumers, distributors, and manufacturers, and any agreement to exclude a particular product from certification was "an implicit agreement not to trade in that type of [product]." [Allied Tube](#), 486 U.S. at 508. This implicit agreement -- not the act of promulgating the standards [\*\*22] -- was the *conduct* forming the basis for antitrust liability. In fact, the Court explicitly emphasized that antitrust laws circumscribe the "conduct" of standard-setting associations. [Id. at 506](#); see also [National Soc'y of Professional Eng'r, Inc. v. United States](#), 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978) (antitrust violation properly asserted against association whose members boycott those manufacturers which do not follow association's position). Conversely, in *Schachar*, the court found no antitrust violation where a medical association publicly stated its belief that a surgical procedure was "experimental" and should not be performed absent more research. The association did not require its members to desist from performing the operation or forbid its members from associating with those who chose to perform the operation. [870 F.2d at 398](#). Unlike *Allied*, where the association's promulgation of standards led to conduct that could be the basis for antitrust liability, the association in *Schachar* merely stated its position. It took no action on which to predicate antitrust liability. By merely stating its position, the association in *Schachar* [\*\*23] did not [\*444] "restrain trade" or monopolize the industry *vis-a-vis* the association in *Allied* which restrained trade by implicitly agreeing not to trade in a product. See also [Consolidated Metal Prods. v. American Petroleum Inst.](#), 846 F.2d 284, 293 (5th Cir. 1988) (holding no antitrust violation where trade association provides information but does not constrain others to follow its recommendations); [Clamp-All Corp. v. Cast Oil Soil Pipe Inst.](#), 851 F.2d 478 (1st Cir. 1988).<sup>15</sup>

Here Vovel is not talking about injury to MSL, but to the reason why he feels ABA has an accreditation monopoly. He goes on, however,

Many other persons who would otherwise apply to and attend MSL will not do so even though they wish to practice law in Massachusetts, where MSL graduates can take the bar examination and practice law. The reason [these people] will not apply to MSL is that *the ABA has persuaded them and others that a law school cannot be a quality law school if it is not ABA accreditated . . .*

(Vovel Aff., 3/22/95, at P27, P28(a) (emphasis added)).

This statement merely points out what the ABA contends are the benefits of its accreditation product. While the corollary of attending an accredited school is not attending a school that has not been accredited, the injury remains incidental to the government's action. There is nothing wrong with the ABA's marketing its product -- nothing wrong with its contending that its evaluation process provides benefits to prospective students and to the profession. The fact that various states agree does not make what ABA does unlawful.

<sup>15</sup> MSL reasons that if extended to its logical extreme, this [First Amendment](#) analysis would protect "discussions by price fixing conspirators about the reasonable level at which prices should be adhered to in the marketplace . . ." (Pl.'s Resp. to Def. ABA's Mot. for Summ. J. at 30). However, the problem with MSL's reasoning here is that the illustration that it cites as the "logical extreme" involves *conduct* -- conspiring to fix prices. In fact, in order for a conspiracy to fix prices to be actionable, there must be an overt act. [United States Anchor Mfg., Inc. v. Rule Indus., Inc.](#), 7 F.3d 986 (11th Cir. 1993). This *act or conduct* is not protected by the [First Amendment](#). MSL concedes as much when it states that this [First Amendment](#) rationale "can fare no better than an

[\*\*24] When an association merely states its position, and a company is stigmatized because of that statement, there is no basis for antitrust liability.<sup>16</sup> ABA's constitutionally protected expression of its views and any resulting stigma that MSL suffers do not amount to ABA *conduct* on which to establish potential antitrust liability.<sup>17</sup> Like *Schachar*, ABA does not restrain trade or monopolize an industry by speaking out on an issue. ABA is entitled to state its position, provided it does not go further and somehow penalize those who do not subscribe to its position. See [\*Schachar\*, 870 F.2d at 399](#) ("An organization's towering reputation does not reduce its freedom to speak out"). If stigma results from simple expression, that stigma is incidental to the speech and cannot be the basis for antitrust liability. For example, in *Schachar*, the court found that the surgeons who performed the surgery were stigmatized by the association's warning and that this stigma led to a drop in business.<sup>18</sup> However, the court did not find any antitrust violation. This conclusion is sound. A contrary result leads to the anomalous situation that antitrust liability would attach to associations [\*\*25] that put persuasive speech into the marketplace of ideas but not to those that put forth fluff. Antitrust laws do not exist to stifle the effects of speech. They exist to protect consumers and to stop conduct that disrupts the marketplace. Thus, any stigma that MSL has suffered because of ABA's not listing MSL as an accredited school does not provide the necessary offensive *conduct* for antitrust liability.

[\*\*26] It is clear that ABA does not violate the Sherman Act when it merely publishes [\*445] quality standards or expresses its views on which schools provide quality educations. Publication of an association's views, without more, is protected speech. Only ABA *conduct* can trigger antitrust liability. Abstract stigma that flows from the publication of speech protected by the [\*First Amendment\*](#) is not enough.

The plaintiff in *Allied* produced plastic electrical conduit. Law schools *produce* educations. The association in *Allied* violated the antitrust laws by requiring its members not to deal with manufacturers of plastic conduit. This *conduct* violated the Sherman Act. ABA would violate the Sherman Act if it required its members not to deal with unaccredited schools (analogous to the manufacturers of plastic conduit in *Allied*). For example, ABA could not tell its members not to teach at unaccredited schools (limit the supply of production resources), work with graduates of unaccredited schools (limit customer base), or refer cases to graduates of unaccredited schools (interfere with the manufacturer's business). However, ABA does none of these things. It does not keep [\*\*27] its members from hiring graduates of unaccredited law schools. It does not restrict its members from making referrals to graduates of unaccredited law schools. It does not forbid its members from dealing with graduates of

argument that the restrictive trade association *activities* involved in *Allied Tube* should be exempt from the antitrust laws . . ." (Pl.'s Resp. to Def. ABA's Mot. for Summ. J. at 30 (emphasis added)). *Allied* involved restrictive *activities*, not expression. Moreover, it is a fallacy to suppose that just because a core concept of *antitrust law* cannot logically be extended indefinitely that the core concept is faulty.

<sup>16</sup> This is different from the situation where an association states its position and then engages in conduct related to its stated position because where there is *conduct*, there is a basis for antitrust liability -- the association has gone *beyond expression*.

<sup>17</sup> The governmental decision to exclude graduates of unaccredited schools from taking certain bar examinations is protected under *Noerr*. Because governmental action is responsible for this injury, ABA *conduct* is not.

<sup>18</sup> MSL might attempt to distinguish the *Schachar* analogy by reasoning that, unlike the plaintiff in that case, it challenges ABA *standards* not ABA accreditation decisions. However, this is a distinction without a difference. No doubt, the association in *Schachar* maintained some standards. One standard might have provided that:

a procedure is termed "experimental" until it has undergone two years of testing.

However, even if the association maintained such a standard, there is no *conduct* on which to base antitrust liability because by promulgating this standard, the association has done nothing more than to express its views on when a procedure is safe to perform. The situation would be different if the association's standard provided that:

a procedure is termed "experimental" until it has undergone two years of testing and no member of the association shall deal or otherwise transact business with a doctor who performs "experimental" procedures.

In this latter scenario, the association has engaged in *conduct* directed at restraining trade. However, there was no such conduct in *Schachar* as there is no such *conduct* in the instant case.

unaccredited law schools. It does not stop its members from teaching at unaccredited law schools. It does not prevent graduates of unaccredited law schools from joining ABA.<sup>19</sup> **[\*\*28]** In fact, ABA in no way acts against schools that fail to satisfy its quality standards.<sup>20</sup> **[\*\*29]** It does not even review schools that do not wish to be considered for accreditation. If they wish, schools can simply disregard ABA's standards.<sup>21</sup> ABA imposes no penalty on these schools and the injury associated with the governmental action to preclude graduates of unaccredited schools from sitting for some bar examinations is not ABA conduct. Indeed, ABA engages in no conduct that can trigger antitrust liability.<sup>22</sup> It merely expresses **[\*446]** its views on which law schools employ sound teaching methods. Such expression is protected under the [First Amendment](#) and cannot be the basis for Sherman Act liability.

#### **[\*\*30] /IV. CONCLUSION**

The ABA, in the view of the 50 states, is quite good at setting standards for legal educators. As evidence of this, each state has concluded that graduation from an ABA accredited law school is a sufficient basis to sit for its bar examination. The fact that the ABA has a reputation for being good at what it does, and that the states have elected to rely on the ABA accreditation process, does not transform that process, which is itself binding on absolutely no one absent state action, into an antitrust violation. If, the effect of governmental reliance on ABA accreditation decisions is to "freeze out" lower income people, to raise faculty salaries unfairly, and to require law schools to have too many books on their shelves, then any disgruntled law school, dean, student, or citizen can petition the state

<sup>19</sup> A quick search in Martindale-Hubbel revealed that at least six MSL graduates have already joined ABA.

<sup>20</sup> In its complaint, MSL points out that its students cannot transfer their credits to ABA accredited law schools, and its students cannot obtain LL.M. degrees from ABA accredited law schools. (Complaint PP 37(d), 37(e)). Although an argument might be made that these two rules amount to ABA conduct, I find that such alleged conduct is insufficient to preclude summary judgment. First, MSL has not produced any evidence indicating that it has been injured because of these two ABA rules. In fact, there is evidence indicating that MSL vigorously attempts to frustrate any student from transferring to an ABA-accredited law school by withholding transcripts and generally not cooperating with transfer efforts. In one instance, an MSL student needed to commence a lawsuit against the school to release her transcripts. *Riley v. Massachusetts School of Law, Inc.*, No. 91-910 (Sup. Ct. Mass.) Mr. Velvel had refused to cooperate with the student's transfer efforts because he maintained that the student had entered the school in bad faith, not intending to graduate, but instead planning all along to transfer to an accredited school. Moreover, the council in charge of higher education in Massachusetts noted:

we continue to receive complaints from students who are unable to resolve complaints on their own with the law school. This includes the law school's refusal to accept certified mail from students, and difficulties in obtaining transcripts and other information from various members of the administrative staff.

(Def.'s Ex. D to Mot. for Summ. J., at 3).

Second, these ABA rules are essentially extensions of the protected speech. ABA's speech would be meaningless if students of unaccredited schools could shoe-horn their unaccredited credits into an ABA accredited law school.

<sup>21</sup> In fact, if a school disagrees with the standards, it should not simply pay lip service to them. Indeed, at least some members of MSL's faculty appear to agree with this sentiment as Mr. Velvel noted that "there are people on our faculty who believe we'd be better off without [ABA accreditation]." Dick Dahl, *Massachusetts Weekly*, January 18, 1993, "A Maverick Law School's Maverick Pitch."

<sup>22</sup> Nor do any of the other defendants engage in conduct detrimental to MSL's ability to compete for customers. Just like ABA, these other defendants may express opinions about quality within the profession, but they take no affirmative action. MSL maintains that LSAC also excludes it from certain LSAC recruitment forums. (Plf.'s Resp. to ABA's Mot. for Summ. J., Vol. II, at 120). MSL might contend that this is "conduct" which, through its conspiracy theory, is relevant in taking this case outside of the [First Amendment's](#) protection. However, as Judge Easterbrook noted in *Schachar*, "[antitrust law](#) does not compel your competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of [antitrust law](#)." *870 F.2d at 399*. MSL cannot use the Sherman Act to compel LSAC, one of the organizations that administers the LSAT which MSL has publicly rejected as racially biased and unreliable, to assist MSL in marketing its product.

legislature to abandon its reliance on the ABA process. The answer is not to assail the ABA which has no authority over who may sit for bar examinations. The answer is to utilize the democratic process, for it is that process that gives force to the standards. Plaintiff's alleged injury that flows from governmental decisions to preclude graduates of unaccredited **[\*\*31]** law schools from sitting for certain bar examinations, is protected under *Noerr*, and cannot be the basis for ABA liability.

If MSL is independently stigmatized because of ABA's denial of accreditation, that injury results from ABA's protected freedom of expression and not because of ABA's conduct. The Sherman Act regulates conduct, not speech. No factfinder could reasonably conclude that ABA has engaged in conduct that trigger antitrust liability.

Finally, judgment should also be entered in favor of the other defendants in this case. In its complaint, MSL contends that the ABA's adoption and approval of the *standards* have the purpose and effect of restraining trade and that the defendants have worked in concert, using some of the ABA's standards, to monopolize the law school accreditation process. As I have found that maintaining the standards does not violate the Sherman Act, there is no basis for liability against the other defendants either. I will therefore enter judgment in their favor as well.<sup>23</sup> An appropriate order follows.

#### **[\*\*32] ORDER**

AND NOW, this 29th day of August, 1996, the American Bar Association's motion for summary judgment is hereby granted and judgment is entered in favor of the American Bar Association, Law School Admission Services (LSAS), Law School Admission Council (LSAC), and the Association of American Law Schools (AALS), and against plaintiff on all counts. It is hereby further ordered that the motions for summary judgment submitted by AALS, LSAS, and LSAC are denied as moot.

BY THE COURT:

J. William Ditter, Jr.

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<sup>23</sup> As I have found that MSL's alleged harm is not a proper basis for recovery, I need not consider the other grounds for summary judgment raised in ABA's motion.



## **Union Carbide Corp. v. Montell N.V.**

United States District Court for the Southern District of New York

August 30, 1996, Decided ; September 3, 1996, FILED

95 Civ. 0134 (SAS)

### **Reporter**

944 F. Supp. 1119 \*; 1996 U.S. Dist. LEXIS 12884 \*\*; 1996-2 Trade Cas. (CCH) P71,650

UNION CARBIDE CORPORATION, individually and on behalf of and as the successor in interest of Seadrift Polypropylene Company, Plaintiff, v. MONTELL N.V.; MONTELL POLYOLEFINS; MONTELL NORTH AMERICA INC.; MONTELL USA INC.; TECHNIPOL S.r.L.; MONTEDISON S.p.A.; MONTELL FINANCE USA, INC.; ROYAL DUTCH PETROLEUM COMPANY; THE SHELL TRANSPORT AND TRADING COMPANY, p.l.c.; SHELL PETROLEUM N.V.; THE SHELL PETROLEUM COMPANY LTD.; SHELL PETROLEUM INC.; SHELL OIL COMPANY; SHELL POLYPROPYLENE COMPANY; SHELL CANADA LTD.; SHELL INTERNATIONAL CHEMICAL COMPANY LTD.; and SHELL INTERNATIONALE RESEARCH MAATSCHAPPIJ B.V., Defendants.

### **Core Terms**

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polypropylene, catalyst, Venture, technology, alleges, licensing, plant, tortious interference, prospective contractual relation, licensees, Generation, motion to dismiss, resin, Defendants', fraudulent, damages, parties, competitor, terminating, joint venture, fraud claim, subsidiary, induced, negotiations, merger, third party, manufacture, polyolefins, announced, antitrust

### **LexisNexis® Headnotes**

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

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

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

In deciding a motion to dismiss for failure to state a claim, the court's function is merely to assess the legal sufficiency of the complaint rather than to weigh the evidence that might be presented at a trial. Therefore, the court must accept as true the factual allegations contained in the complaint. All reasonable inferences must be drawn in favor of the non-moving party on such a motion. 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.

Business & Corporate Law > General Partnerships > Formation > General Overview

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

## **HN2** General Partnerships, Formation

Statements that no partnership is intended are not conclusive. If as a whole a contract contemplates an association of two or more persons to carry on as co-owners a business for profit, there is a partnership.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > Formation

Business & Corporate Law > Joint Ventures > General Overview

## **HN3** Types of Contracts, Joint Contracts

The factors to consider in determining whether a joint venture exists are: (1) the intent of the parties to form a joint enterprise; (2) joint control and management of the business; (3) a sharing of profits and losses; and (4) a combination of property, skill or knowledge.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Contracts Law > Breach > General Overview

## **HN4** Affirmative Defenses, Fraud & Misrepresentation

Where the fraudulent conduct alleged amounts only to the defendant's false representation that it was adhering to the terms of the contract, the claim for fraud must be dismissed as redundant of the breach of contract claim. However, the same conduct which may constitute a breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Governments > Fiduciaries

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

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

## **HN5** Affirmative Defenses, Fraud & Misrepresentation

An action for fraud will lie, notwithstanding that the breached fiduciary duty arose from the contract establishing the fiduciary relationship.

944 F. Supp. 1119, \*1119LÁ1996 U.S. Dist. LEXIS 12884, \*\*12884

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## **HN6** **Affirmative Defenses, Fraud & Misrepresentation**

A difference in the measure of damages is a factor to consider in determining whether a fraud claim is independent of a contract claim, but it is not dispositive of the matter.

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

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Commercial Law (UCC) > Sales (Article 2) > General Overview

## **HN7** **Sales (Article 2), Form, Formation & Readjustment**

The elements of fraud are a material misstatement, known by the perpetrator to be false, made with an intent to deceive, upon which the plaintiff reasonably relies and as a result of which he sustains damages.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

## **HN8** **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) requires that the circumstances constituting fraud shall be stated with particularity. However, the rule must be read together with Fed. R. Civ. P. 8(a), which requires only a short and plain statement of the claims for relief. A general averment, one which provides the defendant with a reasonable opportunity to frame a response, will satisfy rule 9(b).

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Contracts Law > Breach > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

## **HN9** **Types of Contracts, Express Contracts**

Parties to an express contract are bound by an implied duty of good faith; however, breach of that duty is merely a breach of the underlying contract.

Contracts Law > Breach > General Overview

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

944 F. Supp. 1119, \*1119 (1996 U.S. Dist. LEXIS 12884, \*\*12884

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

#### **HN10** [blue icon] Contracts Law, Breach

In order to state a claim for tortious interference with contract, a plaintiff must allege four elements: (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach the contract or otherwise render performance impossible; and (4) damages to plaintiff.

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

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

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

#### **HN11** [blue icon] Motions to Dismiss, Failure to State Claim

A motion under [Fed. R. Civ. P. 12\(b\)\(6\)](#) requires that the court assumes facts in a light most favorable to the claimant.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Commercial Law (UCC) > ... > Remedies > Statute of Limitations > Tolling

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

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

#### **HN12** [blue icon] Tolling of Statute of Limitations, Fraudulent Concealment

The limitation period is tolled during a defendant's fraudulent concealment of facts that would alert the plaintiff to the plaintiff's claim.

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

Torts > Procedural Matters > Statute of Limitations > General Overview

#### **HN13** [blue icon] Commercial Interference, Prospective Advantage

The doctrine of equitable tolling is subsumed within [N.Y. C. P. L. R. 203\(g\)](#) (1996).

Torts > Procedural Matters > Statute of Limitations > General Overview

#### **HN14** [blue icon] Procedural Matters, Statute of Limitations

944 F. Supp. 1119, \*1119L<sup>A</sup>1996 U.S. Dist. LEXIS 12884, \*\*12884

See [N.Y. C. P. L. R. 203\(g\)](#) (1996).

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

#### **HN15**[] **Amendment of Pleadings, Relation Back**

[Fed. R. Civ. P. 15\(c\)\(2\)](#) provides that an amendment of a pleading relates back to the date of the original pleading when (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

#### **HN16**[] **Amendment of Pleadings, Relation Back**

[Fed. R. Civ. P. 15\(c\)\(2\)](#) is to be liberally construed, and the principal inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party by the general fact situation alleged in the original pleading.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

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

Torts > Business Torts > Commercial Interference > General Overview

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

#### **HN17**[] **Amendment of Pleadings, Relation Back**

There is no requirement that the new claim must have been asserted in the original pleading. A single transaction or occurrence can give rise to numerous claims.

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

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

#### **HN18**[] **Intentional Interference, Elements**

The tort of interference with prospective contractual relationship is recognized where a party would have received a contract but for a defendant's interference. Although the "would have received the contract" test is a strict one, the tort extends to mere negotiations. It is not necessary to show that negotiations for the prospective contract had reached the conclusive stage.

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

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

### **HN19** [down] **Intentional Interference, Elements**

Mere anticipation of a contract is not sufficient to make out a proper claim for interference with prospective business relations. Plaintiff must show more than a qualified probability of completing the contract, but need not plead, in exact detail, the circumstances which, on a trial, would prove that success would have been inevitable but for the tortious acts of defendants.

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

### **HN20** [down] **Commercial Interference, Contracts**

Plaintiff must show more than a qualified probability of completing the contract, but need not plead, in exact detail, the circumstances which, on a trial, would prove that success would have been inevitable but for the tortious acts of defendants.

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

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

### **HN21** [down] **Intentional Interference, Elements**

A plaintiff must allege the defendant's interference with prospective business relations either with the sole purpose of harming the plaintiff or by means that are dishonest, unfair or in any other way improper. If the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

### **HN22** [down] **Shareholder Duties & Liabilities, Piercing the Corporate Veil**

In order to state an alter ego claim, a plaintiff must plead that the parent and subsidiary operated as a single economic entity, and must demonstrate an overall element of injustice or unfairness. Where a subsidiary is in fact a mere instrumentality or alter ego of its owner, a court can pierce the corporate veil. Plaintiff must show that the owners exercised complete domination of the corporation in respect to the transaction attacked.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Controlling Shareholders > General Overview

### [\*\*HN23\*\*](#) [+] Alter Ego, Corporate Formalities

A conclusory allegation of domination or control is not enough to justify piercing the corporate veil. Courts have identified several factors relevant in determining whether a parent and a subsidiary operate as a single economic entity. Those factors include whether the corporation was solvent and adequately capitalized, whether corporate formalities were observed, and whether the corporation functioned in general as a facade for the dominant shareholder.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Estoppel

Commercial Law (UCC) > ... > Form, Formation & Readjustment > Parol Evidence Rule > General Overview

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

### [\*\*HN24\*\*](#) [+] Affirmative Defenses, Estoppel

Estoppel may be pleaded as an affirmative cause of action.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

### [\*\*HN25\*\*](#) [+] Contract Interpretation, Parol Evidence

A party may not offer proof of prior oral statements to alter or refute the clear meaning of unambiguous terms of written, integrated contracts to which assent has voluntarily been given.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

### [\*\*HN26\*\*](#) [+] Estoppel, Equitable Estoppel

An estoppel does not originate a legal right; it merely forbids the denial of a right claimed otherwise to have arisen.

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN27\*\*](#) [+] Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN28\*\*](#) [+] Antitrust & Trade Law, Sherman Act

In order to state a claim under [§ 1](#) of the Sherman Act, codified at [15 U.S.C.S. § 1 \(1973\)](#), a plaintiff must allege concerted action by two or more persons which unreasonably restrains interstate or foreign trade or commerce.

944 F. Supp. 1119, \*1119†1996 U.S. Dist. LEXIS 12884, \*\*12884

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

## **HN29** [blue download icon] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

**Antitrust law** makes a clear distinction between unilateral and concerted conduct. Where a concerted refusal to deal with a competitor has injured competition by restricting output, courts have regularly found such conduct illegal.

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

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

Commercial Law (UCC) > Sales (Article 2) > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

## **HN30** [blue download icon] Standing, Clayton Act

In order to have standing to sue under § 7 of the Clayton Act, codified at [15 U.S.C.S. § 18](#), a private plaintiff must allege 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 > General Overview

## **HN31** [blue download icon] Antitrust & Trade Law, Clayton Act

See [15 U.S.C.S. § 18](#).

Antitrust & Trade Law > Clayton Act > General Overview

Commercial Law (UCC) > Sales (Article 2) > General Overview

## **HN32** [blue download icon] Antitrust & Trade Law, Clayton Act

The antitrust laws were enacted for the protection of competition, not competitors. Competition for increased market share is not activity forbidden by the antitrust laws, and the antitrust laws do not protect competitors from loss of profits due to price competition.

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

## **HN33** [blue download icon] Private Actions, Remedies

A competitor plaintiff has standing as long as it can demonstrate that its injury was caused by anticompetitive or predatory aspects of defendant's conduct, not by competition.

**Counsel:** [\*\*1] For MONTEDISON, S.P.A., defendant: William C. Pelster, Skadden, Arps, Slate, Meagher & Flom, New York, NY. For ROYAL DUTCH PETROLEUM COMPANY, THE SHELL TRANSPORT & TRADING COMPANY, P.L.C., SHELL PETROLEUM N.V., THE SHELL PETROLEUM COMPANY LIMITED, SHELL CANADA LTD., SHELL INTERNATIONAL CHEMICAL COMPANY, SHELL INTERNATIONAL RESEARCH MAATSCHAPPIJ B.V., defendants: Rory O. Millson, Cravath, Swaine & Moore, New York, NY USA. For SHELL PETROLEUM INC., defendant: Rory O. Millson, Cravath, Swaine & Moore, New York, NY. William C. Slusser, Baker & Botts, L.L.P., Houston, TX. For SHELL OIL COMPANY, defendant: Steven M. Edwards, DAVIS, SCOTT, WEBER & EDWARDS, P.C., New York, NY. William C. Slusser, Baker & Botts, L.L.P., Houston, TX.

**Judges:** SHIRA A. SCHEINDLIN, U.S.D.J.

**Opinion by:** SHIRA A. SCHEINDLIN

## Opinion

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### [\*1125] OPINION AND ORDER

**SHIRA A. SCHEINDLIN, U.S.D.J.:**

Plaintiff Union Carbide Corporation ("UCC"), both individually and as successor in interest to and on behalf of Seadrift Polypropylene Company ("Seadrift"), has sued 17 defendants on various grounds. Generally, the Complaint <sup>1</sup> alleges violations of the antitrust laws, as well as various common law claims relating to certain defendants' alleged breach of agreements between them and UCC. The defendants are aligned in three groups, and each group has moved to dismiss portions of the Complaint. The groups are as follows. "Shell/Montell" refers to defendants Montell N.V.; Montell Polyolefins; Montell North America Inc.; Montell USA Inc.; and Montell Finance USA, Inc. (the "Montell" defendants), as well as Royal Dutch Petroleum Company; The Shell Transport and Trading Company, p.l.c.; Shell Petroleum N.V.; The Shell Petroleum Company Ltd.; Shell Petroleum Inc.; Shell International Chemical Company Ltd.; Shell Internationale Research Maatschappij B.V. ("SIRM"); and Shell Canada Ltd. (the "Shell" defendants). The Shell/Montell defendants submitted joint briefs on the [\*\*2] motion. Shell Oil Company ("SOC") and Shell Polypropylene Company ("SPC") joined in the briefing of this motion. Finally, defendants Montedison S.p.A. ("Montedison") and Technipol S.r.L. ("Technipol") submitted joint briefs. The relationships among these companies are detailed in PP 7-24 of the Complaint. This Opinion addresses these relationships only to the extent necessary to resolve the motions to dismiss.

#### I. Standard for Deciding a Motion Under [Rule 12\(b\)\(6\)](#)

**HN1** In deciding a motion to dismiss for failure to state a claim, "the Court's function is merely to assess the legal sufficiency of the complaint rather than to weigh the evidence that might be presented at a trial." [Reich v. Glasser, 1996 U.S. Dist. LEXIS 6335, 95 Civ. 8288, 1996 WL 243243, at \\*1](#) (S.D.N.Y. May 10, 1996) (citing [Festa J\\*\\*31 v. Local 3 Int'l Bhd. of Elec. Workers, 905 F.2d 35, 37 \(2d Cir. 1990\)](#)). Therefore, the Court must accept as true the factual allegations contained in the complaint. See [Cohen v. Koenig, 25 F.3d 1168, 1171 \(2d Cir. 1994\)](#). All reasonable inferences must be drawn in favor of the non-moving party on such a motion. See [Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 \(2d Cir. 1991\)](#). 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 \(1957\)](#).

#### II. Facts

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<sup>1</sup> "Complaint" refers to UCC's Third Amended Complaint, filed on January 18, 1996. If reference is made to a prior complaint, the full title will be used (i.e., Original Complaint, First Amended Complaint, Second Amended Complaint).

The following recitation of relevant facts is drawn from UCC's Third Amended Complaint. The absence of the phrase "UCC alleges" at the outset of each paragraph should not be taken as any indication that the Court endorses or adopts the facts set forth herein.

#### A. *Polypropylene and Polypropylene Technology*

Polypropylene is a polymer plastic used in a variety of commercial applications, including caps and closures for bottles, appliances, automotive parts, toys, fibers and filaments, and film. Cplt. [\*\*4] P 25. Two kinds of complex technology are required to produce the polypropylene: (1) "Process technology" which is necessary to design and use the equipment in [\*1126] which the chemical transactions take place; and (2) "catalyst use technology" which is necessary to use the specific catalysts to produce the polypropylene resin for specific end-uses. *Id.* P 26.

Historically, only a small number of firms have developed polypropylene process technology, polypropylene catalysts, or related catalyst use technology. There are significant barriers to entry into these lines of business, including the complexity of the various technologies involved, certain patent barriers, and substantial research and development costs, all of which involve significant sunk costs. Many producers of polypropylene do not have their own proprietary process and catalyst technology, and must obtain by license the technology necessary to manufacture polypropylene. *Id.* P 28.

#### B. *The Development of Current Generation Process and Catalyst Technology*

Since 1975, the polypropylene process and catalyst technologies have improved significantly. The most recent development, "Current Generation Process and Catalyst [\*\*5] Technology," is more efficient and less costly per unit of output than earlier technologies and requires less equipment and capital expenditure by the resin manufacturer. Cplt. P 29. Companies who wish to construct and operate new polypropylene resin plants ordinarily have no economically feasible alternative but to enter into a "Total Package License" for all of the elements necessary to manufacture polypropylene (including Current Generation Catalyst and Process Technology, plant design, and rights to purchase and use Current Generation Polypropylene Catalysts). Thus, there is no longer a demand for separate process and catalyst technology licenses for new plants. *Id.* P 30.

Montedison and Mitsui Petrochemical Industries, Ltd. ("Mitsui") were the first firms to develop, commercialize, and license a Current Generation Catalyst and Process Technology. *Id.* PP 31-33. As of the 1980s, no other prospective licensor had developed both a Current Generation Catalyst and a Current Generation Process Technology. *Id.* P 33. Although UCC had developed a Current Generation Process Technology called UNIPOL, it needed to possess a Current Generation Catalyst in order to successfully enter [\*\*6] the polypropylene technology licensing business. *Id. P 35.* After considering the lengthy period it would take to develop a Current Generation Catalyst and related technology, UCC decided to seek a co-venturer that already possessed a Current Generation Catalyst and associated catalyst technology that could be adapted to function with UCC's UNIPOL process technology. *Id. P 38.* Likely candidates included Hercules, Inc., Stauffer Chemical Company ("Stauffer"), and Shell Oil Company ("SOC"). *Id.* P 34. Mitsui was effectively eliminated as a possible catalyst co-venturer because of a prior research and development agreement it had made with Montedison. *Id.* P 31.

#### C. *Montedison's Efforts To Maintain Its Dominant Position In the Licensing of Current Generation Technology*

In an attempt to acquire and maintain a dominant position in the licensing of Current Generation Catalyst and Process Technology, Montedison took various actions that effectively eliminated some of the most likely catalyst partners for UCC. Cplt. P 40. For example, in August 1982, UCC and Hercules agreed to establish a program that would permit the parties to evaluate the compatibility of Hercules' Current [\*\*7] Generation Catalyst and catalyst use technology. *Id. P 41.* However, in 1983, Hercules and Montedison formed a company called Himont, and shortly thereafter, Hercules discontinued work under the UCC catalyst evaluation agreement because of a likely competitive conflict with Himont. *Id. PP 42-43.*

A similar fate met UCC's joint development discussion with Stauffer. In 1984, Himont, Mitsui, and Stauffer entered into an agreement for the stated purpose of resolving possible patent infringement issues relating to polypropylene

catalysts. *Id. P 47*. After entering into this agreement, Stauffer stopped developing and attempting to market its own Current Generation Catalyst and terminated its joint development discussions with UCC. *Id. P 48*.

#### [\*1127] D. SOC's Venture with UCC

In December 1981, UCC and SOC entered into a confidential polypropylene catalyst evaluation agreement, similar to those that UCC had entered into with Hercules and Stauffer. Cplt. P 49. In December 1983, UCC entered into a long-term cooperative arrangement with SOC (the "UCC/Shell Venture") for the commercial development and licensing of Total Package Licenses to third parties that would include UCC's UNIPOL [\*\*8] Current Generation Process Technology and SOC's SHAC Current Generation Catalyst. *Id. P 50*. The parties also formed a partnership under Texas law, Seadrift Polypropylene Company ("Seadrift"), in order to construct, own and operate a world-scale demonstration polypropylene resin plant (the "Seadrift plant"). *Id. PP 51, 64*.

UCC and SOC entered into a number of related agreements in the course of establishing and operating the UCC/Shell Venture. These agreements include (1) the Cooperative Undertaking Agreement ("CUA"), (2) the Seadrift Partnership Agreement, (3) the Catalyst Sales Contract, and (4) the Polypropylene Conversion Agreement. *Id. P 53*.

The CUA represents the basic agreement defining the duties and obligations of UCC and SOC with respect to the UCC/Shell Venture, particularly with regard to provisions protecting trade secrets both while the CUA is in effect and after termination or expiration of the CUA. *Id. P 54*. Part of the CUA calls for SOC to provide catalysts to the partnership for production of polypropylene resin at the Seadrift plant at "cost plus a reasonable return on capital." *Id. P 56* (citing CUA). The CUA also provides that if SOC terminates [\*\*9] the agreement, SOC "will not for a period of ten (10) years after termination undertake alone or with any third party the development of a gas phase fluid bed process for the manufacture of PP Resin or polyethylene." *Id. P 62*(d) (citing CUA).

The Seadrift Partnership Agreement embodies the terms of the UCC/Shell partnership to construct, own and operate the Seadrift plant. *Id. P 64*. The Catalyst Sales Contract formalizes SOC's rights and obligations in regard to its provision of catalysts to the Seadrift plant for use in producing polypropylene. *Id. P 66*. SOC also entered into the Polypropylene Conversion Agreement (also known as the "Toll Conversion Agreement") to formalize SOC's rights and obligations regarding the marketing and sale of polypropylene resin manufactured at the Seadrift plant. *Id. P 68*.

#### E. Montedison's and Himont's Efforts to Curtail Total Package Licensing Competition From the UCC/Shell Venture

In 1985, when UCC and SOC began to market the UCC/Shell Commercial Process and Total Package License in competition with Himont and Mitsui, UCC and SOC encountered significant difficulties as a result of Montedison's and Himont's conduct. In 1985 and [\*\*10] 1986, Montedison, Himont and Mitsui threatened to sue SOC and its licensees for patent infringement, which deterred a number of potential licensees from using the UCC/Shell Venture's Current Generation Process and Catalyst Technology and delayed for almost two years the effective entry of the UCC/Shell Venture into the Total Package Licensing Business. Cplt. P 70.

UCC (with the backing of SOC) informed Himont, Montedison and Mitsui that it was considering litigation challenging their actions under the antitrust laws of the United States. Thereafter, Himont, Montedison, and Mitsui entered into negotiations with UCC and SOC in an effort to resolve the dispute. The parties ultimately executed a settlement agreement whereby UCC agreed to waive its right to bring an antitrust action against Himont, Montedison and others in return for their dropping patent claims against the manufacture, use, and licensing of the SHAC catalyst. UCC also provided Himont with a nominal royalty on polypropylene resin sales by UCC/Shell Venture licensees. *Id. P 71*.

#### F. The Success of the UCC/Shell Venture in Restraining Himont's Dominance of the Total Package License Market

The December 1986 settlement [\*\*11] enabled the UCC/Shell Venture to enter the Total Package License Market successfully. In [\*1128] that market, the Venture has been the principal worldwide competitor of Montedison. From January 1987 to December 1993, the UCC/Shell Venture obtained approximately 36% of all Total Package

Licenses entered into worldwide with independent third-party licensees. During the same time period, Himont obtained approximately 41% of such licenses. Cplt. PP 74-75.

*G. Catalyst Research and License Agreement with SIRM, and RDS' Plans to Expand its Polypropylene Resin Production Capacity with UNIPOL Technology*

In January 1988, UCC, SOC and SIRM (the research organization owned by the RDS Group) entered into a tripartite research agreement pursuant to which the parties agreed to cross-license the fruits of their catalyst technology research. Cplt. PP 76-77. One month later, UCC and SIRM entered into a Polypropylene License Agreement. Under this agreement, UCC granted SIRM a non-exclusive license to use the UCC/Shell Commercial Process and allowed SIRM to extend that right to use and disclose the commercial process to other RDS Group companies (the "RDS license"). *Id. P 78*. During negotiations regarding **[\*\*12]** the RDS license, RDS told UCC it intended to use UNIPOL in all new RDS impact co-polymer plants. *Id.* From 1987 through mid-1991, RDS conducted a number of polypropylene strategy reviews that recommended using UNIPOL in specific new RDS plants. *Id. PP 80-81*.

*H. Efforts to Expand the UCC/Shell Venture*

As of early 1990, the Seadrift plant had been operating for four years, but its production capacity was limited to 90,000 metric tons. SOC had disposed of its Woodbury, New Jersey manufacturing plant in the late 1980s. As a result, its only remaining polypropylene production capacity was its half interest in the Seadrift plant and its Norco plant (production capacity: 135,000 metric tons). Cplt. P 84. UCC and SOC recognized that they needed direct involvement with the polypropylene resin market in order to be competitive. They also realized that the revenues earned from catalyst production and licensing alone could not support the research and development necessary to maintain a competitive edge. *Id. P 85*.

RDS, meanwhile, had also recognized that the UCC/Shell Venture required more investment in research and development, as well as in polypropylene resin production capacity, **[\*\*13]** to remain competitive. RDS was concerned that the UCC/Shell Venture's licensed technology was vulnerable in the long run because UCC and SOC did not have extensive first-hand experience in the polypropylene market. *Id. P 86*. In response to these forecasts, SOC embarked upon a new strategy in 1989 to increase polypropylene production. SOC intended to become a "top tier" player in the North American polypropylene resin market by the mid-1990s. *Id. P 87*.

In furtherance of this goal, UCC and SOC planned an expanded joint venture, which UCC referred to as "Nautilus." Under the proposal, each party was to contribute capital and services in order to achieve a 50/50 interest in the new venture.<sup>2</sup> SOC and UCC also planned to contribute additional capital sufficient to allow the construction of two major UNIPOL polypropylene plants with 200,000 metric tons of capacity each by the mid-1990s, in time to meet the next high cycle in North American polypropylene demand. *Id. P 88*. As part of this proposed expanded venture, on March 12, 1990, SOC and UCC entered into a six-month Disclosure and Secrecy Agreement that enabled the parties to exchange confidential information. Over the next **[\*\*14]** six months, the parties exchanged proposals addressing various issues relating to **[\*1129]** Nautilus, and began exchanging drafts of the documents necessary to establish the venture.<sup>3</sup> *Id. P 89*. On September 13, 1990, SOC and UCC extended the Disclosure and Secrecy Agreement until March 12, 1991, and continued to meet and exchange information regarding Nautilus. *Id. P 90*.

<sup>2</sup>Under the proposed project, UCC and SOC would both contribute their existing half interest in the UCC/Shell Venture and the Seadrift plant; SOC would contribute its Norco polypropylene resin plant and its SHAC catalyst business; UCC would contribute its supporting training and engineering services business; and UCC and SOC would contribute capital in appropriate amounts to achieve a 50/50 interest. Cplt. P 88.

<sup>3</sup>The parties also increased their research and development expenditures supporting the UCC/Shell venture by approximately 30%, anticipating that Nautilus would become a reality. UCC also prepared cost estimates for constructing the new polypropylene plants, and SOC informed polypropylene resin customers that it was considering an expansion of the UCC/Shell Venture's polypropylene manufacturing capacity. Cplt. P 89.

[\*\*15] Meanwhile, Shell Canada was also reassessing its polypropylene resin strategy, and concluded that it would be in a good position to service the northeastern United States if it could manage to build a new low-cost UNIPOL plant. *Id. P 91*. In March 1991, during discussions between SOC and Shell Canada, a Shell Plastics Business Center executive indicated that the expanded UCC/Shell Venture could provide an avenue for equity participation by Shell Canada, as well as an alternative means for Shell Canada to obtain UNIPOL technology. *Id. P 92*. On March 14, 1991, SOC and UCC extended the Nautilus Disclosure and Secrecy agreement for an additional six months. On May 14, SOC and UCC agreed to extend the coverage of their secrecy agreement to permit SOC to disclose to Shell Canada confidential information from UCC. *Id. PP 92-93*.

In April 1991, the chief SOC negotiator for the Nautilus project reported in a status update to SOC executives that progress was being made toward resolving the remaining key issues. *Id. P 93*. However, in June 1991, while the Nautilus negotiations were proceeding, a senior SOC executive notified a senior UCC executive that Montedison had approached [\*\*16] RDS and SOC about a worldwide RDS/Himont joint venture and that both RDS and SOC were interested. SOC stated that because of Montedison's expressed interest, it wanted to suspend the Nautilus negotiations for a few months. In spite of SOC's unilateral suspension of the Nautilus discussions, on June 27, 1991, UCC reaffirmed to SOC that UCC was still very interested in Nautilus. *Id. P 94*.

#### *I. Montedison's Scheme to Eliminate Competition from the UCC/Shell Venture*

##### *1. Montedison's Situation as of June 1991*

Before Montedison approached SOC, Montedison's Himont subsidiary was the leading polypropylene manufacturer in the world. Cplt. P 95. However, due to a low cycle in the industry in the early 1990s, Montedison faced financial difficulties and a shrinking worldwide market for polypropylene resin. *Id. P 97*. The proposed UCC/Shell Venture licensing program threatened to jeopardize Montedison's commercial advantage by introducing the Current Generation Process and Catalyst Technology into competitors' polypropylene production facilities. *Id.* Montedison hired two consulting firms in 1990 whose findings concluded that UCC's aggressive licensing practices posed a serious [\*\*17] threat to Himont's interests in polypropylene production. *Id. PP 99-104*.

##### *2. Initial Discussions of Project Sophia*

Montedison initially sought to disrupt the UCC/Shell Venture by inducing UCC to align with Montedison. Cplt. P 106. After UCC rejected Montedison's approach, but before SOC suspended the Nautilus negotiations, Montedison contacted RDS and SOC about a worldwide venture in which they would combine their respective polyolefins businesses. *Id.* Beginning in July 1991, representatives of RDS, SOC and Montedison began to discuss a possible venture, referred to as the "Sophia" project. *Id. P 107*. SOC allegedly told Montedison about its business venture with UCC, as well as the Nautilus proposal. *Id. P 109*. In December 1991, a subsidiary of RDS, a subsidiary of Montedison, and SOC entered into a Letter of Intent and Secrecy Agreement in connection with Sophia. The existence of this agreement was not disclosed to UCC. As a result of the Sophia discussions, SOC notified UCC that it was terminating the Nautilus discussions in December 1991. *Id. P 110*.

#### *[\*1130] 3. SOC, Shell Canada and RDS Termination of Expanded UNIPOL Relationship, and SOC's Actions to Terminate [\*\*18] the CUA and Join Montell*

On July 30, 1992, SOC, RDS and Montedison entered into a Memorandum of Understanding regarding the "partial merger" of their worldwide polyolefins business into the Sophia venture.<sup>4</sup> Cplt. P 118. The parties entered into this understanding in spite of a substantial risk of antitrust violations in both Europe and the United States. *Id. PP 116-117*. UCC was not informed of the existence of this Memorandum between SOC, RDS and Montedison. *Id. P 118*.

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<sup>4</sup>This Memorandum contemplated the formation of Sophia on January 1, 1993. SOC would contribute its solely-owned polypropylene assets, including its Norco polypropylene resin plant and its SHAC-II catalyst plant then under construction. SOC would also contribute its propylene manufacturing assets and/or propylene purchase arrangements. Further, Shell Canada was to contribute its Sarnia, Ontario polypropylene plant. Cplt. P 118.

UCC finally became aware of a possible venture between SOC, RDS and Montedison via a letter from SOC dated [\*\*19] August 5, 1992. *Id. P 119*. SOC's letter indicated a desire to negotiate with UCC regarding the termination of the CUA. SOC suggested modifying the CUA to give SOC an option to terminate the agreement so that it could participate in the joint venture between RDS and Montedison without incurring the obligations the CUA's termination provisions would impose. *Id.* Believing that SOC's proposal would leave UCC in a substantially weaker position in the market than if the venture were continued, UCC rejected SOC's proposal. *Id. P 123*.

#### 4. The RDS/Montedison Announcement of a Memorandum of Understanding

On September 17, 1992, while SOC was attempting to disentangle itself from the CUA, RDS and Montedison announced that they had signed a Memorandum of Understanding to evaluate worldwide integration of their polyolefins businesses. Cplt. P 124. On the same day, SOC issued a news release announcing that the proposed RDS/Montedison enterprise would not include the UCC/Shell Venture, and that SOC's obligations under the UCC/Shell Venture would remain unchanged. SOC still did not disclose to UCC that SOC had signed the Memorandum of Understanding announced by Montedison and RDS. [\*\*20] *Id.* In March 1993, after holding discussions aimed at reassuring the UCC/Shell Venture's licensees that SOC would honor its obligations, SOC issued a "Holding Statement," restating its commitment to the UNIPOL technology and to UCC/Shell licensees. *Id. P 125*.

#### 5. The Montell Scheme as Originally Announced, and as Modified to Meet EC Concerns

Nine months later, in December 1993, RDS and Montedison announced that they had signed an agreement to combine major portions of their polyethylene and polypropylene business into a joint venture company, which was later named "Montell." Cplt. P 126. Under the agreement, RDS would own 100 percent of SOC and would have control over Montell. In sum, the venture contemplated RDS controlling the two leading competitors in the licensing of Total Package Licenses and in catalyst research and development. *Id. P 127*. This structure was opposed by the European Community (EC). In response, RDS and Montedison proposed in the Spring of 1994 that the UCC/Shell Venture be dissolved to resolve competitive concerns. However, SOC and UCC were unable to negotiate a resolution. In May 1994, RDS and Montedison offered to form a separate entity, known [\*\*21] as "Technipol," to license Montedison's Current Generation Catalyst and Process Technology (Spheripol) to third parties. These licenses would be offered in competition with the UNIPOL/SHAC licenses offered by the UCC/Shell Venture. *Id. P 128*.

#### 6. The Montell Scheme as Modified by the Proposed FTC Consent Order

On January 11, 1995, the FTC proposed a Consent Order, pursuant to which SOC would have at least six months to divest its polypropylene assets to UCC or an independent party. Cplt. P 129. Further, during the period prior to divestiture, SOC was required to form a separate subsidiary, free from SOC's control, to own and operate the [\*1131] SOC polypropylene assets to be divested. In response, SOC formed Shell Polypropylene Company (SPC), and on February 28, 1995, SOC transferred its polypropylene-related businesses (and purported to assign its rights to and obligations under the CUA) to SPC. Montell became operational on March 31, 1995. *Id. P 130*.

#### J. Actions by SOC and RDS to Weaken Competition Involving the UNIPOL/SHAC Technology

In addition, SOC took other actions which weakened competition in the Total Package License market. For example, in violation of the CUA, [\*\*22] SOC attempted to establish a separate business for the recycling of titanium tetrachloride, a by-product of catalyst production. The result was that SOC allegedly received a return on its capital far in excess of the reasonable return agreed to in the CUA. Cplt. PP 136-42.

In the Summer of 1993, SOC intentionally reduced the productivity of certain catalysts, including SHAC 201, in order to increase its revenues and profits from catalyst sales. Because catalyst yields have improved, licensees can purchase smaller quantities of catalyst to produce the same amount of polypropylene. However, by reducing the productivity of the catalyst, SOC forced licensees to continue to purchase the same amount of catalyst, in violation of its contractual obligations under the CUA to make technological advances available to licensees. *Id. P 143*. Among UCC's other claims are allegations that SOC reduced its portion of research and development expenditures,

increased the price of the SHAC catalyst, and refused to build a new polypropylene plant, all in violation of the CUA. *Id.* PP 144-146.

#### K. SOC's Support of Sophia After It Announced It Could Not Participate in Sophia

SOC continued to [\*\*23] support the Sophia project even after it announced that it would not participate in the venture. Cplt. P 147. SOC undermined the UCC/Shell Venture by publicly professing before the EC that SOC was a neutral observer of the Montell merger, even though SOC's internal assessments of the RDS/Montedison venture indicated otherwise. *Id.* P 152. SOC also actively cooperated with Montedison and RDS in order to help the Montell venture go forward. *Id.* P 151.

Finally, SOC continually subordinated its own interests to those of RDS throughout the events in question. By entering into the FTC Consent Order, which obligated SOC to divest itself of its entire polypropylene business, SOC allowed Montell to penetrate the United States polypropylene market--a market which had traditionally been the exclusive province of SOC under a long-standing protocol between SOC and RDS. *Id.* PP 153-154. SOC did so at a favorable time in the polypropylene business cycle, even though just several years earlier it had sought to become a "top-tier" polypropylene player. *Id.* P 154.

#### L. Events Following Entry of the FTC Consent Order

After filing its Original Complaint on January 9, 1995, UCC made [\*\*24] a motion for a preliminary injunction. That motion was withdrawn on February 22, 1995 when the parties reached a settlement agreement. Under that agreement, an independent third party would appraise the value of the assets of SPC, and UCC would then have the opportunity to purchase those assets at a price derived from the fair market value as computed by the appraiser. The appraiser rendered its estimate on April 28, 1995, and on May 5, UCC gave notice that it would purchase SPC's assets. On June 21, 1995, after further submissions by the parties, the appraiser revised its estimate. On June 28, UCC gave notice that it would purchase SPC's assets at a price derived from the revised estimate of fair market value. When UCC and SOC entered into a definitive agreement for UCC to purchase the assets of SPC, they submitted the agreement to the FTC for approval. The FTC approved the sale on December 21, 1995. Cplt. PP 156-60.

Following its purchase of the assets of SPC, UCC again amended its complaint to incorporate these new allegations. Defendants have moved to dismiss almost all of this Third Amended Complaint.

#### [\*1132] III. Count II: Breach of Fiduciary Duty by SOC and SPC

In Count II, [\*\*25] UCC alleges that SOC breached the fiduciary duty it owed to UCC.<sup>5</sup> UCC alleges that a fiduciary relationship between SOC and UCC arose by virtue of the Seadrift Partnership Agreement between the two entities, as well as by virtue of the Cooperative Undertaking Agreement. Cplt. PP 229-30. UCC incorporated both of these agreements by reference into its Complaint. Cplt. P 53. According to UCC, "[SOC] breached its fiduciary duty to UCC by breaching the CUA, the Catalyst Sales Contract, and the Polypropylene Conversion Agreement, and by actively cooperating in the efforts of the other defendants to establish businesses aimed at undermining the competitive efforts of UCC in the UCC/Shell Venture." Cplt. P 232.

[\*\*26] SOC argues for dismissal of this Count on the ground that the CUA did not create a fiduciary relationship between UCC and SOC. While Article 13 of the CUA provides in part that "this Agreement does not create a partnership or joint venture between the parties," the parties agree that the CUA does not expressly state that no

<sup>5</sup> Count II also alleges that SPC had a fiduciary relationship with UCC and Seadrift by virtue of "the purported assignment of [SOC's] rights and obligations under the CUA, the Seadrift Partnership Agreement, and related agreements . . ." Cplt. P 231. UCC alleges that SPC breached this duty by continuing or assisting the actions of SOC that constitute a breach of fiduciary duty. *Id.* P 232. For simplicity, in the discussion of this Count, I will refer only to SOC, although the analysis applies with equal force to the relationship between UCC/Seadrift and SPC.

fiduciary duty exists between UCC and SOC. SOC/SPC Reply Mem. at 2; UCC Opp. Mem. (SOC/SPC) at 1.<sup>6</sup> In any event, "[HN2](#)" statements that no partnership is intended are not conclusive. If as a whole a contract contemplates an association of two or more persons to carry on as co-owners a business for profit, a partnership there is." [Martin v. Peyton, 246 N.Y. 213, 217, 158 N.E. 77 \(1927\)](#). [HN3](#) Factors to consider in determining whether a joint venture exists are: "(1) the intent of the parties to form a joint enterprise; (2) joint control and management of the business; (3) a sharing of profits and losses; and (4) a combination of property, skill or knowledge." [Sound Video Unlimited, Inc. v. Video Shack Inc., 700 F. Supp. 127, 138 \(S.D.N.Y. 1988\)](#) (citing [Halloran v. Ohlmeyer Communications Co., 618 F. Supp. 1214, 1218 \(S.D.N.Y. 1985\)](#)).

[\*\*27] Proceeding, as I must, on the assumption that UCC's allegations are true, UCC could conceivably prove a set of facts that would entitle it to relief. See Cplt. P 230; [Rose v. Simms, 1995 U.S. Dist. LEXIS 17686, 95 Civ. 1466, 1995 WL 702307](#), at \*10 (S.D.N.Y. Nov. 29, 1995). UCC has alleged all the elements of a joint venture. According to UCC, the CUA "envisioned a joint relationship of trust and confidence;" the CUA "created a joint Management Committee . . . to review the progress of the UCC/Shell Venture;" UCC and SOC "jointly shared the risk of profit and loss in the Venture;" and UCC and SOC committed to developing and sharing "technology and other proprietary information for use in the Venture." Cplt. P 230. Therefore, UCC has alleged facts sufficient to suggest that a fiduciary relationship exists between it and SOC by virtue of the CUA.<sup>7</sup> Accordingly, the motion to dismiss Count II is denied.

#### [\*\*28] IV. Count I: Fraud by SOC and SPC

##### A. Summary of Fraud Claim

In Count I of its Complaint, UCC

[\*1133] alleges a fraudulent scheme by SOC to (1) raise the price of SHAC catalyst well above its actual value under the relevant contracts; (2) inflate the purchase price of SPC far beyond its proper value; and (3) injure the competitive standing of the UNIPOL Total Package License to the financial benefit of Montell.

UCC Opp. Mem. (SOC/SPC) at 8 (citing Cplt. PP 219-26). According to UCC, SOC secretly misappropriated jointly owned technology and used that technology to develop a much cheaper method of producing catalyst (known as the MSR system). Cplt. PP 215-17. UCC alleges that SOC never told it that SOC had developed the cheaper production system. Further, UCC maintains that SOC charged UCC and UNIPOL licensees higher prices for that SHAC catalyst rather than pass along the savings in production costs created by the MSR system. [Id. P 219](#). UCC also alleges that SOC engaged in fraudulent accounting techniques in order to conceal from UCC its development of the new catalyst production method, in order to create the appearance that catalyst production costs had risen, [\*\*29] and in order to maintain the appearance that SOC was not receiving a rate of return on the catalyst business in excess of the contractual limit. [Id. PP 139, 216-21, 226](#).

UCC alleges that SOC made repeated fraudulent misrepresentations, in furtherance of this scheme, to the effect that SOC was complying with contractual restrictions on the rate of return for catalyst production. [Id. P 220\(c\)](#). UCC then alleges that it relied on this misrepresentations to its detriment. Specifically, UCC claims that, through Seadrift,

<sup>6</sup>This Opinion will refer to briefs in the following manner. Moving briefs are called "[name of defendant group] Mem." Plaintiff's opposition to the moving brief of a particular defendant group is called "UCC Opp. Mem. ([name of defendant group])." Finally, reply briefs are called "[name of defendant group] Reply."

<sup>7</sup>SOC concedes that "the Seadrift Partnership Agreement may have created a fiduciary relationship," but states that "that fiduciary relationship was limited to the subject matter of that agreement," which was "to construct, own, and operate the Seadrift plant, which became operational in May 1985." SOC/SPC Reply Mem. at 4 (quoting Cplt. P 64). SOC thus implies that because UCC's allegations in Count II do not relate to the operation of the Seadrift plant, any fiduciary duty arising from the Seadrift Partnership Agreement is irrelevant to this Count. It is unnecessary, however, to address the significance of the Seadrift Partnership Agreement to Count II because I find that UCC has properly alleged a breach of a fiduciary duty between UCC and SOC based on the CUA.

it "purchased SHAC catalyst at grossly inflated prices, attempted to convince potential licensees to obtain UNIPOL licenses despite the high cost of SHAC catalyst, and was prevented from seeking to halt SOC's practice of overcharging for catalysts." UCC Opp. Mem. (SOC/SPC) at 9 (citing Cplt. PP 220, 222). Finally, the claim includes an allegation by UCC that SOC made affirmative misrepresentations regarding the MSR system to an appraiser, resulting in injury to UCC by virtue of the "improper[] and unlawful[] inflation [of] the purchase price of SPC by over \$ 50 million." Cplt. P 219. (UCC contends that it had no choice but to pay the inflated appraised value **[\*\*30]** of SPC in order to mitigate further injury. UCC Opp. Mem. (SOC/SPC) at 9.)

#### B. Sufficiency of Fraud Claim

SOC urges dismissal of Count I on three separate grounds.<sup>8</sup> First, SOC argues that the claim is subsumed by UCC's breach of contract claims; second, SOC contends that UCC has not adequately pled reliance damages; and third, SOC argues that the claim lacks the specificity required by *Fed. R. Civ. P. 9(b)*.

##### 1. Whether fraud claim is subsumed by breach of contract claims

SOC argues that UCC's allegation that SOC concealed its breach **[\*\*31]** of contract from UCC "is insufficient to transform what would normally be a breach of contract action into one for fraud." *Reuben H. Donnelley Corp. v. Mark I Marketing Corp.*, 893 F. Supp. 285, 290 (S.D.N.Y. 1995). **[HN4]** Where the fraudulent conduct alleged amounts only to the defendant's false representation that it was adhering to the terms of the contract, the claim for fraud must be dismissed as redundant of the breach of contract claim." *Glynwill Investments, N.V. v. Prudential Sec., Inc.*, 1995 U.S. Dist. LEXIS 8262, 92 Civ. 9267, 1995 WL 362500, at \*7 (S.D.N.Y. June 16, 1995) (citation omitted). However, "the same conduct which may constitute a breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself." *Mandelblatt v. Devon Stores, Inc.*, 132 A.D.2d 162, 521 N.Y.S.2d 672, 676 (1st Dep't 1987); see also *MBW Advertising Network, Inc. v. Century Business Credit Corp.*, 173 A.D.2d 306, 569 **[\*1134]** N.Y.S.2d 682, 682 (1st Dep't 1991) ("the same acts which give rise to a cause of action for fraud may also form the basis for a breach of contract claim," although the fraud claim "will not arise **[\*\*32]** if the alleged fraud merely relates to the breach of contract").

As discussed above, UCC has properly alleged the existence of a fiduciary duty between SOC and UCC arising from the CUA. This duty constitutes "a legal duty which exists 'independent of contractual relations between the parties,'" and thus allows UCC to sue in tort. *Hargrave v. Oki Nursery, Inc.*, 636 F.2d 897, 899 (2d Cir. 1980). **[HN5]** An action for fraud will lie, notwithstanding that the breached fiduciary duty arose from the contract establishing the fiduciary relationship." *GLM Corp. v. Klein*, 665 F. Supp. 283, 286 (S.D.N.Y. 1987). Accordingly, UCC's fraud claim will not be dismissed on the ground that it is inseparable from the contract claims.

SOC also argues that in order for the fraud claim to stand, UCC must allege damages in addition to those flowing from the alleged breach of contract. SOC/SPC Mem. at 9. However, the *Glynwill* court stated that **[HN6]** a difference in the measure of damages is a factor to consider in determining whether a fraud claim is independent of a contract claim, . . . , but it is not dispositive of the matter." 1995 U.S. Dist. LEXIS 8262, \*25, 1995 WL 362500, at \*8 (citation omitted). Further, some courts have assessed **[\*\*33]** the sufficiency of a fraud claim without even discussing whether alleged fraud damages differ from damages alleged under the contract. See, e.g., *GLM Corp. 665 F. Supp. at 286*; *Licette Music Corp. v. A.A. Records, Inc.*, 601 N.Y.S.2d 297, 297-98 (1st Dep't), leave to appeal denied, 82 N.Y.2d 662 (1993). As UCC suggests, a "claim of distinct fraud damages is merely one means by which a plaintiff can demonstrate that its fraud claim alleges 'extraneous' facts or duties sufficient to distinguish it from a simple breach of contract." UCC Opp. Mem. (SOC/SPC) at 12 (citing *Americana Petroleum Corp. v. Northville Indus. Corp.*, 200 A.D.2d 646, 606 N.Y.S.2d 906, 908 (2d Dep't 1994) (emphasis in original)). In any event, UCC has properly alleged that it suffered damages distinctly attributable to SOC's fraud. See Cplt. P 219.

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<sup>8</sup>The arguments are made jointly with SPC, which is SOC's wholly-owned subsidiary (see Cplt. P 20). SPC is implicated in the fraud claim's allegation that "SPC has also defrauded UCC by falsely representing to UCC that the mixed-solvent recovery system was not Joint Development Technology of UCC and [SOC] and by assisting [SOC] in misrepresenting to the appraiser the relevant facts relating to the allegedly separate mixed-solvent recovery business." Cplt. P 226.

## 2. Whether UCC has sufficiently alleged reliance damages

In further support of its contention that UCC's fraud claim is deficient and should be dismissed, SOC argues that UCC has not alleged reliance damages. SOC correctly notes that [HN7](#) the "elements of fraud are a material misstatement, known by the perpetrator to be false, made with [\*\*34] an intent to deceive, upon which the plaintiff reasonably relies and as a result of which he sustains damages." [Megaris Furs, Inc. v. Gimbel Bros., Inc., 172 A.D.2d 209, 568 N.Y.S.2d 581, 584-85](#) (1st Dep't 1991) (emphasis in original). However, UCC has adequately alleged that it suffered damages as a result of relying on SOC's allegedly fraudulent misrepresentations regarding the price of the SHAC catalyst. Assuming the truth of UCC's allegations, and drawing all reasonable inferences from those allegations in UCC's favor, it is evident that UCC asserts that it was injured in several ways.

As the successor in interest to Seadrift, UCC paid catalyst prices that were improperly inflated despite the fact that catalyst manufacturing costs have declined. See Cplt. P 219. In addition, UCC was injured because the "attractiveness of a UNIPOL/SHAC Total Package License to prospective licensees" was reduced after the licensees' catalyst costs were improperly increased. *Id.* UCC also alleges harm based on the appraised value of SPC, which was more than \$ 50 million higher than it would have been if SOC's and SPC's fraudulent misrepresentations had not caused the appraiser to treat [\*\*35] the MSR process as a separate business rather than as part of the catalyst business. The appraised value determined the price that UCC paid for SPC. *Id.*; see also Cplt. PP 226, 318, 320. Assuming UCC can prove its allegations, it would be entitled to recover its "out-of-pocket losses and consequential damages." [Delcor Lab., Inc. v. Cosmair, Inc., 169 A.D.2d 639, 564 N.Y.S.2d 771, 772](#) (1st Dep't), *appeal dismissed*, 78 N.Y.2d 952, 573 N.Y.S.2d 646, [\*1135] 578 N.E.2d 444 (1991). UCC has alleged just such damages. Accordingly, SOC's argument that UCC has failed adequately to plead reliance damages is without merit.

## 3. Whether UCC has pled the claim with sufficient particularity

Finally, SOC contends that UCC's fraud claim does not comply with [HN8](#) [Fed. R. Civ. P. 9\(b\)](#), which requires that "the circumstances constituting fraud . . . shall be stated with particularity." However, the rule "must be read together with [Rule 8\(a\)](#) [,] which requires only a 'short and plain statement' of the claims for relief." [Quaknine v. MacFarlane, 897 F.2d 75, 79](#) (2d Cir. 1990) (citing [DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247](#) (2d Cir. 1987); [Ross v. A.H. Robins](#) [\*36] [Co., 607 F.2d 545, 557 n.20](#) (2d Cir. 1979), cert. denied, 446 U.S. 946, 64 L. Ed. 2d 802, 100 S. Ct. 2175 (1980)). Consequently, "a general averment, one which provides the defendant with a reasonable opportunity to frame a response, will satisfy [Rule 9\(b\)](#)." [Glickman v. Alexander & Alexander Servs., Inc., 1996 U.S. Dist. LEXIS 2325](#), \*13, 93 Civ. 7594, 1996 WL 88570, at \*4 (S.D.N.Y. Feb. 29, 1996).

SOC identifies three of UCC's allegations of affirmative misrepresentations in particular that it contends fail to satisfy [Rule 9\(b\)](#). First, SOC attacks the claim that in "billing Seadrift for SHAC catalysts purchased in 1993 and 1994." Shell Oil "falsely represented that its catalysts were not priced at a level that allowed [SOC] to realize a rate of return in excess of its actual cost and a 12% per annum return on capital." Cplt. P 220(c). SOC argues that this "general statement does not specify the statements in the bills that were allegedly fraudulent, the dates of the allegedly fraudulent bills or why the statements were allegedly fraudulent." SOC/SPC Mem. at 12. SOC's argument borders on frivolous. The above-quoted language from the Complaint states exactly why UCC believes the statements were fraudulent. [\*\*37] As for specifying which statements in the bills were fraudulent and the date of the bills, UCC has already identified for SOC the precise documents to which it is referring: the bills covering Seadrift's purchase of SHAC catalysts in 1993 and 1994. Further, UCC has stated the time period during which these bills were sent by SOC and has identified the date and amount of a fraudulent price increase (see Cplt. P 145). It is unnecessary to require UCC to specify the precise date on which SOC sent each of the fraudulent bills. Because UCC has given SOC enough information to enable it to frame a response, this pleading satisfies the requirements of [Rule 9\(b\)](#).

Second, SOC challenges the allegation that its "announcement [of] SHAC catalyst price increases in early 1995" contained false representations. See Cplt. P 220(c). According to SOC, "this general statement does not specify what was fraudulent about the announcement [or] who was defrauded." SOC/SPC Mem. at 12. Again, SOC is

wrong. Paragraphs 220(c) and 226 of the Complaint, for example, clearly state that UCC was defrauded by SOC's misrepresentations, and Paragraph 227 alleges that UCC and Seadrift have suffered injury [\*\*38] as a result. And as noted above, the allegations in the Complaint clearly identify the content of SOC's false statement. See Cplt. PP 145, 220(c).

Third, SOC attacks the allegation that

in statements made by William Chalmers and other [SOC] personnel to Stephen Kaufman and other UCC personnel in response to specific inquiries in 1993 and 1994, including an inquiry at a Venture Management Team Meeting in the fall of 1994, [SOC] falsely represented that its catalysts were not priced at a level that allowed [SOC] to realize a rate of return in excess of its actual cost and a 12% per annum return on capital.

Cplt. P 220(c). It is unclear to the Court how SOC's [Rule 9\(b\)](#) challenge to this claim meets the straight face test. Contrary to SOC's assertions, the allegation at issue specifies what was said to UCC and, together with other allegations of the Complaint, provides the basis for concluding that the statement was false.

To the extent that SOC is challenging the other elements of UCC's fraud claim under [Rule 9\(b\)](#), SOC's argument is rejected. As UCC maintains, the "Complaint adequately describes the misrepresentations at issue and explains that they were made [\*\*39] for the purpose of concealing from UCC the excessive profitability [\*1136] of the catalyst business." UCC Opp. Mem. (SOC/SPC) at 18; see also summary of fraud claim in Part IV.A., *supra*. Because the Complaint provides SOC with sufficient notice of its alleged misrepresentations to enable it to present a defense (and because, as discussed above, UCC has adequately pled reliance damages and the claim is not subsumed by the breach of contract claims), the motion to dismiss Count I is denied.

#### *V. Count XIII: Breach by SOC of the Implied Duty of Good Faith and Fair Dealing With Respect to the CUA and Catalyst Sales Contract*

SOC asks the Court to dismiss Count XIII on several grounds, at least one of which is persuasive. SOC contends that UCC's claim for breach of the covenant of good faith and fair dealing is duplicative of its claims for breach of contract. Despite UCC's argument to the contrary, and notwithstanding its careful pleading of the claim,<sup>9</sup> the conduct alleged in Count XIII to constitute a breach of the covenant (Cplt. PP 296-97) is the same as that which forms the basis of UCC's breach of contract claims (see, e.g., Cplt. PP 271, 285). "Under New York law, [HN9](#)[<sup>1</sup>] [\*\*40] parties to an express contract are bound by an implied duty of good faith;" however, "breach of that duty is merely a breach of the underlying contract." [Fasolino Foods Co. v. Banca Nazionale del Lavoro, 961 F.2d 1052, 1056 \(2d Cir. 1992\)](#); see also [Apfel v. Prudential-Bache Sec., Inc., 183 A.D.2d 439, 583 N.Y.S.2d 386, 387](#) (1st Dep't 1992), modified on other grounds and aff'd, [81 N.Y.2d 470, 616 N.E.2d 1095, 600 N.Y.S.2d 433](#) (1993). Because it is redundant of UCC's breach of contract claims, Count XIII is dismissed.<sup>10</sup>

#### *VI. Count VII: Tortious Interference with an Existing Contractual Relationship*

In its claim for tortious interference with an existing contractual relationship, UCC implicates all defendants [\*\*41] except SOC, SPC, Montell N.V., Montell Polyolefins and Technipol. The remaining defendants are charged with inducing SOC to breach its contract with UCC for the production of polypropylene resin and the licensing of polypropylene technology. Cplt. PP 259-263. Each defendant charged in this Count has moved to dismiss the claim. See Montedison/Technipol Mem. at 15; Shell/Montell Mem. at 18. In New York, [HN10](#)[<sup>1</sup>] in order to state a claim for tortious interference with contract, a plaintiff must allege four elements: (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach the contract or otherwise render performance impossible; and (4) damages to plaintiff. [Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 612 N.E.2d 289](#) (1993) (citing [Israel v. Wood Dolson Co., 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97](#) (1956)); [Enercomp, Inc. v. McCorhill Publishing,](#)

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<sup>9</sup> UCC alleges breach of the implied duty "to the extent such conduct does not breach express provisions of the CUA" or the Catalyst Sales Contract. Cplt. PP 296-97.

<sup>10</sup> SOC raises two other grounds for dismissing this Count. Because I am granting the motion to dismiss Count XIII, there is no reason to address SOC's additional contentions.

Inc., 873 F.2d 536 (2d Cir. 1989). Defendants contend that UCC has not properly alleged the second and third elements.

A. Does the Complaint Allege that Defendants' Interference was **[\*\*42]** Knowing and Intentional?

Montedison argues that UCC must allege that Montedison acted for the primary purpose of inducing a breach, or with the knowledge that its actions were certain or substantially certain to induce a breach of contract. Montedison/Technipol Mem. at 17 (citing Restatement (Second) of Torts, § 766 cmt. j (1979)). In addition, Montedison argues that there is no allegation that it knew the details of SOC's contractual relationship with UCC. *Id.* at 19. However, UCC is not required to allege that Montedison had full knowledge of the details of the UCC/Shell Venture. Gold Medal Farms, Inc. v. Rutland County Co-operative Creamery, Inc., 9 A.D.2d 473, 195 N.Y.S.2d 179, 185 (3d Dep't 1959). Moreover, Montedison's arguments ignore the many factual allegations **[\*1137]** in the Complaint. Paragraphs 95-109 of the Complaint sufficiently describe Montedison's efforts to effect "a 'programmed divorce' between UCC and Shell, [thereby] weakening the image and credibility of UCC -- Montedison's most 'aggressive and dreadful' Total Package License competitor . . ." Cplt. P 109. These allegations, incorporated by reference into Count VII (see Cplt. P 259), provide ample support **[\*\*43]** for the inference that Montedison either knew that its actions were certain or substantially certain to induce a breach by SOC of its contracts with UCC, or acted with the primary purpose of inducing a breach. Further, these allegations and others belie Montedison's claim that UCC relies on a "bare legal conclusion." See Cplt. PP 142-44, 161-95.

B. Does the Complaint Allege that SOC Breached a Contract?

The Shell/Montell defendants also contend that UCC's pleading is deficient, primarily because Count VII contains an allegation that the defendants "rendered [SOC's] performance of its contractual obligations more difficult." Cplt. P 261; Shell/Montell Mem. at 18-19. These defendants argue that a plaintiff suing for tortious interference with contract must allege "defendant's intentional inducement of the third party to breach the contract or otherwise render performance impossible." Shell/Montell Mem. at 18-19 (citing Museum Boutique Intercontinental, Ltd. v. Picasso, 886 F. Supp. 1155, 1161 (S.D.N.Y. 1995)). However, as *Museum Boutique* makes clear, while a number of New York courts (as well as federal courts in New York interpreting New York law) have held that **[\*\*44]** a plaintiff must allege actual breach, "other courts have held that a plaintiff does not have to allege a breach of the underlying contract in order to state a claim for tortious interference with contractual relations." Museum Boutique, 886 F. Supp. at 1161-62 (collecting cases). In any event, as UCC suggests, the distinction is irrelevant to the disposition of this motion. UCC pleads, in relevant part, that "the defendants . . . intentionally and wrongfully induced SOC to breach its contractual obligations to UCC . . . and/or rendered [SOC's] performance of its contractual obligations more difficult . . ." Cplt. P 261 (emphasis added). Because the first half of UCC's alternative pleading meets the "actual breach" standard, I need not decide whether an allegation that performance under a contract has been made more difficult still suffices to state a claim for tortious interference with contract in New York.<sup>11</sup>

**[\*\*45]** C. Must UCC Allege Specific Actions by Defendants That Were a "But For" Cause of the Breach?

Montedison further argues that UCC has alleged no specific acts of Montedison without which SOC would not have breached its contracts with UCC. Montedison contends that UCC's claim that it "intentionally and wrongfully induced [SOC] to breach its contractual obligations to UCC" (Cplt. P 261) is "devoid of any allegation of conduct by

<sup>11</sup> Thus I specifically decline to address the import in this case of the recent ruling of the New York Court of Appeals, which held that an actual breach of contract is required (or at least a showing that performance is rendered impossible) in order to state a claim of interference with existing contractual relations. See NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., 87 N.Y.2d 614, 620-21, 641 N.Y.S.2d 581, 664 N.E.2d 492 (1996).

Further, despite the request of Shell/Montell, I decline to require UCC to replead this count in order to specify "what allegations relate to actual breaches of contract that it claims were caused by interference from the defendants." Shell/Montell Reply at 10. Instead, I refer the Shell/Montell defendants to Paragraphs 131-55 and 271 of the Complaint.

Montedison resulting in such inducement or any allegation as to how Montedison induced SOC to breach its contractual obligations to UCC." Montedison/Technipol Mem. at 20. Montedison is incorrect. UCC's Complaint alleges plenty of specific conduct by Montedison. See, e.g., Cplt. P 106 ("Montedison . . . contacted RDS and [SOC] and proposed combining their respective polyolefins businesses into a worldwide venture that would necessarily weaken competition from UCC . . ."); P 107 ("Beginning in July 1991, representatives of RDS, [SOC], and Montedison met . . . to discuss and negotiate a possible venture . . ."); P 109 ("a senior [\*1138] Montedison executive . . . informed the lead Montedison negotiator . . . involved in the proposed Sophia joint venture [\*\*46] discussions that the combination of RDS, [SOC], and Montedison would lead to a 'programmed divorce' between UCC and [SOC], weakening the image and credibility of UCC . . .").

In addition, Montedison contends that UCC's claim is deficient because it does not allege that "there would not have been a breach but for the activities of defendants." Montedison/Technipol Mem. at 20 n.11 (quoting *Sharma v. Skaarup Ship Management Corp.*, 916 F.2d 820, 828 (2d Cir. 1990), cert. denied, 499 U.S. 907, 113 L. Ed. 2d 218, 111 S. Ct. 1109 (1991)). While *Sharma* does contain the quoted language, a complete reading of the case suggests that the tortious interference claim was dismissed not because of plaintiff's failure to include particular language in its allegation, but rather because plaintiff's stated theory of the case (that the breach of contract was motivated by profit) was "incompatible with an allegation of 'but for' cause as to" the defendant. *Sharma*, 916 F.2d at 828. No such incompatibility exists in the instant case. Furthermore, several recent decisions from New York state courts addressing tortious interference with existing contractual relations make no mention [\*\*47] of any requirement that explicit "but for" language is necessary to withstand a motion to dismiss. See, e.g., [\*Lama Holding Co. v. Smith Barney Inc.\*, 88 N.Y.2d 413, 668 N.E.2d 1370, 646 N.Y.S.2d 76](#), No. 144, 1996 WL 326108, at \*5 (N.Y. Ct. App. June 13, 1996); [\*Washington Ave. Assocs., Inc. v. Euclid Equip., Inc.\*, 645 N.Y.S.2d 511](#), No. 95-05544, 1996 WL 410046, at \*1 (2d Dep't July 15, 1996); [\*M.J. & K. Co. v. Matthew Bender and Co.\*, 220 A.D.2d 488, 631 N.Y.S.2d 938, 940](#) (2d Dep't 1995).

A recent case from a district court in this circuit is similar and instructive. In *Lane's Floor Coverings, Inc. v. Ardex, Inc.*, No. CV-95-4078, 1996 WL 19182 (E.D.N.Y. Jan. 4, 1996), the defendant moved to dismiss plaintiff's claim for tortious interference with contract "because plaintiff neglected to allege that, 'but for' the actions of the defendant, the third party would have performed under its agreement with plaintiff." 1996 WL 19182 at \*3. Noting that "[HN11](#)" [↑] a [\*Rule 12\(b\)\(6\)\*](#) motion requires assuming facts in a light most favorable to the claimant," the court held that

Plaintiff properly alleges . . . that at some point following [the formation of the] agreement, the defendant knowingly interfered with that relationship and improperly [\*\*48] induced [the third party] to breach its agreement with plaintiff. In substance, if not literally, plaintiff's complaint charges that, but for the actions of [defendant], [the third party] would not have breached its contract with plaintiff. Further, the language of the [claim] comports with the most recent pronouncement on the subject by the New York Court of Appeals.

*Id.* (citing [\*Kronos\*, 81 N.Y.2d at 94](#)). That analysis applies with equal force to the instant case. Taken together, and drawing all reasonable inferences in UCC's favor, the allegations of the Complaint clearly charge that SOC would not have breached its contractual obligations to UCC but for specific acts of interference by the defendants. See Cplt. PP 84-109, 117, 161-212, 234-58. For that reason, and for the reasons described in Parts VI.A. and VI.B., *supra*, the motion to dismiss Count VII is denied.<sup>12</sup>

<sup>12</sup> The Shell/Montell defendants also argue that UCC's purchase of the assets of SPC at 85% of fair market value (as determined by an independent appraiser) has eliminated any damage claimed by UCC as a result of SOC's assignment of and withdrawal from the CUA. Shell/Montell Mem. at 19; see also Cplt. P 271(g) (alleging breach by SOC through its purported assignment of the CUA). Shell/Montell suggests that UCC's allegation that it bought the assets of SPC "in part to mitigate UCC's damages" limits the amount of damages to which UCC is entitled for Count VII. See Cplt. P 156. At this point, I note only that UCC has properly alleged the damage element of its claim for tortious interference with existing contractual relations. *Id.* P 263. While these damages may be limited by UCC's purchase of SPC's assets, they are not eliminated. It is premature at this stage of the litigation to attempt to assess damages for a claim that UCC has yet to prove, and I decline to do so.

[\*\*49] VII. Count VIII: Tortious Interference with Prospective Contractual Relationships

In its claim for tortious interference with prospective contractual relationships, UCC [\*1139] implicates all defendants except SPC, Montell N.V., Montell Polyolefins and Technipol. The remaining defendants are charged with taking actions with the purpose and effect of preventing

(1) potential licensees of the UNIPOL/SHAC technology from contracting with the UCC/Shell Venture; (2) UCC and [SOC] from expanding the UCC/Shell Venture through Project Nautilus or otherwise; (3) RDS from utilizing UNIPOL technology in new RDS polypropylene facilities; and (4) Shell Canada from utilizing UNIPOL technology in new Shell Canada polypropylene facilities.

Cplt. P 265. Each defendant charged in this Count urges dismissal of the claim on several grounds.

A. Statute of Limitations

Defendants argue that the statute of limitations bars most of UCC's claim for tortious interference with prospective contractual relations. All parties agree that the statute of limitations applicable to this claim is three years. See [N.Y. Civ. Prac. L. & R. 214\(4\)](#) (McKinney 1990); UCC Opp. Mem. (Montedison/Technipol) [\*\*\*50] at 11; Shell/Montell Mem. at 15; Montedison/Technipol Mem. at 6. Defendants' arguments are aimed specifically at parts (2), (3) and (4) of UCC's claim; that is, the parts of the claim relating to the proposed expansion of the UCC/Shell Venture through Nautilus and the potential usage of UNIPOL technology in new RDS and Shell Canada polypropylene facilities.

1. Expansion through Nautilus

Defendants maintain that UCC's claim regarding the decision not to expand the UCC/Shell Venture through Nautilus accrued at the latest in December 1991, when SOC "notified UCC that it was terminating the Project Nautilus discussions." Cplt. P 110. But according to UCC, SOC (along with subsidiaries of RDS and Montedison) entered into a letter of intent and a secrecy agreement in December 1991, and thus did not tell UCC at that time that Montedison's and RDS' interference with Nautilus was the reason for terminating the discussions. *Id.* UCC therefore contends that its claim did not accrue until August 1992, when SOC "obliquely informed UCC that SOC had been lured away from Project Nautilus by overtures made by Montedison and RDS to combine their (and certain SOC) [polypropylene] assets in [\*\*\*51] Project Sophia." UCC Opp. Mem. (Montedison/Technipol) at 12 (citing Cplt. P 119).

UCC correctly points out that "[HN12](#) [↑] the limitation period is tolled during a defendant's fraudulent concealment of facts that would alert the plaintiff to the plaintiff's claim." [Johnson v. Nyack Hosp.](#), 891 F. Supp. 155, 164 (*S.D.N.Y. 1995*), aff'd, [86 F.3d 8 \(2d Cir. 1996\)](#). Assuming the truth of UCC's allegations, Defendants concealed from UCC, until August 1992, the facts that would alert UCC that it had a claim for tortious interference with prospective contractual relations. However, this [HN13](#) [↑] doctrine of equitable tolling is "subsumed within [CPLR] 203(g)." [Glynwill, 1995 U.S. Dist. LEXIS 8262](#), \*11, 1995 WL 362500, at \*4. [HN14](#) [↑] That statute provides, in relevant part, that

where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

[N.Y. Civ. Prac. L. & R. 203\(g\)](#) [\*\*\*52] (McKinney Supp. 1996) (emphasis added). Therefore, "applicability of [the equitable tolling] doctrine cannot extend the limitations period beyond the two years prescribed by the statute." [Glynwill, 1995 U.S. Dist. LEXIS 8262](#), \*11, 1995 WL 362500, at \*4; see also [Cestaro v. Mackell](#), 429 F. Supp. 465, 468-69 (E.D.N.Y.), aff'd, [573 F.2d 1288 \(2d Cir. 1977\)](#). UCC did not file its original complaint in this action until January 9, 1995. Therefore, whether the limitations period is calculated as three years from December 1991 or as two years from August 1992, UCC's claim as it relates to the expansion of the UCC/Shell Venture through Nautilus is time barred. Consequently, that portion of the claim is dismissed.

[\*1140] 2. Prospective contract with Shell Canada

According to UCC, its claim with respect to Shell Canada (that Defendants' tortious interference resulted in Shell Canada's decision not to use UNIPOL technology in new polypropylene facilities in Canada) did not accrue until after July 30, 1992. On that date, SOC, RDS and Montedison entered into a Memorandum of Understanding which contemplated, among other things, that "Shell Canada would contribute its Sarnia polypropylene plant" to the "partial merger" [\*\*53] of their worldwide polyolefins businesses into the Sophia Venture." Cplt. P 118. Defendants argue that even if July 1992 is the date of accrual (which they dispute), the claim is time barred because UCC did not raise the claim until filing its Third Amended Complaint on January 18, 1996. Further, Defendants argue, the claim does not relate back to UCC's original complaint (filed on January 9, 1995) under [Fed. R. Civ. P. 15\(c\)](#).<sup>13</sup>

[HN15](#)[<sup>14</sup>] [Rule 15\(c\)\(2\)](#) provides that "an amendment of a pleading [\*\*54] relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." [HN16](#)[<sup>15</sup>] This rule is "to be liberally construed" ([Siegel v. Converters Transp., Inc.](#), 714 F.2d 213, 216 (2d Cir. 1983) (per curiam)), and the "principal inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party 'by the general fact situation alleged in the original pleading.'" [In re Chaus Sec. Litig.](#), 801 F. Supp. 1257, 1264 (S.D.N.Y. 1992) (quoting [Contemporary Mission, Inc. v. New York Times Co.](#), 665 F. Supp. 248, 255 (S.D.N.Y. 1987), aff'd, 842 F.2d 612 (2d Cir.), cert. denied sub nom. [O'Reilly v. New York Times Co.](#), 488 U.S. 856, 102 L. Ed. 2d 117, 109 S. Ct. 145 (1988)).

UCC's tortious interference claim regarding the decision of Shell Canada not to use the UNIPOL/SHAC technology at its Sarnia polypropylene facility relates back to UCC's Original Complaint of January 9, 1995. The original complaint in this action contained a claim for tortious interference with prospective [\*\*55] contractual relationships, albeit a claim that did not specifically allege interference with a prospective contract between UCC and Shell Canada. See Orig. Cplt. PP 178-84. However, "[HN17](#)[<sup>16</sup>] there is no requirement that the new claim must have been asserted in the original pleading. A single transaction or occurrence can give rise to numerous claims." [Koal Indus. Corp. v. Asland, S.A.](#), 808 F. Supp. 1143, 1158 (S.D.N.Y. 1992). Such is the case here. In its original complaint, UCC alleged that "by agreeing to support and/or participate in the Shell/Himont Joint Venture, the defendants have intentionally and improperly, without legal excuse or justification, interfered with UCC's prospective contractual relationships involving licensing of the UNIPOL/SHAC technology." Orig. Cplt. P 179. This allegation, along with the portions of the complaint describing the Shell/Himont Joint Venture (see generally Orig. Cplt. PP 48-95), set forth the general fact situation sufficiently to provide Defendants "adequate notice of the matters raised in the amended pleading." See [Chaus Sec. Litig.](#), 801 F. Supp. at 1264.

### 3. Prospective contract with RDS

The analysis of whether the portion of [\*\*56] the tortious interference claim regarding RDS' decision not to use UNIPOL technology in new polypropylene facilities is time barred is similar to the above analysis regarding Shell Canada. As with Shell Canada, I find that the claim for tortious interference with a prospective contract with RDS relates back to UCC's Original Complaint. However, the Complaint is unclear as to when UCC alleges it incurred the RDS injury--that is, when RDS told UCC it had decided not to use UNIPOL technology in its new polypropylene facilities.

[\*1141] According to UCC, RDS had contemplated the use of UNIPOL technology for some time. A 1987 Strategy Update for RDS stated that the preferred process for new RDS plants was UNIPOL. Cplt. P 80. In November 26, 1990, it was recommended to the RDS Coordinators Meeting that RDS commission a new UNIPOL plant in Berre, France at the end of 1994. [Id. P 81](#). Further, in July 1991, a report to RDS management observed that a gas phase process such as UNIPOL might be selected over RDS' proprietary earlier generation process for the future production of homopolymer. [Id. P 82](#).

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<sup>13</sup> Defendants contend that the claim accrued in January 1992, when Shell Canada "informed UCC . . . that it was deferring a UNIPOL licensing decision, and committed to participation in the Sophia discussions." Cplt. P 113. However, I need not decide this issue, because the relation-back issue is dispositive. If the claim, raised in January 1996, does not relate back to the Original Complaint, it must have accrued no earlier than January 1993. Thus it would be time barred whether January or July 1992 is used as the date of accrual.

At some point, this tide in favor of UNIPOL turned. In December 1991, SOC and subsidiaries [\*\*57] of RDS and Montedison entered into a letter of intent and a secrecy agreement in connection with Project Sophia. Cplt. P 110. UCC also asserts that the existence of these agreements was not disclosed to UCC, but that RDS did not engage in further discussions with UCC regarding UNIPOL licensing after the agreements were signed.<sup>14</sup> *Id.* Although UCC alleges that Shell Canada told UCC in January 1992 that it was "deferring a UNIPOL licensing decision" (*id. P 113*), UCC makes no corresponding allegation regarding RDS. On July 30, 1992, SOC, Montedison and RDS entered into a Memorandum of Understanding addressing the "partial merger" of their worldwide polyolefins businesses into the Sophia venture" but did not disclose this fact to UCC. *Id. P 118*. Disclosure came a few days later. On August 5, 1992, SOC told UCC that RDS and Montedison were discussing proposals for a joint venture. *Id. P 119*. On September 17, 1992, "RDS and Montedison announced that they had signed a Memorandum of Understanding to evaluate worldwide integration of their polyolefins businesses, and associated feedstock and technology activities, into a new jointly owned enterprise." *Id. P 124*.

[\*\*58] Given this sequence of events, I conclude that UCC's claim accrued in August 1992, when UCC learned through SOC that RDS and Montedison were discussing a possible joint venture. That appears to be the earliest that UCC was put on notice that RDS would most likely not enter into new contracts with it to license UNIPOL technology. Using August 1992 as the date of accrual, UCC would have to file a claim for tortious interference with prospective contractual relations with RDS by August 1995. Since I have already held that UCC's claim in its Third Amended Complaint relates back to the original complaint of January 1995, UCC's claim regarding prospective RDS contracts is not time barred.

#### B. Does the Complaint Allege Prospective Contractual Relationships?

##### 1. Standard

Defendants next argue that UCC's claim should be dismissed because it does not sufficiently allege any prospective contractual relationships with which Defendants interfered. In New York, *HN18*↑ this tort is recognized "'where a party *would* have received a contract but for" a defendant's interference. *Gertler v. Goodgold*, 107 A.D.2d 481, 487 N.Y.S.2d 565, 572 (1st Dep't), aff'd, 66 N.Y.2d 946, 498 N.Y.S.2d 779, I\*\*591 489 N.E.2d 748 (1985) (quoting *Union Car Advertising Co. v. Collier*, 263 N.Y. 386, 401, 189 N.E. 463 (1934)) (emphasis in original); see also *Robbins v. Ogden Corp.*, 490 F. Supp. 801, 811 (S.D.N.Y. 1980). Although the "*would have received the contract*" test is a strict one (see *Optivision, Inc. v. Syracuse Shopping Ctr. Assocs.*, 472 F. Supp. 665, 685 (N.D.N.Y. 1979)), the tort extends to "mere negotiations." *Morse v. Swank, Inc.*, 459 F. Supp. 660, 667 (S.D.N.Y. 1978) (citing *Union Car Advertising*, 263 N.Y. at 401). It is not necessary to show that negotiations for the prospective contract had reached the conclusive stage. See *Williams & Co. v. Collins, Tuttle and Co.*, 6 A.D.2d 302, 176 N.Y.S.2d 99, 104 (1st Dep't 1958), [\*1142] appeal denied, 5 N.Y.2d 710 (1959).

However, case law is in conflict regarding the precise nature of the test. Some courts have held that a plaintiff's allegations must reflect a greater likelihood than "being reasonably certain" or "having a reasonable expectation" of receiving a contract. See *C.E.D. Mobilephone Communications, Inc. v. Harris Corp.*, 1985-1 Trade Cas. (CCH) P66,386, 81 Civ. 4651, 1985 WL 193, at \*8 (S.D.N.Y. Jan. 14, 1985); *Optivision*, 472 I\*\*601 F. Supp. at 685; *Williams*, 176 N.Y.S.2d at 104. By contrast, other courts have stated that claims of tortious interference with business relations may be sustained where "the plaintiff had a 'reasonable expectancy' of a contract with the third party." *Strapex Corp. v. Metaverpa N.V.*, 607 F. Supp. 1047, 1050 (S.D.N.Y. 1985); see also *Davidcraft Corp. v. Danu Int'l, Inc.*, 1992 U.S. Dist. LEXIS 9270, \*9, 90 Civ. 6578, 1992 WL 162997, at \*4 (S.D.N.Y. June 24, 1992) (while "earlier cases hold that the plaintiff must prove that it '*would have received the contract*' but for the interference . . . some later cases, however, appear to have adopted the less stringent '*reasonable certainty*,' or '*reasonable expectation*' test") (internal citations omitted); All *Boys Music, Ltd. v. DeGroot*, 1992 U.S. Dist. LEXIS

<sup>14</sup> The Shell/Montell defendants contend that "according to UCC, . . . the Shell defendants ceased all 'further UNIPOL licensing discussions with UCC' in December 1991." Shell/Montell Mem. at 16. This phrasing is somewhat disingenuous, in that it implies that RDS *told* UCC in December 1991 that it [RDS] was ceasing licensing discussions. UCC actually alleges that "RDS and Shell Canada also did not pursue any further UNIPOL licensing discussions with UCC after the Letter of Intent was signed in December 1991." Cplt. P 110.

2780, \*29, 89 Civ. 8258, 1992 WL 51502, at \*9 (S.D.N.Y. Mar. 9, 1992); Morse, 459 F. Supp. at 667 (tortious interference claims viable where plaintiff has "a reasonable expectancy of a contract"). In any event, it is clear that the requirements for establishing liability for interference with prospective contractual relations are "more demanding" than those for interference with performance of an existing contract. Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 191, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980).

## 2. Shell Canada

Recognizing the strictness of this standard, I cannot say that UCC has met the requirements for pleading tortious interference with prospective contractual relations with Shell Canada. UCC alleges only that Shell Canada "concluded that . . . a new low cost UNIPOL plant would provide Shell Canada with a competitive facility" (Cplt. P 91); that Shell Canada conducted a study of the feasibility of constructing a new polypropylene plant at its Sarnia site using UNIPOL technology (*id.*); that Shell Canada "was exploring taking a UNIPOL license . . . for a new 120,000 ton polypropylene plant in Sarnia, Ontario scheduled to become operational in 1995 . . ." (*id. P 113*); and that Shell Canada "remained interested in taking a UNIPOL license for a new polypropylene plant . . . into late 1991" (*id.*). These allegations do not form a sufficient basis for concluding that but for Defendants' interference, Shell Canada was reasonably certain (let alone more than reasonably certain) to have entered into a UNIPOL licensing agreement for its Sarnia plant.

## 3. RDS

By **[\*\*62]** contrast, I find that UCC's allegations regarding its prospective contractual relations with RDS suffice to state a claim. As detailed in Part VII.A.3., *supra*, UCC alleges that in 1987, an RDS Strategy Update stated that UNIPOL was the preferred process for new RDS plants. Cplt. P 80. In 1990, RDS received a recommendation that it commission a new UNIPOL plant in Berre, France at the end of 1994. Id. P 81. A July 1991 report stated that a gas phase process such as UNIPOL might be selected over RDS' proprietary earlier generation process for the future production of homopolymer. Id. P 82. Finally, an August 1991 RDS Polypropylene Technology Review stated that "the choice of UNIPOL gas phase technology . . . was made several years ago and was supported by an update comparison with other gas phase technologies, which demonstrated that RDS had 'no need' for other process technologies." Cplt. P 115. That Review also "recommended strengthening cooperation with UCC in the context of the UNIPOL license." *Id.*

These specific allegations allow the Court to infer that RDS was reasonably certain to have entered into UNIPOL licensing agreements with UCC for future polypropylene **[\*\*63]** plants. I adopt the reasoning of those cases applying a "reasonable certainty" test, and I find that UCC has met that test with respect to the prospective licensing agreement with RDS. See Crimpers Promotions, Inc. v. Home Box Office, Inc., 554 F. Supp. 838, 850 (S.D.N.Y. 1982), aff'd, 724 F.2d 290 (2d Cir. 1983), cert. denied, 467 U.S. 1252, 82 L. Ed. 2d 841, 104 S. Ct. 3536 (1984) ("while . . . HN19 [↑] 'mere anticipation' of a contract is not sufficient to make out a proper claim for interference with prospective business relations, [citing *Optivision*], we cannot say at this early point in the proceedings that plaintiff could not prove facts alleged in its complaint that would show a high degree of likelihood that such contracts would have been entered into but for defendants' arguably unlawful actions"); Smith v. Emlan Realty Corp., 56 A.D.2d 887, 392 N.Y.S.2d 668, 669 (2d Dep't 1977) ("HN20 [↑] plaintiff must show more than a qualified probability" of completing the contract, but need not "plead, in exact detail, the circumstances which, on a trial, would prove that success would have been inevitable but for the tortious acts of defendants").

## 4. Third-party licensees

**[\*\*64]** The final component of UCC's tortious interference claim--that Defendants' interference prevented potential licensees of the UNIPOL/SHAC technology from contracting with the UCC/Shell Venture--suffers from two defects. First, the claim is deficient because UCC does not identify any particular potential licensee or set of negotiations with which it claims Defendants interfered. See El Greco Leather Prods. Co. v. Shoe World, Inc., 623 F. Supp. 1038, 1044 (E.D.N.Y. 1985), aff'd, 806 F.2d 392 (2d Cir. 1986), cert. denied, 484 U.S. 817, 98 L. Ed. 2d 34, 108 S.

Ct. 71 (1987).<sup>15</sup> The second defect, perhaps resulting from the first, is that UCC has not "alleged facts sufficient for the Court to infer" that contractual relationships would have been (or even are reasonably certain to have been) consummated with any potential licensees. See *Riddell Sports Inc. v. Brooks*, 872 F. Supp. 73, 79 (S.D.N.Y. 1995). Accordingly, the portion of Count VIII relating to potential third-party licensees of the UNIPOL/SHAC technology is dismissed.

**[\*\*65] C. Does the Complaint Allege an Act of Interference by Montedison?**

Montedison also argues that UCC has failed to allege any specific action by Montedison that interfered with UCC's prospective contractual relationship with RDS.<sup>16</sup> However, UCC's Complaint is replete with such allegations. See Cplt. PP 95-110, 179. The Complaint sufficiently alleges efforts by Montedison to create a joint venture with RDS and SOC while knowing that such a venture would interfere with UCC's prospective relations with RDS.

**D. Does the Complaint Allege Improper Interference by Montedison?**

Finally, Montedison contends that even if UCC has alleged that it interfered with **[\*\*66]** UCC's prospective contractual relations, it has not alleged that such interference was improper. Under New York law, [HN21](#) [↑] a plaintiff must allege the defendant's interference with prospective business relations "either with the sole purpose of harming the plaintiff or by means that are 'dishonest, unfair or in any other way improper.'" *PPX Enters., Inc. v. Audiofidelity Enter.*, 818 F.2d 266, 269 (2d Cir. 1987) (quoting *Martin Ice Cream Co. v. Chipwich, Inc.*, 554 F. Supp. 933, 945 (S.D.N.Y. 1983)); see also *Della Pietra v. State*, 125 A.D.2d 936, 510 N.Y.S.2d 334, 336 (4th Dep't), aff'd, 71 N.Y.2d 792, 530 N.Y.S.2d 510, 526 N.E.2d 1 (1988). "If the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct." *PPX Enters.*, 818 F.2d at 269 (citations omitted).

UCC concedes that because it competes with "Montedison in the licensing of [polypropylene] technology and (through the UCC/Shell Venture) in the manufacture of [polypropylene] resins, . . . Montedison's actions vis-a-vis RDS/SOC and the formation of **[\*1144]** Montell were taken, at least in part, to advance **[\*\*67]** Montedison's own competing interests." UCC Opp. Mem. (Montedison/Technipol) at 20. Therefore UCC must allege that Montedison used criminal or fraudulent means to interfere. UCC has alleged just such conduct in its claims of antitrust violations (Counts III-VI, discussed in Parts X and XI, *infra*). See *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 U.S. Dist. LEXIS 8822, \*19, 94 Civ. 2120, 1995 WL 380300, at \*7 (S.D.N.Y. June 27, 1995) (denying motion to dismiss tortious interference claim because "almost the entire Complaint [was] devoted to allegations that [defendant] has been violating, and continued to violate, the Sherman Antitrust Act, a federal criminal statute. If [plaintiff] can prove that [defendant] has violated the antitrust acts, such conduct should be sufficiently criminal to constitute the predicate required for the tort of tortious interference.") (citation omitted); cf. *Commodore Business Machs., Inc. v. Montgomery Grant Inc.*, 1993 U.S. Dist. LEXIS 262, \*8, 90 Civ. 7498, 1993 WL 14503, at \*3 (S.D.N.Y. Jan. 13, 1993) ("In this case, [counterclaiming plaintiff] has asserted valid antitrust claims which provide the unlawful purpose and unjustifiable cause element of its claim of tortious interference with contract").

**[\*\*68]** I therefore hold that UCC has sufficiently alleged improper interference by Montedison. The motion to dismiss UCC's claim for tortious interference with prospective contractual relations is granted in part and denied in part. The components of the claim relating to the expansion of the UCC/Shell Venture through Project Nautilus and relating to prospective contractual relations with potential third-party licensees and with Shell Canada are dismissed. The component of the claim relating to prospective contractual relations with RDS survives.

<sup>15</sup> *Volvo North America Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988), lends no support to UCC. In that case, the complaint actually named third parties who plaintiff alleged were sent letters by defendant that denigrated the plaintiff.

<sup>16</sup> Actually, Montedison makes this argument (and the next one) in opposition to UCC's entire claim for tortious interference with prospective contractual relations. Because I have already dismissed all of the claim except as it relates to prospective contractual relations with RDS, I will apply Montedison's arguments only to that remaining portion.

### VIII. Count X: Breach of CUA by Shell Defendants Other Than SOC and SPC

The Shell/Montell defendants move to dismiss Count X on the ground that they are not parties to the CUA between SOC and UCC. Further, they contend that they should not be liable for any breach of the CUA under an alter ego theory. In support of its claim, UCC urges this Court to pierce the corporate veil that protects the Shell/Montell defendants from liability for the actions of their subsidiary, SOC.<sup>17</sup> The parties agree that Delaware law governs this issue because SOC is a Delaware corporation. Shell/Montell Mem. at 12 n.15; UCC Opp. Mem. (Shell/Montell) at 20. [\*\*69]

**HN22** [↑] In order to state an alter ego claim under Delaware law, a plaintiff must plead that the parent and subsidiary "operated as a single economic entity," and "must demonstrate an overall element of injustice or unfairness." *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995) (applying Delaware law). Where "a subsidiary is in fact a mere instrumentality or alter ego of its owner," "a court can pierce the corporate veil." *Geyer v. Ingersoll Publications Co.*, [\*\*70] 621 A.2d 784, 793 (Del. Ch. 1992). Plaintiff must show that "the owners exercised complete domination of the corporation in respect to the transaction attacked." *Morris v. New York State Dep't of Taxation and Finance*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (1993). In this case, UCC alleges that SOC "has been dominated and controlled by its parent, Shell Petroleum [Inc.], and by other RDS Group affiliates . . . acting in coordination." Cplt. P 274. UCC pleads that in connection with the allegedly unlawful formation of Montell, these companies "caused or directed [SOC] to breach its contractual commitments to UCC under the CUA or otherwise to take actions harmful to UCC," in addition to using SOC "to achieve their own otherwise unlawful business interests and subordinating the business interests of [SOC] to their own." *Id.*

To be sure, **HN23** [↑] a conclusory allegation of domination or control is not enough to justify [\*1145] piercing the corporate veil. Courts have identified several factors relevant in determining whether a parent and a subsidiary operate as a single economic entity. Those factors include whether the corporation was solvent and adequately capitalized, whether [\*\*71] corporate formalities were observed, and whether the corporation functioned in general "as a facade for the dominant shareholder." *Fletcher*, 68 F.3d at 1458 (quoting *Hanco Nat'l Ins. Co. v. Green Farms, Inc.*, No. CIV. A. 1331, 1989 WL 110537, at \*5 (Del. Ch. Sept. 19, 1989)). However, Defendants have cited no decision holding that the absence of allegations of specific *Fletcher* factors justifies granting a motion to dismiss where the plaintiff has made other relevant allegations.

In this case, UCC has made numerous other allegations that support its assertion that the Shell/Montell defendants dominated SOC and forced SOC to act contrary to its own interests. For example, UCC alleges that SOC discontinued discussions regarding expansion of the UCC/Shell Venture through Project Nautilus in order to further the interests of RDS. Cplt PP 132, 274. In addition, in 1992 SOC reduced its research and development expenditures by approximately thirty percent, and reduced the number of SOC staff assigned to polypropylene research and development by ten percent. *Id. P 144*. In 1994, SOC officials testified before the European Commission that SOC was "neither an advocate nor an [\*\*72] adversary of the proposed merger," despite the fact that Montell posed competitive harm to SOC. *Id. PP 149, 151, 105-22*. SOC also offered to take other steps to the detriment of the UCC/Shell Venture, including terminating its relationship with UCC, in order to allow the Montell transaction to be approved by the EC. *Id. P 151*; see also *id. PP 87, 111, 153-55*. These assertions constitute sufficient allegations by UCC that the Shell/Montell defendants and SOC operated as a single economic entity, and preclude a dismissal of this claim. See *In re Buckhead America Corp.*, 178 Bankr. 956, 975 (D. Del. 1994) ("the nature and extent of the dominion and control exercised by [defendants] over [their subsidiary] is a question of fact, not subject to resolution on a motion to dismiss) (internal quotation omitted); *Geyer*, 621 A.2d at 793 (denying motion to dismiss where "three examples [of alleged domination] provided sufficiently specific factual allegations to support plaintiff's" alter ego claim); *Mabon, Nugent & Co. v. Texas Am. Energy Corp.*, 1990 Del. Ch. LEXIS 46, Civ.

<sup>17</sup> SOC is a wholly-owned subsidiary of Shell Petroleum Inc., and is a member of the Royal Dutch Shell (RDS) Group. That group also includes Shell Petroleum Inc., Shell Petroleum N.V., The Shell Petroleum Co. Ltd., Shell International Chemical Co. Ltd., Shell International Research Maatschappij B.V., and Shell Canada Limited. The RDS Group is controlled directly or indirectly by Royal Dutch Petroleum (60%) and the Shell Transport and Trading Co. (40%). These two entities also together own a fifty percent interest in Montell. See Cplt. PP 14-24.

A. No. 8578, 1990 WL 44267, at \*5 (Del. Ch. Apr. 12, 1990) (issues of material fact with respect to plaintiffs' veil-piercing [**\*\*73**] theory precluded summary judgment on claim that subsidiary was instrumentality of its parent).

Similarly, UCC also sufficiently alleges an overall element of unfairness and injustice. Before entering into the CUA, UCC was assured by SOC executives that SOC "operated independently from RDS." Cplt. P 131. Under the CUA, UCC and SOC agreed to use "their best reasonable efforts" to carry out the Cooperative Undertaking." See Cplt. P 62; CUA Articles 1.12(c)(iii), 2.01, 2.03. UCC shared "confidential and proprietary information and know-how" with SOC in order to further the UCC/Shell Venture, based on these assurances that SOC would act in its own economic interests. See Cplt. P 278, 323. It would be unfair to allow the Shell/Montell defendants to use their subsidiary to shield themselves from liability, where they have heretofore ignored that subsidiary's "separate structure and . . . individual economic interests." UCC Opp. Mem. (Shell/Montell) at 22; see also [United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1106 \(D. Del. 1988\)](#), aff'd, 879 F.2d 860 (3d Cir. 1989). Therefore, the motion to dismiss the claim for breach of the CUA by the Shell/Montell defendants is [**\*\*74**] denied.<sup>18</sup>

#### **[\*1146] IX. Count XVII: Equitable Estoppel Against All RDS Defendants**

UCC alleges that it relied to its detriment on representations by the RDS defendants

to the effect that [SOC] was and would be operated and managed as a wholly independent and separate company vis-a-vis the rest of the RDS Group, that [SOC's] activities would [**\*\*75**] be conducted in its own best interests, and that [SOC] would contract with one or more other members of the RDS Group only on terms that would be fair to [SOC].

Cplt. P 323. UCC now alleges that these representations were either false or misleading. *Id.* In its claim, UCC seeks to estop SOC from "relying on any contractual language for any other behavior on the part of UCC induced by the RDS Group's avowals of [SOC's] operational independence vis-a-vis the rest of the RDS Group with respect to the subject matter of the UCC/Shell Venture and related matters . . ." [Id. P 324](#). The Shell/Montell defendants have moved to dismiss this claim.

Despite Defendants' argument to the contrary, [HN24](#)↑ estoppel may be pled as an affirmative cause of action.<sup>19</sup> [**\*\*77**] Accordingly, UCC's claim will not be dismissed on the ground that estoppel is only available to bar a defendant from raising a defense. Defendants also invoke the parol evidence rule in support of their motion to dismiss this claim. "One of the oldest and most settled principles of New York law is that [HN25](#)↑ a party may not offer proof of prior oral statements to alter or refute the clear meaning of unambiguous terms of written, [**\*\*76**] integrated contracts to which assent has voluntarily been given." [Azuma N.V. v. Sinks, 646 F. Supp. 122, 127 \(S.D.N.Y. 1986\)](#) (citations omitted). Defendants have identified no terms of the CUA which they contend conflict

<sup>18</sup> Because I find that UCC has alleged facts sufficient to justify piercing the corporate veil, I need not address UCC's agency theory, which it advanced in its brief.

In addition, Shell/Montell urges dismissal of this Count as against Shell Canada because in Paragraph 274, UCC does not name Shell Canada in its listing of members of the RDS Group. However, UCC clearly implicates "RDS Group affiliates" in its claim, and does not state that its charge is *limited to* those affiliates it names in that paragraph. UCC specifically alleges that "Shell Canada is a member of the Royal Dutch Shell Group." Cplt. P 22. Accordingly, the claim against Shell Canada stands.

<sup>19</sup> See, e.g., [K. Bell & Assocs., Inc. v. Lloyd's Underwriters, 827 F. Supp. 985, 989 \(S.D.N.Y. 1993\)](#) (complaint stated affirmative claim for equitable estoppel); [Lapkin v. Lapkin, 224 A.D.2d 199, 637 N.Y.S.2d 140, 140](#) (1st Dep't) (granting plaintiff leave to amend complaint "to add a cause of action for equitable estoppel"), appeal dismissed, [88 N.Y.2d 843, 644 N.Y.S.2d 689, 667 N.E.2d 339 \(1996\)](#); [Special Event Entertainment v. Rockefeller Center, Inc., 458 F. Supp. 72, 77 \(S.D.N.Y. 1978\)](#) ("a claim based on the doctrine of equitable estoppel has been stated"); but see [Chemical Bank v. City of Jamestown, 122 A.D.2d 530, 504 N.Y.S.2d 908, 909](#) (4th Dep't), appeal denied, [68 N.Y.2d 608 \(1986\)](#) ('[HN26](#)↑ An estoppel does not originate a legal right; it merely forbids the denial of a right claimed otherwise to have arisen") (quoting [Morrill Realty Corp. v. Rayon Holding Corp., 254 N.Y. 268, 275, 172 N.E. 494 \(1930\)](#)); 57 N.Y. Jur. 2d *Estoppel* § 15 (1986) (same).

with the representations attributed to Defendants by UCC. Therefore, this is not a basis for dismissing UCC's claim for equitable estoppel.<sup>20</sup> If Defendants later seek dismissal of this claim upon a motion for summary judgment, I am confident that they will advise the Court of specific provisions of the CUA with which the oral representations allegedly conflict.

**X. Count III: Violations of Section 1 of the Sherman Act in the Polypropylene Resin and Impact Co-Polymer Markets by All Defendants Except Montell N.V., Montell Polyolefins, Technipol and SPC**

In Count III, UCC alleges that SOC's "actions in suspending and then terminating the proposed Project Nautilus venture with UCC in 1991" constituted "part of a collusive scheme . . . taken in furtherance of Montedison's and RDS' efforts to form an unlawful joint venture" which unreasonably restrains trade and commerce in two specific markets<sup>21</sup> in violation of Section 1 of the Sherman Act.<sup>22</sup> Cplt. P 235. Defendants argue [\*1147] that this claim must be dismissed (1) because **antitrust law** imposes no substantive duty on producers to expand markets, and (2) because UCC suffered no damages, in that it does not assert that Defendants prevented UCC from expanding on its own. [\*\*78]

**A. Sufficiency of Claim of Anticompetitive Conduct**

**HN28** [↑] In order to state a claim under Section 1 of the Sherman Act, a plaintiff must allege concerted action by two or more persons which unreasonably restrains interstate or foreign trade or commerce. *Electronics Proprietary*, [\*79] Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 837 (S.D.N.Y. 1988) (citing Oreck Corp. v. Whirlpool Corp., 639 F.2d 75, 78 (2d Cir. 1980), cert. denied, 454 U.S. 1083, 70 L. Ed. 2d 618, 102 S. Ct. 639 (1981)). Plaintiff has met this requirement. In Count III, UCC alleges that

beginning in 1991, Montedison and RDS conspired with SOC to terminate the planned "project Nautilus" expansion (and a 1994 UCC proposal to build a 200,000 ton UCC/SOC [polypropylene] plant) and to deter Shell Canada from investing in a new UNIPOL plant with the purpose and effect of restricting [polypropylene] resin output, reducing competition, and thereby raising prices, and that this conspiracy unreasonably restrained trade in the [polypropylene] Resin and Impact Co-Polymer Markets in North America in violation of Section 1 of the Sherman Act.

UCC Opp. Mem. (Shell/Montell) at 6 (citing Cplt. PP 105-17, 196-212, 234-37). UCC has properly pled facts which, if proven, would entitle it to relief. See, e.g., Associated Press v. United States, 326 U.S. 1, 15, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945); K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995) (\*\*80) (adverse effect on competition as a whole in the relevant market includes reduced output); Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 257-58 (2d Cir.), cert. dismissed, 492 U.S. 939, 110 S. Ct. 29, 106 L. Ed. 2d 639 (1989) (acquisition posed clear threat of decreased competition where plaintiffs alleged that it would result in higher prices and reduced output).

Defendants maintain that SOC's decision not to proceed with Project Nautilus does not constitute anticompetitive conduct because a firm has no general duty to help its competitors. Shell/Montell Mem. at 3-4. Defendants base this argument, however, on standards applicable to claims of unilateral action under Section 2 of the Sherman Act

<sup>20</sup> Defendants' remaining contentions--that UCC has not adequately pled the elements of estoppel, and that UCC has failed to assert any specific statements of SOC or the Shell defendants on which UCC relied--are similarly without merit.

<sup>21</sup> UCC's Complaint contains four antitrust claims (Counts III through VI). Defendants have moved to dismiss two of the claims in full and two claims in part. The Shell/Montell defendants briefed the issues; Montedison joined in their arguments with respect to all four Counts, and Technipol joined in their arguments with respect to Counts IV and V (the only antitrust claims in which Technipol is implicated). See Montedison/Technipol Mem. at 2 n.3 and 3.

<sup>22</sup> **HN27** [↑] That section of the Sherman Act provides, in part, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ." 15 U.S.C. § 1 (1973).

rather than on standards applicable to concerted action under [Section 1](#). [HN29](#) [↑] **Antitrust law** makes a clear distinction between unilateral and concerted conduct. See [Copperweld Corp. v. Independence Tube Corp.](#), [467 U.S. 752, 767-69, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#); [Seagood Trading Corp. v. Jerrico, Inc.](#), [924 F.2d 1555, 1567-68 \(11th Cir. 1991\)](#). Where a concerted refusal to deal with a competitor has injured competition by restricting output, courts have regularly found such conduct [\*\*81] illegal. See, e.g., [FTC v. Superior Court Trial Lawyers Ass'n](#), [493 U.S. 411, 424-25, 107 L. Ed. 2d 851, 110 S. Ct. 768 \(1990\)](#); [NCAA v. Board of Regents](#), [468 U.S. 85, 106-107, 82 L. Ed. 2d 70, 104 S. Ct. 2948 \(1984\)](#); [United States v. General Motors Corp.](#), [384 U.S. 127, 139-41, 16 L. Ed. 2d 415, 86 S. Ct. 1321 \(1966\)](#). Finally, Defendants argue that "declining to invest hundreds of millions of dollars to build new manufacturing facilities . . . does not amount to 'restricting output.'" Shell/Montell Mem. at 3. This argument at best raises a question of fact not properly addressed on a motion to dismiss. If, for example, as UCC alleges, Defendants conspired to prevent a new UNIPOL polypropylene resin plan from starting up, such conduct would violate [Section 1](#) of the Sherman Act.<sup>23</sup>

#### B. Does UCC Allege That it Was Prevented from Expanding on its Own?

Defendants [\*\*82] also urge dismissal of UCC's claim because they maintain that UCC "fails to allege facts that indicate that it was *prevented* from expanding on its own." Shell/Montell Mem. at 2 (emphasis in original). Defendants are incorrect. UCC has made several factual allegations that Defendants' actions "prevented it from making the [[\\*1148](#)] capacity expansions contemplated by Project Nautilus." UCC Opp. Mem. (Shell/Montell) at 10. For example, UCC alleges that it "had no practical alternative for constructing a polypropylene plant when [SOC] declined to proceed jointly;" that SOC knew "it would have been impossible for UCC to get an adequate catalyst partner to replace" SOC; and that "Defendants' actions . . . prevented new capacity . . . from coming on the [North American Polypropylene] market." See Cplt PP 122, 146, 205, 236. Defendants' disputes with these factual allegations, such as its own factual assertions that UCC "could have expanded on its own" and "was actually in a more advantageous position [to expand] than third-party licensees" (see Shell/Montell Mem. at 5 n.6, 6 n.8) are irrelevant on a motion to dismiss.<sup>24</sup> UCC has alleged facts that, if proven, would sufficiently [\*\*83] establish that Defendants prevented UCC from making capacity expansions on its own or with a third party, and that Defendants caused "substantial and direct injury to overall competition in the relevant markets." UCC Opp. Mem. (Shell/Montell) at 10. See [Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.](#), [961 F.2d 1148, 1159 \(5th Cir. 1992\)](#) (reversing lower court's dismissal of antitrust claims because plaintiff did not need "to show how he was damaged at this point" and because allegations "that his business and property were injured . . . [were] sufficient to satisfy the requirements of notice pleading"), *cert. denied*, [506 U.S. 1079, 113 S. Ct. 1046, 122 L. Ed. 2d 355 \(1993\)](#).

#### XI. Count VI: Violations of Section 7 of the Clayton Act in the Total Package License and Catalyst Markets by RDS, Shell Transport, Montedison, [\*\*84] Shell N.V., Montell N.V., and Montell

In Count VI, UCC alleges that the effect of the formation of the Montell venture "may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act ([15 U.S.C. § 18](#))<sup>25</sup> in at least two" specific markets. Defendants challenge UCC's standing to assert this claim. [HN30](#) [↑] In order to have

<sup>23</sup> None of Defendants' remaining arguments justifies dismissing Count III on the ground that it does not allege anticompetitive conduct.

<sup>24</sup> All the cases Defendants cite in support of their position are appeals of grants of summary judgment, appeals after a jury verdict, or (in one case) a decision after a bench trial. None involves a motion to dismiss.

<sup>25</sup> [HN31](#) [↑] That section of the Clayton Act provides, in relevant part:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

standing to sue under Section 7 of the Clayton Act, a private plaintiff must allege 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 Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). Defendants argue that UCC lacks standing to challenge Montell's formation because "as a competitor in the alleged licensing markets, . . . UCC would benefit" from any lessening of competition caused by the Montell transaction and thus "cannot have suffered" antitrust injury. Shell/Montell Mem. at 8. Alternatively, Defendants argue that there is no antitrust injury because any losses suffered as a result of the formation of Montell "would be the result of increased competition." [\*\*85] *Id. at 9*.

"HN32[<sup>A</sup>] 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) (emphasis in original)). Therefore UCC must allege that competition in general has [\*\*86] suffered, not just that UCC itself has been harmed. Plaintiff's Complaint alleges the requisite harm. UCC alleges that "the Montell venture . . . has and will substantially lessen competition" in the relevant markets (Cplt. PP 256-57); that as a result of Defendants' actions, "competition in the already concentrated [<sup>\*</sup>1149] Total Package License Market . . . has been and will continue to be unreasonably restrained" (*id.* P 241); and that competition in the Catalyst Market has suffered (*id.* PP 192, 242). UCC also alleges numerous overt acts by Defendants in furtherance of a "collusive scheme" to "lessen[] competition . . . in the Total Package License Market" by "reducing the only significant competition for Spheripol" in that market. *Id.* P 179. In addition, UCC charges that Defendants' goals were to "restrict output, increase prices, limit the introduction of advanced technology, realize supracompetitive profits, and . . . harm competition." *Id.*

Notwithstanding these allegations, Defendants argue that as a competitor, UCC stands to benefit from any lessening of competition and therefore lacks standing to challenge the formation of Montell. In *Cargill, Inc. v. Monfort of [\*\*87] Colorado, Inc.*, 479 U.S. 104, 116-17, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986), the Supreme Court held that "competition for increased market share[] is not activity forbidden by the antitrust laws," and that the antitrust laws do not protect competitors from loss of profits due to price competition. Defendants correctly note that the *Cargill* decision "imposed significant barriers to competitor attempts" to challenge merger transactions, and "did not leave competitor plaintiffs a very good chance of having standing to enjoin mergers." *Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1166 (W.D. Ark. 1995) (citing *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 102 (5th Cir.), cert. denied, 486 U.S. 1023, 100 L. Ed. 2d 228, 108 S. Ct. 1996 (1988)). However, *Cargill* "has not rendered such attempts [by a competitor to enjoin mergers] impossible." *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 110 (2d Cir.), cert. denied, 493 U.S. 815, 110 S. Ct. 64, 107 L. Ed. 2d 31 (1989). HN33[<sup>A</sup>] A competitor plaintiff has standing as long as it can demonstrate "that its injury was caused by anticompetitive or predatory aspects of [defendant's] conduct, not by competition." *Pacific Express*, [\*\*88] *Inc. v. United Airlines, Inc.*, 959 F.2d 814, 818 (9th Cir.), cert. denied, 506 U.S. 1034, 121 L. Ed. 2d 686, 113 S. Ct. 814 (1992).

Assuming, as I must, the truth of Plaintiff's allegations, UCC has adequately alleged injury caused by the anticompetitive nature of Defendants' actions. Despite Defendants' attempts to distinguish the cases cited by UCC, those cases are similar enough to the instant case to support a finding that UCC has standing to challenge the formation of Montell. See, e.g., *Consolidated Gold Fields, PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), cert. dismissed, 492 U.S. 939, 110 S. Ct. 29, 106 L. Ed. 2d 639 (1989) (finding standing where target of an acquisition would lose independence because of injury occurring in the market; relied on in holding that a competitor-plaintiff has standing to challenge a merger in a market into which the plaintiff sought to expand (see *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860, 878 (W.D.N.Y. 1994))); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 408 (1st Cir. 1985) (competitor gas station owner had standing to sue based on "its allegations that the refined gasoline market has been harmed by [the [\*\*89] merger] and that it will likely be 'squeezed' out of the market in the foreseeable future"); *Community Publishers*, 892 F. Supp. at 1165-66 (owners of competing newspaper had standing to challenge merger of two local newspapers because "any monopolistic increase in the combination's advertising rates would soak up all the available advertising revenue" and thereby "harm not only readers and advertisers, but also competitors"); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 600 F. Supp. 1326, 1331 n.5 (E.D. Mich.), aff'd, 753 F.2d 1354 (6th Cir.), cert. dismissed, 469 U.S. 1200, 105 S. Ct. 1155, 84 L. Ed. 2d 309 (1985) (plaintiff had standing where it showed "a substantial probability that if the proposed merger

is accomplished and competition between [the merging defendants] is eliminated, then the combined firm would be able to target its competitive efforts on [plaintiff] and other small brewers. As a result of this merger, plaintiffs' ability to wholesale and distribute their products may be impaired, and ultimately, [plaintiff's] ability to survive in this industry of giants may be in question. This is exactly the sort of injury the antitrust laws were intended to prevent.") (citing [\*\*90] [United States v. Topco Assocs., Inc., 405 U.S. 596, 610, \[\\*1150\] 92 S. Ct. 1126, 31 L. Ed. 2d 515 \(1972\)](#)). See also [Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 783 \(7th Cir. 1994\)](#) (given two plausible interpretations of an antitrust claim, court chose one that afforded standing to the plaintiff and denied motion to dismiss for lack of standing because it was "premature" to draw conclusions regarding "the character of the loss that [plaintiff] seeks to recover").

The above-cited authorities provide ample support for finding that UCC has standing to challenge the formation of Montell. UCC has adequately alleged that competition has suffered as a result of the transaction, and that any harm suffered by UCC is the result of the anticompetitive nature of Defendants' actions. The motion to dismiss this count is denied.<sup>26</sup>

#### [\*\*91] XII. Conclusion

For the foregoing reasons, Defendants' motions to dismiss UCC's Third Amended Complaint are granted in part and denied in part. UCC's claim for breach of the implied duty of good faith and fair dealing (Count XIII) is dismissed. In addition, those portions of the claim for tortious interference with prospective contractual relations (Count VIII) which relate to prospective contractual relations with potential licensees of the UNIPOL/SHAC technology, prospective contractual relations with Shell Canada, and expansion of the UCC/Shell Venture through Project Nautilus are dismissed. All other claims survive.

Although UCC has now amended its complaint three times, this is the first time that Defendants have moved to dismiss any of UCC's claims, and thus the first time that the Court has expressed its view on the sufficiency of the Complaint. Plaintiff may therefore have one opportunity to replead its claim for tortious interference with prospective contractual relations as it relates to prospective contractual relations with potential licensees of the UNIPOL/SHAC technology and prospective contractual relations with Shell Canada.<sup>27</sup>

#### [\*\*92] SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

August 30, 1996

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<sup>26</sup> Defendants also seek dismissal of the "portions" of Counts IV and V that challenge the formation of Montell. Plaintiff maintains that the Court may not dismiss part of a claim, while Defendants argue the opposite. Because UCC has standing to challenge the formation of Montell, there is no need to resolve this dispute. No portion of Counts IV, V or VI will be dismissed.

In addition, Defendants contend that damages claimed by UCC on its antitrust claims are limited by certain statements UCC's counsel made during the preliminary injunction hearing in February 1995. Specifically, Defendants maintain that UCC is precluded from "recovering damages with respect to any claims that rely on assertions of 'uncertainty' or 'lack of confidence' among existing or potential licensees after the June 28, 1995 announcement that UCC would purchase the assets of SPC." Shell/Montell Mem. at 10. As stated earlier (see note 12, *supra*), a discussion of damages at this stage of the litigation is premature.

<sup>27</sup> UCC may not replead that portion of the claim relating to the expansion of the UCC/Shell Venture through Nautilus because it is time-barred. Also, UCC may not attempt to cure the defect in Count XIII through repleading.

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End of Document

## *United States v. Nippon Paper Indus. Co.*

United States District Court for the District of Massachusetts

September 3, 1996, Decided

CR. No. 95-10388-JLT

### **Reporter**

944 F. Supp. 55 \*; 1996 U.S. Dist. LEXIS 13534 \*\*; 1996-2 Trade Cas. (CCH) P71,575

UNITED STATES OF AMERICA, v. NIPPON PAPER INDUSTRIES CO., LTD.; JUJO PAPER CO., INC.; and HIRINORI ICHIDA; Defendants.

**Disposition:** \*\*1 Nippon Paper Industries Co., Ltd.'s ("Nippon") Motion [29] to Dismiss Count One Of The Indictment For Lack Of Personal Jurisdiction DENIED; Nippon's Motion [66] To Dismiss Count I Of The Indictment For Failure To State An Offense Under 15 U.S.C. § 1 ALLOWED and the Indictment DISMISSED as to Nippon and Jujo Paper Co., Inc.; and Nippon's Motion [64] To Dismiss Count I Of The Indictment For Failure To State An Offense DENIED as moot.

## **Core Terms**

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indictment, trading, houses, Sherman Act, fax, contacts, manufacturers, service of process, alien corporation, extraterritorial, territorial, vertical, personal jurisdiction, sovereign, conspiracy, antitrust, contends, cases, sufficient contact, anti trust law, nationwide, limits, prices, court concludes, co-conspirators, courts, distributor, provisions, customers, meetings

## **LexisNexis® Headnotes**

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Business & Corporate Law > Agency Relationships > Types > General Agents

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Agents Distinguished > General Overview

Business & Corporate Law > ... > Authority to Act > Business Transactions > General Overview

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > Criminal Activities

Civil Procedure > ... > Service of Process > Methods of Service > Service on Corporations

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

## [\*\*HN1\*\*](#) [down] Types, General Agents

Service of process on a corporation may be effected within the territorial limits of the United States by: delivering a copy of the summons to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. [\*Fed. R. Crim. P. 9\(c\)\(1\)\*](#).

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

## [\*\*HN2\*\*](#) [down] Jurisdiction, Jurisdictional Sources

Personal jurisdiction implicates the power of a court over a defendant. Historically, the presence of a defendant within the boundaries of the sovereign served as a prerequisite to its courts exercising jurisdiction over him. Once presence existed, the manner in which such presence was procured did not alter the power of the court over that person.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > 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

## [\*\*HN3\*\*](#) [down] In Rem & Personal Jurisdiction, Constitutional Limits

Exercise of jurisdiction over persons not found within the sovereign's borders was held to be consistent with due process if the defendant has certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. The modern doctrine of personal jurisdiction, thus, involves two distinct and independent bases for exercise of a sovereign's power: (1) physical presence of the person within the territorial boundaries of the sovereign; and (2) sufficient contacts with the sovereign to justify reaching him extraterritorially.

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

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

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

## [\*\*HN4\*\*](#) [down] Subject Matter Jurisdiction, Jurisdiction Over Actions

A court has general jurisdiction over a person when the litigation is not directly based on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous and systemic activity, unrelated to the suit, in the forum state. If general jurisdiction is lacking, a court determines whether it possesses specific jurisdiction by examining: (1) the relatedness of the defendant's forum-state activities and the claim underlying the litigation; (2) the deliberateness of the defendant's contacts with the forum-state; and (3) the reasonableness of the exercise of jurisdiction in light of various factors.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

#### **HN5** [] **In Rem & Personal Jurisdiction, Constitutional Limits**

Turning to adjudication of federal claims in federal courts, two factors must be examined: (1) the territorial limits on service of process defined by Congress, and (2) the constitutional constraints on Congress' definition of those limits. In providing for nationwide service, Congress defines the territorial jurisdiction of the federal courts as encompassing the entire nation. As such, the *Due Process Clause of the Fifth Amendment* does not require that a defendant have sufficient contacts with the state in which the district court sits for there to be jurisdiction.

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

#### **HN6** [] **Accusatory Instruments, Informations**

The power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction."

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

#### **HN7** [] **Accusatory Instruments, Informations**

Minimum contacts considerations do not apply to individuals who are served process within the territorial limits of the sovereign.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Service on Corporations

#### **HN8** [] **In Personam Actions, Minimum Contacts**

Mere service of process on an agent or officer of an alien corporation within the United States does not without more establish the jurisdiction of a federal court over an alien corporation. Rather, service of such process is only effective to create in personam jurisdiction where a defendant has sufficient contacts with the United States.

944 F. Supp. 55, \*551 1996 U.S. Dist. LEXIS 13534, \*\*1

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

#### [HN9](#) [blue icon] Clayton Act, Jurisdiction

Section 12 of the Clayton Act, [15 U.S.C.S. § 22](#), provides: Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Indictments > Contents > Content Requirements

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Sherman Act

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > ... > Indictments > Contents > General Overview

#### [HN10](#) [blue icon] Antitrust & Trade Law, Sherman Act

An indictment must contain essential facts constituting an offense charged and must set forth every essential element of an alleged offense. [Fed. R. Crim. P. 7\(c\)\(1\)](#). The essential elements of a Sherman Act, [15 U.S.C.S. § 1](#), indictment are the time, place, manner, means, and effect of an alleged violation.

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

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

#### [HN11](#) [blue icon] Vertical Restraints, Price Fixing

Compliance by a distributor with a manufacturer's unilateral directive to resell its product at a certain price does not constitute an agreement to conspire on the part of the distributor. The evidence regarding the action of the distributor, therefore, must be of a nature that excludes the possibility the manufacturer and distributor were acting independently. Indeed, the evidence must demonstrate that the manufacturer and distributor had a conscious commitment to a common scheme designed to achieve an unlawful objective. So, for example, neither the fact that a manufacturer has directed a retailer to sell at a certain price and the distributor complies with that direction, nor the fact that the retailer exchanges sales information with the manufacturer, support an inference of a vertical price-fixing scheme.

Antitrust & Trade Law > Clayton Act > Penalties

944 F. Supp. 55, \*551 (1996 U.S. Dist. LEXIS 13534, \*\*1

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Sherman Act

## **HN12** [blue document icon] Clayton Act, Penalties

Section 1 of the Sherman Act , [15 U.S.C.S. § 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 declared to be illegal.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Governments > Legislation > Interpretation

## **HN13** [blue document icon] International Aspects, International Application of US Law

As a general matter, there is a strong presumption against extraterritorial application of federal statutes, absent a clear expression by Congress to the contrary. Courts have held that this presumption has been overcome in the case of civil application of the federal antitrust laws. Nonetheless, because the presumption carries even more weight when applied to criminal statutes, the line of cases permitting extraterritorial reach in civil actions is not controlling. And, indeed, commentators have generally recognized this distinction when explaining the extraterritorial reach of the antitrust laws: The principles governing extraterritorial application of civil laws apply to criminal as well as civil litigation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

## **HN14** [blue document icon] International Aspects, International Application of US Law

The criminal provisions of the Sherman Act, [15 U.S.C.S. § 1](#), do not apply to conspiratorial conduct in which none of the overt acts of the conspiracy take place in the United States.

**Counsel:** For JUJO PAPER CO., LTD (2), Defendant: William H. Kettlewell, Boston, MA.

For NIPPON PAPER INDUSTRIES CO., LTD (3), Defendant: Richard G. Parker, O'Melveny & Myers, Washington, DC. William H. Kettlewell, Boston, MA.

U. S. Attorneys: Lisa M. Phelan, U.S. Department of Justice, Antitrust Division-Litigation II, Washington, DC.

**Judges:** Joseph L. Tauro, United States District Judge

**Opinion by:** Joseph L. Tauro

## Opinion

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### [\*57] MEMORANDUM

September 3, 1996

TAURO, Ch.J.,

The United States brings this criminal action against Nippon Paper Industries Co., Inc. ("Nippon"), alleging that its predecessor, [\*58] Jujo Paper Co., Inc. ("Jujo"), conspired in 1990 to fix prices of jumbo roll thermal facsimile paper ("fax paper") sold in the United States, in violation of section [\*2] 1 of the Sherman Act, 15 U.S.C.A. § 1 (West Supp. 1996). Presently before the court are Nippon's motions to dismiss on three alternative grounds: (1) lack of personal jurisdiction over Nippon, (2) failure of the indictment to state an offense under section 1 of the Sherman Act, and (3) failure of the indictment to adequately plead successor liability.

I.

### BACKGROUND

1

Nippon is a Japanese corporation with its principle place of business in Tokyo, Japan. Nippon was formed in 1993 as a result of a merger between Jujo and Sanyo Kokusaku Co., Ltd., both Japanese corporations with their principal [\*3] places of business in Japan.

In 1990, Jujo manufactured fax paper at mills located in Japan. Jujo did not engage in direct export sales but, rather, sold its fax paper in Japan to Japanese trading houses. With regard to fax paper manufactured by Jujo that ultimately reached customers in the United States, Jujo's sales were limited to two Japanese trading companies, Japan Pulp & Paper Co., Ltd. ("JPP") and Mitsui & Co., Ltd. ("Mitsui"). JPP and Mitsui exported the fax paper to their respective subsidiaries in the United States and those subsidiaries engaged in direct sales to customers in the United States.

The government maintains that the conspiracy originated at meetings held in Japan in early 1990, during which Jujo and other Japanese manufacturers of fax paper "agreed to increase prices for fax paper to be imported in North America." Indictment P 7(b). Although the indictment does not specify which alleged co-conspirators attended these meetings, the government conceded at argument on this motion that none of the Japanese trade houses nor their American subsidiaries participated in these meetings.

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<sup>1</sup> In outlining its background, the court accepts the government's characterization of the case as a conspiracy involving horizontal and vertical relationships. As explained in detail below, the parties dispute whether the indictment adequately pleads the theories of the conspiracy advanced by the government in its memorandum opposing Nippon's motion for failure to state a claim under section 1 of the Sherman Act.

To effectuate this conspiracy, Jujo and the other manufacturers "raised their [\*\*4] prices for fax paper" charged to the Japanese trading houses. The government further contends that Mitsui and JPP, and their American subsidiaries, became co-conspirators by agreeing to sell fax paper in North America at the newly raised price.

## II.

### *DISCUSSION*

#### A. Personal Jurisdiction

Congress, by way of the Federal Rules of Criminal Procedure, has provided for nationwide service of process of criminal summons. Fed. R. Crim. P. 4(d)(2). HN1[] Service of process on a corporation may be effected within the territorial limits of the United States by:

delivering a copy [of the summons] to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States.

#### Fed. R. Crim. P. 9(c)(1).

On January 4, 1996, service by certified mail of a criminal summons was made upon Seiichi Masuko, the general manager of the larger of the two Nippon offices in Seattle. In January [\*\*5] 1996, service of a copy of the criminal summons was made on Richard Parker, a partner of O'Melveny & Myers, who had been active in the law firm's representation of Nippon throughout the grand jury investigation leading to the present indictment. Subsequently, in-hand service of the criminal summons on Seiichi Masuko was executed by a United States Marshal at Nippon's Seattle office.<sup>2</sup>

[\*59] The government contends that the court has jurisdiction over Nippon merely because a summons was served on Seiichi Masuko within the territorial boundaries of the United States pursuant to Rule 4. Alternatively, the government maintains that, because Nippon has sufficient contacts with the United States, service pursuant to Rule 4 gives this court jurisdiction over Nippon.

#### 1. Review of jurisdictional principles

HN2[] "Personal jurisdiction [\*\*6] implicates the power of a court over a defendant." Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 143 (1st Cir. 1995). Historically, the presence of a defendant within the boundaries of the sovereign served as a prerequisite to its courts exercising jurisdiction over him. International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945). Once presence existed, the manner in which such presence was procured did not alter the power of the court over that person. See, e.g., Frisbie v. Collins, 342 U.S. 519, 522, 96 L. Ed. 541, 72 S. Ct. 509 (1952) (jurisdiction existed over criminal defendant brought within border of sovereign by forcible abduction); Chandler v. United States, 171 F.2d 921, 933 (1st Cir. 1948) (court may not refuse jurisdiction where fugitive is brought before it regardless of the means used to bring him within its territorial jurisdiction), cert. denied, 336 U.S. 918, 93 L. Ed. 1081, 69 S. Ct. 640 (1949).

With the advent of personal service of process, the scope of a sovereign's power expanded to include, under certain conditions, persons not present in its territory. International Shoe, 326 U.S. at [\*71] 316. HN3[] Exercise of jurisdiction over persons not found within the sovereign's borders was held to be consistent with due process if the defendant has "certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* The modern doctrine of personal jurisdiction, thus, involves two distinct and independent bases for exercise of a sovereign's power: (1) physical presence of the person within the

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<sup>2</sup> Nippon previously challenged the propriety of the service of process. On March 13, 1996, Chief Magistrate Judge Alexander denied Nippon's motion to quash. Nippon does not here challenge that decision.

territorial boundaries of the sovereign, and (2) sufficient contacts with the sovereign to justify reaching him extraterritorially.

With respect to the latter basis for jurisdiction, the First Circuit has developed the doctrines of general and specific jurisdiction. [United Elec., Radio and Mach. Workers of America v. 163 Pleasant Street Corp.](#), [960 F.2d 1080, 1088 \(1st Cir. 1992\)](#). [HN4](#)<sup>↑</sup> A court has general jurisdiction over a person "when the litigation is not directly based on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous and systemic activity, unrelated to the suit, in the forum state." *Id.* If general jurisdiction is lacking, a court determines whether it possesses [\\*\\*8](#) specific jurisdiction by examining (1) the relatedness of the defendant's forum-state activities and the claim underlying the litigation, (2) the deliberateness of the defendant's contacts with the forum-state, and (3) the reasonableness of the exercise of jurisdiction in light of various Gestalt factors. [Pritzker v. Yari](#), [42 F.3d 53, 60-61 \(1st Cir. 1994\)](#), cert. denied, [U.S. , 131 L. Ed. 2d 851, 115 S. Ct. 1959 \(1995\)](#).

[HN5](#)<sup>↑</sup> Turning to adjudication of federal claims in federal courts, two factors must be examined: (1) the territorial limits on service of process defined by Congress, and (2) the constitutional constraints on Congress' definition of those limits. See, e.g., [S.E.C. v. Unifund Sal.](#), [910 F.2d 1028, 1033 \(2nd Cir. 1990\)](#). Courts have recognized that Congress may provide for nationwide service of process. [Lisak v. Mercantile Bancorp, Inc.](#), [834 F.2d 668, 671 \(7th Cir. 1987\)](#), cert. denied, [485 U.S. 1007, 99 L. Ed. 2d 700, 108 S. Ct. 1472 \(1988\)](#). In providing for nationwide service, Congress defines the territorial jurisdiction of the federal courts as encompassing the entire nation. [Id. at 671-72](#). As such, the [Due Process Clause of \[\\\*\\\*9\]\(#\) the Fifth Amendment](#) does not require that a defendant have sufficient contacts with the state in which the district court sits for there to be jurisdiction. [Johnson Creative Arts, Inc. v. Wool Masters, Inc.](#), [743 F.2d 947, 950 n.3 \(1st Cir. 1984\)](#); [Debreceni v. Bru-Jell Leasing Corp.](#), [710 F. Supp. 15, 20-1 \(D. Mass. 1989\)](#).

[\[\\*60\]](#) With these principles in mind, the court turns to the issues raised by the parties: (1) whether Congress can authorize federal courts to exercise jurisdiction over an alien corporation, without regard to the contacts of that corporation to the United States, (2) whether service under [Rule 4](#) authorizes a federal district court to exercise personal jurisdiction over an alien corporation, regardless of the substantiality of the contacts of that corporation with the state in which the district court sits, and (3) whether Nippon has sufficient contacts with the United States to warrant exercise of jurisdiction over it.

## 2. Jurisdiction by virtue of service in the United States

The government contends that service under [Rules 4](#) and [9](#), standing alone, is sufficient to create jurisdiction over Nippon. In advancing this position, the government argues by analogy [\\*\\*10](#) from cases concerning the presence of individual criminal defendants. The Supreme Court explained in *Frisbee*:

The Court has never departed from the rule announced in [Ker v. Illinois](#), [119 U.S. 436, 30 L. Ed. 421, 7 S. Ct. 225 \[1886\]](#) that [HN6](#)<sup>↑</sup> the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now present to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one *present* in court is convicted of a crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional safeguards."

[342 U.S. at 533](#) (emphasis added). As *Frisbee* implies, [HN7](#)<sup>↑</sup> minimum contacts considerations do not apply to individuals who are served process within the territorial limits of the sovereign. [Burnham v. Superior Court of California](#), [495 U.S. 604, 622, 109 L. Ed. 2d 631, 110 S. Ct. 2105 \(1990\)](#) (plurality opinion) (Scalia, J.); [Johnson Creative Arts](#), [743 F.2d at 950 n.3](#). And so, the government contends, service on an agent within [\\*\\*11](#) the territory of the United States establishes the presence of an alien corporation.

The principal problem with the government's analogy lies with the concept of corporate presence. Corporations are legal constructions and their presence is, in some sense, fixed to the situs of their incorporation. Where nationwide service is applied to an American corporation this does not present a problem, insofar as jurisdiction can be

acquired by service in its state of incorporation. But, process on an alien corporation at its place of incorporation would, of course, take place beyond the territorial limits of the United States.

Moreover, the government's suggestion that service on an officer of an alien corporation within the United States functions as the surrogate for the presence of the alien corporation leads to incongruous results. Consider service of process on the president of an alien corporation who merely happens to be vacationing in Florida, or changing airplanes at an American airport en route to a foreign destination. Is the corporation really "present" in the United States under such happenstance? As Judge Hand recognized, one cannot "impute the idea of locality to a corporation, [\[\\*\\*12\]](#) except by virtue of those acts which realize its purposes." [\*Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 \(2nd Cir. 1930\)\*](#). The vacationing foreign corporation president is likely not acting to serve his employer's purposes. Indeed, it was the problem of corporate presence that led the Supreme Court to articulate the minimum contacts test in *International Shoe*. [\*International Shoe, 326 U.S. at 315-19\*](#). See also [\*Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017, 1020-23 \(2nd Cir. 1978\)\*](#) (explaining rise and fall of the corporate presence theory in the context of states' efforts to reach foreign corporations).

Further, contrary to the government's contention, the minimum contacts test is not limited to cases involving extraterritorial service on a corporation. In *International Shoe*, an agent of the corporate defendant had been served within the forum-state, pursuant to a state statute authorizing in-state service of process on agents of foreign corporations. [\*International Shoe, 326 U.S. at 311\*](#). As such, the issue before the Court involved the limits imposed by due [\[\\*61\]](#) process on a sovereign's efforts to obtain in personam jurisdiction over a foreign corporation [\[\\*\\*13\]](#) by in-state service on one of its agents. In holding that the sovereign only obtains personal jurisdiction where there are sufficient contacts, the Court implicitly found that the mere act of service on the agent did not render the corporation "present" in the state.

For these reasons, this court holds that the [HN8](#)<sup>↑</sup> mere service of process on an agent or officer of an alien corporation within the United States does not without more establish the jurisdiction of a federal court over an alien corporation. Rather, as this court has previously decided in the context of a civil matter, service of such process is only effective to create in personam jurisdiction where a defendant has sufficient contacts with the United States. See [\*Debreceni, 710 F. Supp. at 20-21\*](#) (where federal statute provides for nationwide service of process for a federal claim, the Constitution merely requires minimum contacts with the United States).

### 3. Nationwide service in criminal antitrust actions

Though Congress may bestow on a federal district court personal jurisdiction over an alien corporation without regard to the contacts between the district and the defendant, the question remains whether Congress [\[\\*\\*14\]](#) has done so in this case. Nippon contends that the court should not construe [\*Rules 4 and 9 of the Federal Rules of Criminal Procedure\*](#) as providing federal district courts with jurisdiction on the sole basis of national contacts in criminal antitrust actions. Nippon advances two alternative arguments in support of this contention.

First, Nippon maintains that section 12 of the Clayton Act, [\*15 U.S.C.A. § 22 \(West 1973\)\*](#), is the exclusive provision for nationwide service in antitrust cases. [HN9](#)<sup>↑</sup> Section 12 of the Clayton Act provides:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

[\*15 U.S.C.A. § 22\*](#). Because prosecution in this district allegedly does not satisfy section 12's venue provision, Nippon avers that this court cannot exercise jurisdiction.

It is not clear, however, that section 12 of the Clayton Act applies to criminal prosecutions under the Sherman Act. See [\*United States v. National Malleable & Steel Castings Co., 6 F.2d 40, 43 \(N.D. Ohio\) \(1924\)\*](#)(section 12 of the Clayton Act applies only to civil suits). Moreover, even if section 12 applies to criminal actions, the cases interpreting section 12 demonstrate that it was intended to supplement rather than supplant general federal venue and service of process statutes and rules. See, e.g., [\*Board of County Comm'r's of Custer County v. Wilshire Oil Co.\*](#)

of Texas, 523 F.2d 125, 129-30 (10th Cir. 1975). Accordingly, the court concludes that service under Rules 4 and 9 may be relied on in federal antitrust prosecutions.

Second, Nippon contends that jurisdiction on the basis of national contacts is permitted only when the provision authorizing nationwide service also limits venue to a federal district in which the alien corporation can be found.<sup>3</sup> Any other reading, Nippon suggests, would violate due process. Nippon cites no authority for this novel proposition and the court has found none. The reason for this absence of precedent is found in the Constitution itself, which imposes specific limits on the place of a criminal prosecution. Article III, section 2 requires that trial of crimes shall [\*\*16] be held in the state where the crime was committed. The Sixth Amendment provides that criminal defendants are entitled to trial "by an impartial jury of the State and district wherein the crime shall have been committed." In light of the Constitution's venue and vicinage provisions, this court will not devine a generalized due process right requiring an additional nexus between [\*62] a criminal defendant and a federal judicial district.<sup>4</sup> See generally O'Melveny & Myers v. F.D.I.C., 512 U.S. 79, 114 S. Ct. 2048, 2054, 129 L. Ed. 2d 67 (1994)(expression of one thing implies exclusion of others).

[\*\*17] Moreover, the proposition advanced by Nippon has been rejected by the Supreme Court. In United States v. Union Pacific R.R., 98 U.S. (8 Otto) 569, 603-04, 25 L. Ed. 143 (1878), the Court held that Congress could make a court in Washington, D.C. the exclusive forum for certain claims arising under federal law. If Congress can establish one court within the United States to here all claims without regard to a defendant's contacts to that place, it inescapably follows that Congress can designate any place within the United States as an appropriate forum for federal claims.

Accordingly, this court concludes that the absence of a provision in the Federal Rules of Criminal Procedure linking the venue of a criminal action to contacts with the defendant, does not mandate a reading of Rule 4 as limiting personal jurisdiction to federal districts with which the defendant has sufficient contacts.

#### 4. Nippon's contacts with the United States

Disposition of the present motion depends, then, on whether Nippon has sufficient contacts with the United States to fall within the court's general or specific jurisdiction.

Since its inception in 1993, Nippon has maintained two offices in Seattle, [\*\*18] Washington that Jujo previously operated. These offices are staffed by eight employees. One of these offices engages in market research and quality inspections, as well as arranging for the annual transportation to Japan of over \$ 270 million worth of newsprint, publishing paper, and wood chips purchased by Nippon in the United States. Nippon's other Seattle office negotiates contracts for and purchases annually approximately \$ 40 million in logs and lumber from suppliers in the United States for export to Nippon's production facilities in Japan. The Seattle offices maintain bank accounts in the United States through which Nippon pays for purchases of materials exported to Japan, employee salaries, and office expenses.

Additionally, Nippon owns twenty percent of North Pacific Paper Corporation, Inc. ("NORPAC"), a paper manufacturing corporation located in Longview, Washington. NORPAC generates annual revenues of approximately \$ 350 million.

<sup>3</sup> Fed. R. Crim. P. 18 limits venue to a district in which the offense was committed. For purposes of its motion to dismiss for lack of personal jurisdiction, Nippon does not challenge the government's allegation that co-conspirators committed overt acts in Massachusetts in furtherance of the conspiracy.

<sup>4</sup> The court notes that some courts have suggested that due process may protect against abusive selection of a venue by the federal government. See Petition of Provo, 17 F.R.D. 183 (D. Md.), aff'd, 350 U.S. 857, 100 L. Ed. 761, 76 S. Ct. 101 (1955). There is, however, no suggestion in this case that the prosecution has acted in bad faith in selecting the present forum.

Finally, Nippon officers and directors routinely travel to the United States to conduct business with its suppliers in the United States, to oversee operations of NORPAC, to attend industry conferences, and to negotiate technological agreements.

[\*\*19] In light of these contacts, the court concludes that Nippon has engaged in continuous and systemic activity in the United States. Accordingly, the court possesses general personal jurisdiction over Nippon.

#### B. Extraterritorial Application of [Section 1](#) of the Sherman Act

The court now turns to Nippon's motion to dismiss the indictment for failure to state an action under [section 1](#) of the Sherman Act. Nippon maintains that the indictment charges Nippon, as Jujo's successor, with entering into a horizontal agreement with Japanese manufacturers to fix prices, with selling fax paper to Japanese trading houses in Japan at that price, and directing the Japanese trading houses to resale the fax paper at certain prices. On this characterization of the indictment, the criminal conduct alleged occurred wholly in Japan and was wholly committed by Japanese manufacturers of fax paper. Nippon contends the criminal provisions of the Sherman Act do not apply to conduct wholly occurring outside the United States.

The government responds in two ways. First, it maintains that the indictment alleges [\*63] that the Japanese trading companies and their American subsidiaries joined Jujo in the conspiracy [\*\*20] by entering into a vertical agreement to fix the resale price of fax paper in the United States. As such, the government suggests that Nippon's characterization of the indictment as attempting to reach acts solely occurring outside the United States goes awry. Alternatively, the government contends that the criminal provisions of the Sherman Act can reach wholly foreign acts where the intent and effect of those acts is to affect commerce in the United States.

To resolve this motion, then, the court must address two questions: (1) whether the government has sufficiently pled its claim that a vertical agreement existed between Jujo and the trading houses; and (2) if not, whether the Sherman Act reaches the alleged horizontal agreement between Jujo and the other Japanese manufacturers of fax paper.

##### 1. Adequacy of pleading the vertical agreement

[HN10](#) [↑] An indictment must contain essential facts constituting an offense charged and must set forth every essential element of an alleged offense. [Fed. R. Crim. Pro. Rule 7\(c\)\(1\)](#). See, e.g., [United States v. McDonough](#), [959 F.2d 1137, 1140 \(1st Cir. 1992\)](#). The essential elements of a Sherman Act indictment are the time, place, manner, means, [\*\*21] and effect of an alleged violation. [United States v. Tedesco](#), [441 F. Supp. 1336, 1339 \(M.D. Pa. 1977\)](#).

In [Monsanto Co. v. Spray-Rite Serv. Corp.](#), [465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#), the Supreme Court propounded the evidentiary requirements of proving a vertical agreement to fix resale prices. [HN11](#) [↑] Compliance by a distributor with a manufacturer's unilateral directive to resell its product at a certain price does not constitute an agreement to conspire on the part of the distributor. [Id. at 764](#). The evidence regarding the action of the distributor, therefore, must be of a nature that excludes the possibility the manufacturer and distributor were acting independently. [Id. at 764](#). Indeed, the evidence must demonstrate that the manufacturer and distributor "had a conscious commitment to a common scheme designed to achieve an unlawful objective." [Id.](#) So, for example, neither the fact that a manufacturer has directed a retailer to sell at a certain price and the distributor complies with that direction, nor the fact that the retailer exchanges sales information with the manufacturer, support an inference of a vertical price-fixing scheme. [Id. at I\\*\\*221](#) 762-64.

Monsanto's articulation of what conduct may permissibly give rise to an inference of an agreement is germane to whether the indictment adequately describes the existence of a conspiracy between the trading houses and Jujo. In making that determination, the court looks for either an allegation that an express agreement was entered into between Jujo and the trading houses, or a description of alleged conduct from which the reader could infer such an agreement. For the reasons that follow, the court concludes that the indictment fails to adequately plead the

existence, manner, and means of a vertical price fixing agreement between Jujo and the Japanese trading companies.

As an initial matter, the court observes that the indictment does adequately aver that, at meetings in early 1990, Jujo and co-conspirators explicitly agreed to price increases in fax paper. Indictment P 7(b). The government concedes, however, that it is not proceeding under the theory that the Japanese trading companies attended the meetings at which this alleged explicit agreement was formed. Transcript of July 29, 1996 Hearing at 23.

Apart from the specific allegation that an agreement was reached at [\*\*23] the early 1990 meetings, there is no other language in the indictment indicating that a subsequent vertical agreement arose between Jujo and the Japanese trading houses. In paragraphs 7(d) and 7(e), the indictment states that Jujo "directed the co-conspirator trading houses to implement price increases to fax paper customers in North America" and "participated in telephone conversations and otherwise contacted each other to maintain continued [\*64] adherence to their conspiratorial agreement." This completes the indictment's characterization of the means and method of the conspiracy. Neither direction by Jujo to the trading houses nor communication by Jujo to determine compliance with that direction, imply the existence of a vertical agreement between Jujo and the trading houses.

Examining the indictment's description of the effects of the alleged conspiracy yields even less indication that a vertical agreement is alleged. Paragraph 9 of the indictment reads: "the Japanese manufacturers sold discrete quantities of fax paper to the trading houses in Japan, for specific customers in North America, on condition that such quantities be sold to customers at specified prices." It continues: "the [\*\*24] Japanese manufacturers . . . monitored the trading houses' transactions with the North American customers to ensure that the agreed upon prices were charged." Again, these averments merely suggest that, to ensure the success of its horizontal agreement, Jujo undertook to direct the trading houses to sell fax paper at a specified price and to monitor whether the trading houses were complying with this directive. Neither of these allegations serve as an averment that the trading houses entered into a price fixing agreement with Jujo.

In sum, except for the naked characterization of the trading houses as co-conspirators, the indictment merely alleges: (1) that Jujo directed the trading houses, (2) that Jujo communicated with the trading houses, and (3) that the trading houses served as the distributive link between Jujo and purchasers of fax paper in the United States. This court concludes that such allegations, singly or in combination, do not satisfy the government's burden of pleading with requisite particularity the existence of a vertical agreement.

## *2. The horizontal agreement*

Because the government has failed to plead a vertical agreement to join the conspiracy by the trading [\*\*25] houses, this case does not involve overt acts by co-conspirators occurring in the United States. The government contends, nonetheless, that the Sherman Act encompasses the wholly extraterritorial conduct described in the alleged horizontal agreement between Jujo and the other Japanese manufacturers of fax paper. This presents a question of first impression regarding the extraterritorial reach of the criminal provisions of the Sherman Act. See Restatement (Third) of Foreign Relations Law § 403, note 8 (1986) ("No case is known of criminal prosecution in the United States for an economic offense (not involving fraud) carried out by an alien wholly outside the United State.").<sup>5</sup>

[\*\*26] [HN12](#) 

<sup>5</sup> The government cites two criminal cases as applying the Sherman Act to foreign conduct: United States v. R.P. Oldham Co., 152 F. Supp. 818, 822 (N.D. Cal. 1957) and In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298, 313 (D.D.C. 1960). Both of these cases, however, specifically premise their holding on the fact that co-conspirators committed overt acts in the United States. Oldham, 152 F. Supp. at 821 ("the only commerce sought to be regulated is the importation and sale of wire nails on the West Coast of the United States"); Shipping Industry, 186 F. Supp. at 314 ("American Banana Co. v. United Fruit Co., 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511 (1909), does not preclude Sherman Act jurisdiction over agreements in restraint of trade carried out, at least in part, within the United States."). Indeed, Oldham makes "clear that there is no attempt here to regulate Japanese commerce as such, or to indict Japanese firms or Japanese nationals." Oldham, 152 F. Supp. at 821.

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 declared to be illegal.

15 U.S.C.A. § 1. This section serves as the substantive language for both civil and criminal application of the antitrust laws. According to the government this essentially ends the matter, for "it is well established that [the civil sanctions of] the Sherman Act apply to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993). The court, however, disagrees with that suggested equating of the Sherman Act's civil and criminal application.

[\*65] **HN13** As a general matter, there is a strong presumption against extraterritorial application of federal statutes, absent a clear expression by Congress to the contrary. E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991). As noted above, courts have held that this presumption has been overcome in the [\*27] case of civil application of the federal antitrust laws. Hartford, 509 U.S. at 795. Nonetheless, because the presumption carries even more weight when applied to criminal statutes, United States v. Bowman, 260 U.S. 94, 97-98, 67 L. Ed. 149, 43 S. Ct. 39 (1922), the line of cases permitting extraterritorial reach in civil actions is not controlling. And, indeed, commentators have generally recognized this distinction when explaining the extraterritorial reach of the antitrust laws:

The principles governing [extraterritorial application of civil laws] apply to criminal as well as civil litigation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Restatement (Third) of Foreign Relations Law § 403, cmt. f (1986).

Moreover, courts have recognized that the substantive language of [\*28] section 1 of the Sherman Act requires different treatment in civil and criminal contexts. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 439-43, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978) ("Gypsum"). In *Gypsum*, the Supreme Court confronted the issue of whether criminal responsibility under the Sherman Act should be based on strict liability, as it had been held in civil cases, or whether some intent element should be attributed to it as the traditional canons of statutory interpretation would suggest. Id. at 436. The Court reasoned that the ambiguities inherent in the fact intensive nature of an antitrust prosecution counseled against imposing criminal liability absent a demonstration of intent to violate the law. Id. at 440-42. Additionally, the Court recognized that Congress adopted the language of the Sherman Act "fully aware of the traditional distinction between the elements of civil and criminal offenses and apparently did not intend to do away with them." Id. at 443 n.19.

Here, the court faces a choice between competing interpretative principles similar to the one posed in *Gypsum*. As did the Court in *Gypsum*, this court concludes [\*29] that the traditional distinction between the elements of civil and criminal charges must be maintained.

This conclusion finds support in policies underlying antitrust and criminal law. On the civil side, antitrust enforcement benefits from a certain degree of interpretive flexibility. Appalachian Coals v. United States, 288 U.S. 344, 359-60, 77 L. Ed. 825, 53 S. Ct. 471 (1933). That flexibility enables the government to use the antitrust laws as an effective means for regulating business practices. Cf. Gypsum, 438 U.S. at 442. But, as Nippon observes, such flexibility is antithetical to the principles of predictability and fairness that undergird the criminal law. Id. at 441-42. See also 2 Areeda and Hovenkamp, Antitrust Law § 311 32-33 (rev. ed. 1995). And, because the Sherman Act is silent on the issue, imputation of extraterritorial application of its provisions would present serious questions about notice to foreign corporate defendants as to the criminality of its conduct. Cf. Balthazar v. Superior Court of the Commonwealth of Massachusetts, 428 F. Supp. 425, 433 (D. Mass. 1977) ("criminal liability should only attach to clearly delineated transgressions"), [\*30] aff'd, 573 F.2d 698 (1st Cir. 1978).

In addition, the legislative history belies any suggestion that, in passing the Sherman Act, Congress believed that it was reaching wholly extraterritorial conduct. In response to concerns that potential antitrust violators could evade the proscriptions of the Sherman Act by forming their agreement outside the United States, Senator Sherman explained:

[\*66] It is true that if a crime is committed outside of the United States it can not be punished in the United States. But if an unlawful combination is made outside of the United States and in pursuance of it property is brought within the United States such property is subject to our laws. It may be seized. A civil remedy by attachment could be had. Any person interested in the United States could be made a party.

Either a foreigner or a native may escape "the criminal part of the law," as he says, by staying out of our jurisdiction, as very many do, but if they have property here it is subject to civil process. . . . [A foreigner] may combine or conspire to his heart's content if none of his co-conspirators are here or his property is not here.

21 Cong. Rec. 2461, reprinted [\*31] in Earl W. Kintner, ed., *The Legislative History of Federal Antitrust Laws and Related Statutes*, Part I, *The Antitrust Laws*, vol. 1. p. 126 (1978).

For all these reasons, the court concludes that [HN14](#)[] the criminal provisions of the Sherman Act do not apply to conspiratorial conduct in which none of the overt acts of the conspiracy take place in the United States.

The indictment against Nippon and Jujo will be dismissed.<sup>6</sup>

An order will issue.

Joseph L. Tauro

United States District Judge

ORDER

September 3, 1996

TAURO, Ch.J.,

For the reasons stated in the accompanying memorandum, the court orders as follows:

1. Nippon Paper Industries Co., Ltd.'s ("Nippon") Motion [29] to Dismiss Count One Of The Indictment For Lack Of Personal Jurisdiction is DENIED;
2. [\*32] Nippon's Motion [66] To Dismiss Count I Of The Indictment For Failure To State An Offense Under [15 U.S.C. § 1](#) is ALLOWED and the Indictment is hereby DISMISSED as to Nippon and Jujo Paper Co., Inc.; and
3. Nippon's Motion [64] To Dismiss Count I Of The Indictment For Failure To State An Offense is DENIED as moot.

IT IS SO ORDERED.

Joseph L. Tauro

United States District Judge

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<sup>6</sup> Because Jujo no longer exists, the court considers Nippon's motion for dismissal as made on behalf of both defendants named in Count I of the Indictment. Accordingly, dismissal of the indictment will enter as to both Nippon and Jujo.



## **Alpha Lyracom Space Communs. v. Comsat Corp.**

United States District Court for the Southern District of New York

September 4, 1996, Decided ; September 5, 1996, FILED

89 Civ. 5021 (JFK)

### **Reporter**

968 F. Supp. 876 \*; 1996 U.S. Dist. LEXIS 12915 \*\*; 1997-1 Trade Cas. (CCH) P71,679

ALPHA LYRACOM SPACE COMMUNICATIONS, INC., REYNOLD V. ANSELMO, PAN AMERICAN SATELLITE, and PANAMSAT, L.P., Plaintiffs, v. COMSAT CORPORATION, Defendant.

**Disposition:** **[\*\*1]** Plaintiffs's discovery motions denied and the orders of the Magistrate Judge affirmed in all respects. Defendant's motion for summary judgment granted as to all claims.

### **Core Terms**

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signatory, conspiracy, alleged conspiracy, immunity, operating agreement, conspire, plaintiff's claim, antitrust, landing, rights, boycott, ventures, satellite, monopolization, markets, parties, infer, meetings, communications, disparagement, summary judgment, common carrier, negotiations, damages, satellite systems, delays, customers, reflects, refusals, argues

### **LexisNexis® Headnotes**

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Communications Law > Federal Acts > Communications Satellite Act

#### **HN1 Federal Acts, Communications Satellite Act**

The Communications Satellite Act, [47 U.S.C.S. § 701 et seq.](#) provides that a satellite corporation shall be subject to appropriate governmental regulation and that the ownership of the corporation shall be consistent with the federal antitrust laws.

Communications Law > Federal Acts > Communications Satellite Act

International Trade Law > Trade Agreements > General Overview

International Trade Law > General Overview

International Trade Law > Dispute Resolution > General Overview

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

#### **HN2 Federal Acts, Communications Satellite Act**

To join Intelsat, the United States implemented various international agreements including the 1971 Definitive Agreement (the formative document of Intelsat), and the 1976 Headquarters Agreement. These agreements require that each party-nation grant appropriate privileges, exemptions and immunities to Intelsat, to the other parties, the signatories and their representatives. The 1976 Headquarters Agreement provides the officers and employees of Intelsat, the representatives of the parties and of the signatories shall be immune from suit and legal process relating to acts performed by them in their official capacity.

Communications Law > Federal Acts > Communications Satellite Act

International Trade Law > General Overview

### **HN3** **Federal Acts, Communications Satellite Act**

For domestic satellite services, the party seeking to provide a separate system must consult the Board of Governor's regarding the technical compatibility of the proposed system with Intelsat. For international services, the party must also consult the Assembly of Parties for approval. Thus a separate international system requires the home government to clear the nascent service with the entire Assembly.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > Formation

Communications Law > Federal Acts > Communications Satellite Act

Business & Corporate Law > Joint Ventures > General Overview

### **HN4** **Types of Contracts, Joint Contracts**

In addition to technical clearance from the Board and approval of the Assembly of Parties, a proposed separate international system must acquire landing rights in each nation to which it intends to deliver a signal. Landing rights are authorization from a party to provide or land a satellite signal within that party's national territory. Landing rights are generally procured from or with the assistance of the signatory post, telegraph, and telephone company (PTT) in each nation. Landing rights may issue either as general or limited grant of authority for the provision of independent services, or through some form of joint venture or other arrangement with the PTT. The scope of authorization is generally governed by the terms of a formal agreement, referred to in the record and herein as an operating agreement. Depending upon the regulatory structure of a given nation at a given time, landing rights (and therefore operating agreements), may have been literally impossible to obtain.

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Waiver & Preservation of Defenses

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > General Overview

International Law > ... > Foreign Sovereign Immunities Act > Exceptions > Waivers

## [\*\*HN5\*\*](#) Contract Conditions & Provisions, Waivers

If the parties to a contract agree that the laws of one country will govern contractual interpretations, they have implicitly waived the defense of sovereign immunity.

[Antitrust & Trade Law](#) > ... > [Price Fixing & Restraints of Trade](#) > [Horizontal Refusals to Deal](#) > General Overview

[Civil Procedure](#) > ... > [Summary Judgment](#) > [Entitlement as Matter of Law](#) > General Overview

## [\*\*HN6\*\*](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Both the Supreme Court and the Court of Appeals for the Second Circuit have held, in antitrust cases involving allegations of conscious parallelism and concerted refusals to deal, that summary judgment may be granted in such cases if the moving party is able to show that the facts relied on by the plaintiff in support of its allegations are not susceptible of the interpretation the plaintiff seeks to give them and the plaintiff fails to respond to such a showing with 'significant probative evidence' in support of its theory of the case.

[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

## [\*\*HN7\*\*](#) Summary Judgment, Burdens of Proof

[\*Fed. R. Civ. P. 56\*](#) mandates the entry of summary judgment after adequate time for discovery and upon motion, if the entire record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden of showing that no genuine issue of material fact exists rests on the movant. The burden will be satisfied if the movant can point to an absence of evidence to support an essential element of the nonmoving party's claim. If the movant satisfies its burden, the nonmoving party must then set forth specific facts showing that there is a genuine issue for trial.

[Civil Procedure](#) > ... > [Summary Judgment](#) > [Entitlement as Matter of Law](#) > General Overview

## [\*\*HN8\*\*](#) Summary Judgment, Entitlement as Matter of Law

In viewing the evidence to determine whether there exists a genuine issue for trial, the court must assess the record in the light most favorable to the non-movant and draw all reasonable inferences in its favor. The court may not resolve issues of fact, it may only ascertain whether such issues are present. In antitrust litigation, however, the non-moving party must set forth facts that tend to preclude an inference of permissible conduct.

[Civil Procedure](#) > ... > [Summary Judgment](#) > [Entitlement as Matter of Law](#) > Materiality of Facts

[Civil Procedure](#) > [Judgments](#) > [Summary Judgment](#) > General Overview

[Civil Procedure](#) > ... > [Summary Judgment](#) > [Entitlement as Matter of Law](#) > General Overview

**HN9** [blue download icon] Entitlement as Matter of Law, Materiality of Facts

Although difficult in factually complex cases, summary judgment is not disfavored in antitrust actions. On the contrary, recognizing that summary judgment is not a substitute for trial, current Supreme Court and Second Circuit cases have tended to encourage its use in complex cases such as this one. Summary judgment remains a vital procedural tool and may be particularly important in antitrust litigation. If no material fact is presented after years of discovery including dozens of depositions and the production of thousands of documents, and the most that can be hoped for is the discrediting of the defendants' denials at trial, a court must grant summary judgment.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[International Trade Law > General Overview](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act](#)

[Contracts Law > Defenses > Ambiguities & Mistakes > General Overview](#)

[Evidence > Inferences & Presumptions > General Overview](#)

[International Law > Dispute Resolution > General Overview](#)

**HN10** [blue download icon] Antitrust & Trade Law, Sherman Act

Sherman Act [§ 1, 15 U.S.C.S. § 1](#), prohibits every contract, combination or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. On a motion for summary judgment against a [§ 1](#) claim a court initially must determine whether a reasonable jury could find that there was some form of concerted action between two or more legally distinct entities. Only after an illegal agreement is shown will a court consider whether the agreement constituted an unreasonable restraint of trade, whether per se or under the rule of reason. In making this threshold determination, the court must bear in mind that the range of inferences that a trier of fact may draw from ambiguous evidence in a [§ 1](#) case is limited, and the non-movant must set forth facts that tend to preclude an inference of permissible conduct.

[Civil Procedure > Trials > Judgment as Matter of Law > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview](#)

[Evidence > Inferences & Presumptions > Inferences](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

**HN11** [blue download icon] Trials, Judgment as Matter of Law

But [\*\*antitrust law\*\*](#) limits the range of permissible inferences from ambiguous evidence in a Sherman Act [§ 1, 15 U.S.C.S. § 1](#), case. The court held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment 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.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

Evidence > Inferences & Presumptions > General Overview

### **HN12** [blue icon] Antitrust & Trade Law, Sherman Act

Plaintiffs must present evidence which reasonably tends to prove that a defendant has a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

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

### **HN13** [blue icon] Practices Governed by Per Se Rule, Boycotts

Some group boycotts involving concerted refusals to deal with a competitor are per se violations. Plaintiffs, therefore, need only to show the existence of the alleged conspiracy and defendant's participation in it.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

Plaintiffs must still show defendant's participation in an illegal contract, combination or conspiracy. Plaintiffs must then prove an antitrust injury by showing that the illegal agreement caused an actual adverse effect on competition as a whole in a relevant market. Proof that plaintiffs have been harmed as an individual market actor is not enough. If plaintiffs satisfy this threshold burden, defendant must offer evidence of the pro-competitive virtues of the challenged combination. If defendant presents such evidence, plaintiffs must show that any legitimate objectives could have been achieved by less restrictive alternatives. In other words, Plaintiffs must show that the anticompetitive effects of the alleged conspiracy outweigh its procompetitive effects.

Antitrust & Trade Law > Sherman Act > General Overview

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

968 F. Supp. 876, \*876L996 U.S. Dist. LEXIS 12915, \*\*1

## [\*\*HN15\*\*](#) [blue icon] Antitrust & Trade Law, Sherman Act

Evidence of parallel conduct alone cannot suffice to prove an antitrust conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

## [\*\*HN16\*\*](#) [blue icon] Antitrust & Trade Law, Sherman Act

Since mere parallel behavior can be consistent with independent conduct, courts have held that a plaintiff must show the existence of additional circumstances, often referred to as plus factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.

Evidence > Inferences & Presumptions > General Overview

## [\*\*HN17\*\*](#) [blue icon] Evidence, Inferences & Presumptions

Additional facts or circumstances are needed to show that the decisions were interdependent and thus raise the inference of a tacit agreement to boycott. Plus factors, however, may not necessarily lead to an inference of conspiracy and could lead to an equally plausible inference of mere interdependent behavior.

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

Evidence > Inferences & Presumptions > General Overview

Governments > Courts > Authority to Adjudicate

## [\*\*HN18\*\*](#) [blue icon] Conspiracy, Elements

The court necessarily examines each of these factors and the alleged refusals to deal individually. The court, however, does not examine each piece of evidence in a vacuum, but considers the evidence as a whole to determine the reasonableness of inferences to be drawn by a jury.

Evidence > Inferences & Presumptions > General Overview

## [\*\*HN19\*\*](#) [blue icon] Evidence, Inferences & Presumptions

The alleged refusals to deal must be viewed in their factual context. When the factual context indicates that a defendant lacked a rational motivation to join the alleged conspiracy to boycott, the plaintiffs must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Evidence > Inferences & Presumptions > General Overview

## [\*\*HN20\*\*](#) [blue icon] Evidence, Inferences & Presumptions

If the scheme alleged is implausible, a conspiracy must be proved by strong direct or strong circumstantial evidence, and the implausibility of the scheme will reduce the range of inferences that may be permissibly drawn from ambiguous evidence.

Evidence > Inferences & Presumptions > General Overview

### **HN21** Evidence, Inferences & Presumptions

Actions against the apparent individual economic self-interest of the alleged conspirators may raise an inference of interdependent action. The question, therefore, is whether a rational entity would have engaged in the alleged parallel behavior individually.

Antitrust & Trade Law > Regulated Industries > Communications

### **HN22** Regulated Industries, Communications

The FCC may grant certificates where the gain is incurred while attempting to advance a change in government policy.

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

Torts > Business Torts > Trade Libel > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Trade Libel > General Overview

### **HN23** Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

To state a commercial disparagement claim a plaintiff must show a knowing publication of material derogatory to the plaintiff's business; that the material is false; that it is of a nature calculated to prevent others from dealing with the plaintiff or to interfere with the plaintiff's relations with others to its disadvantage; and that in material and substantial part induces others not to do business with the plaintiff with the result that special damages in the form of lost business are incurred.

Evidence > Inferences & Presumptions > General Overview

### **HN24** Evidence, Inferences & Presumptions

After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive redeeming virtues of their combination. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole.

968 F. Supp. 876, \*876A 1996 U.S. Dist. LEXIS 12915, \*\*1

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

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

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

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

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

## **HN25** [ ] Scope, Monopolization Offenses

Sherman Act [§ 2, 15 U.S.C.S. § 2](#), prohibits attempts 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.

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

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 > Elements

Antitrust & Trade Law > Sherman Act > General Overview

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

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Governments > Federal Government > Elections

## **HN26** [ ] Conspiracy to Monopolize, Sherman Act

To sustain a claim under the Sherman Act [§ 2, 15 U.S.C.S. § 2](#), for conspiracy to monopolize, Plaintiffs must show proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and the commission of an overt act in furtherance of the conspiracy. Unlike the elements required to establish an attempt to monopolize, however, proof of a conspiracy to monopolize does not require a dangerous probability of success.

Antitrust & Trade Law > Sherman Act > General Overview

968 F. Supp. 876, \*876L<sup>A</sup>996 U.S. Dist. LEXIS 12915, \*\*1

Evidence > Inferences & Presumptions > General Overview

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

## [HN27](#) [blue icon] Antitrust & Trade Law, Sherman Act

. To sustain a claim under the Sherman Act [§ 2, 15 U.S.C.S. § 2](#), for monopolization, plaintiffs must show that defendant has the power to monopolize the relevant market, and that it willfully acquires or maintains that power, causing unreasonable exclusionary or anticompetitive effects.

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

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

## [HN28](#) [blue icon] Intentional Interference, Elements

Under New York law, plaintiff must establish that defendant interfered with a prospective contractual advantage through fraudulent, criminal or otherwise improper conduct.

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**Judges:** JOHN F. KEENAN, UNITED STATES DISTRICT JUDGE

**Opinion by:** JOHN F. KEENAN

## Opinion

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### ***OPINION and ORDER***

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### *Conclusion*

#### **[\*881] JOHN F. KEENAN, United States District Judge:**

There are four motions before the Court. Plaintiffs have filed three motions objecting to various discovery decisions rendered by Magistrate Judge Nina Gershon. Defendant has filed a motion for summary judgment. For the reasons set forth below, Plaintiffs' discovery motions are denied and the orders of the Magistrate Judge are affirmed in all respects. Defendant's motion for summary judgment is granted as to all claims.

### ***Background***

The background of this action has been fully presented in the earlier opinions of this Court and of the Second Circuit. See [Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 1990 U.S. Dist. LEXIS 11964, 1990-2 Trade Cas. \(CCH\) P69,188, 1990 WL 135637 \(S.D.N.Y. 1990\)](#) (dismissing 1st Am. Compl. on immunity grounds), *aff'd in part, rev'd in part*, [946 F.2d 168 \(2d Cir. 1991\)](#) (remanded for opportunity to replead), cert. denied, 502 U.S. 1096 (1992); [Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 1993 U.S. Dist. LEXIS 3825, 1993-1 Trade Cas. \(CCH\) P70,184, 1993 WL 97313 \(S.D.N.Y. 1993\)](#) (denying motion to dismiss 2d Am. Compl.); [Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 1994 U.S. Dist. LEXIS 7464, 1994-2 Trade Cas. \(CCH\) P70,689, 1994 WL 256671 \(S.D.N.Y. 1994\)](#) (granting leave to file 3d Am. Compl. naming as a Plaintiff PANAMSAT, L.P.; denying leave to add new defendants and claims).

### **I. Factual background**

The Court assumes the reader's familiarity with the prior opinions in this action and provides below only a rudimentary recitation of the facts and procedural history.

### **A. Parties**

Plaintiffs consist of various formations of Pan American Satellite ("PAS" or "PANAMSAT") and its founder and principal owner, Reynold V. Anselmo ("Anselmo"). Plaintiff Anselmo formerly did business as Alpha Lyracom, a sole proprietorship, which in turn did business as Pan American Satellite, Alpha Lyracom Space Communications, Inc., a Delaware corporation, and PANAMSAT, L.P., a Delaware limited [\\*\\*5](#) partnership. PANAMSAT, L.P. succeeded Alpha Lyracom after the commencement of this action. The managing general partner of PANAMSAT, L.P. is PANAMSAT, Inc., which is a corporation that was controlled by Plaintiff Anselmo until his death on September 20, 1995. The executors of Plaintiff Anselmo's estate were substituted as Plaintiffs on January 3, 1996.

This action arises out of PAS's launching, marketing and operating the first international commercial communications satellite outside of the International Telecommunications Satellite Organization ("Intelsat"). Non-party Intelsat is an international organization created under a 1961 United Nations resolution that owns and operates a global satellite communications system. See G.A.Res. 1721, 1 U.N. GAOR Supp. (No. 17), [\\*\\*882](#) at 6, U.N.Doc. A/5100 (1962). Intelsat is structured on three levels: the Assembly of Parties, the Meeting of Signatories, and the Board of Governors. Each member-nation or "party" has a seat and a vote in the Assembly of Parties. The United States has designated the State Department as its representative to the Assembly of Parties. Each party also designates a "signatory" to market and operate the Intelsat communications [\\*\\*6](#) system within the party's

territory. Each signatory is represented in the Meeting of Signatories and on the Board of Governors. Signatories range from public ministries to private corporations, depending on the level of regulation in a nation. Signatories are often referred to as "PTTs," an acronym for "post, telegraph, and telephone" companies. The Board of Governors consists of approximately twenty-nine persons representing all of the signatories in the day-to-day operations of the system. The Director General of Intelsat heads the Board of Governors. See [Alpha Lyracom, 1990 U.S. Dist. LEXIS 11964, \\*6, 1990-2 Trade Cas. \(CCH\) P69,188 at 64,580, 1990 WL 135637 at \\*2; Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 946 F.2d 168, 170 \(2d Cir. 1991\)](#).

In 1962 Congress enacted the Communications Satellite Act ("CSA") to implement the United States' participation in Intelsat. See [47 U.S.C. §§ 701 et seq.](#). Defendant Commercial Satellite Corporation ("Comsat") is a private corporation created under the CSA and designated as the United States' signatory to Intelsat. [HN1](#)<sup>↑</sup> The CSA provides that Comsat "shall be . . . subject to appropriate governmental regulation" and that "the ownership [\*\*7] of the corporation [(Comsat)] shall be consistent with the federal antitrust laws." See *id.* [§ 701\(c\)](#). Comsat is subject to extensive Executive Branch supervision by the State Department and the Federal Communications Commission ("FCC") to assure that Comsat's relations with foreign governments are consistent with the United States' foreign policy. See *id.* P 721(a)(4).

## B. Operation of Intelsat, immunity, & separate systems

Any Intelsat transmission requires the action of two PTT signatories, with each responsible for the transmission of a signal to and from a ground station in its territory and an Intelsat satellite. Rates for the use of Intelsat satellite capacity are uniform and, in the aggregate, cover the costs of operating the system. Rates are set by the Board of Governors, not the signatory PTTs such as Comsat. The procurement of satellite capacity is also regulated, with procurement in excess of \$ 500,000 requiring approval of the Board. Signatories have no authority to approve procurement.

[HN2](#)<sup>↑</sup> To join Intelsat, the United States implemented various international agreements including the 1971 Definitive Agreement (the formative document of Intelsat), and the [\*\*8] 1976 Headquarters Agreement. See [Alpha Lyracom, 1990 U.S. Dist. LEXIS 11964, \\*5, 1990-2 Trade Cas. \(CCH\) P69,188 at 64,580, 1990 WL 135637 at \\*2](#) (Intelsat's headquarters are located in the United States.). These agreements require that each party-nation grant appropriate privileges, exemptions and immunities to Intelsat, to the other parties, the signatories and their representatives. The 1976 Headquarters Agreement provides "the officers and employees of Intelsat, the representatives of the parties and of the signatories . . . shall be immune from suit and legal process relating to acts performed by them in their official capacity . . . ." [Alpha Lyracom, 1990 U.S. Dist. LEXIS 11964, \\*8, 1990-2 Trade Cas. \(CCH\) P69,188 at 64,580-81, 1990 WL 135637 at \\*3; see Alpha Lyracom, 946 F.2d at 170-72](#). This Court previously held, and the Second Circuit affirmed, that Comsat as a signatory is the representative of the United States for Intelsat immunity purposes. See [Alpha Lyracom, 1990 U.S. Dist. LEXIS 11964, \\*8, 1990-2 Trade Cas. \(CCH\) P69,188 at 64,584, 1990 WL 135637 at \\*6-7](#).

While Intelsat was created to establish a single global satellite system, the Definitive Agreement also provides for the creation of separate satellite systems. Article XIV of the Definitive [\*\*9] Agreement sets out a "consultation process." See [Alpha Lyracom, 1990 U.S. Dist. LEXIS 11964, \\*7, 1990-2 Trade Cas. \(CCH\) P69,188 at 64,581-82, 1990 WL 135637 at \\*3-4. HN3](#)<sup>↑</sup>

For domestic satellite services, the party seeking to provide a separate system must consult the Board of Governor's regarding the technical compatibility of the proposed system with Intelsat. [\*883] For international services, the party must also consult the Assembly of Parties for approval. See *id.* Thus a separate international system requires the home government to clear the nascent service with the entire Assembly.

[HN4](#)<sup>↑</sup> In addition to technical clearance from the Board and approval of the Assembly of Parties, a proposed separate international system must acquire "landing rights" in each nation to which it intends to deliver a signal. Landing rights are authorization from a party to provide or "land" a satellite signal within that party's national territory. Landing rights are generally procured from or with the assistance of the signatory PTT in each nation. Landing rights may issue either as general or limited grant of authority for the provision of independent services, or through some form of joint venture or other arrangement with the PTT. The [\*\*10] scope of authorization is

generally governed by the terms of a formal agreement, referred to in the record and herein as an "operating agreement." Depending upon the regulatory structure of a given nation at a given time, landing rights (and therefore operating agreements), may have been literally impossible to obtain.

### C. United States' separate systems policy

In 1983 the FCC received several applications to operate separate satellite systems, ultimately resulting in Presidential Determination No. 85-2. See [49 Fed. Reg. 46,987 \(1984\)](#); [Alpha Lyracom, 1990 U.S. Dist. LEXIS 11964](#), \*10, [1990-2 Trade Cas. \(CCH\) P69,188 at 64,581-82, 1990 WL 135637](#) at \*3-4; [Alpha Lyracom, 946 F.2d at 171-72](#). Determination No. 85-2 allowed the development of separate systems but directed the State Department to consult with Intelsat before authorizing any separate system to ensure that the United States met its obligations under the Definitive Agreement. The President also instructed the Secretaries of the State Department and the Commerce Department to set criteria for final FCC approval of any separate systems. Under these criteria, the FCC required (a) that each new system be restricted to providing services through [\[\\*\\*11\]](#) the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public switched message networks, and (b) that one or more foreign authorities authorize the use of each proposed separate system prior to FCC approval by granting the proposed system landing rights and by entering into Article XIV consultation procedures with the United States' party to insure technical compatibility of the proposed system with Intelsat satellites. Congress ratified these conditions in the Foreign Relations Authorization Act, Fiscal Years 1986-87 ("FRAA"). See Pub. L. No. 99-93, 99 Stat. 405, 425-2 (1985); [Alpha Lyracom, 946 F.2d at 171-73](#).

While the first applications for approval of proposed separate satellite systems were still pending, the FCC issued a Report and Order dated July 25, 1985 stating that the FCC would not issue a final license for the operation of any separate system "until the U.S. has completed coordination of that system with Intelsat pursuant to Art. XIV(d)." See [In re Establishment of Satellite Systems Providing International Communications](#), FCC Docket No. 84-1299, at 143 (July 25, 1989) ("FCC Report and Order"). In September [\[\\*\\*12\]](#) 1985, the FCC preliminarily approved Plaintiffs' application to operate a subregional Western Hemisphere satellite system. In September 1987, Plaintiffs received final FCC approval to launch in June 1988 Plaintiffs' first satellite, the "PAS-1." See [Alpha Lyracom, 1990 U.S. Dist. LEXIS 11964](#), \*2, [1990-2 Trade Cas. \(CCH\) P69,188 at 64,582, 1990 WL 135637](#) at \*4.

### D. Response to the United States' separate systems policy

The other parties and signatories to Intelsat widely opposed Presidential Determination No. 85-2 and the United States' support of separate satellite systems. These participants in Intelsat were concerned that permitting competing systems would lead to the destruction of the Intelsat network, to the great disadvantage of regions less technologically developed than the United States. This concern was heightened by the fact that the United States was by far the largest participant in Intelsat, and that any action by the [\[\\*884\]](#) United States greatly effected the global system. As a result, at the fourteenth session of the Meeting of Signatories, held in April 1984, the signatories discussed and unanimously ratified a resolution agreeing not to sponsor the development of separate systems. See PAS [\[\\*\\*13\]](#) Ex. 3085 (record of the Fourteenth Meeting of Signatories of Intelsat). Comsat voted in favor of the resolution. Under the direction of the State Department, however, Comsat also presented to the Meeting of Signatories a statement on the United States' position in favor of separate systems. See PAS Ex. 3085, Attachment No. 2, at 29, Annex (iii) (statement by the signatory of the United States). At the fifteenth session of the Meeting of Signatories, held in April 1985, and the sixteenth session, held in April 1996, the signatories passed resolutions reaffirming their opposition to separate satellite systems as harmful to the Intelsat network. See PAS Ex. 3082 (record of the Fifteenth Meeting of Signatories of Intelsat (Apr. 16, 1985)); PAS Ex. 3084 (record of the Sixteenth Meeting of Signatories of Intelsat (Apr. 10, 1986)).

Plaintiffs' First Amended Complaint cites the 1984 Intelsat signatory resolution and the 1985 and 1986 reaffirming resolutions as admissions of a conspiracy involving Intelsat, Comsat and the PTTs. After the Second Circuit affirmed this Court's ruling on Comsat's signatory immunity, Plaintiffs' deleted from their Second and Third

Amended Complaints any **[\*\*14]** claims specifically based on the resolutions, referring to the resolutions only as "evidence" of a conspiracy between Comsat and the PTTs acting as common carriers outside of their roles as Intelsat signatories. Compare 1st Am. Compl. PP 28(c)-(d), with 2d Am. Compl. P 28(b) (omitting references to the resolutions).<sup>1</sup>

## II. Procedural history

Plaintiffs' filed the original Complaint on July 25, 1989, and filed a First Amended Complaint on November 22, 1989. On September 13, 1990, the Court dismissed the First Amended Complaint on immunity grounds without reaching the merits of the underlying antitrust claims. See [Alpha Lyracom, 1990 U.S. Dist. LEXIS 11964, 1990-2 Trade Cas. \(CCH\) P69,188, 1990 WL 135637 \(S.D.N.Y. 1990\)](#). The Court found that signatories were "representatives of the parties;" that the immunity clause of the Headquarters Agreement covering representatives therefore applied to signatories such as Comsat; **[\*\*15]** and that the antitrust consistency clause of the CSA does not apply to Comsat's actions as a signatory. [1990 U.S. Dist. LEXIS 11964](#), See *id.* at 64,582-83, 1990 WL 135637 at \*6. In the alternative, the Court dismissed the First Amended Complaint pursuant to [Fed. R. Civ. P. 19](#) for failure to join Intelsat, the Intelsat parties, and the Intelsat signatory PTTs as necessary and indispensable parties. [1990 U.S. Dist. LEXIS 11964](#), See *id.* at 64,584-85, 1990 WL 135637 at \*9-10. The Court also dismissed Plaintiffs' state law interference with prospective advantage claim for failure to specify the contracts that were lost. See *id.* at 64,585-86, 1990 WL 135637 at \*10.

The Second Circuit affirmed this Court's rulings on Defendant's immunity and on the antitrust exclusion clause. See [Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 946 F.2d 168 \(2d Cir. 1991\)](#), cert. denied, 502 U.S. 1096, 117 L. Ed. 2d 419, 112 S. Ct. 1174 (1992). The Circuit remanded only to give Plaintiffs an opportunity to replead their claims against Comsat in its role as a common carrier, and not as an immune signatory. See [Alpha Lyracom, 946 F.2d at 175](#). The Circuit also warned Plaintiffs that if they presented only a formalistic **[\*\*16]** repleading of the claims in the First Amended Complaint, the "District Court should not hesitate to dismiss [Plaintiffs' complaint] again." *Id.*

If [Plaintiffs] can allege specific aspects of COMSAT's conduct as common carrier that are actionable under the antitrust laws, [they are] free to proceed. But the effort will require precise drafting and an avoidance of the scattershot approach evident in the current complaint. In particular, we caution [plaintiffs] not to assume, as [they appear] to do in some of [their] **[\*885]** argument, that an allegation against COMSAT will survive dismissal as long as it is confined to unilateral rather than concerted action. The line to be drawn is not between concerted and unilateral action, since even COMSAT's unilateral action might have been undertaken in its role as signatory to INTELSAT, but between action taken as signatory and action taken as common carrier.

*Id.* Regarding the PTTs as necessary parties, the Circuit stated:

We need not consider the District Court's alternative ground for dismissal of the antitrust claims--failure to join indispensable parties under Civil [Rule 19](#), since any allegations that **[\*\*17]** *Alpha Lyracom is able to replead challenging COMSAT's conduct in its role as common carrier are unlikely to encounter the indispensable party concerns Judge Keenan noted with respect to the "signatory" allegations.*

*Id.* Concerning the state law claims, the Circuit stated:

Similarly, we need not assess the adequacy of appellant's state law claims for tortious interference with business opportunities since all of these allegations concern COMSAT's consultative activity within INTELSAT relating to the authorization of a competing satellite system. Those are plainly "signatory activities." Appellants may, if so advised, replead state law claims, confined to COMSAT's common carrier role, bearing in mind the strict pleading requirements of state law claims emphasized by the District Court.

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<sup>1</sup> Plaintiffs' Third Amended Complaint adds PANAMSAT, L.P. as a party and is otherwise identical.

*Id.*

Plaintiffs' filed their Second Amended Complaint on November 12, 1991. The Second Amended Complaint restated the conspiracy, antitrust and state law claims of the First Amended Complaint, but omitted references to the PTTs as "other Intelsat signatories" and inserted repeated assertions that "all of this conduct has been undertaken by Comsat outside of its capacity as [\*\*18] United States signatory to Intelsat." 2d Am. Compl. P 27.

On March 30, 1993, the Court denied Comsat's motion to dismiss the Second Amended Complaint. The Court rejected Comsat's challenge to subject matter jurisdiction and denied the applicability of the act of state doctrine. See [Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 1993 U.S. Dist. LEXIS 3825, 1993-1 Trade Cas. \(CCH\) P70,184, 1993 WL 97313 \(S.D.N.Y. 1993\)](#).

With regard to Plaintiffs' conspiracy and antitrust claims, the Court deferred to the liberal pleading requirements of [Fed. R. Civ. P. 8\(a\)](#) and accepted Plaintiffs' representations that the restated claims in the Second Amended Complaint did not implicate Defendant's role as a signatory. See *id.* at 69,861-62, 1993 U.S. Dist. LEXIS 3825, 1993 WL 97313 at \*5-6. The Court did not endorse Plaintiffs' claims, as Plaintiffs argue in support of their current motions, but merely noted that "any further distinguishing between Comsat's roles as common carrier and an Intelsat signatory at this time would inappropriately transform this motion to dismiss into a motion for summary judgment." *Id.* at 69,861, 1993 U.S. Dist. LEXIS 3825, 1993 WL 97313 at \*4.

The Court denied Defendant's argument that the *Noerr-Pennington* [\*\*19] doctrine barred Plaintiffs' claim that Comsat interfered with PAS's obtaining landing rights and operating agreements in several nations, finding that the question of the availability of landing rights and operating agreements went beyond the scope of the pleadings. *Id.* at 69,863, 1993 U.S. LEXIS 3825, 1993 WL 97313 at \*8. The Court also denied Defendant's argument that the *Noerr-Pennington* doctrine--which states that concerted efforts to restrain trade by petitioning government officials are protected from antitrust liability--barred Plaintiffs' claim that Comsat interfered with Plaintiff Anselmo's application to the FCC for a tax deferral certificate. See *id.*

Finally, the Court denied Defendant's motion to dismiss Plaintiff's claim for injunctive relief under [Fed. R. Civ. P. 12\(b\)\(7\)](#), and accepted as pleaded Plaintiffs' claims for interference with prospective advantage under New York and Connecticut law. See *id.* at 69,863-64, 1993 U.S. Dist. LEXIS 3825, 1993 WL 97313 at \*8.

Plaintiffs moved to file a Third Amended Complaint adding as a plaintiff PANAMSAT, L.P., a Delaware limited partnership formed after the commencement of this action, adding as defendants seventeen PTTs (including [\*886] fifteen Intelsat signatories [\*\*20] and two PTT parent companies), and adding new claims allegedly based on acts committed after the filing of the Second Amended Complaint. On June 7, 1994, the Court granted without objection leave to file a Third Amended Complaint adding PANAMSAT, L.P., but denied leave to add any new claims or defendants. See [Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 1994 U.S. Dist. LEXIS 7464, 1994-2 Trade Cas. \(CCH\) P70,689, 1994 WL 256671 \(S.D.N.Y. 1994\)](#). The Court found that adding new defendants and claims after significant discovery had been completed would result in prejudice and delay. See [id. 1994 U.S. Dist. LEXIS 7464](#), \*4, at 72,729-30, 1994 WL 256671 at \*2. The Court also found that joinder of the foreign PTTs would be improper under the law of the case. See [id. 1994 U.S. Dist. LEXIS 7464](#), \*5, at 72,730, 1994 WL 256671 at \*3.

The parties have concluded extensive discovery. They have taken depositions of more than thirty-five current and former Comsat employees and five third-party witnesses, and have produced well over 330,000 pages of documents among themselves and at least an additional 57,000 pages from nineteen third-parties. See [Alpha Lyracom, 1994 U.S. Dist. LEXIS 7464, \\*2, 1994-2 Trade Cas. \(CCH\) P70,689, 1994 WL 256671](#) at \*1; Def.'s S.J. Mem. at 2. [\*\*21] The only outstanding discovery issues are presented by Plaintiffs' current motions objecting to various orders of the Magistrate Judge, principally concerning the discoverability of the Intelsat signatory resolutions of 1984, 1985, and 1986. The Court addresses those motions below, prior to its discussion of Defendant's motion for summary judgment.

## ***Discussion***

### **I. Plaintiffs' discovery motions**

Plaintiffs' object to various discovery orders of Magistrate Judge Nina Gershon. For the reasons discussed below, the Court overrules the objections and affirms the Magistrate Judge's orders.

#### **A. The July 20, 1994 order**

On July 20, 1994, Magistrate Judge Gershon entered an order granting Defendant's motion to enforce a prior protective order in this action and awarding Defendant \$ 12,744.25 in fees and costs on the motion. Plaintiffs did not object to the fee award. The Magistrate Judge also required Plaintiff Reynold V. Anselmo to use agreed upon language to inform any non-party with whom he communicated concerning access to documents disclosed in this action that the protective order was sought by both parties in order to protect the documents of both parties. Plaintiffs' **[\*\*22]** counsel consented to this sanction at the hearing on the motion on June 20, 1994. Plaintiffs only objection to the July 20, 1994 order is to its last sentence, which cautions Plaintiffs that future violations of the protective order or the orders of the Court would trigger far more serious sanctions.

In light of the undisputed, multiple violations of the protective order that have occurred in this case, plaintiffs are cautioned that any further violations, or any violations of the directives in the order being issued today, will result in the imposition of far more serious sanctions.

App. to Pls.' Objs. to Order of M.J. Nina Gershon, Ex. A (Order of July 20, 1994) (hereinafter "July 20, 1994 Order").

Pursuant to 28 U.S.C. § 636(b)(1)(A), Plaintiffs' objection is subject to a "clearly erroneous" standard, which Plaintiffs do not even attempt to argue. Plaintiffs argue only that the Magistrate Judge's warning "does not accurately reflect, and indeed overstates, the number, nature, and gravity of the violations of the protective order found by the Magistrate Judge," Pls.' Objs. to Order of M.J. Nina Gershon at 2, and that the warning "is inappropriate and unjustified, **[\*\*23]** and should be reversed." *Id.* at 5.

After reviewing the Order, Plaintiffs' memorandum of objections with attachments, and Defendant's memorandum in opposition with attachments--including the transcript of the June 20, 1994 hearing on Defendant's motion to enforce the protective order--the Court finds that the warning was entirely appropriate. The Court therefore overrules Plaintiffs' objection and sustains the Magistrate Judge's order. Moreover, the Court agrees with Defendant that Plaintiffs' objection was "an unconscionable waste of judicial resources," "frivolous in the extreme," and "entirely without basis." See Def.'s Opp'n to Pls.' Objs. to Order of M.J. Nina Gershon at 1-2. The Court therefore grants Defendant's application for sanctions, and directs Plaintiffs to pay Defendant's costs and fees associated with the motion.

#### **B. The July 12, 1994 order**

Richard Colino was employed at Comsat from 1973 to 1979, served as a consultant to Comsat from 1979 to 1981, and was Director General of Intelsat from 1983 to 1986. Plaintiffs' object to that portion of Magistrate Judge Gershon's July 12, 1994 order which granted Defendant Comsat and non-party Intelsat's motions for **[\*\*24]** an order under *Fed. R. Civ. P.* 26(c)(1) and 45(c)(3) quashing the deposition subpoena served by Plaintiffs on Richard Colino, and for a protective order precluding Plaintiffs from taking Colino's deposition with regard (a) to any information obtained by Colino as a result of his role as Director General of Intelsat (including information about the Intelsat signatory resolutions) and (b) to Colino's service at Comsat insofar as Comsat was a signatory to Intelsat (Magistrate Judge Gershon permitted inquiry of Colino regarding Comsat's non-immune, common-carrier role.). See App. to Pls.' Objs. to M.J. Gershon's Order Regarding the Dep. of Richard Colino, Ex. A (Order of July 12, 1994) (hereinafter "Colino Order").

Again, pursuant to [28 U.S.C. § 636\(b\)\(1\)\(A\)](#), Plaintiffs' objections are subject to a "clearly erroneous" standard. Plaintiffs argue that two of the rulings in the Magistrate Judge's July 12, 1994 order are clearly erroneous. Plaintiffs argue that the Magistrate Judge erred in finding that Intelsat has not waived its immunity with respect to Colino. Plaintiffs also argue that the Magistrate Judge erred in finding that Plaintiffs may not inquire of Colino concerning the **[\*\*25]** Intelsat signatory resolutions or the acts of Intelsat, Comsat, and the Intelsat signatory PTTs to implement those resolutions.

## 1. Intelsat's immunity

In 1977, President Ford designated Intelsat a "public international organization entitled to enjoy the privileges, exemptions and immunities conferred by the International Organizations Immunities Act." [Weidner v. International Telecommunications Satellite Org., 392 A.2d 508, 510 \(D.C. 1978\)](#) (citing Exec. Order No. 11966, Jan. 19, 1977, [42 F.R. 4331 \(1977\)](#)). Those immunities include "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that [it] may expressly waive [its] immunity for the purpose of any proceedings or by the terms of any contract." [22 U.S.C. § 288a\(b\)](#); Exec. Order No. 11966, Jan. 19, 1977, [42 Fed. Reg. 4331](#); Exec. Order No. 11718, May 14, 1973, [38 Fed. Reg. 12797](#). The officers, representatives and employees of public international organizations likewise have immunity from suit and legal process for acts performed in their official capacity and within their official functions, unless that immunity is expressly waived by the organization. **[\*\*26]** See [22 U.S.C. § 288d\(b\)](#); [DeLuca v. The United Nations Org., 841 F. Supp. 531, 534-35 \(S.D.N.Y. 1994\)](#). Magistrate Judge Gershon correctly found that Intelsat has not waived its immunity or Colino's in this proceeding. See Colino Order at 6.

Plaintiffs argue that on March 31, 1988, Intelsat's then Director General Dean Burch presented to the United States District Court in the District of Columbia a general waiver for any and all actions involving Colino. Magistrate Judge Gershon properly found to the contrary, ruling that the March 31, 1988 waiver was provided by Intelsat on Judge Royce Lamberth's direction and was limited in form and intent to the civil action then pending before Judge Lamberth, *Intelsat V. Richard Colino*, Civ. Action No. 87-2749 (D.D.C.) (Lamberth, J.). Written on Intelsat stationary, the letter reads in full:

31 March 1988  
 Judge Royce Lamberth  
 U.S. District Court for the District of Columbia  
 Washington, D.C. 20001  
 Dear Judge Lamberth:  
 Re: INTELSAT vs. Richard R. Colino  
 (Civil No. 87-2749)

Please be advised that in my capacity as Director General of INTELSAT, I hereby waive any and all privileges, exemptions and immunities **[\*\*27]** of Mr. Richard R. Colino with respect to all actions performed by him while he was in the employment of INTELSAT. This waiver has no restrictions of any kind.

At its 69th meeting the INTELSAT Board of Governors unanimously decided to waive any and all privileges, exemptions and immunities of Mr. Colino in connection with the U.S. Department of Justice investigation, and at its 74th meeting the Board waived Mr. Colino's civil immunity for all of his actions while he was an INTELSAT employee.

Sincerely,  
 [signature]  
 Dean Burch  
 Director General

App. to Pls.' Objs. to M.J. Gershon's Order Regarding the Dep. of Richard Colino, Ex. I (Letter of Dean Burch, Mar. 31, 1988).

In their memorandum in support of their objections Plaintiffs deleted the caption referencing the *Intelsat v. Colino* action. See Pls.' Objs. to M.J. Gershon's Order Regarding the Dep. of Richard Colino at 5 (hereinafter "Pls.' Colino Mem."). They also overlooked the specific salutation to Judge Lamberth, as opposed to a general salutation which

would more definitively establish an express waiver for all actions. Nevertheless, Plaintiffs argue that the 1988 letter is an express waiver for any and [\***28**] all actions without restriction, see Pls.' Colino Mem. at 7-10 (citing *In re Doe, 860 F.2d 40, 46 (2d Cir. 1988)*; *In re Grand Jury Proceedings, Doe No. 700, 817 F.2d 1108, 1110-11* (4th Cir.), cert. denied, 484 U.S. 890 (1987); *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390 (2d Cir. 1985)*; *Paul v. Avril, 812 F. Supp. 207, 210 (S.D. Fla. 1993)*; *Marlowe v. Argentine Naval Comm'n, 604 F. Supp. 703 (D.D.C. 1985)*), such that the Magistrate Judge erred in reaching the issue of Intelsat's intent under the analysis in *Mendaro v. World Bank, 230 U.S. App. D.C. 333, 717 F.2d 610, 617 (D.C. Cir. 1983)* and *United States v. James, 980 F.2d 1314 (9th Cir. 1992)*, cert. denied, 510 U.S. 838, 126 L. Ed. 2d 84, 114 S. Ct. 119 (1993).

The cases cited by Plaintiffs do not support their contention that the waiver in the 1988 civil action should be applied to the current action and all actions *in futuro*. Both *In re Doe* and *In re Grand Jury Proceedings, Doe No. 700*, involved grand jury investigations of former Philippine President Ferdinand Marcos and his wife Imelda Marcos. Both cases hold that the current government [\***29**] of a nation may expressly waive the head-of-state immunity of its former leaders and that other nations should give any such express waiver its full effect. See *In re Doe, 860 F.2d at 46*; *In re Grand Jury, 817 F.2d at 1110-11*. Notwithstanding the fact that the language of the waiver in those cases "could scarcely be stronger," *In re Doe, 860 F.2d at 46*, the effect of the waiver was properly limited by its terms to the action before the court. See *id.* ("This waiver extends only to provision of evidence, [etc.] . . . *in the above Grand Jury investigation.*"").

*Proyecfin de Venezuela, Marlowe*, and *Paul* examine the validity and scope of waivers under the Foreign Sovereign Immunities Act. See *28 U.S.C. §§ 1330*, 1602-11. In *Proyecfin de Venezuela*, the Second Circuit examined two contractual agreements and determined that an explicit waiver of sovereign immunity in the first agreement was incorporated into the second agreement. See *Proyecfin de Venezuela, 760 F.2d at 392-93*. In *Marlowe*, HN5[] the district court held that "if the parties to a contract agree that the laws of one country will govern contractual interpretations, they have implicitly [\***30**] waived the defense of sovereign immunity." *Marlowe, 604 F. Supp. at 709*. In *Paul*, the district court held that an April 9, 1991 waiver by the Government of Haiti that stated that its former President Prosper Avril "enjoyed absolutely no form of immunity" should be given "its due weight." *Paul, 812 F. Supp. at 210*. (But unlike the Philippine waiver in *In re Doe* and *In re Grand Jury Proceedings, Doe No. 700*, the Haitian waiver was not limited to a particular action.). None of these cases support Plaintiffs' contention that the 1988 Intelsat waiver should be applied to this action and all actions *in futuro*.

On the other hand, the specific salutation and opening reference to the *Intelsat v. Colino* civil action in the March 31, 1988 waiver raise questions as to whether the waiver was limited to the action before Judge Lamberth. Therefore the Magistrate Judge was completely correct in examining Intelsat's intent under the *Mendaro* analysis. This Court agrees with the Magistrate Judge's conclusion that Intelsat issued the waiver in order to collect the damages it sustained as a result of Colino's fraudulent conduct against Intelsat, and not to waive irrevocably [\***31**] Colino's immunity in any and all proceedings. See Colino Order at 5.<sup>2</sup> The Court therefore overrules Plaintiffs' objections and affirms that portion of the Magistrate Judge's July 12, 1994 order finding that Intelsat has not waived its immunity with respect to Colino.

## 2. Plaintiffs' boycott claims

Plaintiffs also challenge as clearly erroneous the Magistrate Judge's finding that Plaintiffs may not inquire of Colino concerning either the Intelsat signatory resolutions or the acts of Intelsat, Comsat, or the signatory PTTs to implement those resolutions. Plaintiffs argue that the resolutions and their implementation are not privileged because [\***887**] they are not proper signatory functions. Plaintiffs further argue that even if the passage and implementation of the resolutions were proper signatory functions, [\***32**] they should be discoverable for the purpose of establishing a record for appeal and the motive behind Comsat's acts as a common-carrier.

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<sup>2</sup> Plaintiffs did not argue on this motion that Intelsat had any other intent in effecting the waiver, but restricted themselves to the argument that the Court should not reach the issue of Intelsat's intent.

The signatory resolutions are official Intelsat documents resulting from official sessions of the Meeting of Signatories. Comsat participates in those sessions as the signatory of the United States, not as a common-carrier. Although Plaintiffs' argue that the resolutions "could . . . have been agreed to anywhere," Reply Mem. of Pls.' in Supp. of Obj. to Mag.'s Order Regarding Dep. of Richard Colino at 25 (hereinafter "Pls.' Colino Reply Mem."), the fact remains that the resolutions resulted from official sessions of Intelsat signatories. It is not the function of this Court to inject itself into those sessions to determine whether Comsat is properly fulfilling its obligations as the United States' Signatory. Congress assigned that function to the Executive, as even Plaintiffs' acknowledge in their papers. See Pls.' Colino Reply Mem. at 21 (discussing a memorandum of understanding reached by Comsat, the FCC, the State Department, and the Department of Commerce after the 1984 Intelsat signatory resolution); see also [Alpha Lyracom, 946 F.2d at 171](#) [\*\*33] (discussing Executive Branch authority "to oversee and regulate COMSAT's management and operation of the system and its relations with foreign governments and their designated satellite management entities"). The Court's function is to uphold Congress's grant to signatory immunity to Comsat, as it has been explained in the prior orders of this Court and the Second Circuit. See [Alpha Lyracom, 1990 U.S. Dist. LEXIS 11964, \\*17, 1990-2 Trade Cas. \(CCH\) P69,188 at 64,584, 1990 WL 135637](#) at \*6-7; [Alpha Lyracom, 946 F.2d at 174-75](#). Accordingly, discovery concerning the signatory resolutions and their implementation was properly barred.

Plaintiffs' argument that it should be permitted discovery concerning the resolutions in order to create a "factual record" for appeal is a mere attempt to subvert the Second Circuit's affirmation of this Court's findings on Comsat's immunity. Plaintiffs had the opportunity to appeal this issue, exhausted that opportunity, and now must conduct their discovery within the parameters set by the Second Circuit.

Plaintiffs' analogizing Comsat's signatory immunity to a duck blind or sanctuary "in which to plot illegal conduct" misses the mark. Congress exempted the Intelsat Signatories [\*\*34] from suit and legal process in antitrust actions, not from criminal prosecution. In this antitrust action, therefore, the Court will not permit inquiry into Comsat's actions during signatory meetings or while it otherwise acted as a signatory. If, as per Plaintiffs' analogy, this were a criminal action charging Defendant with arson or conspiracy to commit murder, the scope of permissible inquiry obviously would differ.

Plaintiffs' argument that the resolutions and their implementation are discoverable to show intent or motive also fails to persuade the Court. Plaintiffs analogize to the *Noerr-Pennington* doctrine and the admissibility of evidence of acts which are themselves immune from antitrust liability. See Pls.' Colino Mem. at 17 (citing [United States Football League v. NFL, 842 F.2d 1335, 1374 \(2d Cir. 1988\)](#); [Alexander v. National Farmers Org., 687 F.2d 1173, 1196 \(8th Cir. 1982\)](#), cert. denied, 461 U.S. 937, 77 L. Ed. 2d 313, 103 S. Ct. 2108 (1983); [Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 543 n.7 \(5th Cir. 1978\)](#), cert. denied, 444 U.S. 924, 62 L. Ed. 2d 180, 100 S. Ct. 262 (1979)). But the Magistrate Judge correctly found that [\*\*35] the immunity from suit and legal process enjoyed by Intelsat signatories is much broader than the exemption from antitrust liability at issue in the cases Plaintiffs cite. See Colino Order at 7-8. Those cases speak exemption or immunity from antitrust liability. They do not address the exemption from suit and legal process enjoyed by Intelsat signatories.

In sum, the Court finds that Comsat's signatory immunity has not been waived and therefore precludes Plaintiffs' from using Comsat's conduct as an Intelsat signatory to prove a conspiracy or boycott by Comsat as a common carrier. The Court overrules Plaintiffs' objections and affirms the Magistrate Judge's July 12, 1994 order in all respects.

### [\*888] 3. Defendant's application for sanctions

Defendant Comsat moves for an award of its costs and expenses on the motion. The Court declines the application as to the July 12, 1994 order.

### C. The September 27, 1994 order

Plaintiffs also object to those portions of the Magistrate Judge's September 27, 1994 order denying two of Plaintiffs' motions to compel answers to Plaintiffs' discovery requests and granting Defendant's motion for a protective order.

### **1. Plaintiffs' motion [\*\*36] to compel responses**

Plaintiffs's first motion to compel sought answers to Plaintiffs' Request for Admission No. 12 and Plaintiffs' Interrogatory No. 42. Plaintiffs' Request for Admission No. 12 and Defendant's response were as follows:

#### *REQUEST NO. 12:*

The statements contained in paragraph 28(d) of the complaint that you instigated, voted for, participated in, and caused to be adopted a resolution by Intelsat signatories "to refrain from entering into any arrangements which may lead to the establishment and subsequent use of" competing alternative satellite systems "to carry traffic to or from their respective countries," and on at least two occasions joined with Intelsat to ratify and reaffirm that resolution are true.

#### *RESPONSE*

COMSAT objects to this request because it calls for information relating to COMSAT's role as the United States signatory to INTELSAT which is outside the permissible scope of this lawsuit.

App. to Objs. of Pls.' to Disc. Orders of M.J. Gershon of Sept. 27, 1994, Ex. C at 9 (Comsat's Resps. to Pls.' 1st & 2d Sets of Reqs. for Admiss.). Plaintiffs' Interrogatory No. 42 and Defendant's response are as follows:

**INTERROGATORY [\*\*37] NO. 42:** From 1984 to the present, have you had any understanding or agreement, express or implied, with any entity to refrain from entering into any arrangement which may lead to the establishment or subsequent use of a separate international satellite system to carry traffic to or from any country originating from or terminating in the United States?

**RESPONSE:** In addition to the General Objections set forth above, COMSAT objects to this interrogatory to the extent it calls for information pertaining to COMSAT's role as the United States signatory to Intelsat. COMSAT further objects to this interrogatory on the grounds that it is vague and unintelligible. Subject to these objections, COMSAT's answer is no.

*Id.*, Ex. C at 6 (Comsat's Resps. to Pls.' 5th Set of Interrogs. & Reqs. for Production of Docs.). For the reasons set forth above in the Court's discussion of Plaintiffs' boycott claims, the Court finds Defendant's responses appropriate. The Court agrees that Plaintiffs' Request for Admission No. 12 rests on the Intelsat signatory resolutions and the signatory boycott claims. The Court dismissed those claims from the First Amended Complaint on the grounds that [\*\*38] they were barred by Defendant's Intelsat signatory immunity. Plaintiffs subsequently represented they had dropped those claims from the current complaint. The Court also agrees that Plaintiffs' sole basis for challenging Comsat's response to Interrogatory No. 42 was Comsat's proper refusal to disclose information about the Intelsat signatory resolutions. The Court therefore overrules Plaintiffs' objections and affirms the Magistrate Judge's order as to the motion to compel responses.

### **2. Plaintiffs' motion to compel production**

Plaintiffs' second motion sought to compel production of documents responsive to subparagraph 24 of Plaintiffs' Document Request No. 76. The request and Defendant's response were as follows:

**DOCUMENT REQUEST NO. 76:** In relation to each meeting identified below, produce all documents referring thereto, and all documents used in conjunction with, or arising from, any such meeting:

Meetings between representatives from Comsat and representatives from each of the foreign PTTs set forth in Paragraph K of this Document Request, "to urge all [\*\*889] Signatories to refrain from entering into any' arrangements which may lead to the establishment and subsequent [\*\*39] use" of other satellite systems "to carry traffic to or from their respective countries" following the April 1984 meeting of signatories memorialized

in the "Intelsat Meeting of Signatories Record of Decisions of the Fourteenth Meeting" at pp. 11-12. (Ex. 31, hereto).

**RESPONSE:**

COMSAT incorporates its General Objections and files the following specific objections to Document Request No. 76. . . . COMSAT objects to Request No. 76 to the extent it calls for documents relating to subjects deleted from the original complaint and not found in the Second Amended Complaint. . . . COMSAT objects to Request No. 76 to the extent it calls for information relating to COMSAT's role as the U.S. Signatory to INTELSAT (particularly subparagraph 24).

*Id.*, Ex. C at 6, 11 (Comsat's Resps. to Pls.' 6th Set of Interrogs. & Reqs. for Production of Docs.). The Court agrees that Plaintiffs' sole basis for challenging Comsat's response to this request was Comsat's proper refusal to disclose information about the Intelsat signatory resolutions. For the reasons stated above, the Court overrules Plaintiffs' objections and affirms the order of the Magistrate Judge as to the motion to compel **[\*\*40]** production.

### **3. Defendant's motion for a protective order**

Plaintiffs also object to Magistrate Judge Gershon's granting Defendant's motion for a protective order precluding Plaintiffs from taking a Rule 30(b)(6) deposition that was directed solely at Intelsat and signatory conduct, particularly the Intelsat signatory resolutions and their implementation. For the reasons stated above, the Court overrules Plaintiffs' objections and affirms the order of the Magistrate Judge as to the granting of Defendant's motion for a protective order.

### **4. Defendant's application for sanctions**

Defendant Comsat again moves for an award of its costs and expenses on the motion. This application presents an extremely close call, insofar as the Court agrees with the Magistrate Judge's assessment of Plaintiffs' intentions concerning the discovery motions directed at Defendant Comsat's immunity and the Intelsat signatory resolutions.

The plaintiff's position with regard to immunity is rejected. In my view, what the plaintiff's position on these motions amounts to is a last-ditch effort to completely change the parameters of this litigation as laid down by the Second Circuit and Judge **[\*\*41]** Keenan. . . . Judge Keenan accepted plaintiff's representations that . . . plaintiff was alleging something different from what it alleged initially, in particular, as to the Intelsat boycott resolutions. Apparently now, from the oral argument, it appears that the boycott alleged in the second amended complaint is one and the same as the so-called Intelsat boycott, as reflected in the resolutions, and which was alleged as a principal focus of the initial complaint, and which was, so it was represented to Judge Keenan, dropped when the complaint was amended.

App. to Obj. of Pls.' to Disc. Orders of M.J. Gershon of Sept. 27, 1994, Ex. A at 1 (Order of Sept. 27, 1994), Ex. B at 26-27 (Hrg Tr. (Sept. 21, 1994)).

In addition, Plaintiffs misrepresented the law of the case by asserting that this Court somehow validated Plaintiffs' boycott and conspiracy claims by denying Defendant's motion to dismiss those portions of the Second Amended Complaint. See Reply of Pls.' to Opp'n of Comsat to Obj. of Pls.' to Disc. Orders of M.J. Gershon of Sept. 27, 1994, at 12 (hereinafter "Pls.' Sept. 27, 1994 Reply"). On a motion to dismiss, the pleadings must be read in the light most favorable **[\*\*42]** to the plaintiff. See *Alpha Lyracom, 1993 U.S. Dist. LEXIS 3825, \*10, 1993-1 Trade Cas. (CCH) P70,184 at 69,860, 1993 WL 97313* at \*3 (citing *Zinermon v. Burch, 494 U.S. 113, 118, 110 S. Ct. 975, 979, 108 L. Ed. 2d 100 (1990); Scheuer v. Rhodes, 416 U.S. 232, 237, 94 S. Ct. 1683, 1687, 40 L. Ed. 2d 90 (1974); Yoder v. Orthomolecular Nutrition Inst., Inc., 751 F.2d 555, 562 (2d Cir. 1985)*). The Court therefore properly read Plaintiffs' claims in light of Plaintiffs' representations that they had dropped any claims based on Defendant's conduct as an Intelsat signatory, on Intelsat meetings or activities, and on the Intelsat signatory resolutions. *1993 U.S. Dist. LEXIS 3825*. See *id.* at 69,861, 1993 WL 97313 at \*3-4. The Court then denied Defendant's motion to dismiss on the grounds that a conspiracy to boycott proven without resort to the resolutions, Intelsat, or signatory

conduct would not implicate the Defendant's immunity. See *id.* Plaintiffs' motions before the Magistrate Judge and this Court reveal that Plaintiffs' earlier representations to the Court were not in fact completely forthcoming. Had the Plaintiffs represented on the motion to dismiss that their alleged conspiracy and boycott claims rested on the Intelsat [\*\*43] signatory resolutions those claims might not have survived that motion.

The Court nevertheless denies Defendant's application for costs and expenses. The Court has no desire to punish litigants for presenting arguably valid positions. Plaintiffs' objections to the Magistrate Judge's July 12, 1994 order were still pending when Plaintiffs filed this motion. Plaintiffs' might have expected a favorable ruling on those earlier filed objections, which would in turn have supported Plaintiffs' objections to the September 27, 1994 order. In light of this, Plaintiffs should not be sanctioned for filing the motion. The Court therefore exercises its discretion and declines to award costs and expenses.

For the reasons discussed above, the Court overrules Plaintiffs' objections and affirms the orders of the Magistrate Judge in all respects. Discovery is therefore complete. The Court addresses below Defendant's motion for summary judgment.

## **II. Defendant's motion for summary judgment**

Defendant moves for summary judgment on all of the claims in Plaintiffs' Third Amended Complaint. The Court heard argument from the parties on the motion on August 3, 1995.

### **A. Overview**

The central [\*\*44] allegation in Plaintiffs' Third Amended Complaint is that Defendant Comsat entered into a conspiracy to prevent PAS's entry into the commercial communications satellite market and generally to prevent the development of satellite systems separate and apart from Intelsat. See 3d Am. Compl. P 27. Plaintiffs allege that Comsat was joined in the conspiracy by the PTTs in Chile, Argentina, Brazil, Venezuela, Colombia, Guatemala, Jamaica, Barbados, Trinidad & Tobago, the Dominican Republic, the United Kingdom, France, Germany, Italy, and Spain, all of which were also the Intelsat signatory for their respective nation, with the possible exception of the PTT in Guatemala. See 3d Am. Compl. P 26; Pls.' 3(g) Statement P 14 at 8. Plaintiffs claim that in furtherance of the conspiracy the PTTs refused to provide PAS with landing rights and operating agreements in their respective countries. Plaintiffs claim that Comsat furthered this conspiracy by refusing to purchase capacity from PAS, creating services and joint ventures which would directly compete with PAS, and disparaging PAS to prospective customers. See 3d Am. Compl. P 28.

Plaintiffs frame eleven claims from their core allegation [\*\*45] of a conspiracy against PAS and from the conduct alleged in support of that conspiracy. Plaintiffs raise two claims under § 1 of the Sherman Act, consisting of one claim of conspiracy to boycott and to refuse to deal with PAS, and one claim of conspiring to restrain trade and commerce in the relevant market and the geographic submarkets. See 3d Am. Compl. P 33. Plaintiffs raise seven claims under § 2 of the Sherman Act, consisting of one claim of monopolization [\*890] involving the United States market, three claims of attempted monopolization respectively involving the United States market, domestic and regional markets in Central and South America, and domestic and regional markets in Europe, and three claims of conspiracy to monopolize, again respectively involving the United States market, domestic and regional markets in Central and South America, and domestic and regional markets in Europe. See 3d Am. Compl. P 32. Plaintiffs also raise two claims of interference with prospective advantage respectively under the common law of New York and Connecticut. See 3d Am. Compl. P 34.

In opposition to the current motion, Plaintiffs argue that summary judgment is inappropriate because [\*\*46] Defendant's intent is a material issue in dispute with regard to much of the evidence and several of the claims. See Pls.' Mem. in Opp'n to Def.'s Mot. for Summ. J. (hereinafter "Pls.' Opp'n Mem.") at 28 (claim for refusal to use PAS capacity), 31 (Latin American joint venture claims), & 32 (Atlantic Television claim). The Court disagrees.

**HN6**[<sup>1</sup>] Both the Supreme Court and the Court of Appeals for the Second Circuit have held, in antitrust cases involving allegations of conscious parallelism and concerted refusals to deal, that summary judgment may be granted in such cases if the moving party is able to show that the facts relied on by the plaintiff in support of its allegations are not susceptible of the interpretation the plaintiff seeks to give them and the plaintiff fails to respond to such a showing with 'significant probative evidence' in support of its theory of the case.

*Harlem River Consumers Corp. v. Associated Grocers of Harlem*, 1976 Trade Cas. (CCH) P60,820 at 68,575, 1976 WL 1238 at \*4 (S.D.N.Y. Mar. 5, 1976); see also *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975) ("Under these circumstances, unless [\*\*47] plaintiffs have thus far turned up evidence from the defendants or elsewhere supporting their conspiracy theory we do not see how, in the face of defendants' uncontradicted evidence negating it, trial would give them any greater opportunity to elicit from defendants and their employees evidence tending to prove it.").

Defendant's principal argument on the current motion is that Plaintiffs have failed to provide any evidence from which a reasonable jury could infer either the existence of the alleged conspiracy to boycott or to refuse to deal with PAS, or Comsat's membership in any such boycott or conspiracy. Comsat also argues that to the extent that Plaintiffs may have shown evidence of Comsat's opposition to separate satellite systems, such opposition is either immune conduct undertaken in Comsat's signatory role, or permissible competitive conduct undertaken in Comsat's common carrier role.

Comsat's secondary arguments are that Plaintiffs have failed to show that Comsat proximately caused any antitrust or other injury to PAS; that Plaintiffs have failed to provide a reasonable estimate of their alleged damages; and that Plaintiffs have failed to apportion their damage demand among [\*\*48] the various claims alleged. Comsat also argues that Plaintiffs' failure to apportion damages is an admission that the many acts alleged in the Third Amended Complaint constitute a single boycott claim and do not allege independent antitrust violations. Comsat cites Plaintiffs' papers in opposition, wherein Plaintiffs admit that all of the acts alleged

including [Comsat's] Latin American ventures, Atlantic Television ("ATV"), COMSAT's refusal to accept PAS offers of satellite capacity, COMSAT's filing against PAS's tax deferral, and COMSAT's representations to customers that PAS would be unable to obtain landing rights . . . were in furtherance of the overall conspiracy with the PTTs to boycott separate systems.

Pls.' Opp'n Mem. at 3.<sup>3</sup>

[\*\*49] At oral argument Plaintiffs disavowed any reading of their papers which would limit [\*891] the Complaint to the boycott claim. See *Alpha Lyracom Space Communications, Inc., et al. v. Comsat Corp.*, 89 Civ. 5021 (JFK), Hr'g Tr. at 17-18 (Aug. 3, 1995). Plaintiffs argued that although each act alleged in the Third Amended Complaint supports the alleged conspiracy to boycott or to refuse to deal with PAS, many of those acts are also pleaded as independent antitrust violations. See *id.* (referencing Pls.' Opp'n Mem. at 23 (arguing that Defendant's alleged refusal to deal with PAS constitutes a separate act of monopolization in violation of § 2), 28 (arguing that Defendant's Latin American joint ventures constitute separate acts of monopolization in violation of § 2 "if undertaken for an exclusionary purpose")). Reading the Third Amended Complaint favorably to Plaintiffs, the Court must examine the evidentiary support for each alleged act both as an act in furtherance of the alleged conspiracy and as an independent antitrust violation.

Finally, Comsat argues that the Court should dismiss Plaintiffs' claims under the act of state doctrine or for failure to join as indispensable parties [\*\*50] the alleged conspirator PTTs. The Court addresses these arguments after examining the alleged conspiracy and Plaintiffs' claims for damages.

<sup>3</sup> See also Pls.' Opp'n Mem. at 7 ("As will be shown, all of this other conduct, from the joint ventures to ATV to the tax certificate to the disparagement to the refusal to take capacity on PAS-1, was *directly and inextricably connected* with the separate systems boycott, and furthered that conspiracy. Accordingly, *the separate acts cannot be compartmentalized*, but must be viewed in the context of the evidence as a whole.") (emphasis added); *id. at 47* ("Because the underlying boycott was the cause of PAS's injury, and the other acts were incidental to and in furtherance of the boycott, PAS has not attempted to attribute damages to each of those subsidiary actions.").)

## B. Standard

**HN7** Fed. R. Civ. P. 56 "mandates the entry of summary judgment after adequate time for discovery and upon motion," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986), if the entire record demonstrates that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). The burden of showing that no genuine issue of material fact exists rests on the movant. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970). The burden will be satisfied if the movant can point to an absence of evidence to support an essential element of the nonmoving party's claim. See *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). If the movant satisfies its burden, the nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed. R. [\*\*51] Civ. P. 56(e); *Anderson*, 477 U.S. at 248-49, 106 S. Ct. at 2510 (requiring non-movant responding to a properly supported motion for summary judgment to adduce "significant probative supporting evidence" demonstrating that a factual dispute exists); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (requiring non-movant to present sufficient evidence to allow "a rational trier of fact to find for the non-moving party").

**HN8** In viewing the evidence to determine whether there exists a genuine issue for trial, the Court must "assess the record in the light most favorable to the non-movant and . . . draw all reasonable inferences in its favor." *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177 (2d Cir. 1990), cert. denied, 500 U.S. 928, 114 L. Ed. 2d 125, 111 S. Ct. 2041 (1991); see *Adickes*, 398 U.S. at 157, 90 S. Ct. at 1608. The Court may not resolve issues of fact, it may only ascertain whether such issues are present. See *Donahue v. Windsor Locks Bd. of Fire Comm'r's*, 834 F.2d 54, 58 (2d Cir. 1987). In antitrust litigation, however, the non-moving party must set forth facts [\*\*52] that tend to preclude an inference of permissible conduct. See *Capital Imaging v. Mohawk Valley Medical Assoc.*, 996 F.2d 537, 542 (2d Cir.), cert. denied, 510 U.S. 947, 126 L. Ed. 2d 337, 114 S. Ct. 388 (1993) (citing *Matsushita*, 475 U.S. at 588, 106 S. Ct. at 1356).

**HN9** Although difficult in factually complex cases, see *Hayden Publishing Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 68 (2d Cir. 1984), summary judgment is not disfavored in antitrust actions. On the contrary, recognizing that summary judgment is not a substitute for trial, current Supreme Court and Second Circuit cases have "tended to [\*\*892] encourage its use in complex cases such as this one." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir.), cert. denied, 484 U.S. 977, 108 S. Ct. 489, 98 L. Ed. 2d 487 (1987) (citing *Celotex Corp.*, 477 U.S. at 327, 106 S. Ct. at 2555; *Anderson*, 477 U.S. at 242, 106 S. Ct. at 2505); *Matsushita*, 475 U.S. at 574, 106 S. Ct. at 1356; *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986), cert. denied, 480 U.S. 932, 94 L. Ed. 2d 762, 107 S. Ct. 1570 (1987); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 250-51 (2d Cir. 1985)); see also *Capital Imaging*, 996 F.2d at 541 ("Summary judgment remains a vital procedural tool . . . and may be particularly important in antitrust litigation."). If no material fact is presented after years of discovery including dozens of depositions and the production of thousands of documents, and the "most that can be hoped for is the discrediting of [the] defendants' denials at trial," a court must grant summary judgment. *Modern Home*, 513 F.2d at 110; *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969) ("Summary judgment cannot be defeated by the vague hope that something may turn up at trial.").

## III. Sherman Act § 1 conspiracies

**HN10** Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." See 15 U.S.C. § 1. On a motion for summary judgment against a § 1 claim a court initially must determine whether a reasonable jury could find that there was some form of concerted action between two or more legally distinct entities. "Only after an illegal agreement is shown will a court consider whether the agreement constituted an unreasonable restraint [\*\*54] of trade, whether *per se* or under the rule of reason." *AD/SAT v. Associated Press, et al.*, 920 F. Supp. 1287, 1308 (S.D.N.Y. 1996) (Leisure, J.) (citing *Capital Imaging*, 996 F.2d at 542). In making this threshold determination, the Court must bear

in mind that the "range of inferences" that a trier of fact may draw from ambiguous evidence in a § 1 case is limited, and the non-movant must "set forth facts that tend to preclude an inference of permissible conduct." *Capital Imaging*, 996 F.2d at 542.

**HN11**[↑] But **antitrust law** limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id. at 764, 104 S. Ct. at 1470*. See also *Cities Service*, *supra*, 391 U.S. 253, 280, 88 S. Ct. at 1588. 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 [\*\*55] the alleged conspirators acted independently. *465 U.S. at 764, 104 S. Ct. at 1471*. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. See *Cities Service*, *supra*, 391 U.S. at 280, 88 S. Ct. at 1588.

*Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356-57; see *Apex Oil Co.*, 822 F.2d at 252; *Minpeco, S.A. v. Conticommodity Services, Inc.*, 673 F. Supp. 684, 688 (S.D.N.Y. 1987). **HN12**[↑] Plaintiffs, therefore, must present evidence which reasonably tends to prove that Comsat "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 104 S. Ct. 1464, 1471, 79 L. Ed. 2d 775 (1984) (quoting *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), cert. denied, 451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)); *Minpeco*, 673 F. Supp. at 688; *Harlem River, 1976-1 Trade Cas. (CCH) P60,820 at 68,575, 1976 WL 1238* at \*4; see also *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir. 1976) (requiring a showing sufficient to warrant a jury in finding that the conspirators had a "unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement") (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S. Ct. I\*893] 1125, 1139, 90 L. Ed. 1575 (1946)), cert. denied, 429 U.S. 885 (1979).

According to Plaintiffs, the common scheme to which Comsat consciously agreed was a conspiracy to boycott and to refuse to deal with PAS. See 3d Am. Compl. P 33. If true, the conspiracy constitutes a *per se* violation of the Sherman Act. **HN13**[↑] Some group boycotts involving concerted refusals to deal with a competitor" are *per se* violations. See *Capital Imaging*, 996 F.2d at 543 (citing *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-12, 79 S. Ct. 705, 708-09, 3 L. Ed. 2d 741 (1959)). Plaintiffs, therefore, need only to show the existence of the alleged conspiracy and Defendant's participation in it. See *Capital Imaging*, 996 F.2d at 542; *International Distrib. Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 793 (2d Cir.), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, [\*\*57] 107 S. Ct. 3188 (1987).

Plaintiffs also claim that Defendant violated § 1 by conspiring to restrain unreasonably trade and commerce in the relevant markets. See 3d Am. Compl. P 33. Like most § 1 claims, this claim must be analyzed under the rule of reason. The rule of reason requires the fact finder "to weigh all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 (1977). **HN14**[↑] Plaintiffs must still show Defendant Comsat's participation in an illegal contract, combination or conspiracy. Plaintiffs must then prove an antitrust injury by showing that the illegal agreement caused an actual adverse effect on competition as a whole in a relevant market. Proof that Plaintiffs have been harmed as an individual market actor is not enough. See *Capital Imaging*, 996 F.2d at 542-43; *International Distrib.*, 812 F.2d at 793 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)). If Plaintiffs satisfy this threshold burden, [\*\*58] Defendant Comsat must offer evidence of the pro-competitive virtues of the challenged combination. If Comsat presents such evidence, Plaintiffs must show that any legitimate objectives could have been achieved by less restrictive alternatives. See *Capital Imaging*, 996 F.2d at 543. In other words, Plaintiffs must show that the "anticompetitive effects of the alleged conspiracy outweigh its procompetitive effects." *International Distrib.*, 812 F.2d at 793 (citing *National Soc'y of Prof. Eng'r's v. United States*, 435 U.S. 679, 691, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978)).

## A. Comsat's conscious participation in a common scheme

Plaintiffs argue that the existence of the alleged conspiracy and Comsat's conscious participation therein may be inferred from the record in three ways. Plaintiffs principally argue that the conspiracy and Comsat's participation may be inferred from an alleged pattern of refusals by the alleged PTT conspirators to grant PAS landing rights and operating agreements, coupled with additional considerations or "plus factors." Plaintiffs next argue that the conspiracy and Comsat's participation may be inferred from Comsat's alleged refusal to [\*\*59] purchase space segment capacity from PAS. Plaintiffs then argue that the conspiracy and Comsat's participation may be inferred from Comsat's alleged "pattern and practice" of "tracking PAS throughout the world" and forming ventures in Europe and Latin America, allegedly for the exclusive purpose of preventing PAS's entry into those markets.

### 1. Parallel refusals and plus factors

Plaintiffs attempt to show the existence of the alleged conspiracy by showing allegedly parallel conduct among Comsat and various PTT co-conspirators. However "[HN15](#)[<sup>15</sup>] evidence of parallel conduct alone cannot suffice to prove an antitrust conspiracy." [Apex Oil Co., 822 F.2d at 252](#) (citing [Monsanto, 465 U.S. at 764, 104 S. Ct. at 1471](#) (quoting [Edward J. Sweeney & Sons, 637 F.2d at 111](#))). More must be shown.

[HN16](#)[<sup>16</sup>] Since mere parallel behavior can be consistent with independent conduct, courts have held that a plaintiff must show the existence of additional circumstances, often referred to as "plus" factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.

[Apex Oil Co., 822 F.2d at 253](#) (citations omitted); [Modern Home, I<sup>\\*\\*60</sup> 513 F.2d at 110](#) ("[HN17](#)[<sup>17</sup>] Additional facts or circumstances are needed to show that the decisions were interdependent and thus raise the inference of a tacit agreement to boycott."); [Minpeco, 673 F. Supp. at 688](#); [Harlem River, 1976-1 Trade Cas. \(CCH\) P60,820 at 68,575, 1976 WL 1238](#) at \*4. Plus factors, however, "may not necessarily lead to an inference of conspiracy . . . . [and] could lead to an equally plausible inference of mere interdependent behavior." [Apex Oil Co., 822 F.2d at 254](#).

Plaintiffs allege as plus factors a common motive to conspire, a high level of interfirm communications, "customary indications" of a traditional conspiracy, and evidence that the alleged parallel conduct was contrary to the alleged conspirators' economic interests. See *id.*; [Minpeco, 673 F. Supp. at 688](#). [HN18](#)[<sup>18</sup>] The Court necessarily examines each of these factors and the alleged refusals to deal individually. The Court, however, does not examine each piece of evidence in a vacuum, but considers the evidence as a whole to determine the reasonableness of inferences to be drawn by a jury. See [Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 1405, 8 L. Ed. 2d 777](#) [<sup>\*\*61</sup>] (1962); [International Distrib., 812 F.2d at 793-94](#); [Minpeco, 673 F. Supp. at 688](#).

[HN19](#)[<sup>19</sup>] Moreover, the alleged refusals to deal must be viewed in their factual context. See [AD/SAT, 920 F. Supp. at 1308](#) (citing [Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356](#) (discussing [First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89, 88 S. Ct. 1575, 1592-93, 20 L. Ed. 2d 569 \(1968\)](#))). When the factual context indicates that a defendant lacked a rational motivation to join the alleged conspiracy to boycott, the plaintiffs "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." [Matsushita 475 U.S. at 587, 106 S. Ct. at 1356](#) (citing [Cities Serv., 391 U.S. at 278-79, 88 S. Ct. at 1587](#)); see also [Apex Oil Co., 822 F.2d at 253](#) ("[HN20](#)[<sup>20</sup>] If the scheme alleged is implausible, a conspiracy must be proved by strong direct or strong circumstantial evidence, and the implausibility of the scheme will reduce the range of inferences that may be permissibly drawn from ambiguous evidence."). Defendant argues that PAS's alleged conspiracy makes no economic sense and therefore is implausible. The Court disagrees. The [\*\*62] alleged conspiracy, if true, would

have served the conspirators' economic interests by preventing competition in an industry with high regulatory and financial barriers to entry. The Court therefore finds that no heightened showing is required.<sup>4</sup>

#### [\*\*63] (A) No reasonable inference of parallel refusals

Plaintiffs have failed to present evidence from which a trier of fact could find that the individual PTTs refused to deal or delayed their dealings with PAS, let alone that any such refusals or delays formed a pattern of conscious, parallel conduct involving Comsat. Instead Plaintiffs have presented only unsubstantiated argument that the PTTs had the ability to conspire against PAS, and conclusory assertions that they must have exercised that ability. This showing is insufficient.

Plaintiffs contend that Defendant Comsat and the PTTs conspired to prevent PAS from gaining access to commercial communications satellite markets by denying or delaying Plaintiffs' procurement of operating agreements. According to the record, operating agreements are one of the two prerequisites to market access.<sup>5</sup> An

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<sup>4</sup> Defendant does not present any evidence tending to show that the alleged conspiracy, if successful, would operate contrary to the interests of the alleged conspirators. Counterintuitively, Plaintiffs present the strongest evidence that the alleged boycott would have operated against the interests of the PTTs, and therefore that a heightened showing is required.

Plaintiffs argue that PAS offered substantial advantages over the Intelsat system, including lower prices, higher power and the opportunity to resell PAS capacity for incremental profits. See Pls.' 3(g) Statement P 17 (citing **Saralegui Dep.** Vol. 1 at 187-89 (alleging obstruction of PAS through the Intelsat process), Vol. 2 at 256-57 (alleging that PAS offered the PTTs a percentage in return for access and required no service functions from the PTTs); **PAS Ex. 82** (handwritten notes comparing PAS and Comsat); **Skjei Dep. at 39-42** (discussing PAS Ex. 82 and advantages of PAS over Comsat, including price); **Giarman Dep.** at 84 (discussing PAS Ex. 82); **Crockett Dep. Vol. 2** at 328-31 (discussing PAS Ex. 82 and advantages of PAS over Comsat, including price and power); **Carroll Dep.** Vol. 1 at 50-52 (discussing PAS Ex. 82 and advantages of PAS power and flexible pricing), 97-98 (discussing shortage in Comsat Ku-band capacity); **Alewine Dep.** Vol. 2 at 188-91 (acknowledging Comsat capacity shortage prior to Intelsat-K and Intelsat VI satellites coming on line); **Kopinski Dep.** at 40-41 (acknowledging Comsat shortage of station-kept, Ku-band capacity prior to Intelsat-K), 126-27 (acknowledging a lack of high-power Ku capacity on Intelsat in 1990, before Intelsat-K and the Intelsat VI and VII satellites), 132-35 (acknowledging shortage in full-time voice grade capacity to Latin America prior to Intelsat VI satellites); **PAS Ex. 2894** (ISS Strategic Business Plan, 1991-93); **Popkin Dep.** at 54-62 (listing alleged advantages of PAS as reported by potential customers, including digital compression service, orbital location and station kept signal), 71-73 (acknowledging shortage of station-kept capacity but denying knowledge of any PAS offer to sell capacity to Comsat); **Salvati Dep.** at 38-40 (acknowledging a shortage in Ku-band capacity on Comsat until launch of Intelsat K-4 in 1992, and denying effort to obstruct major broadcasters from switching to PAS); **Schnicke Dep.** at 22-23 (acknowledging periods of capacity shortages on Comsat); **Tanner Dep.** Vol. 1 at 16-17 (acknowledging shortages in Ku-band capacity); **Twining Dep.** at 30-31 (acknowledging shortages of Ku-band capacity); **Comsat Ex. 988** (Statement of Reynold Anselmo, Chairman of PAS, July 28, 1994, before the Committee on Energy and Commerce Subcommittee on Telecommunications and Finance); **PAS Ex. 1102** (March 24, 1989 Comsat/Entel Chile Joint Venture Proposal); **Balz Dep.** at 80-85 (discussing licensing of private providers of voice telephony services within the former East Germany to meet the exceptional demand created by reunification)). Plaintiffs then reason that the PTTs, in the face of these advantages, should have switched to PAS. The fact that the PTTs did not enthusiastically switch to PAS, Plaintiffs claim, can only be explained by the existence of the alleged conspiracy. In other words, according to Plaintiffs the fact that the alleged conspiracy makes no economic sense helps to prove its existence.

Despite Plaintiffs' reliance on this argument, the Court finds that the alleged conspiracy is not economically implausible and therefore a heightened showing is not required.

<sup>5</sup> The other prerequisite identified in the record is formal approval under Article XIV of the Intelsat agreements, which ensures the technical compatibility of any proposed new operator. Article XIV(c) approval or "consultations" allow domestic transmissions, and Article XIV(d) consultations allow international transmissions.

A service provider seeking to enter a market generally would undertake to secure Article XIV consultations prior to seeking an operating agreement, although there is some disagreement between the parties on this point. Assuming no technical conflicts, the Board of Governors generally grants Article XIV consultations a short time after the local PTT monopoly submits a formal letter requesting consultations on the party's behalf. A PTT therefore could have refused to deal with PAS by declining to submit a formal letter of request for consultations on PAS's behalf, or by delaying such a letter. Plaintiffs, however, do not argue that the

operating agreement is essentially regulatory authorization for a service provider's business proposal, generally negotiated, approved, or otherwise issued by a PTT signatory, defining the nature of the services that the provider is authorized to offer, to whom, and under what terms.

[\*\*64] Plaintiffs argue the alleged conspiracy was made possible by the regulatory structure prevalent in Europe and Latin America until the early 1990s, which traditionally limited the provision of telecommunications services in each nation to a monopoly PTT. See Pls.' 3(g) Statement P 14. Plaintiffs argue that these legal monopolies collectively formed a "bottleneck" with "the power to exclude PAS" or any other competitor by denying or delaying requests for operating agreements. See *id.*<sup>6</sup> From this proposition that the PTTs formed a "bottleneck" with the ability to conspire against PAS, Plaintiffs leap to the conclusion that Comsat and the PTTs did conspire to deny or to delay PAS's applications for operating agreements. See Pls.' Opp'n Mem. at 10 (alleging that "until at least 1991 for the most part, and in many instances . . . through [February 28, 1995]," the conspirators "uniformly refused to enter into operating agreements with PAS"). Plaintiffs claim that the PTTs in Chile, Colombia,<sup>7</sup> Argentina, Brazil, Venezuela, the Dominican Republic, Jamaica, Barbados, Trinidad & Tobago, Guatemala, Italy, Spain, Germany, France, and the United Kingdom either denied or delayed [\*\*65] Plaintiffs' requests for operating agreements. See Pls.' Opp'n Mem. at 10. Plaintiffs, however, fail to substantiate these alleged denials and delays.

Plaintiffs might have presented evidence as to each country showing when PAS requested each type of Intelsat consultations; when the PTT submitted a formal request letter to Intelsat (if at all); when each type of consultation was obtained; when operating agreements for each type of service were available under the applicable regulatory [\*\*66] structure of each nation (since a PTT cannot be charged with denying or delaying the issuance of an agreement which the PTT could not legally provide); when PAS initiated negotiations with the PTT over operating agreements for each type of service; and when any agreements were obtained or formally denied. Such information would have assisted the Court in determining whether a factfinder could reasonably draw an inference of refusals to deal or delays in dealing with PAS. Instead, Plaintiffs provided only lengthy string citations to testimony and exhibits: citations marked by scattershot page references and the absence of a single textual or parenthetical explanation. See, e.g., Pls.' 3(g) Statement P 36 (containing a three page string citation addressing without a single parenthetical explanation conduct in fourteen of the fifteen alleged PTT conspirator nations (inexplicably omitting Guatemala)).

Upon examination, Plaintiffs' references do not provide support for Plaintiffs' claims, and do not in the aggregate form a record from which a reasonable jury could infer that any PTT refused to deal with PAS, let alone that they collectively refused to deal.<sup>8</sup> Indeed, although it normally [\*\*67] seeks to keep footnotes to a minimum in its

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alleged PTT conspirators denied or delayed PAS's requests for Article XIV consultations (even though many of Plaintiffs' sources allege exactly that), presumably because such denials or delays would be the result of PTT signatory conduct and therefore outside the scope of this litigation.

<sup>6</sup> Although Defendant argues that no bottleneck existed-- because operating agreements were not required in some countries and the issuance of landing rights was often controlled by a government agency and not the PTT--Defendant does not dispute that the PTTs were traditionally monopolies with significant control over their home markets.

<sup>7</sup> Plaintiffs claim that the Colombian PTT Telecom required PAS to execute an exclusive operating agreement, only then to refuse to provide service under it. See Pls.' Opp'n Mem. at 11.

<sup>8</sup> Plaintiffs' submissions suggest an effort to conceal the perceptible lack of support for Plaintiffs' claims in the record. In addition to failing to provide page indicators and explanatory references, Plaintiffs frequently refer to the same document within the same citation by two or more exhibit numbers. See, e.g., Pls.' 3(g) Statement P 36 (citing **Argentina**: Comsat Exs. 160 & 262, PAS Ex. 2252; Comsat Exs. 28 & 520; **Brazil**: Comsat Exs. 36 & 244; **Venezuela**: Comsat Ex. 420 & PAS Ex. 1901; **Colombia**: Comsat Ex. 267 & PAS Ex. 1875; **Jamaica**: PAS Ex. 2110 & Comsat Ex. 526; PAS Ex. 2135 & Comsat Ex. 279; Comsat Ex. 431 & PAS Ex. 2016; Comsat Ex. 432 & PAS Ex. 2050; Comsat Ex. 467 & PAS Ex. 1992; Comsat Ex. 472 & PAS Ex. 2083; **Barbados**: Comsat Ex. 279 & PAS Ex. 2135; Comsat Ex. 526 & PAS Ex. 2110; **Trinidad & Tobago**: PAS Exs. 2114 & 2117; Comsat Ex. 466 & PAS Ex. 2072; Comsat Ex. 526 & PAS Ex. 2110; Comsat Ex. 528 & PAS Ex. 1898). Plaintiffs also frequently repeat nearly identical string citations in support of different propositions. Compare Pls.' 3(g) Statement P 24 with P 25 and P 32. These practices so completely fail to present the material issues for review that they cause the Court to question whether they are not a

decisions, the Court uses footnotes below to point up this absolute failure of Plaintiffs to support their claims. The Court's review of Plaintiffs' often useless citations to depositions and exhibits amply demonstrates the correctness of the Court's conclusion in this case.

[\*\*68] Many of Plaintiffs' citations merely repeat without support the accusations stated in the Complaint, see, e.g., Pls.' 3(g) Statement P 36,<sup>9</sup> [\*\*69] and many of those cite only to the testimony of Plaintiffs' own officers and employees. See *id.*<sup>10</sup> [\*\*70] Other citations refer only to unsubstantiated claims of business lost as a result of the

calculated attempt to survive the motion not on the merits but by overwhelming judicial resources with a mountain of paper. Unfortunately for Plaintiffs, the Court has inspected each citation provided.

<sup>9</sup> Citing generally: **Landman Dep.** Vol. 4 at 749 (alleging Comsat strategy to announce joint ventures with PTTs to thwart PAS); **Argentina: Anselmo Dep.** Vol. 1, 131-34 (discussing allegation that Comsat entered a joint venture in April 1989 with Entel Argentina to exclude PAS)); **Colombia: Anselmo Dep.** Vol. 1 at 145-48 (repeating allegations behind the alleged boycott and Comsat's improper purpose in entering joint-venture discussions in Colombia); **Gazzolo Dep.** Vol. 1 at 127 (alleging Comsat entered a joint venture in Colombia); **Landman Dep.** Vol. 3 at 591 (alleging Comsat and Telecom announced a joint-venture to thwart PAS)); **France: Saralegui Dep.** Vol. 4, at 633 (alleging, without specification, that France Telecom and Comsat were abiding by the alleged Intelsat boycott and delaying PAS operating agreements)).

<sup>10</sup> Citing **Chile: Landman Dep.** Vol. 4 at 748-49 (repeating without support allegation of Comsat plot to enter or discuss joint ventures to thwart PAS); **Saralegui Dep.** Vol. 3 at 420-21 (alleging without support refusal of PTT to deal with PAS); **Argentina: Eastman Dep.** Vol. 1 at 16-23 (stating that Entel Argentina "did not want to work with PANAMSAT"), 35-40 (alleging that Entel Argentina offered Intelsat service to customers requesting PAS), Vol. 2 at 282 (alleging that in 1989 the monopoly signatory would not complete the consultation process); **Landman Dep.** Vol. 4 at 748-49 (repeating without support allegation of Comsat plot to enter or discuss joint ventures to thwart PAS); **Saralegui Dep.** Vol. 3 at 418-21 (alleging without support refusal of PTT to deal with PAS); **Brazil: Eastman Dep.** Vol. 1 at 16-23 (stating that Embratel "did not want to work with PANAMSAT"); **Saralegui Dep.** Vol. 1 at 126 (discussing alleged economic incentives for Embratel to deal with PAS), Vol. 3 at 418-21 (alleging without support refusal of PTT to deal with PAS), 436-42 (discussing without mention of Comsat delaying effect of Embratel monopoly on PAS market entry); **Venezuela: Goldschmidt Dep.** Vol. 2 at 260-61 (discussing without reference to Comsat alleged refusal of Compania Anonima Nacional Telefonos de Venezuela ("C.A.N.T.V.") to deal with PAS allegedly because it would violate an unspecified Intelsat treaty); **Saralegui Dep.** Vol. 3 at 420 (alleging C.A.N.T.V.'s reluctance to deal with PAS in February 1987); **Eastman Dep.** Vol. 1 at 130-34 (testimony that Comsat was negotiating a joint venture with C.A.N.T.V.); **Colombia: Eastman Dep.** Vol. 1 at 39-41 (alleging that when customers inquired of Telecom Colombia, the monopoly PTT, about PAS service they were offered Intelsat service instead), 136 (stating that PAS was forced to sign an exclusive agreement with Telecom Colombia), 157-58 (alleging that when Texaco and Citibank went to Telecom Colombia seeking PAS service, they were offered Intelsat service); **Gazzolo Dep.** Vol. 1 at 113-14 (alleging Comsat entered a joint venture with Telecom to thwart PAS); **Goldschmidt Dep.** Vol. 2 at 263 (alleging that Colombia Telecom took "extraordinary steps to keep [PAS] out of the Colombian market" and that there were indications of outside interference from Intelsat); **Saralegui Dep.** Vol. 3 at 420-21 (alleging that the PTT in Colombia refused to deal with PAS); **Jamaica: Eastman Dep.** Vol. 2 at 215-20 & Vol. 3 at 550-62 (alleging that PAS had difficulty in obtaining operating agreements from the individual PTT monopolies in the Caribbean, including Jamaica, Barbados, and Trinidad & Tobago, which were affiliated with Cable & Wireless ("C&W") of London); **Barbados: Eastman Dep.** Vol. 2 at 215-20 & Vol. 3 at 550-62 (alleging that PAS had difficulty in obtaining operating agreements from the individual PTT monopolies in the Caribbean, including Jamaica, Barbados, and Trinidad & Tobago, which were affiliated with Cable & Wireless ("C&W") of London); **Trinidad & Tobago: Saralegui Dep.** Vol. 4, at 637-39 (stating that PAS was unable to secure operating agreement in Trinidad and Tobago with the PTT Trinidad & Tobago External Telecommunications Company ("Textel")); **Eastman Dep.** Vol. 2 at 215-20, & Vol. 3 at 550-62 (*supra*); **the United Kingdom: Goldschmidt Dep.** Vol. 1 at 217 (alleging that British Telecom delayed in finalizing the agreement for joint operations with PAS because of its interest in ATV and the Intelsat-K satellite), 224-25 (stating a suspicion that British Telecom delayed negotiations on an operating agreement because it did not want competition from PAS and because of British Telecom's connections to ATV and Intelsat-K), Vol. 2 at 440-44 (discussing alleged CEPT boycott resolution, but admitting that "by definition, Comsat could not be a party to CEPT's resolution, because it is not a member of CEPT); **France: Reverege Anselmo Dep.** Vol. 1 at 117-18 (alleging that France "led the charge against [PAS]"), 120-21 (alleging three year delay in PAS's entry into the French market due to Comsat's Intelsat connections with PTTs), 126 (alleging that France denied PAS's request to do business), Vol. 2 at 252-53 (alleging "perfect collusion between Elf and France Telecom"); **Antonovich Dep.** at 30-31 (alleging that France Telecom was preventing competition despite regulatory liberalization in France), 45 (alleging lost business opportunities in France), 64-66 (alleging that France Telecom was refusing to deal with PAS, resulting in lost opportunity with radio station FR3); **Spain: Goldschmidt Dep.** Vol. 2 at 422-25 (discussing the blanket refusal of the Spanish PTT Compania Telefonica Nacional de Espana ("Telefonica") to deal with PAS).

alleged conspiracy. See *id.*<sup>11</sup> [\*\*71] Still other citations refer only to self-serving documents created by PAS, including letters from PAS complaining to various government ministries and agencies about PAS's difficulty in gaining access to some countries, see *id.*,<sup>12</sup> [\*\*72] marketing letters from PAS urging prospective customers to

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<sup>11</sup> Citing generally: **Comsat Ex. 732** (chart entitled "Identified Lost Business on PAS-1 C-band (revised)"); **Chile: Saralegui Dep.** Vol. 2 at 297-303 (discussing alleged Entel demand for full control over PAS in Chile in exchange for support in Article XIV(d) consultations), 313-18 (discussing Entel opposition in 1986 to Article XIV(d) consultations for PAS); **Eastman Dep.** Vol. 1 at 28-29, 37-40 (discussing problems in PAS negotiations with Citibank and IBM due to lack of operating agreements); **Gazzolo Dep.** Vol. 1 at 82-83 (discussing delays in getting operating agreements); **Argentina: Eastman Dep.** Vol. 1 at 42-45 (stating that Entel Argentina refused "to establish a relationship with PANAMSAT" to permit PAS business with Citibank), 94-96 (stating that Entel Argentina refused to allow PAS to provide IBM service to Argentina), 121-23 (discussing alleged loss of customers due to delay in obtaining agreements in Argentina); **Goldschmidt Dep.** Vol. 3 at 567-70 (discussing unspecified customers lost for lack of operating agreements in Argentina in Dec. 1988), Vol. 4 at 204-05 (discussing lost business with Key Data Argentina and Telerate because of lack of landing rights); **Landman Dep.** Vol. 3 at 542-52 (alleging that Comsat negotiated a joint venture with Entel Argentina for the purpose of discouraging or preventing customers such as Cargill from doing business with PAS); **Morgan Dep.** at 62-63 (discussing failure to secure Bank of Boston business in Argentina for lack of operating agreements, but disavowing knowledge of any Comsat involvement), 68-69 (discussing failure to secure Tandem Computer business for lack of operating agreements, but disavowing knowledge of any Comsat involvement)); **Brazil: Carroux Dep.** at 129-39 (discussing Embratel opposition to PAS business with Victori Communications and Coca Cola); **Eastman Dep.** Vol. 1 at 67-70 (discussing Embratel objection to PAS deal with CMA, a Brazilian company, but without knowledge of any Comsat involvement); **Gazzolo Dep.** Vol. 2 at 299-301 (alleging lost business with Coca Cola in Brazil because PAS lacked landing rights); **Lanni Dep.** Vol. 3 at 386-89 (discussing Reuters decision not to use PAS because PAS lacked authorizations, and blaming lack of authorizations on Embratel and Brazilsat); **Venezuela: Morgan Dep.** at 69-76 (alleging, without reference to Comsat, C.A.N.T.V. intervention at the Venezuelan Ministry/Conatel to delay licensing of PAS, causing delays in PAS business with Asociados Espada, Hughes, Electrospace, and Bartel), 78-79 (alleging delay in PAS business with Infosat due to C.A.N.T.V. intervention at the Venezuelan Ministry/Conatel), 167-68 (alleging delay caused by C.A.N.T.V. joint venture); **Saralegui Dep.** Vol. 4 at 562-66 (discussing, without reference to Comsat, PAS's inability to secure business with Corvan due to inability to secure uplink agreements before late 1990 or early 1991), 572-74 (discussing PAS's failure to secure business from Venevision in 1991 because of an inability to get authorizations), 579-81 (discussing, without reference to Comsat, loss of Venevision and delay of Omnidision business for lack of authorizations through 1991)); **Colombia: Eastman Dep.** Vol. 1 at 160 (alleging without any support that Comsat prevented PAS from doing business with Citibank and Texaco); **Gazzolo Dep.** Vol. 1 at 56-58 (alleging that Colombia Telecom, without reference to Comsat, undercut PAS pricing, costing PAS business with Unisys), Vol. 2 at 264-65 (stating that potential customer Banco Ganadero was delayed in getting a license from the Colombian Ministry), 279-81 (dispute over provisions of an exclusive operating agreement with Telecom delayed business between PAS and Precidatos), 300-01 (alleging that PAS lost business with Coca-Cola because PAS lacked landing rights), 307 (attributing a loss of business with Ecopetrol to "negative marketing" by Telecom), 322-24 (discussing PAS's exclusion from Eloductos's request for proposals), 330-31 (discussing Orbinet), 354-57 (discussing Unisys); **Lanni Dep.** Vol. 2 at 283-85 (discussing Procedatos, and alleged efforts by Telecom--ultimately unsuccessful--to disrupt business between PAS and Procedatos); **Comsat Ex. 161** (August 28, 1992 PAS letter to Procedatos alleging efforts by Telecom, without reference to Comsat, to disrupt PAS business with Procedatos); **Jamaica: Eastman Dep.** Vol. 4 at 725-27 (alleging that PAS lost opportunities for business with Shell and Citibank in Jamaica because Article XIV(d) consultations had not been completed); **PAS Ex. 2080** (October 16, 1990 letter from Citicorp Latino Inc. to PAS withdrawing Citicorp's order for service via PAS-1); **Trinidad & Tobago: Eastman Dep.** Vol. 4 at 726-27 (alleging that PAS lost opportunities for business with Shell and Citibank in Trinidad because Article XIV(d) consultations had not been completed); **the United Kingdom: Antonovich Dep.** at 103 (alleging that British Telecom uplink pricing was too high and harmed PAS business opportunities).

<sup>12</sup> Citing generally: **Comsat Ex. 278** (October 15, 1991 PAS letter to the FCC complaining about C&W and delays in obtaining Caribbean operating agreements with C&W affiliated PTTs); **Comsat Ex. 244** (December 12, 1988 PAS memorandum to U.S. Trade Representative discussing barriers to market entry and alleging extensive PTT behavior "in concert with Intelsat"); **Comsat Ex. 35** (PAS memo dated February 20, 1987 repeating without support allegations of boycott and refusals to deal and urging U.S. government action); **Comsat Ex. 213** (July 1986 letter from PAS urging U.S. Department of Commerce to take action against alleged refusals to deal with PAS throughout Latin America); **Argentina: PAS Ex. 1885** (March 1989 marketing letter from PAS urging Intelsat consultations); **PAS Ex. 2252** (March 1992 letter from PAS to Argentine government describing PAS's current services and seeking authorization for on-premises services); **Comsat Ex. 35** (PAS memo dated February 20, 1987 repeating without support allegations of boycott and refusals to deal and urging U.S. government action); **Comsat Ex. 160** (same as PAS Ex. 2252, *supra*); **Comsat Ex. 244** (December 1988 letter from PAS to U.S. Trade Representative outlining PAS

lobby on PAS's behalf, see *id.*<sup>13</sup> [\*\*73] and letters from PAS discussing its negotiations with some of the alleged PTT conspirators. See *id.*<sup>14</sup> [\*\*74] The rest of Plaintiffs' citations reference hearsay statements, often without identifying the alleged declarant or the time, place and specific content of the alleged statement. See *id.*<sup>15</sup>

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concerns throughout Latin America); **Comsat Ex. 262** (same as Comsat Ex. 160 & PAS Ex. 2252, *supra*); **Comsat Ex. 263** (March 1992 letter from PAS to Argentine government lobbying for authorization for PAS services); **Brazil: Comsat Ex. 35** (PAS memo dated February 20, 1987 repeating without support allegations of boycott and refusals to deal and urging U.S. government action); **Comsat Ex. 36** (same as Comsat Ex. 244, *supra*); **Venezuela: PAS Ex. 1911** (May 1989 PAS presentation to the government of Venezuela); **Colombia: Comsat Ex. 244** (December 12, 1988 PAS memorandum to U.S. Trade Representative discussing barriers to market entry and alleging extensive PTT behavior "in concert with Intelsat"); **Jamaica: PAS Ex. 2038** (April 18, 1990 PAS marketing letter to Jamaican Ministry of Development Planning & Production including attached list of PAS-1 clients and end-users and list of countries as of March 1990 having coordinated Article XIV(d) consultations and granted landing rights); **PAS Ex. 2073** (October 1, 1990 PAS letter to Jamaican Ministry of Public Utilities & Transports complaining of delays in negotiations with Jamaica International Telecommunications, Ltd. ("Jamintel") and seeking direct government assistance in procuring Article XIV(c) and (d) consultations); **PAS Ex. 2083** (October 26, 1990 PAS letter to U.S. Trade Representative seeking assistance in gaining access to Jamaican market); **Comsat Ex. 277** (May 2, 1991 PAS memorandum discussing PAS filing against C&W with the FCC if Jamintel does not show good faith in submitting Article XIV(d) letter); **Comsat Ex. 278** (October 15, 1991 PAS letter to FCC complaining about C&W and delays in obtaining Caribbean operating agreements with C&W affiliated PTTs); **Comsat Ex. 472** (same as PAS Ex. 2083, *supra*); **Trinidad & Tobago: Goldschmidt Dep.** Vol. 1, at 130-32 PAS (discussing meeting in 1986 with Trinidad government agency over landing rights); **PAS Ex. 2114** (January 24, 1991 PAS letter to Telecommunications Services of Trinidad and Tobago, Limited ("TSTT") complaining of Textel's delay in entering an operating agreement and refusal to permit on-premises services (including list of PAS-1 clients and end-users)); **PAS Ex. 2117** (body of letter is the same as PAS Ex. 2114, *supra*) (appending list of PAS-1 clients and end users)); **PAS Ex. 2133** (April 1, 1991 PAS letter to the TSTT asking for conclusion of negotiations on an operating agreement in the next couple of weeks); **PAS Ex. 2142** (April 10, 1001 PAS letter to Telecommunications Task Force in the Office of the Prime Minister of Trinidad and Tobago complaining that no operating agreement with TSTT had been reached after nearly two years of negotiations); **PAS Ex. 2151** (May 3, 1991 PAS letter to TSTT mentioning PAS FCC filing).

<sup>13</sup> Citing **Chile: PAS Ex. 1885** (March 2, 1989 PAS marketing letter to KAVOURAS, Inc., urging Intelsat consultations); **PAS Ex. 1903** (April 11, 1989 PAS marketing letter to Houston Data Transmission urging Intelsat consultations); **Venezuela: PAS Ex. 1958** (Aug. 15, 1989 PAS letter to Venevision urging it to lobby C.A.N.T.V.); **Colombia: PAS Ex. 1875** (January 27, 1991 PAS marketing letter urging Chevron to assist PAS in obtaining landing rights); **Comsat Ex. 267** (same as PAS Ex. 1875, *supra*); **Jamaica: Eastman Dep.** Vol. 3 at 550-62 (discussing PAS's agreement with Citibank and Citibank inquires to Jamintel about Intelsat capacity); **PAS Ex. 2050** (June 22, 1990 PAS letter to Citicorp Latino asking Citicorp to urge Jamintel to expedite negotiations with PAS); **PAS Ex. 2110** (January 11, 1991 PAS letter to C&W London complaining of Jamintel's continuing refusal to submit Article XIV(d) letter for PAS); **PAS Ex. 2141** (April 10, 1991 letter to C&W London seeking its assistance in pressuring Jamintel to conclude negotiations); **PAS Ex. 2181** (August 27, 1991 PAS memorandum and letters discussing possible PAS business with Alcan Jamaica Company in Jamaica); **PAS Ex. 2190** (September 19, 1991 PAS letter to Alcan Jamaica Company including budgetary proposal and seeking assistance in expediting PAS negotiations with Jamintel); **Comsat Ex. 526** (same as PAS Ex. 2110, *supra*); **Comsat Ex. 432** (same as PAS Ex. 2050, *supra*); **Trinidad & Tobago: PAS Ex. 2050** (June 22, 1990 PAS letter to Citicorp Latino noting that Trinidad & Tobago had recently consulted for PAS-1 services after urging by Mobil Oil and Citibank Trinidad); **PAS Ex. 2110** (January 11, 1991 PAS letter urging C&W London to assist PAS in convincing Textel to permit on-premises service to Citibank Trinidad and Mobil Oil); **Comsat Ex. 465** (May 23, 1990 PAS letter to Trinidad and Tobago Telephone Company, Ltd. ("Teleco") asking it for assistance in reaching a working arrangement with Textel); **Comsat Ex. 526** (*supra*).

<sup>14</sup> Citing generally: **Eastman Dep.** Vol. 2 at 215-19 (stating that PAS succeeded in providing service to Curacao, Haiti, the Bahamas, the Dominican Republic, Grand Cayman and Barbados, but not Jamaica or Trinidad & Tobago); **Chile: Comsat Ex. 33** (February 10, 1986 PAS memorandum discussing Entel opposition PAS XIV(d) coordination); **PAS Ex. 1854** at PAS 053674 (October 1988 letter from PAS stating landing rights in Chile expected "within the next few months"); **PAS Ex. 1991** at PAS 053389 (PAS marketing proposal dated November 28, 1989 stating that Article XIV(d) consultations completed and landing rights obtained); **Comsat Ex. 556** (PAS memo dated Dec. 18, 1991 discussing multiple projects in Chile and expected operating agreement in March 1992); **Argentina: PAS Ex. 1854** at PAS 053674 (October 1988 letter from PAS expecting "to see major progress" in obtaining landing rights in Argentina by mid-1989); **Comsat Ex. 135** (October 1991 PAS memorandum discussing provision of VSAT services in Argentina for Dow Corning and outstanding need for final agreement with Telintar); **Comsat Ex. 405** (Nov. 1991 letter from PAS to Telintar discussing operating agreement and lobbying for authorization of PAS on-premises services); **Brazil: PAS Ex. 1854** at PAS 053674 (October 1988 letter from PAS expecting "to see major progress" in obtaining

[\*\*75] Defendant, on the other hand, has shown that Plaintiffs did in fact receive authorization to operate in many

landing rights in Brazil by mid-1989); **Comsat Ex. 28** at PAS 0201547 (Oct. 1985 PAS memorandum discussing without reference to Comsat a meeting with the president of Embratel, concluding that he is "a firmly entrenched Intelsat man however, a good deal for Embratel could cause him to turn the other way"); **Comsat Ex. 147** (discussing PAS negotiations with LA Technologies); **Comsat Ex. 574** (August 1990 PAS proposal to Coca-Cola); **Venezuela: PAS Ex. 1854** at PAS 053674 (October 1988 letter from PAS expecting "to see major progress" in obtaining landing rights in Venezuela by mid-1989); **PAS Ex. 1885** (March 1989 marketing letter from PAS urging Intelsat consultations); **PAS Ex. 1901** (April 3, 1989 PAS memorandum discussing potential clients and problems created by PAS's lack of landing rights in Venezuela); **PAS Ex. 1991** at PAS 053388 (PAS marketing proposal dated November 28, 1989 stating that "negotiations are continuing with the Venezuelan government and landing rights are expected to be granted during the 1st quarter of 1990"); **PAS Ex. 2090** (November 2, 1990 PAS memorandum discussing alliance between PAS, EDS, and COMCAR called "SKYCOM"); **Comsat Ex. 420** (same as PAS Ex. 1901, *supra*, without attachments); **Jamaica: Eastman Dep.** Vol. 2 at 224-25 (stating that as of April 2, 1991, Jamintel, the Jamaican PTT had not completed Article XIV(d) consultations for PAS); **PAS Ex. 1868** (January 3, 1989 PAS marketing letter stating that PAS is "in the process of developing a relationship with Jamintel"); **PAS Ex. 1992** (November 30, 1989 PAS letter to Jamintel requesting Article XIV(d) consultations by December 7, 1989); **PAS Ex. 2014** (February 27, 1990 PAS memorandum discussing status of negotiations and support of C&W for PAS-1 services); **PAS Ex. 2016** (February 27, 1990 PAS letter to Jamintel seeking a meeting to discuss an operating agreement); **PAS Ex. 2023** (PAS marketing letters to Jamintel from November 1989 through March 1990 including proposed operating agreement); **PAS Ex. 2071** (September 24, 1990 PAS letter to Jamintel seeking to conclude year-long negotiations over operating agreement on October 4, 1990); **PAS Ex. 2078** (October 11, 1990 PAS letter to Citibank Jamaica); **PAS Ex. 2115** (January 25, 1991 PAS memorandum discussing problems with PAS approach to negotiating with Jamintel); **PAS Ex. 2135** (April 2, 1991 PAS letter proposing June 1, 1991 deadline for executing an operating agreement); **Comsat Ex. 467** (same as PAS Ex. 1992, *supra*); **Comsat Ex. 431** (same as PAS Ex. 2016, *supra*); **Barbados: PAS Ex. 2031** (August 1989 through April 1990 marketing letters for PAS in Barbados, including a list of countries which as of September 1989 had granted Article XIV(d) consultations and landing rights); **PAS Ex. 2135** (April 2, 1991 PAS letter proposing May 1, 1991 deadline for executing an operating agreement); **Trinidad & Tobago: PAS Ex. 1898** (March 31, 1989 PAS letter to PTT Textel indicating that Textel had wanted to get Intelsat consultations "moving as quickly as possible"); **PAS Ex. 1902** (April 4, 1989 PAS marketing letter to Textel); **PAS Ex. 1934** (June 14, 1989 PAS letter to Textel urging Textel to provide Article XIV(c) & (d) letters); **PAS Ex. 1982** (October 20, 1989 PAS marketing letter to Textel); **PAS Ex. 2052** (June 28, 1990 PAS letter to Citibank Trinidad describing completed Article XIV(d) consultations as "the largest stumbling block to [PAS's] provision of services" and stating that PAS expected to conclude negotiations on an Operating Agreement with Textel within weeks); **PAS Ex. 2079** (October 12, 1990 PAS letter to Textel discussing Textel rejection of proposed operating agreement and PAS proposal of IDS agreement); **PAS Ex. 2086** (October 31, 1990 PAS letter to Textel referencing a working arrangement that was reached after failed efforts at an operating agreement and which would allow PAS and Textel "to jointly provide PAS-1 services"); **PAS Ex. 2135** (same as Comsat Ex. 279) (April 2, 1991 PAS letter to C&W London recognizing C&W's "limited influence in Trinidad and Tobago" and proposing June 1, 1991 deadline for executing an operating agreement); **PAS Ex. 2201** (October 24, 1991 PAS letter to TSTT regarding further negotiation of operating agreement); **Comsat Ex. 430** (September 6, 1990 PAS letter to Textel seeking to set a meeting date to finalize an operating agreement); **Comsat Ex. 528** (same as PAS Ex. 1898, *supra*); **the Dominican Republic: PAS Ex. 1972** (September 25, 1989 PAS marketing letter to Codetel discussing pricing for Private International Digital Services ("PIDS")); **PAS Ex. 1976** (October 6, 1989 PAS marketing letter to Codetel); **PAS Ex. 1986** (November 21, 1989 PAS marketing letter to Codetel providing prices for Ku-band service); **the United Kingdom: PAS Ex. 1991** at PAS 053387 (PAS marketing proposal dated November 28, 1989 stating that Article XIV(d) consultations had been completed and an operating agreement "is in the final stages of negotiation with Telecom and is expected to be signed prior to December 15"); **Comsat Ex. 77** (October 2, 1992 PAS letter to IBM France indicating that British Telecom initiated Article XIV consultations in March 1988, June 1988, and March 1991); **France: Comsat Ex. 77** (*supra*); **Comsat Ex. 531** (July 18, 1989 PAS letter to radio station FR3 stating that negotiations with France Telecom over an operating agreement were at an impasse); **(Comsat Ex. 77** (October 2, 1992 PAS letter to IBM France indicating that the Federal Ministry of Post and Telecommunications initiated Article XIV consultations in June 1988, September 1988, and December 1989); **Spain: Carroux Dep.** at 203-05 (discussing lack of operating agreement with Telefonica after almost six years of discussions with PAS); **Comsat Ex. 77** (October 2, 1992 PAS letter to IBM France indicating that Telefonica initiated Article XIV consultations in March 1990, that video transmission is handled through a January 1, 1991 agreement with Retevision, and that negotiations with Telefonica were continuing to expand PAS service to include digital services); **Comsat Ex. 215** (November 21, 1989 PAS memorandum including notes of November 17, 1989 meetings with Telefonica and Ministry of Communications indicating that Telefonica was willing to negotiate a "good agreement").

<sup>15</sup> Citing **Chile: Gazzolo Dep.** Vol. 2 at 213-17 (discussing alleged January 1992 statement of Christian Nicolai "that due to the nature of the relationship between Comsat and PANAMSAT . . . [Entel] couldn't sign an operating agreement [with PAS]."); **Brazil: Eastman Dep.** Vol. 1 at 26-35 (discussing conversations with unspecified employees of IBM in late 1988 or early 1989

of the subject countries. See generally Comsat Ex. 924 at 2 (chart of PAS consultations worldwide); Def.'s Reply Mem. in Supp. of Mot. for Summ. J. at 8 n.15 (hereinafter "Def.'s Reply Summ. J. Mem.") (citing Landman Aff. P 13).<sup>16</sup> **[\*\*77]** Moreover, Plaintiffs' own citations reveal that PAS did in fact obtain authorization to enter the markets of most of the alleged PTT conspirators' home countries. See, e.g., Pls.' 3(g) Statement P 36.<sup>17</sup> **[\*\*78]** These

regarding PAS's lack of operating agreements and an alleged "old boys network" among the PTTs and Comsat); **Venezuela: Goldschmidt Dep.** Vol. 1 at 220 (alleging that Intelsat boycott was invoked by Venezuelan authorities as a reason for not granting PAS operating agreements), Vol. 2 at 394-97 (alleging C.A.N.T.V.'s making of unspecified misrepresentations about PAS); **Morgan Dep.** at 54 (alleging that an official in the Venezuelan ministry, a C.A.N.T.V. official, and the President of Venezuela informed PAS that PAS would not get operating agreements because "[Venezuela/C.A.N.T.V. has] a pending joint venture with Comsat, and, for domestic digital services, [they will] only use INTELSAT"); **Colombia: Gazzolo Dep.** Vol. 1 at 130-31 (alleging report by employee of Vitacom that at a meeting with Telecom, with no one from Comsat present, misrepresentations about PAS-1 were made), Vol. 1 at 135-37 (stating that customers Genetcom and Unisys also reported alleged "bad mouthing" of PAS by Telecom, without reference to Comsat); **Goldschmidt Dep.** Vol. 1 at 219-20 (alleging that the boycott was invoked by Colombian authorities as a reason for not granting PAS an operating agreement), Vol. 2 at 306 (alleging that a Colombian official represented that members of the Andean group were conspiring not to deal with PAS, and further alleging, without support, Comsat's involvement), 396-97 (discussing allegations that Colombian government officials made misrepresentations about PAS); **Comsat Ex. 443** (February 25, 1991 PAS memorandum alleging misrepresentation by the Colombian PTT to an unspecified customer); **Jamaica: PAS Ex. 2121** (March 6, 1991 PAS memorandum stating that Jamintel allegedly told PAS that Jamintel will not deal with PAS); **France: Reverte Anselmo Dep.** Vol. 2 at 270-77 (stating that political pressure was put on TV-5, a customer of France Telecom and partially government owned, not to sign a contract with PAS); **Comsat Ex. 533** (July 17, 1989 PAS memorandum to France Telecom file recording alleged conversations about France Telecom's alleged resistance to dealing with PAS).

<sup>16</sup> See also **Argentina: Comsat Ex. 924** at 1 (PAS secured Intelsat consultations in Argentina for domestic service in May 1989 and international service between the United States and Argentina in June 1989); **Dell'Oro Maini Dep.** at 48; **Dell'Oro Maini Decl.** P 11; **Comsat Ex. 955** at PAS 834743 (In April 1990, PAS reached an interim agreement with Entel Argentina and later obtained a license from the National Telecommunications Commission ("CNT"), the government agency which replaced Entel Argentina as the signatory PTT after Entel was privatized.); **Comsat Ex. 514**, Attach. A (5th Supp. Resp. of Pls. to 2d Set of Interrogs. & Regs. for Prod. of Docs. (PAS received an operating agreement for Argentina in January 1992)); **Trinidad & Tobago: PAS Ex. 2086** at PAS 033072 (discussing the working arrangement); **Barbados: Def.'s Reply Mem. at 10 & App. B. at 2** (citing **Comsat Ex. 924** at 1; **Comsat Ex. 925** at 1; **PAS Ex. 2110** at PAS 017684 (arguing that PAS reached an operating agreement in Barbados in fifteen months, and attributing any delay to heavy workload at BET, the PTT signatory in Barbados, and not to any "planned obstruction of PAS-1 services")); **Guatemala: Def.'s Reply Mem.** at 10 & App. B. at 6-7 (citing **Comsat Ex. 1024**; **Comsat Ex. 1025**; **Morgan Dep.** at 36-37 (PAS entered agreements with two companies in 1990, but in May 1991 the President of Guatemala invalidated the concessions previously granted to those companies, effectively "knocking PAS out of the market.")); **Italy: Def.'s Reply Mem.** at 9 & App. B. at 7 (arguing that PAS obtained landing rights within six months after consultations); **the United Kingdom: Goldschmidt Dep.** Vol. 1 at 132-38 (admitting PAS got initial landing rights in the United Kingdom in 1988, class licenses in 1991, and a specialized license in March 1993).

<sup>17</sup> Citing generally: **Eastman Dep.** Vol. 2 at 217-21 (stating that PAS succeeded in providing service to Curacao, Haiti, the Bahamas, the Dominican Republic, Grand Cayman and Barbados, but not Jamaica or Trinidad & Tobago); **PAS Ex. 2031** (including a list of countries which as of September 1989 had granted Article XIV(d) consultations and landing rights); **PAS Ex. 2038** (April 18, 1990 PAS marketing letter including attached list of PAS-1 clients and end-users and list of countries as of March 1990 having coordinated Article XIV(d) consultations and granted landing rights); **PAS Ex. 2034** (April 5, 1990 PAS marketing letter to Mobil with attached list of countries which have provided Article XIV(d) consultations and list of PAS-1 clients and endusers); **Chile: Gazzolo Dep.** Vol. 1 at 82 ("Patricio and Marco [Northland of PAS] negotiated that, and they got an operating agreement to enter into the Chilean market"), 84 ("After Patricio [Northland] left, I took over Chile and managed to get an operating agreement with Chilesat after that."), 85 ("[CTC] had a problem. They transponded from [PAS]."), 300 (stating that PAS could have signed a contract for landing rights in Chile for business with Coca-Cola); **Landman Dep.** Vol. 2 at 473-84 (discussing PAS contracts in Chile dating back to 1989); **Saralegui Dep.** Vol. 2 at 318 (acknowledging contract with TVN in late 1988 or early 1989); **Argentina: Landman Dep.** Vol. 3 at 560-62 (stating in July 1993 that PAS recently signed an agreement with Teleintar); **Lanni Dep.** Vol. 1 at 117-18 (discussing Teleintar and VSAT authorization), Vol. 2 at 277-82 (discussing PAS memorandum of understanding with Telintar for international digital services ("IDS") but not "on-premises" services); **Venezuela: Eastman Dep.** Vol. 1 at 130-34 (discussing PAS provision of services in Venezuela through Infosat); **PAS Ex. 2275** (June 12, 1992 PAS marketing letter to Pepsi Venezuela stating that PAS-1 is running out of capacity), 131 (discussing Infosat and Citibank point-to-point service); **Colombia: Eastman Dep.** Vol. 1 at 39-41 (discussing bulk bandwidth capacity offered by

citations also admit that the local PTT monopolies assisted PAS in gaining market access. See *id.*<sup>18</sup> [\*\*79] Defendant has also presented evidence that many of the alleged PTT conspirators could not grant landing rights, and that Plaintiffs could and did circumvent the PTT in other countries.<sup>19</sup> Defendant argues therefore that the alleged "bottleneck" did not exist, and that Plaintiffs cannot base a claim for refusal to deal on any PTTs' failure to provide agreements which were not necessary in the first place. In the face of Plaintiffs' failure to provide a reasonable estimate of any denials or delays of PAS requests for operating [\*\*76] agreements, and to support such

Comsat to Citibank in Colombia, Argentina and Venezuela), 136 (stating that PAS was forced to sign an exclusive agreement with Telecom Colombia), Vol. 2, 196-99 (alleging that after a 1991 change in Colombian law, PAS sought to transfer its exclusive agreement with Telecom Colombia to the Colombian ministry, so that customers interested in PAS would no longer have to go to Telecom but could go to the ministry to obtain licenses); **Saralegui Dep.** Vol. 3 at 451-52 (discussing competition in the Colombian market involving PAS, Comsat, Telecom, and possibly Brazilsat and ASETA's proposed Condor regional satellite system); **Trinidad & Tobago: PAS Ex. 2016** (February 27, 1990 PAS letter to Jamintel stating that PAS is "currently implementing this network in countries such as . . . Trinidad"); **PAS Ex. 2076** (October 5, 1990 PAS letter to Textel discussing pricing terms for Mobil and Citibank business under proposed operating agreement); **PAS Ex. 2088** (October 31, 1990 PAS letter to Shell Oil Company giving prices on business with PAS under working agreement with Textel); **PAS Ex. 2089** (October 31, 1990 PAS letter to Textel confirming details of business relationship)); **the United Kingdom: Comsat Ex. 77** (October 2, 1992 PAS letter to IBM France indicating that British Telecom initiated Article XIV consultations in March 1988, June 1988, and March 1991, and that "PAS also has a license to provide two-way VSAT services to and from the UK."); **France: Saralegui Dep.** Vol. 4, at 632 (admitting that PAS got limited license to provide VSAT and video applications); **Comsat Ex. 77 (supra)**; **Germany: Comsat Ex. 77** (October 2, 1992 PAS letter to IBM France indicating that PAS "has a license to provide two-way VSAT services to and from Germany"); **Italy: Antonovich Dep.** at 36-37 (admitting that PAS has an operating agreement in Italy with Telespazio); **Carroux Dep.** at 204-05 (as of November 1993, PAS had agreement in Italy to down-link broadcasts, but was unable to conclude operating agreement for two-way telecommunications services); **Comsat Ex. 77** (October 2, 1992 PAS letter to IBM France indicating Telespazio initiated Article XIV consultations in September 1989 and PAS entered an operating agreement dated April 30, 1990); **Comsat Ex. 955** (October 23, 1991 PAS memorandum titled "PAS 'Landing Rights' Outside of the United States" indicating Telespazio completed consultations for PAS Ku-band service in September 1989 and entered an operating agreement with PAS dated April 30, 1990); **Spain: Comsat Ex. 77** (October 2, 1992 PAS letter to IBM France indicating that video transmission is handled through a January 1, 1991 agreement with Retevision).

<sup>18</sup> Citing generally: **Comsat Ex. 532** (alleged excerpt of statements of PAS officer from July 2, 1990 *Satellite Week* magazine stating that "British Telecom, German and Swiss PTTs have given PANAMSAT 'excellent support';" that "June was 'blockbuster' for PANAMSAT's trans-Atlantic service;" and that "PANAMSAT has 'locked up' full-time capacity on Latin beam; U.S. beam still has capacity available."); **Brazil: PAS Ex. 2142** (April 10, 1991 letter to Telecommunications Task Force in the Office of the Prime Minister of Trinidad and Tobago, stating that "[PAS] found that Embratel did not have an exclusive monopoly over telecommunications in Brazil, and that, with the appropriate government authorization, [PAS] did not have to provide services through Embratel or Embratel's authorization, but could go directly to the government for approval. We now find that Embratel is willing to work with us"); **Jamaica: PAS Ex. 2014** (February 27, 1990 PAS memorandum discussing support of C&W for PAS-1 services)); **Trinidad & Tobago: PAS Ex. 2009** (February 7, 1990 PAS memorandum discussing Textel officials as "serious about doing business with [PAS]"); **PAS Ex. 2014** (February 27, 1990 PAS memorandum discussing status of Article XIV(d) consultations and the support of C&W for PAS-1 services); **PAS Ex. 2034** (March 30, 1989 PAS marketing letter to Mobil indicating that Textel "seemed very receptive to PAS-1's services"); **the United Kingdom: Goldschmidt Dep.** Vol. 1 at 128-30 (discussing C&W as competitor of PAS in Great Britain and the Caribbean nations), 132-38 (admitting PAS got initial landing rights in the United Kingdom in 1988, class licenses in 1991, and a specialized license in March 1993); **Spain: Comsat Ex. 215** (November 21, 1989 PAS memorandum including notes of November 17, 1989 meetings with Telefonica and Ministry of Communications indicating that Telefonica was willing to negotiate a "good agreement").

<sup>19</sup> See, e.g., **Brazil: Araujo Decl.** PP 12-13 (arguing that Embratel does not have the ability to grant the operating agreement); **Eastman Dep.** at 22 (an operating agreement from Embratel was not even required after PAS had secured authorization from the government); **the Dominican Republic: Def.'s Reply Summ. J. Mem.** at 10 & App. B. at 4 (arguing that PAS did not need an operating agreement but could work through the private provider Tricom); **Germany: Def.'s Summ. J. Mem.** at 13 n.18 (citing **Balz Decl.** PP 4-5) (claiming that the German PTT does not even have authority to give landing rights); **Def.'s Reply Summ. J. Mem.** at 8-9 & App. B. at 6; **France: Def.'s Summ. J. Mem.** at 13 n.18 (citing **Dupuis Toubol Decl.** P 4 (claiming that the French PTT does not even have authority to give landing rights)); **the United Kingdom: Def.'s Summ. J. Mem.** at 13 n.18 (citing **Gillies Decl.** P 4 (alleging that British Telecom did not have the authority to grant landing rights)).

an estimate with evidence, Defendant's showing precludes a reasonable inference of a pattern of parallel refusals to deal with PAS.

Moreover, Plaintiffs have failed to refute Defendant's showing that any appearance **[\*\*80]** of parallel conduct is attributable to other causes. For example, Defendant has shown that an historic wave of regulatory liberalization swept over the telecommunications industry between 1988 and 1992.<sup>20</sup> **[\*\*82]** Plaintiffs' own citations

<sup>20</sup> See, e.g., generally: **Goldberg Dep.** at 52-55 (discussing liberalization generally); **Comsat Ex. 77** (October 2, 1992 PAS letter to IBM France stating that PAS's ability actually to do business after Article XIV consultations is "wholly dependant on the telecommunications laws of the country and often does not involve specific governmental action at all. Since most European countries have deregulated their VSAT services, at least on a receive-only basis, PAS is able to deal directly with its customers, whether telecommunications service providers or end users, without the need for further action by governmental authorities. If any governmental action is necessary under local law, PAS usually relies on those customers to secure the requisite authorizations."); **Argentina: Dell'Oro Maini Decl.** (showing that prior to January 1990, telecommunications services in Argentina were provided exclusively by the State, through the PTT signatory Entel Argentina), P 12 (stating that in September 1991, CNT adopted formal procedures allowing for non-Intelsat satellite capacity providers to be authorized); **Dell'Oro Maini Dep.** at 25, 35-36, 42, 44 (same); **Goldschmidt Dep.** Vol. 2 at 400-02 (indicating that in Argentina and throughout Latin American PAS's problem getting market access was one of national law and PTT policy); **Comsat Ex. 28** (October 1985 PAS memorandum discussing lobbying strategy for changing Argentine regulatory structure); **Comsat Ex. 213** at PAS 212467 (admitting that Argentine laws limiting access have delayed PAS's entry into the market); **Comsat Ex. 262** at PAS 027425 (March 18, 1992 PAS letter acknowledging that Entel was a monopoly provider prior to the liberalization of the Argentine regulatory structure in 1990 and the privatization of Entel--conduct completely beyond the scope of Comsat's activities); **Brazil: Araujo Decl.** PP 11-13 (Brazil did not remove all the limits to non-Intelsat space segment providers until 1991); **Araujo Dep.** at 32-39, & 45 (Brazil effectively did not allow Embratel to purchase capacity directly from PAS until 1993); **Comsat Ex. 36** at 5 (same as Comsat Ex. 244, *supra*, (December 1988 letter from PAS to U.S. Trade Representative listing as the number one barrier to PAS market entry in Brazil as the "current government prohibition of any access to the PAS-1 by Brazilian customers (i.e. total market exclusion)"); **Comsat Ex. 924** at 1 (PAS received its Intelsat consultation in March 1989); **Chile: Gutierrez Decl.** P 4 (from mid-1988 to 1990, "the laws and regulations of Chile" effectively prevented Plaintiffs from providing satellite capacity for the provision of satellite-based services to end-users in Chile), PP 9-10 (stating that although the Chilean telecommunications sector formally began to liberalize in 1982, the Undersecretariat of Telecommunications ("Subtel") did not promulgate the regulations necessary to gain operating authorization until 1988), P 16 (stating that PAS never applied for a license); **Gutierrez Dep.** at 25-26, & 30 (stating that competition developed slowly until 1994 because there was "no legal framework" before amendments to the general telecommunications law in March 1994 and regulations issued in July 1994), & 41-42 (discussing without mention of Comsat the inability of CTC to use the transponder purchased from PAS because of "regulatory problems" and because of PAS's failure to obtain the necessary license); **Gazzolo Dep.** Vol. 1 at 25-26 (as of the passage of the 1988 regulations, the Chilean market was effectively limited to three companies: Entel Chile, CHILESAT, and TVN), 85 ("[CTC] had a problem . . . with the courts within Chile . . . that lasted for almost five years, six years, until this year [(1994)] they were allowed to operate a data communication."); **Comsat Ex. 955** at PAS 834744 (stating that the Subtel informed PAS in June 1990 that PAS could offer capacity for various services in Chile if it first obtained a license); **Venezuela: Def.'s Summ. J. Mem.** at 13 n.18; **Def.'s Reply Summ. J. Mem.** at 9 & App. B. at 10-11; **Goldschmidt Dep.** Vol. 2 at 255-57 (referring to 1991 reform of the telecommunications sector, including privatization of C.A.N.T.V., leading to the possibility of private networks such as PAS); **Juarez Decl.** PP 9-11, 13-14, 16-18 (PAS received its Intelsat consultations in June and August 1990, one year before Venezuela deregulated); **Guatemala: Def.'s Reply Summ. J. Mem.** at 10 & App. B. at 6-7 (citing Comsat Ex. 1024; Comsat Ex. 1025); **Morgan Dep.** at 36-37 (showing that Guatel, the PTT signatory in Guatemala, could not offer service through private companies until June 1989, and then only to majority Guatemalan companies); **Spain: Def.'s Reply Summ. J. Mem.** at 9 & App. B. at 8; **Boneyto Dep.** at 24; **Beneyto Decl.** PP 15-17 (with exceptions, private providers still cannot provide end-user service in Spain); **Germany: Balz Dep.** at 62-67; **Balz Decl.** P 6, 11 (stating that before June 1990, private sellers could not sell capacity directly in Germany); **France: Reverte Anselmo Dep.** Vol. 2 at 270-77 (stating that PAS did not get authorization from the Ministry of Foreign Affairs because France Telecom is a government owned corporation); **Dupuis-Toubol Decl.** PP 5 & 19 (French law restricted service to permit only the French PTT), PP 20-21 (PAS got license to operate within four months after applying after change in French regulatory structure); **Dupuis-Toboul Dep.** at 33-37; **the United Kingdom: Gillies Decl.** PP 9-10 (asserting that British Telecommunications ("British Telecom") was the monopoly PTT in Great Britain; that it was approximately 48% government owned; and that from 1981 to 1988, British Telecom and a company called Mercury Communications were the only telecommunications companies authorized to provide service in Great Britain under a government "duopoly" policy); **Comsat Ex. 924** (PAS obtained its Article XIV consultations at the end of the "duopoly" policy in 1988); **PAS Ex. 3118; Colombia: Def.'s Reply Summ. J. Mem.** at 8-9 & App. B. at 3-4 (citing Tamayo Decl. P 3

acknowledge this wave of liberalization and recognize its effect on the industry and on Plaintiffs' ability to gain access to many markets. See Pls.' 3(g) Statement P 36.<sup>21</sup>

Laws regulating access to satellite systems vary from country to country and, as a result, there is no single model which will work in all countries. Some countries have substantially deregulated satellite communications, making customer access to [PAS's] services a simple procedure, while other countries have maintained strict monopoly regimes, so that establishing a framework for accessing [PAS's] services is a time-consuming task.

Comsat Ex. 998 at 54 (PAS SEC Form S-1 (Oct. 6, 1994)); see *id. at 24* (attributing 1992 increase in Latin American customers to "removal of regulatory restrictions in Venezuela and Colombia"), 32 (acknowledging that PAS faced "significant regulatory hurdles" when it started in 1988 and attributing PAS's success and growth to **[\*\*81]** "continuing worldwide deregulation of telecommunications markets"). Since regulatory liberalization is clearly outside the common carrier role of Comsat and the alleged PTT conspirators, the burden is on Plaintiffs' to show that any apparent parallel conduct was not the result of this liberalization. Plaintiffs have not met this burden.

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(claiming that Colombian law precluded PAS entry for one year after PAS-1 launch), P 12 (PAS applied in July 1989 and got authorization on March 7, 1990); **Italy: Rverige Anselmo Dep.** Vol. 1 at 62-63 (discussing receive-only legislative restrictions in Italy where Societa Telespazio ("Telespazio") is the PTT monopoly provider of transmission services); **Spain: Antonovich Dep.** at 35-37 (stating that Spain is a "highly regulated and controlled" market); **Comsat Ex. 215** (November 21, 1989 PAS memorandum including notes of November 17, 1989 meetings with Telefonica and Ministry of Communications indicating that all decisions on PAS-1 would come from the Ministry of Communications).

<sup>21</sup> Citing generally: **Goldberg Dep.** at 37-39 ("Virtually all of the PTTs . . . were monopoly entities. Over the course of eight or nine years, through the processes of liberalization and privatization around the world, situations have changed."); **Argentina: Maini Dep.** at 35-46 (stating that Entel Argentina was an effective monopoly prior to the liberalization of government regulations); **Eastman Dep.** Vol. 1 at 102-10 (discussing privatization of Entel Argentina and formation of Telintar), 118 (discussing Telintar exclusion of PAS), 127-29 (discussing Telintar); **Goldschmidt Dep.** Vol. 2 at 400-02 (indicating that in Argentina and throughout Latin American PAS's problem getting market access was one of national law and PTT policy); **Saralegui Dep.** Vol. 1 at 160-62 (discussing authorizations required in preliberalization Argentina); **PAS Ex. 1866** (December 1988 letter from PAS stating PAS intention to establish "affiliation agreement" with an Argentine company as soon Argentine Secretariat of Communications issues authorization); **Comsat Ex. 520** (October 1985 PAS memorandum discussing lobbying strategy for changing Argentine regulatory structure); **Brazil: Goldberg Dep.** at 39 (Embratel was a monopoly until shortly before Sept. 1994); **Araujo Dep.** at 37-38 ("prior to 1991 if PANAMSAT wanted to get access to the Brazilian market, the only alternative PANAMSAT had was to make some type of arrangement with Embratel"); **Gazzolo Dep.** Vol. 1 at 154 (discussing Embratel refusal to deal with PAS in 1991, and option of PAS going directly to the Brazilian ministry for authorization); **Comsat Ex. 955** (October 23, 1989 PAS memorandum discussing "continuum of deregulation" with regard to PAS efforts to obtain landing rights); **Venezuela: Goldschmidt Dep.** Vol. 2 at 255-57 (referring to 1991 reform of the telecommunications sector, including privatization of C.A.N.T.V., leading to the possibility of private networks such as PAS); **Morgan Dep.** at 55 (Venezuelan deregulation in late 1992 or early 1993 when the bureaucracy "caught up" to the earlier passed deregulation laws); **Colombia: Eastman Dep.** Vol. 1 at 162-63 (discussing process of initiating Article XIV consultations), Vol. 2 at 196-99 (alleging that after a 1991 change in Colombian law, PAS sought to transfer its exclusive agreement with Telecom Colombia to the Colombian Ministry, so that customers interested in PAS would no longer have to go to Telecom but could go to the ministry to obtain licenses); **Lanni Dep.** Vol. 2 at 266 (discussing PAS's intention to by-pass Telecom and seek authorization from the ministry), Vol. 3 at 362-63 (discussing national political problems delaying deregulation in Colombia); **PAS Ex. 2283** (July 1, 1992 PAS letter to Telecom requesting transfer of PAS agreement with Telecom to the Ministry pursuant to a change in the regulatory structure); **France: Albert Dep.** Vol. 1 at 95-96 (between 1990 and 1993 France loosened regulations and allowed independent licensing of private organizations to uplink services); 99 (regarding application procedure for uplink licenses); **Comsat Ex. 532** (alleged excerpt from July 2, 1990 Satellite Week magazine stating that it remained to be seen how or whether France Telecom would open the French market to U.S. satellite service providers); **Germany: Goldschmidt Dep.** Vol. 1 at 221-22 (stating without reference to Comsat that the German telephone company, Deutsche Bundespost, consistently opposed granting any operating rights to PAS in Germany until 1991, when changes to the licensing procedure removed the need to obtain the authorization of the Bundespost); **Italy: Rverige Anselmo Dep.** Vol. 1 at 62-63 (discussing receive-only legislative restrictions in Italy where Societa Telespazio ("Telespazio") is the PTT monopoly provider of transmission services); **Antonovich Dep.** at 34-35 (citing Telespazio as monopoly PTT).

[\*\*83] Defendant has also shown through the admissions of PAS officers and employees that PAS's novelty contributed to delays in its obtaining market access. See Def.'s Mem. in Supp. of Mot. for Summ. J. at 10 n.15 (hereinafter "Def.'s Summ. J. Mem."). For example, PAS officer Saralegui admitted that

[PAS] often was a strange animal in the sense that there may not have been a specific regulation as to who can or cannot access a satellite system separate from Intelsat, because when the regulations were drafted, I think sometime it was assumed it would always be Intelsat.

Saralegui Dep. Vol. 2 at 317; see *id.* Vol. 1 at 154-55 ("[PAS], as a separate satellite from Intelsat, often was something that had not even been contemplated when these regulations were drafted. So we often found ourselves in a nether world.").<sup>22</sup> Again, the burden is on Plaintiffs' to present evidence tending to show that any appearance of parallel conduct is not merely a reflection of PAS's role in the vanguard of liberalization. Plaintiffs have not met this burden.

[\*\*84] Defendant has likewise shown that unique local factors in many of the alleged PTTs' nations belie any cosmetic appearance of parallel conduct.<sup>23</sup> [\*\*86] For example, PAS's entry into the Brazilian market was delayed by PAS's intentional exclusion of Brazil from the primary coverage area of the PAS-1 satellite. See Anselmo Dep. at 451-52. In Trinidad & Tobago, on the other hand, "recent [political] disruptions" contributed to PAS's delays. See Comsat Ex. 462 at PAS 038860 (alleging that PAS entered a working arrangement without an operating agreement in Trinidad & Tobago despite serious military and political unrest during the negotiations).<sup>24</sup> In the United Kingdom, Plaintiffs lost an open competition with twenty-seven other companies for early authorization to enter the British market. See Def.'s Reply Summ. J. Mem. at 9 & App. B. at 9-10. Plaintiffs attributed a delay in Barbados to the PTT's "heavy workload rather than any planned obstruction of PAS-1 services." See PAS Ex. 2110 at PAS 017684 (January 11, 1991 PAS letter to C&W London). Moreover, Defendant cites Plaintiffs' admission that "there is no single model that will work in all countries." Comsat Ex. 998 at [\*\*85] 54. Defendant argues, therefore, that Plaintiffs have failed to show a "uniform refusal," a "general similarity of action" or "parallel action" on the part of the

<sup>22</sup> See also **Albert Dep.** at 120-21 (agreeing that the most significant disadvantage for PAS was the regulatory approval process); **Comsat Ex. 644** at 55 (DLJ Confidential Offering Memorandum, May 1991) ("Obtaining Landing Rights in many countries was very difficult for PAS-1 because there was no precedent for dealing with a private satellite system. However, the process should not be as troublesome for PAS-2."); **Comsat Ex. 814** at PAS 212623-23 (PAS January 3, 1989 letter to U.S. Trade Commission acknowledging that "[PAS's] presence appears unique" and acknowledging a "perception that [PAS] is attempting to force a revolution in the way international telecommunications service is offered").

<sup>23</sup> See, e.g., generally: **PAS Ex. 2009** (February 7, 1990 PAS memorandum alluding to AT&T as "working against [PAS] lately in a number of locations," but not mentioning Comsat); **Chile: Landman Dep.** Vol. 2 at 481 ("[Chile] was not typical of most South American countries . . . . it was unique then"); **Argentina: Eastman Dep.** Vol. 3 at 416-19 (discussing competitiveness of Argentine market); **Comsat Ex. 244** at PAS 021803 (acknowledging that delay in negotiating operating agreement caused by uncertainty over privatization of Entel Argentina); **Comsat Ex. 284** (Feb. 1989 PAS memorandum discussing strategies for Argentina and stating that "given the politics in Argentina, [Goldschmidt] will be very surprised if anything develops until the last gasp of 1989"); **Venezuela: Goldschmidt Dep.** Vol. 2 at 580-82 (discussing PAS-1 C-band foreign domestic transponder capacity selling out); **Saralegui Dep.** Vol. 4 at 579-81 (discussing, without reference to Comsat, loss of Venevision and delay of Omnidision business for lack of PAS capacity after 1991); **PAS Ex. 2275** (June 12, 1992 PAS marketing letter to Pepsi Venezuela stating that PAS-1 is running out of capacity); **Colombia: Gazzolo Dep.** Vol. 2 at 264-65 (stating that potential customer Banco Ganadero was delayed in getting a license from the Colombian Ministry), 279-81 (dispute over provisions of an exclusive operating agreement with Telecom delayed business between PAS and Precidatos), 319-20 (stating that Impsat was delayed in obtaining authorization when it applied directly to the Ministry of Colombia), 326-27 (discussing ministry delay in authorizing Orbinet); **Saralegui Dep.** Vol. 4 at 629 (admitting lack of direct knowledge of either Comsat or Telecom involvement in delays of ministry authorization for PAS).

<sup>24</sup> See also **Eastman Dep.** Vol. 2 at 219 (claiming difficulty in obtaining operating agreement due to C&W ownership of the PTT); **PAS Ex. 2072** (September 25, 1990 PAS letter to Textel noting that "recent disruptions [in Trinidad] have likely contributed to the delays [PAS is] currently experiencing" and the "still tenuous situation in Trinidad"); **Comsat Ex. 429** (August 31, 1990 PAS letter to Textel recognizing "some disruption in [Textel's] normal activities" caused by the unstable situation in Trinidad and Tobago); **Comsat Ex. 466** (same as PAS Ex. 2072, *supra*).

alleged conspirators. See Def.'s Reply Summ. J. Mem. at 10 (citing at [Harlem River, 1976-1 Trade Cas. \(CCH\) P60,820 at 68,575, 1976 WL 1238](#) at \*4). The Court agrees.

## (B) Insufficient evidence of plus factors

Rather than present evidence of the alleged refusals to deal or delays, Plaintiffs urge the Court to examine additional factors which allegedly establish that the still unsubstantiated parallel conduct resulted from the alleged conspiracy. See Pls.' S.J. Opp'n Mem. at 11. These factors include a common intent to conspire, a high level of interfirm communications, "customary indications" of a traditional conspiracy, and evidence that the [\*894] alleged parallel [\*\*87] conduct was contrary to the alleged conspirators' economic interests.

### (1) Intent to conspire

Plaintiffs argue that the record contains evidence of an intent to conspire against PAS. See Pls.' Opp'n Mem. at 11-12. For the most part, however, Plaintiffs cite to testimony and exhibits which reveal only Comsat's intention to vie for business in an atmosphere of growing competition from various companies, including PAS.<sup>25</sup> [\*\*88] Without

<sup>25</sup> See, e.g., **PAS Ex. 80** (handwritten May 25, 1988 note discussing PAS pricing for full and 1/2 circuits); **PAS Ex. 81** (June 1988 ISS/Comsat strategy paper excerpts discussing PAS "threat"); **PAS Ex. 265** (April 28, 1989 Comsat/ISS memorandum discussing PAS agreement with Entel Argentina and possibility of similar deal between Entel and Comsat); **PAS Ex. 288** (May 4, 1989 Comsat/ISS memorandum discussing competition from PAS and political situations in Argentina, Brazil, and Chile); **PAS Ex. 139** (October 18, 1990 Comsat priority memorandum discussing Argentine strategies and mentioning PAS); **PAS Ex. 101** (July 19, 1989 note stating "Here is some more information on PAS"); **PAS Ex. 102** (July 7, 1989 analysis of PAS-1 financial and capacity characteristics); **PAS Ex. 1102** (March 24, 1989 Comsat/Entel Chile joint venture proposal); **PAS Ex. 112** (October 14, 1988 memorandum comparing Comsat and PAS rates for data and video service); **PAS Ex. 26** (June 1, 1988 memorandum comparing PAS-1 and PAS-2 satellites with Intelsat VI and Intelsat VII satellites on cost, price, capacity and performance); **PAS Ex. 35** (ISS competitive analysis charts on PAS-1 transponder loading and on trans-Atlantic capacity for all satellites); **PAS Ex. 109** (capacity, program, and financial analysis of PAS-1); **PAS Ex. 1552** (May 7, 1992 Comsat World Systems memorandum forwarding a May 4, 1992 memorandum comparing prices of Comsat and PAS); **PAS Ex. 2715** (incremental cost analysis of PAS-1 and Orion); **PAS Ex. 1793** (Comsat/ISS strategy materials listing as competitors Brightstar, Teleglobe, PAS, and domestic satellites in the Caribbean); **PAS Ex. 671** (March 12, 1992 covering memorandum distributing an article from *Interspace* newsletter, allegedly written by PAS, discussing PAS landing rights, country by country); **PAS Ex. 73** (November 29, 1988 memorandum discussing PAS satellites and competition); **PAS Ex. 1800** (March 3, 1989 Comsat memorandum examining pricing of television for PTAT and PAS); **PAS Ex. 57** (February 7, 1990 message seeking information on PAS transponders); **PAS Ex. 931** (June 7, 1990 Comsat circulation memorandum with attached May 1990 Comsat Competitive Systems Quarterly Report, listing PAS among six competing satellite systems and listing PAS customers); **PAS Ex. 349** (handwritten note stating that PAS has an earth station in Costa Rica, and a February 26, 1990 memorandum with attachments examining PAS traffic); **PAS Ex. 386** (July 18, 1989 or 1990 handwritten memorandum discussing PAS capacity and quoting Anselmo statement that PAS sold out capacity on its southern beams); **PAS Ex. 391** (July 17, 1989 or 1990 handwritten note listing countries which have allowed PAS to provide service); **PAS Ex. 399** (June 28, 1989 memorandum highlighting issues about PAS); **PAS Ex. 940** (comparison charts of PAS and Orion power coverage of European cities); **PAS Ex. 941** (data on PAS-1 European coverage, trans-Atlantic satellite capacity, and Intelsat-K satellite); **PAS Ex. 943** (data on 1992 K-band capacity in the trans-Atlantic and European markets); **PAS Ex. 122** (undated memorandum on PAS satellite capabilities); **PAS Ex. 354** (April 2, 1990 memorandum distributing attached article on Anselmo and PAS from the *New York Times Magazine*, April 1, 1990); **PAS Ex. 651** (article from August 1990 issue of *Satellite Communications* focusing on PAS-1); **PAS Ex. 655** (memorandum on PAS satellite capabilities); **PAS Ex. 661** (March 22-29, 1989 *Variety* magazine article on PAS-1); **PAS Ex. 938** (chart comparing power coverage of European cities among Intelsat, Astra, PAS, and Orion); **PAS Ex. 1342** (March 6, 1991 data on capacity and status of separate satellite systems); **PAS Ex. 381** (June 6, 1989 memorandum to file discussing PAS financials, operating costs, and "free use introductory offers"); **PAS Ex. 1516** (competitive analysis of PAS-1 customers and services); **PAS Ex. 975** (data on competitive systems including Intelsat, K-Sat, Astra, Eutelsat, PAS-2 and Orion); **PAS Ex. 133** (May 18, 1989 data on cost, pricing, and programming of PAS-2); **PAS Ex. 454** (incremental cost analysis of PAS-1 and Orion); **PAS Ex. 58** (August 21, 1990 handwritten memorandum discussing PAS and Brazilsat as two separate systems serving South America); **PAS Ex. 1547** (February 12, 1991 ISS analysis of PAS-1 fill factor); **PAS Ex. 1390** (February 12, 1991 ISS analysis of PAS-1 and Orion); **PAS Ex. 1023** (February 20, 1991 Comsat memorandum discussing PAS and Orion); **PAS Ex. 1548** (data on PAS-1 full time pricing); **PAS Ex. 959** (February 25, 1991 Comsat memorandum discussing bearer capacity on PAS-1); **PAS Ex. 1550** (September 25, 1991 rate comparison between Comsat and PAS-1); **PAS Ex. 78** (March 17, 1992 Comsat World Systems

more, a reasonable trier of fact cannot infer from this permissible intent to compete an impermissible intent to conspire against competition.<sup>26</sup>

Plaintiffs claim that Comsat exceeded vigorous competition and engaged in anticompetitive initiatives from 1984 through 1986 by lowering prices and entering long-term contracts with common carriers. Plaintiffs argue that this conduct permits an inference of an intent to foreclose PAS from the business of these carriers. See Pls.' 3(g) Statement P 19 at 11. The Court disagrees. The record reflects that Comsat's rates are set according to Intelsat

memorandum comparing Intelsat and PAS capabilities); **PAS Ex. 38** (ISS Competitive Analysis charts on Orion and PAS systems); **PAS Ex. 2636** (May 15, 1992 marketing proposal comparing Intelsat/Comsat with PAS as a space segment supplier for VSATs in Latin America); **PAS Ex. 135** (April 23, 1990 data comparing separate satellite systems including PAS, Intelsat, and Orion); **PAS Ex. 1735** (handwritten notes on PAS lease rates); **PAS Ex. 1736** (analysis of PAS-1 and PAS-2); **PAS Ex. 1514** (data on PAS revenues with handwritten note stating that "PANAMSAT could charge much less!"); **PAS Ex. 1769** (March 14, 1991 Comsat World Systems memorandum with projections for video competition among Comsat, PAS, Colombia, Orion, and Teleglobe); **PAS Ex. 3009** (Intelsat Satellite Services ("ISS") Strategic Business Plan 1991-1993 in draft form); **PAS Ex. 3012** (March 1991 Comsat/ISS Strategic Outlook report listing PAS as customer alternative for IBS and television services in 1991); **PAS Ex. 3017** (Oct. 29, 1991 Comsat World Systems Strategic Business Plan 1991-1996); **Skjei Dep.** at 39-65 (discussing PAS Ex. 82 (handwritten notes comparing PAS and Comsat)), 79-87 (discussing PAS Ex. 80, *supra*), 91-94 (denying that PAS was discussed at Comsat joint venture meetings); **Vargo Dep.** at 19-22 (discussing Comsat strategic planning regarding separate systems), 29-30 (discussing Comsat strategic planning), 39-42 (Comsat disavowing knowledge of PAS overtures in Argentina and Chile prior to Comsat negotiations in those countries), 70-72 (discussing preparation and receipt of PAS Exs. 101-02, 354-55), 92-97 (discussing PAS Ex. 1102 and Comsat awareness in March 1989 of PAS negotiations in Chile), 128 (referencing PAS Ex. 81), 130-32 (acknowledging that after March 1989 PAS may have been mentioned at Comsat meetings), 162-65 (referencing PAS Exs. 108 & 1345)); **Boll Dep.** Vol. 1 at 37-43 (referencing PAS Ex. 112 and discussing Comsat comparison of PAS and Comsat/Intelsat satellite features), 50-52 (discussing PAS Ex. 112), 73-82 (discussing PAS Ex. 26 comparison of Intelsat and PAS satellites), 89-90 (referencing PAS Ex. 35), 189-91 (referencing PAS Exs. 108-09), Vol. 2 at 282-91 (discussing need for operating agreements when providing full circuit), 424-25 (acknowledging Comsat comparison of Comsat and PAS pricing), 448-49 (examining PAS Ex. 1552), 471-73 (discussing PAS Ex. 2715); **Cecala Dep.** at 9-15 (examining PAS Ex. 1793 and comparing Comsat and PAS); 20-23 (discussing PAS Exs. 80 & 1182 regarding PAS pricing data), 46 (referencing PAS Ex. 671); **Chaconas Dep.** at 45-55 (discussing a Comsat internal presentation on separate systems in 1989, including but not limited to PAS), 102-12 (referencing PAS Ex. 73 and discussing a Comsat internal presentation on separate systems in 1989, including but not limited to PAS), 116-41 (discussing PAS Ex. 1800 and Comsat analysis of separate system break-even points, including PAS); **Flower Dep.** at 96-104 (discussing PAS Ex. 57 and economic analysis performed by Comsat), 107-08 (referencing PAS Ex. 57), 121-27 (discussing PAS Ex. 26); **Giarman Dep.** at 25-31 (discussing PAS Ex. 931 and discontinued Comsat quarterly report on competitors), 41-46 (discussing Comsat gathering and internal distribution of publicly available information on separate satellite and cable systems, including PAS), 55-66 (discussing PAS Exs. 349, 386 & 391), 84-85 (discussing PAS Ex. 82), 89-90 (discussing PAS Ex. 82 and Comsat monitoring of all satellite launches), 94-98 (discussing PAS Exs. 391 & 399), 102-16 (discussing PAS Exs. 940-41, & 943), 120-23 (discussing PAS Exs. 101-02), 126-32 (referencing PAS Exs. 122 & 354), 134-47 (referencing PAS Exs. 122, 651, 655, 661, 938, 940 & 1342); **Hoff Dep.** at 32-65 (discussing PAS Exs. 73, 381, & 1800 and analyses of separate systems and cables, including PAS costs, pricing and capacity); **Hsu Dep.** at 27-45 (discussing Comsat competitive analyses of separate cables and satellite systems, including PAS, after 1990), 76-80 (discussing PAS Exs. 26 & 1516 regarding Comsat competitive analyses), 84-85 (discussing Comsat report comparing PAS and Astra), 96-100 (referencing PAS Exs. 133 & 975), 109-13 (referencing PAS Exs. 454 & 2715 regarding incremental costs of new satellites), 115-18 (referencing PAS Exs. 58 & 1541), 133-46 (discussing PAS Exs. 959, 1023, 1390, 1547-48), 164-73 (discussing PAS Exs. 38, 78, & 1550 and stating that one hundred percent of information collected by Comsat about PAS came from publicly available sources), 182-85 (discussing PAS Exs. 2636); **Jacxsens Dep.** at 34-45 (discussing PAS Ex. 26 which compares costs of Intelsat and PAS satellites), 47-61 (discussing PAS Exs. 109 & 135 and analyses of separate systems' capacity, costs, & coverage), 64-70 (discussing PAS Exs. 133 & 2715 comparing Intelsat-K and PAS-II), 74-85 (discussing PAS Exs. 1514 & 1735-36 regarding PAS costs and pricing of transponders); **Kemp Dep.** at 61-76 (discussing Comsat financial analysis of PAS using only publicly available information), 144-55 (discussing PAS Exs. 1769 and market share forecasts, 1990-93), 162-69 (discussing PAS Ex. 78 comparing PAS and Intelsat capabilities).

<sup>26</sup> In a further effort to show Defendant's alleged intent to conspire against PAS, Plaintiffs cite to lobbying materials, see, e.g., **PAS Ex. 3120** (testimony of Irving Goldstein, President of Comsat, before the Committee on Energy and Commerce of the House of Representatives, June 13, July 25 and 26, 1984), and to materials produced in connection with Defendant's signatory role. See, e.g., **PAS Ex. 3085** (record of the Fourteenth Meeting of Signatories of Intelsat concerning separate satellite systems). These materials cannot support an inference of impermissible conduct.

tariff schedules, therefore Plaintiffs' allegations concerning **[\*\*89]** price amount to little. Moreover, although the record does reflect that Comsat entered long-term contracts with many common carriers, nothing in the record suggests that Comsat secured any of the contracts by means of any anticompetitive act against PAS. On the contrary, the record suggests that for their own reasons, the common carriers elected to secure long-term deals with Comsat only after considering and rejecting offers from PAS. See *id.*<sup>27</sup>

**[\*\*90]** Plaintiffs also purport to offer "substantial testimony" from PAS customers--including IBM, DuPont, and Cargill--that these customers "were precluded from doing business with PAS because of the refusal of PTTs to enter into operating agreements or provide landing rights." See Pls.' S.J. Opp'n Mem. at 22-23 & n.5. This compound proposition misstates the testimony in the record. The record contains testimony that identifies PAS's lack of operating agreements as one reason, among many, that certain customers chose not to do business with PAS. Plaintiffs provide no testimony, however, of any intent to conspire to deny PAS any operating agreement. Defendant, on the other hand, cites testimony refuting this claim. See, e.g., Def.'s Summ. J. Mem. at 9 (citing Maull Dep. at 7, 101-02) (testimony of AT&T's international negotiations manager disputing any suggestion that PTTs in Latin America were operating in conjunction). Plaintiffs' attributing to the alleged conspiracy the fact that PAS may have lacked operating agreements at a particular time, in a particular nation, for a particular service is not supported by the record.

Ultimately, Plaintiffs resort to repeated, talismanic **[\*\*91]** citation of a few items out of the thousands provided to the Court. This effort is unavailing. Plaintiffs repeatedly cite to the handwritten notes by a Comsat employee comparing PAS and Comsat. See PAS Ex. 82 (notes of Stephen Skjei).<sup>28</sup> **[\*\*92]** Plaintiffs argue that a clause in the notes stating that Comsat should "contest every market" permits an inference of an intent to conspire. The Court disagrees. In context, the clause shows nothing more than an intent to compete. Although Plaintiffs contend that the clause indicates Comsat's decision to contest every market "regardless of business justifications," see Pls. 3(g) Statement P 21, nothing in either the document or the many pages of deposition testimony concerning the document warrants such an inference.<sup>29</sup> On the contrary, the deposition testimony indicates that the notes record

<sup>27</sup> Citing **Lanni Dep.** Vol. 2 at 198-219 (discussing alleged "Mastercard" meeting between Comsat and AT&T and alleged "top down" meeting at AT&T, but without personal knowledge and without identifying the parties allegedly present for Comsat or AT&T); **Comsat Ex. 143** (December 23, 1991 draft of PAS marketing letter to AT&T concerning pricing for VSAT service); **Comsat Ex. 221** (July 25, 1988 PAS marketing letter to AT&T admitting that "PAS-1 does not meet AT&T's current satellite requirements" and that AT&T's "relationship with various PTTs precludes [AT&T's] reaching an agreement with PAS"); **Comsat Ex. 236** (May 12, 1992 PAS memorandum discussing AT&T and alleged "Mastercard" meeting); **Comsat Ex. 777** (November 19, 1991 PAS memorandum discussing concern over customer inquiries about PAS restoral ability); **Comsat Ex. 778** (December 30, 1991 final draft of PAS marketing letter to AT&T concerning pricing for VSAT service, including pricing appendices and list of countries in which PAS is authorized to provide services); **Comsat Ex. 782** (same as Comsat Ex. 236, *supra*).

<sup>28</sup> The notes list under the heading "PAN AMSAT" the subheadings "ADVANTAGES" and "DISADVANTAGES." Listed as PAS advantages are "lower price" and "higher power." Listed as PAS disadvantages are "connectivity," "no cross-strap," "no restoration," "no ties," and "no U.S. coverage," followed by notations stating "all can be overcome w. time + money" and "if he builds second satellite we are in trouble." The notes then list under the heading "CQ RESPONSE" and the subheading "GENERAL" the following items: "Better capacity - off the shelf networks," "Business relations/ties w. Signatories," "Promotion - CQ labs, if reoriented," "Emphasis on networks - digital IBS, IDR, ISDM," "Contest every market;" and "REGIONAL SYSTEM, TV-SAT, SEX APPEAL." On a second page under the heading "Pan Amsat" there appear notations stating "creativity - conventions on C-SPAN," and "we need more ideas." See PAS Ex. 82.

<sup>29</sup> See, e.g., **Skjei Dep.** at 15-16 (discussing Skjei's tenure as Comsat Director of Business Development), 39-40 (discussing Comsat sources of information in PAS Ex. 82), 40-42 (discussing PAS Ex. 82 and advantages of PAS over Comsat, including price)); **Giarman Dep.** at 84-85 (discussing PAS Ex. 82), 89-90 (discussing PAS Ex. 82 and Comsat monitoring of all satellite launches); **Crockett Dep.** Vol. 2 at 328-31 (discussing PAS Ex. 82 and advantages of PAS over Comsat, including price and power); **Carroll Dep.** Vol. 1 at 50-52 (discussing PAS Ex. 82 and advantages of PAS power and flexible pricing); **Phillips Dep.** at 336-37 (interpreting "contest every market" as recognizing competition, not a nonprice predation).

only the author's opinions, see Skjei Dep. at 57-59 (stating that PAS Ex. 82 merely reflects opinion and does not suggest responses to PAS), and were never distributed to higher-ups. See *id.*

Plaintiffs also invoke a draft of a June 15, 1989 memorandum from a Comsat research analyst to Comsat's vice president of business development. See Pls.' 3(g) Statement P 35; PAS Ex. 108 (June 15, 1989 draft memorandum discussing Comsat "strategic business plan competitor issues"). The memorandum discusses competition not only from PAS but from the Orion [\*\*93] and Astra satellite systems, from underseas fiber cable systems, and from common carriers such as US Sprint. Plaintiffs excerpt a single item from the draft memorandum:

. Several PTT's in Europe, e.g. France, Switzerland (?) and the UK have agreements with PANAMSAT to provide back-up capacity to INTELSAT. This is done in an effort to appear pro-competitive. However, no capital has been used to support these agreements, i.e. purchasing antennas as with INTELSAT.

PAS Ex. 108. Even if a reasonable trier of fact could find that this excerpt supports an inference of hostility toward PAS on the part of certain European PTTs, the excerpt does not support an inference that Comsat conspired against PAS. Moreover, the excerpt indicates that even these allegedly hostile PTTs entered agreements, and the full memorandum shows that other PTTs in Europe and Latin America also entered agreements with PAS. See *id.* at 1 (indicating that in addition to PTTs in France, the United Kingdom, and perhaps Switzerland, PAS reached agreements with PTTs in Brazil and Germany, and received FCC authorizations for five customers to operate United States earth stations to provide services to "the [\*\*94] UK, Ireland, FRG, Luxembourg and Sweden"). At least some of these agreements were initiated by the PTT signatories themselves. See *id.* (stating that PAS had two or three new leases in the Atlantic Ocean Region "which were initiated by signatories"). Again, Plaintiffs cite to nothing in the many pages of deposition testimony that supports their reading of the document. On the contrary, the record disfavors Plaintiffs' reading, see, e.g., Johnson Dep. at 10-12 (discussing PAS Ex. 108 as not final and subject to having been changed), 12-30 (discussing publicly available sources for data in PAS Ex. 108 and defining PTT efforts to "appear pro-competitive" as "not wanting to have a bad relationship with PANAMSAT"), and suggests that the document was never circulated. See Vargo Dep. at 132 (disavowing knowledge of PAS Ex. 108); Alewine Dep. at 201 (same); Alper Dep. at 146 (same); Carroll Dep. at 50 (same); Flower Dep. at 151-52 (same); Shubilla Dep. at 147-48 (same); Crockett Dep. at 328-29 (disavowing knowledge of PAS Ex. 108 and disagreeing with its content).

Plaintiffs also quote Comsat's president stating that "in telecommunications as in love, it takes two to tango." [\*\*95] See Pls.' 3(g) Statement P 22; Goldstein Dep. at 40-44. This comment merely states a fact which the parties accept: under the Intelsat system, a United States space segment provider such as Comsat or PAS must have a correspondent provider in each target nation. See Def.'s Reply Summ. J. Mem. at 14. No inference of an intent to conspire may be drawn from Comsat's acknowledgment of this undisputed fact.

Plaintiffs have failed to present evidence tending to show an intent by Comsat and any PTT to conspire against PAS.

## **(2) Interfirm communications**

Plaintiffs also allege that support for the alleged conspiracy can be inferred from the "literally hundreds" of meetings between Comsat and PTT co-conspirators "in addition to and wholly separate from Intelsat business." See Pls.' 3(g) Statement P 24. Plaintiffs claim that many of these meetings and communications between Comsat and the PTTs directly arose from, related to, or referenced competition from PAS. See Pls.' 3(g) Statement P 25.<sup>30</sup> An examination of Plaintiffs' proffered evidence does not bear this claim out.

[\*\*96] Many of the citations in Plaintiffs' 3(g) Statement PP 24 and 25 reference meetings between Comsat and various PTTs, but do not identify whether Comsat participated in those meetings in its common carrier capacity, or

<sup>30</sup>Paragraph 25 of Plaintiffs' 3(g) Statement supports different propositions but lists the same citations as in P 24, with an additional citation to the **Belmar Dep.** Vol. 2 at 352-54 (discussing Comsat discussions with CNN and Turner, without mention of PAS).

as an Intelsat signatory.<sup>31</sup> **[\*\*97]** Other citations in PP 24 and 25 identify meetings undertaken in Comsat's common carrier role, but do not mention PAS.<sup>32</sup> **[\*\*98]** Still other citations in PP 24 and 25 specifically deny that

<sup>31</sup> See **Alewine Dep.** Vol. 2 at 301-02 (acknowledging meetings with British Telecom, but not necessarily separate from Intelsat business); **Carroll Dep.** Vol. 2 at 275-78 (referencing unspecified meetings in Jamaica, Trinidad & Tobago, Barbados and London), 294-97 (referencing unspecified meetings between Comsat and PTT officials in Chile, Argentina, Brazil, Venezuela, Colombia, the Dominican Republic, Jamaica, Trinidad & Tobago, Barbados, the United Kingdom, France, Germany, Spain and Italy); **Chow Dep.** at 39-40 (referencing PAS Ex. 1181 regarding a meetings in May 1988 between Comsat and the PTT signatories of the United Kingdom, France, Belgium, Spain and Italy); **Crockett Dep.** Vol. 1 at 39-41 (referring to meetings in Chile), 81 (referring to communications between Comsat/Intelsat and providers in Russia, Colombia, Argentina, Brazil, Venezuela, Singapore, Thailand and the Philippines); **Lowry-Gabriel Dep.** Vol. 2 at 218-25 (acknowledging Comsat meetings with signatories in the United Kingdom, France, Spain, Africa (numerous nations), Japan, Singapore, Australia, Brazil, Argentina, Chile, the Dominican Republic, Venezuela, Costa Rica, Mexico and probably more); **Hannan Dep.** at 17-20 (discussing 1988 meetings with European signatories), 27-33 (acknowledging 1989 meetings with France Telecom, Deutsche Bundespost, the Greek signatory and Telespazio); **Schnicke Dep.** at 58-60 (referring generally to meetings with signatory PTTs); **Twining Dep.** at 35-36 (acknowledging unspecified meetings with European PTTs).

<sup>32</sup> See **Alewine Dep.** Vol. 2 at 325-27 (alleging Comsat meeting with DTRE in France on or about September 26, 1988 regarding ATV), 332-36 (referencing PAS Ex. 1296 and September 1988 meeting in France); **Alper Dep.** at 211-16 (referencing PAS Ex. 266 and alleged meeting with Entel Argentina regarding Comstar consultations); **Belmar Dep.** Vol. 2 at 363-66 (referencing PAS Ex. 1359 and alleged February 1989 meetings with Entel Argentina regarding Comstar), 373-78 (referencing PAS Ex. 266 and two meetings with Entel Argentina regarding Comstar), 396 (referencing earlier referenced meeting in Florida about Comstar); **Carroll Dep.** Vol. 2 at 268-69 (referencing an unspecified meeting between Comsat and Embratel Brazil in Rio de Janeiro concerning the Turner lease), 325-29 (referencing PAS Ex. 265 and meetings in Argentina regarding Comstar); **Chow Dep.** at 47-54 (discussing PAS Ex. 1173 and August 23-24, 1988 meetings in Rome among Comsat and representatives of British Telecom, Deutsche Bundespost, France Telecom, Telefonica, and Telespazio to discuss ATV; also discussing PAS Exs. 1592 and 1109 regarding meetings in Colombia); **Crockett Dep.** Vol. 1 at 91-95 (discussing meetings regarding ventures in Venezuela and Brazil), 116-17 (discussing Comsat's historical connection with PTTs worldwide), 159-67 (discussing Comsat joint venture in Colombia and Comsat negotiations with ASETA), Vol. 2 at 352-54 (discussing PAS Ex. 1112 and meetings in Colombia over venture opportunities); **Lowry-Gabriel Dep.** Vol. 2 at 229-31 (discussing meetings between Comsat and Codetel), 245-49 (referring to meetings with Latin American signatories regarding Mastercard and AT&T business), 252-53 (discussing meetings with Embratel in 1992), 255-60 (discussing 1992 meetings with C.A.N.T.V. Venezuela and C&W); **Kopinski Dep.** at 21-26 (discussing ATV meetings in Paris in 1988 or 1989), 35-38 (discussing meetings with signatories in Argentina, Chile, Colombia, Brazil and Venezuela regarding Comsat bandwidth-on-demand service), 159-60 (referencing PAS Ex. 1305 discussing June 1988 meetings in Paris); **Nolting Dep.** at 108-20 (discussing informal meetings at the International Telecommunications Union ("ITU") conventions), 124-25 (referencing VSAT meetings discussed in PAS Ex. 1732), 139-41 (referencing VSAT meetings discussed in PAS Ex. 1732); **Shubilla Dep.** at 60-68 (discussing meetings in 1988 in Argentina and Chile to discuss possible joint ventures); **Skjei Dep.** at 24-26 (discussing Embratel rejection of Comsat IDS joint venture overture); **Tanner Dep.** Vol. 2 at 279-86 (discussing PAS Ex. 2794 and Comsat agreement with Telefonica and British Telecom); **Torrico Dep.** at 32-33 (discussing Comsat revenue share agreement with Telecom Colombia in July 1992), 49-53 (discussing meetings with Telecom over revenue share agreement with Comsat); **Twining Dep.** at 39-46 (discussing meeting with European PTTs regarding Intelsat-K marketing); **Vargo Dep.** at 46-47 (acknowledging meetings with Telecom Colombia in 1991 about revenue share agreement), 62-63 (referencing PAS Ex. 267 referencing a memorandum of understanding signed with Entel Argentina), 67-69 (referencing PAS Ex. 1346); **PAS Ex. 90** (excerpt from *FCC Week*, October 7, 1991); **PAS Ex. 266** (Comsat March 15, 1989 internal memorandum on status of Comstar negotiations in Argentina); **PAS Ex. 267** (Comsat April 19, 1989 covering memorandum and attached memorandum of understanding between Comsat and Entel Argentina); **PAS Ex. 1109** (Comsat November 1, 1988 letter and telex referencing meetings in Colombia); **PAS Ex. 1112** (telex referencing meeting in Colombia (same as PAS Ex. 1109, *supra*)); **PAS Ex. 1172** (January 26, 1989 telex from British Telecom to PTT participants in ATV, including Comsat, discussing agreement resulting from January 23-24, 1989 meetings in London); **PAS Ex. 1173** (September 7, 1988 memorandum discussing results of August 23-24, 1988 meetings in Rome among Comsat and European signatories regarding ATV); **PAS Ex. 1181** (Comsat May 23, 1988 memorandum discussing, without mention of PAS, meetings with European signatories); **PAS Ex. 1296** (October 3, 1988 letter from France Telecom referencing meetings in Paris); **PAS Ex. 1299** (September 26, 1988 telex from France Telecom acknowledging meeting in Paris the week before about ATV); **PAS Ex. 1305** (Comsat July 5, 1988 memorandum discussing, without reference to PAS, June 29-30, 1988 meetings in Paris with six European signatories about ATV, including appended draft agreement); **PAS Ex. 1346** (Comsat March 13, 1989 memorandum reporting results of meetings in Chile and Argentina); **PAS Ex. 1359** (Comsat March 3, 1989 memorandum highlighting issues

PAS was a factor or was even discussed at Comsat's meetings with various PTTs.<sup>33</sup> Indeed, only isolated references to competition from PAS can be found anywhere in the lengthy string citations in PP 24 and 25,<sup>34</sup> and of these isolated references, one actually describes an effort by Comsat to assist PAS. See Schnicke Dep. at 26-30 (referring to "hundreds" of meetings with PTTs, and stating that PAS was discussed one time in the context of a Comsat effort to gain support for PAS coordination and thereby promote competition).

[\*\*99] As Defendant correctly notes, contacts among alleged conspirators cannot alone support an inference of conspiracy. See Def.'s Summ. J. Mem. at 32-33 n.42 (citing *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1012 (2d Cir. 1989) (recognizing that manufacturers and distributors must coordinate their activities); *Venture Technology Inc. v. National Fuel Gas Co.*, 685 F.2d 41, 44 (2d Cir.) (evidence of close relations or frequent meetings insufficient absent evidence of an illegal agreement), cert. denied, 459 U.S. 1007, 74 L. Ed. 2d 398, 103 S. Ct. 362 (1982)). In light of the fact that Comsat must deal with the PTT signatories in order to complete its common carrier functions, Plaintiffs have failed to present evidence tending to show as a factor in support of the alleged conspiracy an unusual incidence of communications between Comsat and the alleged PTT conspirators.

### **(3) Customary indications of conspiracy**

Plaintiffs also allege that support for the alleged conspiracy can be inferred from "customary indications" of traditional conspiracy. These indications allegedly include innumerable meetings between Comsat and the alleged co-conspirators [\*\*100] involving specific attempts to block PAS, Defendant's dealings with Codetel in the Dominican Republic, and the Intelsat signatory resolutions regarding separate satellite systems.

#### **(a) Innumerable meetings**

In addition to citing meetings between Comsat and various PTTs as evidence of interfirm communications, Plaintiffs very loosely cite these meetings as evidence of an effort to block PAS from obtaining CNN's business, of a conspiracy behind ATV, the Intelsat-K satellite and Latin American joint ventures, and of an effort to block PAS from getting business from AT&T for Mastercard's VSAT network in Latin America. See Pls. Opp'n Mem. at 12; Pls.' 3(g) Statement PP 24-37. Plaintiffs claim that at these meetings and in meetings with customers, Comsat and its co-conspirators expressly discussed means of hindering PAS's efforts. The materials cited by Plaintiffs, however, do not support these claims.

With regard to the CNN business, Plaintiffs claim that after PAS met with CNN in late 1988 and early 1989, Comsat met with the European and South American PTTs to "formulate strategy and proposals to prevent PAS from

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discussed during February 20-28, 1989 meetings in Chile and Argentina); **PAS Ex. 1592** (Comsat October 28, 1988 letter to Telecom Colombia referencing October 26, 1988 meeting); **PAS Ex. 1732** (February 26, 1992 memorandum summarizing, without reference to PAS, the results of February 1992 meetings in Brazil, Chile, and Argentina); **PAS Ex. 2690** (Comsat July 19, 1989 memorandum discussing schedule of conferences at which to market Intelsat K-4); **PAS Ex. 2794** (March 2, 1992 letter from Telefonica acknowledging February 13, 1991 meeting in Washington among Telefonica, Comsat, and British Telecom regarding Brightstar and Intelsat-K, and without mention of PAS).

<sup>33</sup> See **Crockett Dep.** Vol. 2 at 249-52 (mentioning meetings with Embratel Brazil regarding venture opportunities but disavowing ever discussing PAS), 296-300 (discussing failures of Comsat Timeplex preemptible service and meetings with Entel Argentina, but disavowing knowledge of PAS negotiations with Entel Argentina), 303-08 (denying having discussed with Entel Argentina political impact of PAS Intelsat coordination); **Flower Dep.** at 199-214 (discussing birth of ATV at meeting among Comsat, British Telecom, Telespazio, Deutsche Bundespost, and Telefonica, and explicitly disavowing anything having to do with PAS as reason for starting the ATV service); **Tanner Dep.** Vol. 2, 182-87 (referencing PAS Ex. 2690, a July 1989 memorandum on the marketing of Intelsat K-4, discussing meetings with European PTTs, but disavowing ever discussing PAS at those meetings).

<sup>34</sup> See **Nolting Dep.** at 85-105 (referencing PAS Ex. 1732 discussing February 1992 meetings with signatory-PTTs in Latin American and acknowledging Comsat representations to the PTTs that failure to act in VSAT market could cause VSAT and IDS business to switch to PAS); **Skjei Dep.** at 141-46 (referencing PAS Ex. 288 discussing PAS success in Brazil and financial potential of an Embratel/Comsat venture in IDS); **PAS Ex. 265** (Comsat April 28, 1989 internal memorandum discussing Comstar competition with PAS in Argentine market); **PAS Ex. 288** (Comsat May 4, 1989 memorandum discussing status of Comsat business in Argentina, Brazil and Chile, and noting PAS success in Argentina and Brazil).

obtaining this business." Pls.' 3(g) Statement P 32.<sup>35</sup> In support [\*\*101] of this claim, Plaintiffs cite many meetings and communications between Comsat and the PTTs which Plaintiffs claim directly arose from, related to, or referenced competition from PAS for CNN's business. See Pls.' 3(g) Statement P 25. The majority of Plaintiffs' citations, however, make no mention of PAS, see *id.*,<sup>36</sup> [\*\*102] and those that do mention PAS include only benign acknowledgments that both Comsat and PAS sought the CNN business for Latin America. See *id.*<sup>37</sup> These acknowledgments do not support an inference of conspiracy or other anticompetitive conduct. Ultimately, Comsat retained CNN's business between the United States and Europe, but lost it to PAS in South America. See Def.'s Reply Summ. J. Mem. at 15.<sup>38</sup>

[\*\*103] With regard to the Atlantic Television Service (ATV)<sup>39</sup> and the Intelsat-K satellite,<sup>40</sup> [\*\*105] Plaintiffs claim that these services were "directly targeted at PAS." Pls.' 3(g) Statement P 31. In support of this claim,

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<sup>35</sup> Paragraph 32 of Plaintiffs' 3(g) Statement references in support the same string citation as provided in P 25, which the Court examined and dismissed earlier. See *supra*, nn. 31-34.

<sup>36</sup> Citing **Belmar Dep.** Vol. 2 at 352-54 (discussing without mention of PAS discussions with CNN and Turner); **Carroll Dep.** Vol. 1 at 122-28 (discussing CNN and Turner proposals in Brazil and Argentina without mention of PAS), 142 mentioning PAS along with Intelsat and Teleglobe as competitors with Comsat/ATV, but without mention of CNN or Turner), 166-68 (discussing negotiations with Turner for 10 year lease, without mention of PAS); **Crockett Dep.** Vol. 4 at 650 (referencing without mention of PAS negotiations on rates for 10 year contract for CNN); **Hannon Dep.** at 43-47 (discussing without reference to PAS Comsat's exploration of video business with Turner/CNN, citing as the cause "increasing pressure from fiber optic cables"), 60-61 (referencing effort to convince Colombia to alter lease terms to allow CNN access to capacity), 65-66 (referencing CNN/Turner's "very new way" of operating through hundreds of small satellite dishes, in effect bypassing domestic microwave distribution systems); **Tanner Dep.** Vol. 1, at 84-98 (discussing Comsat efforts to facilitate Brazil's interest in working with Turner/CNN and disavowing any mention in discussions between Comsat and Turner/CNN of PAS's lack of landing rights or relationships with other signatories), 114-19 (discussing negotiations of 10 year global leases among Turner/CNN, Comsat, British Telecom, and Cable & Wireless), 121-27 (discussing development of negotiations over global leases with CNN); **Twining Dep.** at 87-105 (discussing meeting between Comsat and Turner/CNN regarding long-term global lease package and Comsat communications with European PTTs indicating the competitive nature of the negotiations), 111-13 (discussing cost sharing arrangement among Comsat and the European PTTs), 116-18 (discussing statement about setting rates in an unusual manner), 120-21 (discussing issues of lease utilization and cost sharing among Comsat and the European PTTs); **PAS Ex. 1567** (Comsat proposed outline for CNN service to South America); **PAS Ex. 1568** (June 2, 1988 Comsat letter to Turner/CNN outlining Comsat proposal for CNN service to Latin America); **PAS Ex. 1795** (June 17, 1988 Comsat proposal to Turner/CNN); **PAS Ex. 2563** (August 31, 1988 Comsat memorandum discussing rates for ten year global leases for CNN).

<sup>37</sup> Citing **Carroll Dep.** Vol. 2 at 241-44 (referencing participation of Chile in Turner proposal, and comparing PAS ability to provide complete circuit with Comsat ability to obtain matching orders from PTT signatories), 258-60 (acknowledging Comsat's competing with PAS for Turner business in Latin America, but not Europe, and discussing, without reference to PAS, rates for 10 year contract); **Hannon Dep.** at 55-57 (acknowledging Comsat's competing with PAS in 1988 for Turner business in Latin America); **Saralegui Dep.** Vol. 3 at 474-75 (claiming that PAS agreements with ESPN and CNN were won with "low-ball" prices, but not unfairly low); **Twining Dep.** at 124-26 (acknowledging Comsat's awareness that it was competing with PAS for the CNN/Turner lease business); **PAS Ex. 2821** (May 18, 1988 memorandum summarizing a meeting with Turner/CNN in Atlanta on May 12, 1988 which addressed *inter alia* competition with PAS for CNN business in Latin America).

<sup>38</sup> Citing **Carroll Dep.** at 245-46 (alleging that Comsat lost the CNN business in Latin America to PAS because PAS had better salespeople); **Tanner Dep.** at 81 (acknowledging that in 1988 Comsat lost the Turner/CNN business in Latin America to PAS); **Twining Dep.** at 25-27 (acknowledging competing with PAS and losing to PAS the Turner/CNN business in Latin America).

<sup>39</sup> Plaintiffs claim that Comsat conspired with the PTTs in Italy, Britain, Spain and Portugal to provide an "end-to-end" service offering "discounted rates, flexible volume-based contracts, one-stop booking for space segment, [and] connectivity to and from Europe, Central and South America, and Africa." 3d Am. Compl. P 28(e). Plaintiffs claim that the conspirators put a price ceiling on the service, resulting in unreasonable hindrances on competition. Plaintiffs cite to the discontinuance of the service within one year as proof that it was developed for no legitimate business purpose but rather to impede PAS's negotiations in the participating nations.

Plaintiffs cite many meetings and communications between Comsat and the participating PTTs which Plaintiffs claim directly arose from, related to, or referenced competition with PAS. See Pls.' 3(g) Statement P 25. Plaintiffs' own citations, however, reveal that PAS was merely one of several entities with which ATV and Intelsat-K were designed to compete. See *id.* P 25,<sup>41</sup> P 31.<sup>42</sup> [\*\*106] Moreover, many of the cited communications make no reference to PAS. See Pls.' 3(g) Statement P 31.<sup>43</sup> [\*\*107] Those that do reference PAS do so only in the context of permissible competition, see *id.*,<sup>44</sup> [\*\*108] and indicate that PAS often prevailed in that competition. See *id.*

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<sup>40</sup> The Intelsat-K satellite was an Intelsat property offering services which Comsat and other signatories sold. See Def.'s Reply Summ. J. Mem. at 16 (citing Lowry-Gabriel Dep. at 29-30; Cecala Dep. at 29-30). Comsat's conduct with regard to the planning and collective marketing of Intelsat-K is therefore immune, insofar as it that conduct was undertaken in Comsat's signatory capacity. Plaintiffs acknowledged as much by deleting references to Intelsat-K from the Third Amended Complaint. Compare 1st Am. Compl. P 28(h) at 24-26 (containing allegations based on Intelsat-K), with 2d Am. Compl. P 28 (omitting Intelsat-K allegations).

<sup>41</sup> Citing **Carroll Dep.** Vol. 1 at 142-43 (listing as competitors of Comsat's ATV service PAS, Brightstar, and Teleglobe); **Kopinski Dep.** at 27 (acknowledging PAS as competitor of Comsat's ATV service).

<sup>42</sup> Citing **Carroll Dep.** Vol. 1 at 138-39 (acknowledging that one intention behind K-SAT was technical competition with Astra, Eutelsat and PAS), 142-43 (listing as competitors of Comsat's ATV service PAS, Brightstar, and Teleglobe); **Alewine Dep.** Vol. 3 at 427-28 (identifying Hisposat, PAS, TDRSS and regional systems as Comsat's competition for video business between 1988 and 1991); **Cecala Dep.** at 39 (referencing PAS Ex. 2760 containing comparison of Intelsat-K, Orion, and PAS); **Kopinski Dep.** at 38-39 (referencing forecasting of Atlantic video service prior to procurement of Intelsat-K), 41 (identifying PAS as Comsat's only competition for Atlantic Ku-band capacity at the time of the Intelsat-K traffic forecasting), 43 (stating that Intelsat-K video services were marketed to end users, while VSAT services were marketed to carriers); **Salvati Dep.** at 61 (acknowledging that Intelsat-K would compete with PAS, Astra, and Eutelsat, among others); **PAS Ex. 1530** (materials for presentation on trans-Atlantic market containing, *inter alia*, list of satellite (Intelsat, Astra, Eutelsat, PAS, Orion) and cable (TAT and PTAT) competitors).

<sup>43</sup> Citing **Fagan Dep.** at 34-37 (referencing meetings between Comsat and various European PTTs, some about ATV, others about the marketing of Intelsat-K); **PAS Ex. 1381** (agenda for April 21, 1989 Comsat Board of Directors meeting, without reference to PAS, Intelsat-K, or ATV); **PAS Ex. 2734** (Comsat September 17, 1990, memorandum summarizing results of meeting with ABC concerning Intelsat-K); **PAS Ex. 2760** (January 23, 1991 covering memorandum and attached Intelsat-K presentation materials for broadcasters); **PAS Ex. 2774** (Comsat March 29, 1991 memorandum highlighting results of meetings with Hughes Communication, Keystone, and IDB of California regarding Intelsat-K); **PAS Ex. 2775** (March 30, 1991 memorandum concerning marketing recommendations for Intelsat-K); **PAS Ex. 2829** (August 14, 189 memorandum reporting results of meetings with European Broadcasting Union ("EBU") and Turner/CNN over Intelsat-K); **PAS Ex. 2841** (February 6, 1991 memorandum containing impressions from Comsat meetings with ESPN, VIACOM, and HBO about Intelsat-K); **PAS Ex. 2894** (ISS Strategic Business Plan, 1991-93); **PAS Ex. 2690** (Comsat July 19, 1989 memorandum regarding marketing strategy for the K-4 satellite).

<sup>44</sup> Citing **Popkin Dep.** at 135 (stating that ITU constraints might be a problem for marketing Intelsat-K, especially in comparison to PAS), 186-87 (referencing PAS Ex. 1652 and Comsat's need to persuade British Telecom to use Intelsat-K instead of PAS segment for CBS business in Intelsat VI), 194 (acknowledging competition between Intelsat-K and PAS for EBU news services); **Salvati Dep.** at 40-41 (disavowing any effort by Comsat to prevent PAS from obtaining major broadcaster customers of Ku-band capacity); **Tanner Dep.** Vol. 2 at 180-81 (acknowledging PAS advantage in Ku-band capacity prior to Intelsat-K), 183 (acknowledging meetings with European PTTs to discuss marketing of Intelsat-K capacity), 191 (acknowledging that Comsat supplied ABC with a comparison of PAS and Intelsat K-4 services), 254-55 (discussing Intelsat-K prelaunch discounts and restoration plans in context of IDB), 260-61 (discussing need for restoration plan and identified replacement satellite for Intelsat-K); **Twining Dep.** at 86-91 (discussing PAS video business development in Europe), 94 (acknowledging competition between Intelsat-K and PAS), 130-31 (acknowledging Comsat internal competitive information comparing Comsat to PAS and other separate systems, but denying having ever used the information with clients); **PAS Ex. 78** (Comsat March 17, 1992 memorandum comparing Intelsat and PAS capabilities in terms of connectivities, coverages, customer options, on-board redundancy, and restoration capacity); **PAS Ex. 81** (marketing presentation materials captioned, *inter alia*, "The PANAMSAT Threat," "Migration to PANAMSAT," and "COMSAT vs. PANAMSAT: Video Pricing"); **PAS Ex. 2671** (Comsat satellite presentation materials including ATV, Intelsat-K, and Ku-band performance comparison to PAS-1); **PAS Ex. 2605** (Comsat presentation on K-4 Satellite including Ku-Band performance comparison to PAS-1); **PAS Ex. 2713** (March 21, 1990 electronic

<sup>45</sup> **[\*\*109]** These citations do nothing to refute Defendant Comsat's showing that ATV and Intelsat-K were not responses to PAS but merely efforts to provide services not readily available from any one PTT. See Def.'s Reply Summ. J. Mem. at 16. <sup>46</sup> Indeed, Plaintiffs cite numerous sources which support Defendant's claim **[\*\*104]** that ATV and Intelsat-K were not specific responses to PAS, see Pls.' 3(g) Statement P 31, <sup>47</sup> but merely attempts at developing new customer services. See *id.* [P 25](#). <sup>48</sup>

**[\*\*110]** In addition to ATV and Intelsat-K, Plaintiffs claim that Comsat entered joint ventures in Latin America which were undertaken "to reinforce the PTTs in their commitment to a separate system boycott, ensuring that they would not provide correspondent arrangements, operating agreements, or landing rights to PAS." See Pls.' 3(g) Statement P 26. Plaintiffs, however, fail again to provide any evidence of a conspiracy or other anticompetitive conduct among Comsat and the PTTs. Plaintiffs merely provide numerous citations in support of the undisputed fact that Comsat negotiated ventures in Latin America. See *id.* <sup>49</sup> **[\*\*112]** These include specific citations for Argentina, <sup>50</sup> **[\*\*113]**

mail-memorandum discussing ABC plan to sign a short-term contract with PAS); **PAS Ex. 2723** (July 5, 1990 electronic mail-memorandum discussing ABC's contract with PAS for outbound service and ABC's continued interest in Intelsat-K).

<sup>45</sup> Citing **Salvati Dep.** at 44-45 (stating that the major American television networks (ABC, CBS and NBC) had contracts with PAS by the time Intelsat-K launched); **Tanner Dep.** at 202-05 (acknowledging ABC's decision to enter short-term contract with PAS for trans-Atlantic video services because PAS's power permitted use of small antennas), 215-19 (discussing ABC's reasons for contracting with PAS before the launch of Intelsat-K), 222 (noting that despite contract with PAS, ESPN remained interested in Intelsat-K services, if they should become available), 231-32 (referencing PAS Ex. 2734 discussing terms of PAS contract with ABC), 238-42 (referencing PAS Ex. 1766 discussing British Telecom's interest in using PAS space segment for NBC video transmission), 251 (discussing ESPN interests), 267 (discussing ABC and CBS alleged use of PAS and reasons therefore); **PAS Ex. 1533** (July 11, 1989 memorandum discussing a letter of agreement between PAS and ABC/ESPN/WTN, and suggesting that PAS was chosen for its Ku-band access to Europe and its price); **PAS Ex. 1633** (July 10, 1990 memorandum summarizing ESPN business); **PAS Ex. 1654** (Comsat August 8, 1991 memorandum concerning renewal of full-time leases with ABC, CBS, and NBC, and noting that ABC and CBS use PAS on part time basis); **PAS Ex. 1766** (November 29, 1990 electronic mail-message and response discussing British Telecom's alleged desire to use PAS capacity); **PAS Ex. 2680** (April 18, 1989 memorandum discussing shortage of Ku-band capacity on Intelsat leading to customer PVTs's decision to work with PAS).

<sup>46</sup> Citing **Crockett Dep.** at 133-34 (describing, without reference to PAS or any other competitor, the double preemptible nature of the ATV capacity and the ultimate failure of the service); **Carroll Dep.** at 102-04 (briefly describing the ATV service); **Kopinski Dep.** at 31-32 (discussing ATV service and its discontinuance after a change in cable restoration capacity).

<sup>47</sup> Citing **Carroll Dep.** Vol. 2 at 346-48 (stating that K-4 or K-SAT was not a response to PAS but a response to customer demands for better quality video signal, demands which prior to K-4 regional systems like Astra and PAS were trying to meet); **Kopinski Dep.** at 131-32 (acknowledging that Comsat's development of Intelsat-K was a response to competition in the video and digital services markets).

<sup>48</sup> Citing **Carroll Dep.** Vol. 1 at 135 (stating that Comsat marketed capacity on K-4); **Cecala Dep.** at 29-30 (referencing PAS Ex. 2700 and discussing pre-launch marketing meeting with CBS, ABC, CNN and others to discuss their expectations of Intelsat-K), 32 (referencing PAS Ex. 27 and discussing ease of scheduling capacity); **Kopinski Dep.** at 98-99 (discussing Comsat reservation of transponders on Intelsat-K in an aggressive effort to retain a large share of the international video market), 102 (discussing strategy for promoting Intelsat-K as highly reliable, highly improved technology for non-preemptible service, higher power, and Ku-band capacity), 127-28 (mentioning competitors for Intelsat-K Astra, PAS, Eutelsat, TDF-1, Tele-X, and TVSat-2); **Twining Dep.** at 66 (explaining satellite news gathering ("SNG")), 69-70 (referencing Comsat efforts to provide additional Ku-band capacity for television uses, including Intelsat-K and other Intelsat satellites); **Vargo Dep.** at 181 (stating that higher Ku-band power results in a savings on ground segment because smaller earth stations may be used); **PAS Ex. 1635** (redacted Comsat September 17, 1990 memorandum summarizing results of meeting with ABC concerning Intelsat-K (see *infra* PAS Ex. 2734 (complete version)); **PAS Ex. 1652** (July 31, 1991 memorandum concerning renewal of CBS and EBU leases); **PAS Ex. 2608** (May 3, 1990 letter from NBC to Comsat requesting additional information about Intelsat-K reservation policy and rates); **PAS Ex. 2700** (October 26, 1989 covering memorandum and attached October 23, 1989 memorandum indicating Comsat customer responses to Intelsat-K presentations).

<sup>49</sup> Citing **generally:** **Carroll Dep.** Vol. 2 at 294-97 (referencing unspecified meetings between Comsat and PTT officials in Chile, Argentina, Brazil, Venezuela, Colombia, the Dominican Republic, Jamaica, Trinidad & Tobago, Barbados, the United Kingdom, France, Germany, Spain and Italy); **Chow Dep.** at 33-35 (acknowledging, without reference to PAS, meetings with PTTs in

Britain, France, Germany, Spain, Colombia, Venezuela and Brazil); **Crockett Dep.** Vol. 1 at 81 (referring to communications between Comsat/Intelsat and providers in Russia, Colombia, Argentina, Brazil, Venezuela, Singapore, Thailand and the Philippines), 116-17 (discussing Comsat's historical connection with PTTs worldwide); **PAS Ex. 288** (Comsat May 4, 1989 memorandum discussing status of Comsat business in Argentina, Brazil and Chile, and noting PAS success in Argentina and Brazil)).

<sup>50</sup> See Pls.' 3(g) Statement P 28 (citing **Alper Dep.** at 211-16 (referencing PAS Ex. 266 and alleged meeting with Entel Argentina regarding Comstar consultations); **Belmar Dep.** Vol. 2 at 363-66 (referencing PAS Ex. 1359 and alleged February 1989 meetings with Entel Argentina regarding Comstar), 373-78 (referencing PAS Ex. 266 and two meetings with Entel Argentina regarding Comstar), 396 (referencing earlier referenced meeting in Florida about Comstar); **Carroll Dep.** Vol. 2 at 325-29 (referencing PAS Ex. 265 and meetings in Argentina regarding Comstar); **Crockett Dep.** Vol. 2 at 296-300 (discussing failures of Comsat Timeplex preemptible service and meetings with Entel Argentina, but disavowing knowledge of PAS negotiations with Entel Argentina), 303-08 (denying having discussed with Entel Argentina political impact of PAS Intelsat coordination); **Vargo Dep.** at 62-63 (referencing PAS Ex. 267 referencing a memorandum of understanding signed with Entel Argentina), 67-69 (referencing PAS Ex. 1346); **PAS Ex. 265** (Comsat April 28, 1989 internal memorandum discussing Comstar competition with PAS in Argentine market); **PAS Ex. 266** (Comsat March 15, 1989 internal memorandum on status of Comstar negotiations in Argentina); **PAS Ex. 267** (Comsat April 19, 1989 covering memorandum and attached memorandum of understanding between Comsat and Entel Argentina); **PAS Ex. 1346** (Comsat March 13, 1989 memorandum reporting results of meetings in Chile and Argentina); **PAS Ex. 1359** (Comsat March 3, 1989 memorandum highlighting issues discussed during February 20-28, 1989 meetings in Chile and Argentina)).

Plaintiffs claim that after PAS entered negotiations with Entel Argentina in late 1988 and early 1989, Comsat entered discussions with Entel for a potential joint venture. See Pls.' 3(g) Statement P 28 (citing **PAS Ex. 90** (excerpt from *FCC Week*, October 7, 1991); **PAS Ex. 265** (*supra*); **PAS Ex. 266** (*supra*); **PAS Ex. 267** (*supra*); **PAS Ex. 1079** (June 13, 1990 memorandum regarding Propulsa's services and compensation); **PAS Ex. 1346** (*supra*); **PAS Ex. 1359** (*supra*); **PAS Ex. 1396** (October 17, 1989 PAS memorandum discussing privatization of Entel Argentina and opportunities in Uruguay); **PAS Ex. 2697** (August 28, 1989 memorandum mentioning, without reference to PAS, possible MOU with C.A.N.T.V. regarding joint feasibility analysis); **Alper Dep.** at 211-16 (*supra*); **Belmar Dep.** Vol. 2 at 363-66 (*supra*), 373-78 (*supra*), 396 (*supra*); **Carroll Dep.** Vol. 2 at 294-97 (referencing unspecified meetings between Comsat and PTT officials in Argentina, among other nations), 325-29 (*supra*); **Crockett Dep.** Vol. 2 at 296-300 (*supra*), 303-08 (*supra*); **Shubilla Dep.** at 60-68 (discussing meetings in 1988 in Argentina and Chile to discuss possible joint ventures); **Vargo Dep.** at 62-63 (*supra*), 67-69 (*supra*)).

Plaintiffs claim that Entel Argentina and Comsat expressly "discussed strategies for frustrating [PAS's] efforts" to enter the Argentine market. See *id.* (citing **PAS Ex. 265** (*supra*); **Alper Dep.** at 126-29 (referencing PAS Ex. 265 with regard to Comsat's marketing Comstar services in Argentina at the same time PAS was negotiating with Entel Argentina), 134-43 (discussing PAS Ex. 265 and Comsat's negotiations with Entel Argentina over Comstar in the wake of Entel's announcement of a domestic service arrangement with PAS); **Belmar Dep.** Vol. 1, 126-27 (acknowledging PAS's presence in Chile pre-dated Satel, but disavowing knowledge as to whether that presence involved dealings with Entel Chile), 210-15 (acknowledging conversations with former officer of Entel Argentina regarding privatization of Entel), 218-19 (acknowledging Comsat's marketing of Comstar at the time of PAS's negotiations with Entel Argentina, but denying any knowledge of the substance of PAS's negotiations and denying that Entel's willingness to request consultations for PAS was a problem for Comsat), Vol. 2 at 367-68 (acknowledging MOU with Entel Argentina for a study of IBS, awareness of PAS's talks with Entel Chile, and having met once with ASETA, but disavowing any knowledge of discussions between Entel Argentina and PAS about a possible joint venture); **Chow Dep.** at 57 (stating disagreement with concept of marketing Comstar to Argentina because the technical coverage was not complete), 63-65 (denying, in the context of PAS Ex. 265, any change in Comsat strategy in Argentina precipitated by PAS reaching an agreement with Entel Argentina), 70-74 (referring to PAS Exs. 1396 & 1079 and Propulsa, allegedly acting as an agent of Comsat in Argentina), 77-78 (discussing a meeting among Comsat, IATA-Alcatel, and Propulsa in Washington to discuss joint venture possibilities arising from the privatization of Entel Argentina); **Shubilla Dep.** at 60-62, 64-66 & 69 (acknowledging meetings about joint ventures in Chile and Argentina, but without recollection of any knowledge at the time that PAS was marketing competing services in those countries), 94-95 (discussing steps leading up to Comsat's MOU with Entel Argentina); **Skjei Dep.** at 22 (stating witness's involvement in the decision to seek a joint venture in Argentina), 64-65 (stating an awareness that PAS had had some form or agreement in Chile, Argentina, and Brazil at some time during Comsat's ventures in those nations), 106-07 (acknowledging PAS's agreement with TELEX Chile, presence of related PAS salespeople in Chile, and meeting with Entel-Argentina about a joint venture, but disavowing awareness of Comsat's marketing of Comstar to Entel at that time), 135-36 (acknowledging awareness of PAS's agreement with Entel Argentina, but denying that Comsat and PAS were competitors in that market at that time), 140-42 (acknowledging PAS success in Chile, Argentina and Brazil and denying any

Brazil,<sup>51</sup> Chile,<sup>52</sup> Colombia<sup>53</sup> [\*\*114] and Venezuela.<sup>54</sup> Plaintiffs argue that a conspiracy may be inferred from the many meetings and communications between Comsat and each PTT in negotiating these ventures. See Pls.'<sup>1</sup>

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consideration of Comsat efforts to counteract that success); **Vargo Dep.** at 42 (Comsat disavowing knowledge of PAS overtures in Argentina prior to Comsat negotiations there), 120-21 (referencing PAS Ex. 265 and Comsat's marketing of Comstar in Argentina)).

Plaintiffs also claim that PAS hired alleged "consultants" to make payoffs to Argentine officials on behalf of Comsat. See Pls.' 3(g) Statement P 28 (citing **Alewine Dep.** Vol. 2 at 278-83 (referencing PAS Ex. 1079 and denying knowledge of its contents, of the work of Propulsa referenced therein, or any bribes); **Alewine Dep.** Vol. 3 at 349-52 (acknowledging transfer of funds for payment to Vegas of Propulsa, but denying knowledge services for which amounts were due), 358 (having no memory of correspondence from Propulsa or Vegas), 387-90 (discussing consulting fees paid to Propulsa and Vegas), 396-400 (referencing PAS Ex. 1979 and payments to Vegas but denying any suggestion of resulting pay-offs or bribes); 405-06 (discussing Vegas); **Alper Dep.** at 25-37 (acknowledging Vegas as an agent of Comsat in Argentina who received a commission for facilitating deal between Comsat and IATA-Alcatel), 43-58 (discussing PAS Ex. 1079 and fees paid to Vegas in Argentina), 60-75 (discussing PAS Exs. 851, 852, & 1079 and fees paid to Vegas in Argentina), 101-03 (denying knowledge of any consulting fees paid by Vegas to Argentine military officials), 204-08 (discussing payment to Vegas of Argentina); **Belmar Dep.** Vol. 1 168-72 (discussing Belmar's meetings with Argentine government officials, facilitated by Vegas, regarding privatization in general), 279-82 (referencing PAS Ex. 1704 and denying knowledge of any payment by Vegas to Argentine congressmen), 284-87 (acknowledging Vegas's ability to arrange meetings with government officials for Comsat officers), 294-98 (discussing authorization of \$ 40,000 consulting fees and \$ 32,000 invoice), Vol. 2 at 403-04 (acknowledging Vegas services), 475-79 (discussing Vegas/Propulsa services and compensation); **Crockett Dep.** Vol. 1 at 100-09 (discussing payments to Vegas for consulting), 157-59 (discussing Vegas services and compensation), Vol. 2 at 258-93 (referencing PAS Exs. 852, 1079, & 1398 and repeating previous testimony concerning Vegas/Propulsa services and compensation), 295-96 (discussing records of payments to Vegas/Propulsa); **Skjei Dep.** at 101-02 (referencing PAS Ex. 1347 and identifying Guillermo Klein as a Comsat consultant in Argentina), 110 (mentioning Klein), 155-59 (discussing Propulsa/Vegas services for Comsat), 170-79 (referencing PAS Exs. 1357, 1805 & 2702 and discussing Klein consulting with Vegas/Propulsa services, but denying any payments to government officials by Vegas, Propulsa or Klein, and denying knowledge of any officials soliciting bribes), 182-84 (discussing compensation for Propulsa/Vegas), 202-12 (referencing PAS Exs. 1703, 1704, 2725, & 2727 and discussing negotiations with Propulsa over compensation); **Vargo Dep.** at 51-62 (discussing compensation of Vegas/Propulsa and specifically denying any payments by Vegas/Propulsa to Argentine government officials or their families), 107-18 (discussing Propulsa/Vegas services in Argentina); **PAS Ex. 620** (undated memorandum entitled "PANAMSAT in South America"); **PAS Ex. 801** (August 26-31, 1990 itinerary for J.R. Alper trip to Argentina and Chile, including notation that Vegas/Propulsa is trying to set up meetings for him); **PAS Ex. 851** (Comsat November 15, 1990 facsimile coversheet to Vegas/Propulsa); **PAS Ex. 852** (Propulsa November 15, 1990 facsimile coversheet and letter to Alper of Comsat regarding transfer of payment); **PAS Ex. 892** (February 28-March 8, 1991 itinerary for J.R. Alper trip to Argentina and Chile including notes); **PAS Ex. 1079 (supra)**; **PAS Ex. 1397** (presentation reports entitled "Argentine Business Development Opportunities"); **PAS Ex. 1398** (October 19, 1989 memorandum from Propulsa to Comsat seeking a more formal agreement); **PAS Ex. 1703** (electronic mail message discussing payment for Propulsa); **PAS Ex. 1704** (July 16, 1990 memorandum outlining proposal for compensating Propulsa); **PAS Ex. 1706** (September 18, 1990 memorandum discussing compensation of Propulsa); **PAS Ex. 1709** (October 1, 1990 covering memorandum and September 28, 1990 letter from Propulsa discussing failure to make negotiated payments); **PAS Ex. 1757** (December 19, 1989 December 19, 1989 memorandum seeking authorization for payment of Propulsa); **PAS Ex. 1763** (August 8, 1990 memorandum referencing negotiation of payment for Propulsa); **PAS Ex. 1805** (November 10, 1989 and October 23, 1989 documents concerning Klein consulting services in Argentina); **PAS Ex. 2702** (November 10, 1989 document concerning Klein consulting services in Argentina); **PAS Ex. 2704** (November 15, 1989 memorandum and attached documentation concerning Propulsa compensation); **PAS Ex. 2725** (letter from Propulsa referencing discussions with Comsat); **PAS Ex. 2727** (July 24, 1990 memorandum concerning terms and conditions for Propulsa consulting agreement)).

Plaintiffs admit that the joint venture with Entel Argentina was never finalized because the Argentine government privatized Entel. See Pls.' 3(g) Statement P 28.

<sup>51</sup> See Pls.' 3(g) Statement P 26 (citing **Crockett Dep.** Vol. 1 at 91-95 (discussing meetings regarding ventures in Venezuela and Brazil), Vol. 2 at 249-52 (mentioning meetings with Embratel Brazil regarding venture opportunities but disavowing ever discussing PAS); **Skjei Dep.** at 24-26 (discussing Embratel rejection of Comsat IDS joint venture overture), 141-46 (referencing PAS Ex. 288 discussing PAS success in Brazil and financial potential of an Embratel/Comsat venture in IDS).

3(g) Statement P 25. An examination of Plaintiffs' citations, however, shows that no such inference may reasonably be drawn. Many of Plaintiffs' citations make no mention of PAS at all, see *id.*,<sup>55</sup> **[\*\*115]** while the remainder contain either benign acknowledgments that Comsat competed with PAS in Latin America, **[\*\*111]** one of the most rapidly developing markets in the world at the time, see *id.*,<sup>56</sup> **[\*\*116]** or contain explicit denials that Comsat

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<sup>52</sup> See *id.* (citing **Crockett Dep.** Vol. 1 at 39-41 (referring to meetings in Chile); **PAS Ex. 1346** (Comsat March 13, 1989 memorandum reporting results of meetings in Chile and Argentina); **PAS Ex. 1359** (Comsat March 3, 1989 memorandum listing issues addressed on February 20-28, 1989 at meetings in Chile and Argentina)).

<sup>53</sup> See *id. P 26* (citing **Crockett Dep.** Vol. 1 at 161-67 (discussing Comsat joint venture in Colombia and Comsat negotiations with ASETA), Vol. 2 at 352-54 (discussing PAS Ex. 1112 and meetings in Colombia over venture opportunities); **Vargo Dep.** at 46-47 (acknowledging meetings with Telecom Colombia in 1991 about revenue share agreement); **PAS Ex. 1112** (telex referencing meeting in Colombia (same as PAS Ex. 1109, *supra*)); see also *id. P 30* (citing **Carroll Dep.** Vol. 2 at 294-97 (referencing unspecified meetings between Comsat and PTT officials in Colombia, among other nations); **Crockett Dep.** Vol. 1 at 159-61 (acknowledging, without mention of PAS, that Comsat formed a venture in Colombia after six years of negotiations)).

<sup>54</sup> See Pls.' 3(g) Statement P 26 (citing **Crockett Dep.** Vol. 1 at 91-95 (discussing meetings regarding ventures in Venezuela and Brazil), P 29 (citing **Belmar Dep.** Vol. 2 at 337-39 (discussing, without mention of PAS, Comsat effort to negotiate joint venture for IBS with C.A.N.T.V.), 406-07 (referencing PAS Ex. 1392 and discussing negotiations with C.A.N.T.V., without reference to PAS), 419 (acknowledging a general awareness that since 1985 PAS was trying to do business all over Latin America); **PAS Ex. 1392** (July 21, 1989 memorandum discussing, without mention of PAS, possible MOU with C.A.N.T.V. for a joint feasibility analysis of IBS services); **PAS Ex. 2697** (August 28, 1989 memorandum mentioning, without reference to PAS, possible MOU with C.A.N.T.V. regarding joint feasibility analysis); see also Pls.' Opp'n Mem. at 13 (citing **Morgan Dep.** at 54-55 (reciting hearsay statement that prior to deregulation in 1992-93, C.A.N.T.V. refused to deal with PAS because C.A.N.T.V. was negotiating a joint venture with Comsat)).

<sup>55</sup> Citing **Chile: Alper Dep.** at 158 (stating that in October 1989, Comsat already had a joint venture in Chile); **Belmar Dep.** Vol. 1 at 114 (acknowledging Comsat venture in Chile called Satel and in Argentina called Satelital); **PAS Ex. 306** (May 15, 1989 joint venture agreement between Comsat and Entel Chile); **PAS Ex. 1102** (March 24, 1989 Comsat/Entel Chile joint venture proposal); **PAS Ex. 1359** (Comsat March 3, 1989 memorandum highlighting issues discussed during February 20-28, 1989 meetings in Chile and Argentina); **PAS Ex. 2679** (excerpts of March 28, 1989 corporate proprietary agreement between Comsat and Entel Chile for IBS service in Chile); **Colombia: Alewine Dep.** at 68 (acknowledging that Comsat does telecommunications and half-circuit carriage in Colombia); **Venezuela: Belmar Dep.** at 419 (acknowledging that Comsat and AT&T entered an IBS venture in Venezuela).

<sup>56</sup> Citing generally: **Alewine Dep.** at 127-28 (disavowing knowledge of particulars of PAS-1 capabilities in Latin America); **Belmar Dep.** at 419 (acknowledging that as of 1985, PAS was trying to do business all over Latin America); **Skjei Dep.** at 64-65 (stating an awareness that PAS had had some form or agreement in Chile, Argentina, and Brazil at some time during Comsat's ventures in those nations), 218 (referencing PAS Ex. 139 meeting notes indicating PAS advertising Latin American capacity for 1992); **Tanner Dep.** Vol. 2 at 205 (referencing PAS Ex. 121); **PAS Ex. 82** (handwritten notes of Stephen Skjei comparing PAS and Comsat); **PAS Ex. 87** (Comsat May 11, 1992 memorandum discussing and attaching technical comparison of PAS-1 and Intelsat VI satellites for Latin American coverage); **PAS Ex. 90** (excerpt from *FCC Week*, October 7, 1991); **PAS Ex. 121** (April 26, 1990 memorandum examining PAS competition in Latin America and the customers using PAS-1's Latin beam); **PAS Ex. 288** (May 4, 1989 Comsat/ISS memorandum discussing competition from PAS and political situations in Argentina, Brazil, and Chile and stating that PAS has had success in Argentina and can provide service to all for any purpose in Brazil); **PAS Ex. 1038** (April 29, 1992 memorandum requesting the technical comparison of PAS-1 and Intelsat VI satellites included in PAS Ex. 87); **Argentina: Alper Dep.** at 129 (accepting the possibility that Comsat knew at the time that Comsat was negotiating with Entel Argentina over use of the Comstar system, PAS was negotiating with Entel for use of PAS-1), 133-43 (discussing PAS Ex. 265 and Comsat's negotiations with Entel Argentina over Comstar in the wake of Entel's announcement of a domestic service arrangement with PAS); **Crockett Dep.** Vol. 1 at 120-21 (acknowledging that PAS had more power than Intelsat for some applications to certain parts of southern Chile and Argentina); **Skjei Dep.** at 135-36 (acknowledging awareness of PAS's agreement with Entel Argentina, but denying that Comsat and PAS were competitors in that market at that time), 142 (acknowledging PAS success in Argentina); **PAS Ex. 139** (October 18, 1990 Comsat Priority Memorandum discussing Argentine strategies and mentioning PAS); **PAS Ex. 265** (April 28, 1989 Comsat/ISS memorandum discussing PAS agreement with Entel Argentina and possibility of similar deal between Entel and Comsat); **Brazil: Skjei Dep.** at 144 (discussing Comsat effort to capitalize on PAS success in Brazil by pushing Embratel to become more responsive); **Chile: Alewine Dep.** Vol. 1 at 38

intended to hinder PAS's entry into any market. See *id.*<sup>57</sup> These citations do not support an inference of conspiracy or other anticompetitive conduct.

[\*\*117] Finally, nothing in Plaintiffs' citations would permit a reasonable trier of fact to infer the existence of a conspiracy or other anticompetitive conduct arising from COMSAT's dealings with AT&T on the Mastercard VSAT network for Latin America. Plaintiffs claim that AT&T had selected PAS, subject to confirmation of PAS's landing rights. Plaintiffs further claim that while confirmation was pending, Comsat combined with unspecified Latin American PTTs to interfere with PAS's agreement by providing AT&T with written commitments of pricing and landing rights if AT&T used Comsat/Intelsat space segment. See Pls.' 3(g) Statement P 33; Pls.' Opp'n Mem. at 13-14. Plaintiffs claim that many meetings and communications between Comsat and the Latin American PTTs directly arose from, related to, or referenced this allegedly improper competition for the Mastercard VSAT network. See Pls.' 3(g) Statement P 25.<sup>58</sup> [\*\*119] Plaintiffs' citations, however, reveal only permissible competition for the AT&T/Mastercard VSAT business. See *id.* PP 25 & 33.<sup>59</sup> [\*\*120] Moreover, Plaintiffs' citations support Comsat's

(acknowledging that at some point Comsat knew PAS was trying to obtain consultations in Chile); **Alper Dep.** at 126-27 (acknowledging PAS's presence in Chile pre-dated Satel, but disavowing knowledge as to whether that presence involved dealings with Entel Chile), **Belmar Dep.** Vol. 2 at 368-73 (disavowing knowledge that PAS was marketing to ASETA at the time of a Comsat presentation to ASETA, and discussing early stages of Satel venture in Chile), 389-90 (discussing competitive environment in Chile and acknowledging Comsat's awareness that PAS had leased a transponder from CTC); **Carroll Dep.** Vol. 2 at 314-15 (acknowledging that Telex Chile, using PAS space segment, was a probable competitor of Satel, but denying that CTC might be a competitor); **Chow Dep.** at 120-21 (acknowledging that PAS had more power than Intelsat for some applications to certain parts of southern Chile and Argentina); **Skjei Dep.** at 106 (acknowledging PAS's agreement with Telex Chile and presence of related PAS salespeople in Chile), 120-21 (referencing PAS Ex. 82 and stating an understanding that PAS had salespeople in Chile); **Vargo Dep.** at 92-93 (referencing PAS Ex. 1102 and acknowledging a March 1989 awareness that PAS was trying to do business in Chile), 96 (acknowledging an awareness that PAS was actively pursuing the Chilean market).

<sup>57</sup> Citing generally: **Crockett Dep.** Vol. 1 at 168 (stating that Comsat meeting with ASETA predicated knowledge that PAS had marketed its services to ASETA); **Skjei Dep.** at 140 (acknowledging PAS success in Chile, Argentina and Brazil and denying any consideration of Comsat efforts to counteract that success); **Torrico Dep.** at 159-60 (denying discussing PAS in meetings over joint ventures in Argentina, Colombia, Guatemala and Venezuela); **Argentina: Carroll Dep.** Vol. 2 at 327 (denying any direct correlation between Comsat's Comstar negotiations in Argentina and PAS's reaching an agreement with Entel Argentina); **Chow Dep.** at 63-65 (denying, in the context of PAS Ex. 265, any change in Comsat strategy in Argentina precipitated by PAS reaching an agreement with Entel Argentina); **Shubilla Dep.** at 60-69 (acknowledging meetings about joint ventures in Chile and Argentina, but without recollection of any knowledge at the time that PAS was marketing competing services in those countries); **Vargo Dep.** at 42 (denying knowledge of PAS in Argentina predating summer 1989 meetings there); **Chile: Carroll Dep.** Vol. 1 at 27-28 (denying any awareness that PAS was specifically attempting to enter the Chilean market at the time of the development of Satel, although acknowledging a general assumption that PAS was seeking to do business throughout Latin America); **Chow Dep.** at 61 (denying knowledge that PAS might be providing space segment to Satel's competitors); **Crockett Dep.** Vol. 1 at 53-57 (stating that negotiations over Satel in Chile predicated knowledge of any marking by PAS in Chile, and that Comsat never viewed PAS as a competitor of Satel in Chile); **Shubilla Dep.** at 60-69 (acknowledging meetings about joint ventures in Chile and Argentina, but without recollection of any knowledge at the time that PAS was marketing competing services in those countries), 87 (acknowledging Comsat meeting with Entel Chile in which PAS's marketing of video in Chile was mentioned, but denying any discussion of PAS IBS service), 141 (denying knowledge of any PAS marketing in Chile other than video service), 145 (again denying knowledge of any PAS marketing in Chile other than video service); **Skjei Dep.** at 92 (denying discussing PAS at joint-venture meetings, although acknowledging that PAS's relationship with Telex Chile may have been mentioned); **Vargo Dep.** at 39-40 (denying any knowledge of PAS in Chile predating April 1989 meetings there)).

<sup>58</sup> The citations in Plaintiffs' 3(g) Statement P 25 regarding VSAT mirror the citations in P 33.

<sup>59</sup> Citing **Barr Dep.** at 133 (acknowledging PAS's general desire to provide end-to-end service), 166 (generally acknowledging competitive situation between Comsat and PAS for AT&T business); **Barr Dep.** Vol. 2 at 316 (acknowledging that other VSAT business would accrue to the company securing AT&T VSAT business); **Lowry-Gabriel Dep.** Vol. 1 at 177-81 (discussing Comsat document comparing Intelsat, Eutelsat, PAS-1 and Orion for VSAT services to Latin America), 189 (discussing format of Comsat document comparing Eutelsat, Intelsat, and PAS), Vol. 2 at 250-51 (referencing a technical comparison of the Comsat and PAS proposals for AT&T VSAT service to Latin America), 330-47 (referencing PAS Exs. 87, 1038, & 2636, and discussing technical comparisons of PAS and Comsat for VSAT capacity to Latin America), 354 (acknowledging Comsat competition with

assertions that Comsat was at a disadvantage during the competition for the AT&T/Mastercard VSAT [\*\*118] business, see *id.*<sup>60</sup> [\*\*121] that AT&T initiated the discussions with Comsat, and that ultimately AT&T awarded the business to Comsat after developing misgivings about PAS. See *id.*<sup>61</sup> Indeed, the record before the Court

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PAS for VSAT service); **Nolting Dep.** at 92-97 (acknowledging meetings in Brazil wherein Comsat express its concern that if other systems secured AT&T's VSAT business, it would be difficult to regain the opportunity), 110 (discussing Intelsat Board of Governors meetings), 121-24 (discussing PAS Ex. 2637), 203-05 (discussing article written by PAS ostensibly indicating the countries with which PAS had agreements), 212-13 (discussing Comsat's available capacity for VSAT), 221-22 (discussing advantages of Comsat over PAS), 224-25 (discussing major challenges to PAS and denying knowledge at time of negotiations with AT&T that PAS had any intention of launching additional satellites); **PAS Ex. 10** (Comsat 1988 annual report); **PAS Ex. 22** (December 30, 1991 memorandum discussing Comsat options for competing for international VSAT business on the same grounds as PAS); **PAS Ex. 78** (Comsat March 17, 1992 memorandum comparing Intelsat and PAS capabilities in terms of connectivities, coverages, customer options, on-board redundancy, and restoration capacity); **PAS Ex. 87** (Comsat May 11, 1992 memorandum discussing and attaching technical comparison of PAS-1 and Intelsat VI satellites for Latin American coverage); **PAS Ex. 586** (Comsat June 17, 1991 memorandum containing notes from Comsat presentation on PAS VSAT services); **PAS Ex. 671** (March 12, 1992 covering memorandum distributing an article from *Interspace* newsletter, allegedly written by PAS, discussing PAS landing rights, country by country); **PAS Ex. 1038** (April 29, 1992 memorandum requesting the technical comparison of PAS-1 and Intelsat VI satellites included in PAS Ex. 87); **PAS Ex. 1726** (Comsat international VSAT business plan); **PAS Ex. 1731** (Comsat international VSAT business plan (same as PAS Ex. 1726, *supra*, but with cover and attachments included); **PAS Ex. 1733** (November 5, 1992 memorandum summarizing global VSAT service development); **PAS Ex. 2632** (May 1992 materials for VSAT presentation for Mastercard business); **PAS Ex. 2633** (May 1992 materials for Comsat VSAT presentation for Mastercard business); **PAS Ex. 2636** (May 15, 1992 marketing proposal comparing Intelsat/Comsat with PAS as a space segment supplier for VSATs in Latin America); **PAS Ex. 2637** (May 18, 1992 chart comparing Comsat and PAS Mastercard VSAT space segment pricing); **PAS Ex. 2639** (June 3, 1992 electronic mail memorandum summarizing status of AT&T VSAT Mastercard deal); **PAS Ex. 2762** (AT&T Tridom chronology of events for Skynet Global VSAT Service)).

<sup>60</sup> Citing **Barr Dep.** at 151-53 (stating that AT&T was considering PAS services thinking that PAS could more rapidly provide VSAT services because PAS was not required to work with the PTTs through whom Comsat worked and with whom AT&T had been having trouble), 155-56 (discussing series of letters and meetings with PTTs to address AT&T's concerns in providing VSAT services), 173 (acknowledging risk of losing AT&T Mastercard network business to PAS), 219-20 (referencing PAS Ex. 1025), 243 (referencing trip to visit PTTs around time of AT&T negotiations), 258 (referencing unspecified exhibit); **Barr Dep.** Vol. 2 at 311-12 (recounting AT&T concerns about Comsat for VSAT services); **Lowry-Gabriel Dep.** Vol. 1 at 191-93 (discussing PAS Ex. 22 and efforts by Comsat to achieve regulatory freedom enjoyed by PAS), 200-01 (referencing unspecified exhibit discussing Comsat options for securing freedoms enjoyed by other companies such as PAS), 204 (referencing unspecified exhibit and discussing Comsat options for securing freedoms enjoyed by other companies, including attempt to employ model used by PAS in France); **Nolting Dep.** at 72-73 (acknowledging communicating to Embratel in Brazil that if it did not offer competitive rates, both Comsat and Embratel would lose the VSAT business to PAS), 169-70 (discussing Comsat communications with PTTs about permitting Comsat the same access to VSAT services as PAS), 175-77 (acknowledging Comsat's efforts to secure assurances from PTTs that a single tariff for VSAT services would apply equally to PAS and Comsat); **PAS Ex. 1025** (December 30, 1991 memorandum discussing Comsat options for competing for international VSAT business on the same grounds as PAS (same as PAS Ex. 22, *supra*), with attachments).

<sup>61</sup> Citing **Barr Dep.** Vol. 1 at 124-27 (acknowledging that AT&T had informed Comsat that AT&T was considering using PAS for VSAT services), 144-46 (discussing AT&T's professed advantages and disadvantages of dealing with PAS for VSAT services to Latin America); **Maull Dep.** at 49-52 (discussing PAS representations to Maull of AT&T that PAS had the necessary landing rights in many Latin American countries), 59-76 (discussing AT&T's decision to reject PAS and accept Comsat proposal for VSAT services to Latin America, naming Comsat's deployment of additional capacity as the most important issue); **Nolting Dep.** at 36-47 (discussing AT&T responses to PAS proposals for IBS and VSAT services in Latin America, including AT&T's solicitation of proposals from Comsat), 78-80 (stating that AT&T provided Comsat with a technical analysis of PAS's proposal to AT&T, so that Comsat to provide AT&T with a technical comparison of its services with PAS's proposal), 83 (citing excerpt of document indicating AT&T's initial inclination to use PAS), 127-29 (stating that Comsat won AT&T's VSAT business because its proposal was technically superior to PAS), 131-35 (referring to PTT pricing for Comsat and PAS for VSAT services), 143 (referencing Embratel's skepticism that PAS could offer VSAT in Brazil, as PAS was not yet licensed for two-way transmission), 146-47 (referencing Embratel's skepticism that PAS could offer VSAT in Brazil, as PAS was not licensed for two-way transmission), 195 (acknowledging Comsat's effort to provide "one-stop-shopping" for VSAT upon AT&T's request for such service); **Twining Dep.** at 177-78 (disavowing knowledge as to why AT&T selected Comsat over PAS); **PAS Ex. 2631** (PAS technical proposal provided by AT&T to Comsat).

sustains Defendant's assertions that PAS had misrepresented its authorizations to AT&T, which AT&T discovered, see Maull Dep. at 68 (stating that PAS had represented to AT&T that all in-country arrangements had been made), 96-97 (expressing AT&T's doubts that PAS, despite its representations to the contrary, had in fact been granted in-country authorizations), that thereafter AT&T invited Comsat's bid, see Maull Dep. at 67-69 (AT&T informed Comsat of the existence of PAS's proposal and challenged Comsat to make its own proposal to AT&T), and that AT&T awarded the business to Comsat because Comsat's bid was technically superior to that of PAS. See, e.g., Nolting Dep. at 128-29 (stating that Comsat proposal showed that AT&T would need to use less space segment on Intelsat than PAS). Nothing in the record would permit a reasonable trier of fact to infer the existence of a conspiracy or other anticompetitive conduct.

[\*\*122] Although Plaintiffs have shown that Comsat met with various PTTs concerning the CNN business, ATV, Intelsat-K, joint ventures in Latin America and AT&T's Mastercard VSAT network, Plaintiffs have failed to show that any reasonable inference of a conspiracy may be drawn from those meetings.

#### (b) PAS, Codetel and Tricom

Plaintiffs claim that a further customary indication of traditional conspiracy is "the evidence surrounding Codetel, the PTT for the Dominican Republic." See Pls.' Opp'n Mem. at 14. Plaintiffs rely on the testimony of Richard Burleson, an executive who left Codetel and went to non-party Tricom. Plaintiffs claim that when Burleson was acting for Tricom, Codetel demanded that Tricom sever its relationship with PAS. Plaintiffs cite as evidence of Comsat's involvement in this conduct a Codetel report about PAS, a copy of which was found in files at Comsat. See PAS Ex. 1046 (June 13, 1988 Codetel document entitled "Preliminary Report on PANAMSAT," signed by Dugan). Upon review of Plaintiffs' citations, however, it is clear that Burleson himself never alleged any agreement between Comsat and Codetel with respect to Tricom.<sup>62</sup> [\*\*124] Moreover Burleson, in portions of [\*\*123] his testimony cited by Defendant, admits that he has no personal knowledge of any agreement between Comsat and Codetel to impede PAS.<sup>63</sup> The Court finds, therefore, that nothing in the record would permit drawing from Codetel's dealings with PAS a reasonable inference of a conspiracy involving Comsat.

#### (c) Intelsat resolutions

Plaintiffs also cite as "customary indication[s] of traditional conspiracy" the Intelsat separate systems resolutions. See Pls.' Opp'n Mem. at 15-18.<sup>64</sup> Plaintiffs claim to offer the resolutions as evidence of an intent to boycott PAS.

<sup>62</sup> See **Burleson Dep.** at 11-14 (reciting Burleson's work history with Codetel, the monopoly telephone company of the Dominican Republic), 16-39 (discussing Burleson tenure at Codetel, including his concerns about competition within the Dominican Republic resulting from shift in U.S. policy on private satellite systems, and denying Codetel dealings with Comsat), 41-62 (discussing PAS Ex. 1046 and Codetel's competitive analysis of PAS, but denying any specific recollections of discussions between Comsat and Codetel about PAS), 62-86 (discussing PAS Exs. 1509-10 and, without mention of Comsat, the alleged obstruction of Tricom business in the Dominican Republic by Codetel), 101-08 (referencing a meeting between Burleson and Crockett at which regulatory issues and competition were discussed, but denying any recollection of any agreement resulting); **PAS Ex. 1509** (October 30, 1990 letter from Burleson of Tricom to Anselmo alleging pricing fixing and restraint of trade by Codetel, the PTT signatory in the Dominican Republic, but without mention of Comsat); **PAS Ex. 1510** (October 29, 1990 letter from Burleson of Tricom to U.S. Department of State, alleging price fixing and restraint of trade by Codetel, the PTT signatory in the Dominican Republic, but without mention of Comsat).

<sup>63</sup> See **Burleson Dep.** at 93 (denying knowledge of any strategies involving Comsat), 123-32 (explaining that complaints in PAS Ex. 1510 refer to Codetel's conduct, not any conduct of Comsat; denying personal knowledge of any actions of Comsat vis-a-vis Tricom; denying any preemptive pricing by Codetel; admitting efforts by Codetel to block PAS's approval with the government, but denying any knowledge of Comsat involvement in those activities).

<sup>64</sup> Citing **PAS Ex. 3085** (record of the Fourteenth Meeting of Signatories of Intelsat concerning separate satellite systems, January 4, 1985); **PAS Ex. 3082** (record of the decisions of the Fifteenth Meeting of Intelsat Signatories concerning separate satellite systems, April 16, 1985); **PAS Ex. 3084** (report by the Sixteenth Meeting of Signatories to the Assembly of Parties, April 10, 1986); **PAS Ex. 3120** at 121 (testimony of Irving Goldstein, president of Comsat, before the Committee on Energy and

See Pls.' Opp'n Mem. at 18-19. The Court rejected this argument in its earlier opinion, see [Alpha LyraCom, 1993 U.S. Dist. LEXIS 3825, 1993-1 Trade Cas. \(CCH\) P70,184 at 69,860-61, 1993 WL 97313](#) at \*3-4, and above in its discussion of the decisions of Magistrate Judge Gershon. See [supra at 21-30](#). The Court declines to reexamine Plaintiffs argument here and finds that no inference may be drawn [\*\*125] from the Intelsat resolutions.

The Court finds, therefore, that the record does not provide sufficient "customary indications" of traditional conspiracy to sustain an inference of a conspiracy or other anticompetitive conduct among Comsat and the PTTs.

#### (4) Contrary [\*\*126] to self-interest

Plaintiffs claim as a final plus factor that Comsat and the PTTs acted against their self-interest by refusing to purchase capacity from PAS. "[HN21](#)" Actions against the apparent individual economic self-interest of the alleged conspirators may raise an inference of interdependent action." [Modern Home, 513 F.2d at 111](#); see [Apex Oil Co., 822 F.2d at 254-55](#). The question, therefore, is whether a rational entity would have engaged in the alleged parallel behavior individually.

Plaintiffs claim that Comsat and Intelsat experienced capacity shortages in some markets. See Pls.' Opp'n Mem. at 19; Pls.' 3(g) Statement P 17.<sup>65</sup> [\*\*127] Plaintiffs further claim that one of PAS's advantages over Comsat and Intelsat was PAS's ability to provide capacity to those markets. See Pls.' 3(g) Statement P 17.<sup>66</sup>

[\*\*128] Defendant admits in response that both PAS and Intelsat experienced capacity constraints for some services in some markets. Defendant argues, however, that Plaintiffs can point to no evidence either that Intelsat ever shut down for lack of capacity or that any PTT ever lacked capacity. See Def.'s Reply Summ. J. Mem. at 18 n.30.<sup>67</sup> Defendant argues, therefore, that even if Comsat and the PTTs experienced capacity constraints, and even if they refused to deal with PAS, the PTTs--most of whom were legal monopolies--would have been acting in their independent self-interest. Defendant argues that by using Intelsat, the PTTs would avoid (a) reducing their market

Commerce of the House of Representatives, June 13, July 25 and 26, 1984, stating that the Intelsat signatory resolutions indicated frustration on the part of Comsat's treaty partners, and did not signal a decision to form a boycott).

<sup>65</sup> Citing **Alewine Dep.** Vol. 2 at 188-91 (acknowledging Comsat capacity shortage prior to Intelsat-K and Intelsat VI satellites coming on line); **Carroll Dep.** Vol. 1 at 97-98 (discussing shortage in Comsat Ku-band capacity); **Kopinski Dep.** at 40-41 (acknowledging Comsat shortage of station-kept, Ku-band capacity prior to Intelsat-K), 126-27 (acknowledging a lack of high-power Ku capacity on Intelsat in 1990, before Intelsat-K and the Intelsat VI and VII satellites), 132-35 (acknowledging shortage in full-time voice grade capacity to Latin America prior to Intelsat VI satellites); **Popkin Dep.** at 71-73 (acknowledging shortage of station-kept capacity but denying knowledge of any PAS offer to sell capacity to Comsat); **Salvati Dep.** at 38-40 (acknowledging a shortage in Ku-band capacity on Comsat until launch of Intelsat K-4 in 1992, and denying effort to obstruct major broadcasters from switching to PAS); **Schnicke Dep.** at 22-23 (acknowledging periods of capacity shortages on Comsat); **Tanner Dep.** Vol. 1 at 16-17 (acknowledging shortages in Ku-band capacity); **Twining Dep.** at 30-31 (acknowledging shortages of Ku-band capacity).

<sup>66</sup> Citing **Balz Dep.** at 80-85 (discussing licensing of private providers of voice telephony services within the former East Germany to meet the exceptional demand created by reunification); **Carroll Dep.** Vol. 1 at 50-52 (discussing PAS Ex. 82 and advantages of PAS power and flexible pricing); **Crockett Dep.** Vol. 2 at 328-31 (discussing PAS Ex. 82 and advantages of PAS over Comsat, including price and power); **Giarman Dep.** at 84 (discussing PAS Ex. 82); **Popkin Dep.** at 54-62 (listing alleged advantages of PAS as reported by potential customers, including digital compression service, orbital location and station kept signal); **Saralegui Dep.** Vol. 1 at 187-89 (alleging obstruction of PAS through the Intelsat process), Vol. 2 at 256-57 (alleging that PAS offered the PTTs a percentage in return for access, but required no service functions by the PTT); **Skjei Dep.** at 39-42 (discussing PAS Ex. 82 and advantages of PAS over Comsat, including price); **PAS Ex. 82** (handwritten notes comparing PAS and Comsat); **PAS Ex. 1102** (March 24, 1989 Comsat/Entel Chile joint venture proposal); **PAS Ex. 2894** (ISS Strategic Business Plan, 1991-93); **Comsat Ex. 988** (statement of Reynold Anselmo, Chairman of PAS, July 28, 1994, before the Committee on Energy and Commerce Subcommittee on Telecommunications and Finance).

<sup>67</sup> See, e.g., **Dupuis-Toubol Decl. P 13** (reporting that France Telecom officials confirmed that the PTT had access to sufficient capacity); **Dupuis-Toubol Dep.** at 28-31 (stating that an inquiry revealed no capacity shortage for French domestic and international services)).

share to PAS (insofar as the PTTs were often also signatories and part owners of Intelsat), (b) providing exposure for a competitor and (c) diverting revenues to that competitor. See Def.'s Reply Summ. J. Mem. at 18 n.30. Plaintiffs failed to address this argument. Plaintiffs wholly failed to show that any individual PTT's decision not to use PAS capacity was against its self-interest in view of that PTT's capacity needs.

[\*\*129] Plaintiffs' only attempt at such a showing centers on what Plaintiffs refer to as "the \$ 1 transponder." Plaintiffs assert that in order to be operative upon the launch of PAS-1, Plaintiffs had to obtain Intelsat consultations and landing rights from at least one country. Plaintiffs argue that because of the alleged conspiracy, PAS was forced to obtain initial landing rights in Latin America by offering a transponder worth approximately \$ 6 million for only \$ 1. Plaintiffs offered the transponder first to Colombia and Ecuador in exchange for landing rights. See Pls.' Opp'n Mem. at 19-20; Pls.' 3(g) Statement P 39. Plaintiffs allege that each country refused, and that their refusals prove the existence of the alleged conspiracy, since the transaction was clearly in the best interest of each country. Plaintiffs state that the third time the offer was made, Peru accepted and PAS got its landing rights, allowing it to launch PAS-1. See Pls.' Opp'n Mem. at 20.

Comsat responds that the transponder was offered not for landing rights, but for Article XIV consultations which are the province of the Intelsat parties not the signatories and definitely not the common carrier PTTs. [\*\*130] See Def.'s Reply Summ. J. Mem. at 18 (citing Anselmo Dep. Vol. 3 at 466-68 (discussing the transponder offer in the context of Intelsat coordination); Saralegui Dep. at 219-21 (same)). This dispute is not material. The record is clear that PAS offered the transponder to all three nations, and that only Peru accepted. The record also reflects, however, that PAS offered the transponder directly to senior government officials, not to the PTTs. See, e.g., Anselmo Dep. Vol. 3 at 464-68 (explaining that offer to Peru was communicated directly to President Garcia through Delgado Parker, a close personal friend of both President Garcia and Anselmo). Insofar as the officials represented either Intelsat parties or signatories, no inference may be drawn from their conduct. Moreover, even if one were to draw inferences, the record reflects that neither Ecuador nor Colombia actually rejected the offer: PAS placed a time limit on its offer which expired in a relatively short time. Only Peru was able to accept in what PAS considered a timely fashion: about half a day. See Landman Dep. Vol. 4 at 819-26 (acknowledging restrictions on transponder offer, including limitation on its use to [\*\*131] non-commercial, educational, medical or social services); Saralegui Dep. Vol. 2 at 219-22 (stating that neither Colombia nor Ecuador rejected the offer, they just did not act quickly enough, whereas Peru accepted in about half a day); Comsat Ex. 31 (September 3, 1986 memorandum summarizing PAS/State Dept. tour of South America).

PAS does not even claim that the PTTs in Ecuador and Peru are part of the alleged conspiracy. Therefore, even if those PTTs had acted against their self-interest, their conduct does not support an inference of the conspiracy alleged to exist among Comsat and other PTTs. See Anselmo Dep. Vol. 3 at 466-68 (discussing the transponder offer in the context of Intelsat coordination); Comsat Ex. 924 at 2 (showing that PAS secured Intelsat consultations from Ecuador on October 20, 1989); Comsat Ex. 925 at 5 (indicating that PAS never received an operating agreement in Peru).

The Court finds no evidence in the record which would allow a reasonable trier of fact to infer that Comsat or the alleged PTT conspirators engaged in conduct contrary to their self-interests.

#### **(C) No inference of Comsat participation**

Even if Plaintiffs had provided evidence of parallel [\*\*132] refusals to deal and plus factors from which a reasonable trier of fact could infer an agreement among the PTTs, Plaintiffs have failed to provide evidence of Comsat's participation in any agreement. Indeed, the only allegations of Comsat's involvement in refusals to deal involve Comsat's alleged rejection of PAS's offer of capacity. Those allegations are addressed separately below. See *infra* at 112-117.

The record clearly reflects that consultations, landing rights and operating agreements are matters outside of Comsat's control and squarely within the control of foreign Intelsat parties, signatories, or PTTs. Plaintiffs have not provided any evidence that Comsat had a role in the procurement of operating agreements in any other country; that Comsat and any PTT conspired in any way to deny or delay PAS's application for an operating agreement; that

Comsat in any way impeded the liberalization of telecommunications laws in any country so as to deny or delay an operating agreement to PAS; or that PAS's success after that liberalization resulted from the breakdown of the alleged "artificially imposed" conspiracy involving Comsat and not merely from the liberalization of regulatory [\*\*133] restrictions. Absent such evidence, any factual disputes about the alleged denial or delay of a PAS request for an operating agreement in a given country is not sufficient to survive the current motion: Even if the trier of fact were to accept Plaintiffs' allegations that the PTTs formed a "bottleneck" and denied PAS operating agreements, Plaintiffs have failed to offer any evidence showing that Comsat created, maintained or otherwise participated in that conduct.

Plaintiffs did designate four witnesses who allegedly could testify about Comsat's participation in the alleged conspiracy. See Def.'s Summ. J. Mem. at 7 (citing Comsat Ex. 47, Interrogs. Nos. 4, 19, 23, & 24; Comsat Ex. 729, Interrog. No. 4). Plaintiffs designated Reynold Anselmo, Landman, Saralegui and Goldschmidt as witnesses who could testify about Comsat's involvement. In their deposition testimony, however, each admitted having no personal knowledge of any facts showing Comsat's involvement. See Def.'s Summ. J. Mem. at 7 n.9.<sup>68</sup> [\*\*135] In addition, Defendant cites to the deposition transcripts of thirteen other current and former PAS employees. None of them testified to having personal knowledge of any facts showing [\*\*134] Comsat's involvement. See Def.'s Summ. J. Mem. at 7-8 n.11.<sup>69</sup> Nor did any of the many Comsat employees deposed by the parties testify to the existence of a conspiracy.<sup>70</sup>

The Court finds that even if Plaintiffs had shown a pattern of refusals by the PTT conspirators to grant PAS landing rights and operating agreements, [\*\*136] coupled with additional considerations or "plus factors," Plaintiffs have failed to provide evidence from which Comsat's conscious participation in that conduct reasonably may be inferred.

## 2. Refusal to purchase PAS capacity

Plaintiffs argue that the existence of the alleged conspiracy and Comsat's conscious participation therein may also be inferred from Comsat's alleged refusal to purchase space segment capacity from PAS. See Pls.' S.J. Opp'n Mem. at 11, 19; Pls.' 3(g) Statement P 38.<sup>71</sup>

<sup>68</sup> Citing **Anselmo Dep.** at 110-11 (admitting having no personal knowledge of facts supporting Compl. P 28(e)), 114 (same, regarding P 28(f)), 133 (regarding P 28(g)), 138-39 (regarding P 28(h)), 144-45 (regarding P 28(i)), 152 (regarding P 28(j)), 159-60 (regarding P 28(l)), 172 (regarding P 28(m)), 191 (regarding P 28(n)), 195-95 (regarding P 28(o)), 210-11 (regarding P 28(b)), 212 (regarding P 28(a)); **Goldschmidt Dep.** Vol. 1 at 13-14 (disclosing Goldschmidt's ownership interest in PAS), 99 (admitting having created Comsat Ex. 201), 200 (admitting having created Comsat Ex. 204), 216 (admitting having no personal knowledge of facts supporting Compl. P 28(l) other than reference to Intelsat signatory resolutions), 224 (admitting having only suspicion of Comsat involvement in PAS delays with British Telecom); **Landman Dep.** at 505-07 (unable to name a single customer with whom Satel interfered as alleged in Compl. P 28(f)), 580-81 (unable to name a single customer with whom Comsat/C.A.N.T.V. interfered), 590-93 (unable to name a single source in Colombia of alleged disparagement and obstruction by Comsat), 605-06 (unable to name a single independent source in support of Compl. P 28(j)), 636 (unable to support Compl. P 28(l)), 685 (unable to support Compl. P 28(c)); **Saralegui Dep.** at 472-74 (unable to support Compl. P 28(d)), 497-98 (unable to support allegations concerning Entel Argentina), 503-04 (unable to support Compl. P 28(h)), 513 (unable to support Compl. P 28(j)) 522 (unable to support Compl. P 28(l)), 523-25 (unable to support Compl. PP 28(l) & (m)).

<sup>69</sup> Citing **Albert Dep.** at 12-15, 21, 188-94; **Bachelder Dep.** at 40-41; **Bednarek Dep.** at 115-17; **Carroux Dep.** at 110-14; **Costello Dep.** at 7, 78-89, 172; **Gazzolo Dep.** at 110; **Hanafi Dep.** at 296; **Marco Northland Dep.** at 15, 39-42, 154-62; **Lanni Dep.** at 36-38, 300-06; **Quesada-Bryans Dep.** at 12; **Walisko Dep.** at 39-40; **Whitehead Dep.** at 8, 36; **Zarecor Dep.** at 66-68.

<sup>70</sup> On the other hand, Patricio Northland, formerly in charge of PAS's Latin American marketing, allegedly testified that Plaintiffs' conspiracy claims are not true. See Def.'s Summ. J. Mem. at 7-8 (quoting Patricio Northland Dep. at 124-25, 128). This testimony was not provided to the Court. Plaintiffs do not refute Defendant's representation of the substance of the testimony, but argue that it should be given no weight because Patricio Northland is "a disgruntled ex-employee." Pls.' Opp'n Mem. at 22 n.5.

[\*\*137] On or about February 1989, PAS lawyer Philip Spector called Comsat lawyer Maury Mechanick and ostensibly offered trans-Atlantic Ku-band capacity on PAS-1. See Def.'s Summ. J. Mem. at 19-20.<sup>72</sup> [\*\*138] Mechanick conferred with counsel and Comsat's senior management. Senior management allegedly thought that Comsat World Systems was barred by law from "independently buying capacity from PAS," Def.'s Summ. J. Mem. at 20, 22-23,<sup>73</sup> although Plaintiffs claim that Comsat could have purchased capacity directly from PAS. See Pls.' Opp'n Mem. at 26.<sup>74</sup> [\*\*139] Senior management then referred the matter to Intelsat. See Crockett Dep. at 63-65 (acknowledging consulting counsel then referring the offer to Dean Birch of Intelsat), 73-74 (discussing referral to Dean Birch of Intelsat). Intelsat declined to act on the alleged offer. Mechanick then advised Spector that Comsat was not interested.<sup>75</sup> Plaintiffs claim that PAS's offer and Comsat's rejection occurred at a time when Comsat had a capacity shortage. Plaintiffs argue, therefore, that it was contrary to Comsat's self-interest to reject to offer, and therefore that the rejection is evidence of the alleged conspiracy.

As an initial matter of law, no contractually sufficient offer was made. Spector provided no terms for price, duration, payment, or quantity of the capacity, nor did Spector provide any written proposal. See Spector Dep. 25-27 (failing to remember substance of the alleged offer, acknowledging having never made any other offers for PAS, and acknowledging that Mechanick, to whom the offer was made, worked primarily on Intelsat matters). Plaintiffs' admit as much. See Goldberg Dep. 27-28 (specifically denying that Spector's phone call constituted a formal offer of PAS

<sup>71</sup> Citing **Spector Dep.** at 23-32 (alleging to have communicated an offer of PAS capacity to Comsat, but failing to recall the date or even the year, and acknowledging that no price, duration, payment, or technical terms were mentioned); **Spector Aff.** of Feb. 21, 1995 (repeating allegation that Spector made offer of Ku-band capacity to Comsat on behalf of PAS); **PAS Ex. 1522** (February 28, 1989 Comsat memorandum to the record discussing Comsat rejection of Spector offer of PAS capacity); **PAS Ex. 2952** (Comsat February 28, 1989 memorandum by Mechanick and notes of conversation with Spector); **Mechanick Dep.** at 60-70 (discussing telephone conversations with Spector in January or February 1990 and ambiguity as to whether offer was made to Comsat as a carrier or to Intelsat and Comsat as a signatory); **Landman Dep.** Vol. 3 at 650-68 (alleging to have personally communicated an offer of PAS trans-Atlantic Ku-band capacity to Comsat, but failing to recall the date or even the year and any terms; discussing Comsat Ex. 17 and alleged business lost by PAS due to lack of PAS capacity resulting from delayed financing and launches); **Cummings Dep.** at 146-48 (acknowledging general willingness at Comsat to consider using PAS capacity if it made economic sense, and discussing Satel capacity shortage in 1992).

<sup>72</sup> Citing **Spector Dep.** at 23-25 (discussing Spector call to Mechanick); **Spector Aff.** of Feb. 21, 1995 (repeating allegation that Spector made offer of Ku-band capacity to Comsat on behalf of PAS); **Mechanick Dep.** 16-17 (discussing Mechanick's positions as Director of Intelsat Affairs and vice president of Intelsat Policy and Representation); 77-78 (identifying PAS Ex. 1522 record of second conversation with Spector); **PAS Ex. 1522** (February 28, 1989 Comsat memorandum to the record discussing Comsat rejection of Spector offer of PAS capacity); **PAS Ex. 2952** (Comsat February 28, 1989 memorandum by Mechanick and notes of conversation with Spector); **Goldberg Dep.** at 24-25 (stating his awareness of Spector offer on behalf of PAS)).

<sup>73</sup> Citing **Crockett Dep.** at 66-67 (discussing limitations on Comsat World Systems and its passing to offer on to Intelsat), 75 (understanding after having consulted counsel that at the time, Comsat World Systems could not buy capacity from PAS and resell it in the United States).

<sup>74</sup> Citing **Alewine Dep.** Vol. 2 at 194-98 (expressing view that Comsat, as signatory, has an obligation to secure its capacity through Intelsat); **Alper Dep.** at 224 (stating that Comsat sells capacity to U.S. customers, while PAS sells capacity for international routes); **Carroll Dep.** Vol. 1 at 96-97 (acknowledging Comsat's ability to compete with Intelsat, in context of reselling preemptible restoration capacity); **Hannon Dep.** at 67-73 (stating that Comsat discussed recommending that Intelsat consider acquiring PAS capacity to cover Intelsat capacity shortages); **Kopinski Dep.** at 187-88 (stating that in preparing options to address capacity shortages in 1992, witness did not recommend consideration of PAS capacity because of the pending lawsuit); **Shubilla Dep.** at 12-13 (stating that Comsat only marketed capacity on Intelsat satellites, although unaware of any formal prohibition against marketing capacity from other sources); **Vargo Dep.** at 20-23 (acknowledging that Comsat had considered PAS capacity); **Crockett Dep.** Vol. 1, 56-57 (acknowledging that for certain services, if capacity was unavailable from Intelsat, Comsat could have used PAS capacity).

<sup>75</sup> See **Mechanick Dep.** at 67 (discussing rejection of alleged offer after consultation with Comsat's senior management); **Spector Dep.** at 24-25 (stating that Mechanick indicated he would consult management); **PAS Ex. 2952** (Comsat February 28, 1989 memorandum by Mechanick and notes of conversation with Spector).

capacity to Comsat). Plaintiffs claim, however, that the alleged offer was sufficient for antitrust demand purposes, even if not contractually significant. See Pls.' Opp'n Mem. at 25-26 (citing [\*\*140] *Continental Ore Co., 370 U.S. at 699, 82 S. Ct. at 1410* (on facts showing that demands had been made, rejecting mechanical requirement that antitrust plaintiff show contemporaneous demand on defendant plus exhaustion of all other sources); *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 487 n.5, 88 S. Ct. 2224, 2228 n.5, 20 L. Ed. 2d 1231 (1968)* (finding an explicit demand to deal unnecessary under the circumstances)). Plaintiffs also argue that no demand is required where such demand would be futile. See Pls.' Opp'n Mem. at 25-26 (citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 781 (3d Cir. 1967) (finding demand unnecessary where defendant's policy would render demand futile), aff'd, *392 U.S. 481, 487 n.5, 20 L. Ed. 2d 1231, 88 S. Ct. 2224*); *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 120 n.15, 89 S. Ct. 1562, 1575 n.15, 23 L. Ed. 2d 129 (1969)* (noting that where a demand would have been futile under defendant's policy, absence of a formal request is not fatal to plaintiff's claim).

Plaintiffs are correct that there is no general requirement that an antitrust plaintiff prove a formal demand. See, [\*\*141] e.g., *Out Front Productions, Inc. v. Magid, 748 F.2d 166, 169-70 (3d Cir. 1984)* (finding that antitrust suits are not subject to the type of demand prerequisite in shareholder derivative suits). In this instance, however, Plaintiffs seek to prove a specific refusal to purchase capacity. Since the record does not support a finding that a specific offer or demand was ever presented to Comsat, Comsat cannot be found to have refused to purchase PAS capacity based on Spector's communications with Mechanick.<sup>76</sup>

[\*\*142] Plaintiffs also suggest that other offers were made, including one oral offer by Plaintiffs' president Frederick Landman, and another unspecified offer to Satel, Comsat's joint venture in Chile. See Pls.' Opp'n Mem. at 25; but see Spector Dep. at 49 (disavowing any knowledge of anyone else offering PAS capacity to Comsat). As to Satel, the limited evidence in the record suggests only that Satel considered using PAS capacity. See Cummings Dep. at 146-48 (stating that in 1992, Comsat's joint venture with Entel Chile, Satel, began looking for additional capacity and considered PAS). This fact, if true, does not support any inference that Comsat refused to deal with PAS. As to Landman, at his deposition he was unable to recall a single detail of the offer of capacity he allegedly made to Comsat. He could not recall the year of the offer, the amount of capacity offered, the price, the duration, the individual at Comsat to whom the offer was made, the individual who responded to the offer or whether the response was oral or written. See Def.'s Summ. J. Mem. at 20 n.27 (citing Landman Dep. at 650-58 (alleging to have personally communicated an offer of PAS trans-Atlantic [\*\*143] Ku-band capacity to Comsat, but failing to recall the date or even the year and any terms)); Def.'s Reply Summ. J. Mem. at 20 n.37 (same). No reasonable trier of fact could draw any inference against Comsat from Landman's alleged offer.

On the current record, the Court finds that no inference of a conspiracy or Comsat's conscious participation therein may reasonably be drawn from the alleged refusals of Comsat to purchase PAS capacity.

### **3. Tracking PAS throughout the world**

Finally, Plaintiffs argue that the conspiracy and Comsat's participation therein may be inferred from Comsat's alleged "pattern and practice" of "tracking PAS throughout the world" and forming ventures in Latin America and Europe for the exclusive purpose of preventing PAS's entry into those markets. These ventures were discussed

<sup>76</sup> Defendant also argues that Spector's telephone call was merely a maneuver to set up an antitrust claim. There is evidence to support this argument in the record. See, e.g., **Goldberg Dep.** 27-28 (admitting that Spector communication with PAS was suggested by counsel, not PAS officers); **Spector Dep.** at 39-47 (discussing antitrust implications of Spector offer in context of Spector's contemporaneous lobbying against Comsat to U.S. government officers).

There is also evidence to support Defendant's view that the offer, if any, was extended to Intelsat and not to Comsat. See, e.g., **Spector Dep.** 34-36 (stating that PAS did not distinguish between Comsat and Intelsat in making the alleged offer), 67 (stating that he never even considered contacting anyone at Intelsat directly or anyone at any other Intelsat Signatory, other than Comsat, about an offer of capacity from PAS to ease the Intelsat capacity shortage).

briefly above. See [supra at 90-102](#). In Latin America, Plaintiffs claim that Comsat entered or negotiated ventures in Argentina, Venezuela, Colombia and Chile in order to frustrate PAS marketing efforts.<sup>77</sup> In Europe, Plaintiffs claim that Comsat devised ATV just to impede PAS's growth.

#### [\*\*144] (A) Latin American ventures

Plaintiffs claim that each of Comsat's Latin American ventures, whether consummated or merely discussed, "was part and furtherance of the separate systems boycott." Pls.' Opp'n Mem. at 28. Plaintiffs claim that Comsat initiated negotiations for the ventures only after PAS sought entry into each market, and that "part of the understanding" was that the PTT would use the pending venture as a pretext to "refuse to enter into an operating agreement with PAS." Pls.' Opp'n Mem. at 28. Plaintiffs claim that such ventures were therefore "incident to the boycott" in violation of [§ 1](#).<sup>78</sup> [\*\*145] Plaintiffs alleged evidence in support of this claim, however, consists only of general testimony about various venture negotiations which either do not reference PAS, see Pls.' Opp'n Mem. at 30,<sup>79</sup> [\*\*146] or which contain explicit denials of Plaintiffs' claim. See *id.*<sup>80</sup> Even if these citations could be read to infer that certain PTTs refused to deal with PAS during negotiations with Comsat, nothing in the record supports an inference that Comsat encouraged or even had knowledge of any such refusals.

The existence of the proposed ventures in and of themselves cannot support an inference of conspiracy because Comsat has provided ample evidence that the ventures developed for business reasons independent of PAS. Comsat has shown that it pursued growth strategies all over the world, including places where PAS was not doing

<sup>77</sup> Plaintiffs had alleged that Comsat interfered with PAS's bidding on a United States Department of Defense contract with Honduras. See 3d Am. Compl. P 28(j). This claim has been withdrawn. See Comsat Ex. 1003 (Letter from Daniel R. Shulman, counsel for Plaintiffs, to Mark D. Wegener, counsel for Defendant (Nov. 1, 1994)).

<sup>78</sup> Plaintiffs also claim that these ventures were overt acts of a conspiracy to monopolize in violation of [§ 2](#), and acts of monopolization in violation of [§ 2](#) "if undertaken for an exclusionary purpose." Pls.' Opp'n Mem. at 28.

<sup>79</sup> Citing generally: **Carroll Dep.** Vol 2, at 294-97 (referencing unspecified meetings between Comsat and PTT officials in Chile, Argentina, Brazil, Venezuela, Colombia, the Dominican Republic, Jamaica, Trinidad & Tobago, Barbados, the United Kingdom, France, Germany, Spain and Italy); **Shubilla Dep.** at 60-68 (discussing meetings in 1988 in Argentina and Chile to discuss possible joint ventures); **Crockett Dep.** Vol. 1 at 81 (referring to communications between Comsat/Intelsat and providers in Russia, Colombia, Argentina, Brazil, Venezuela, Singapore, Thailand and the Philippines), 91-95 (discussing meetings regarding ventures in Venezuela and Brazil), 116-17 (discussing Comsat's historical connection with PTTs worldwide); **PAS Ex. 1359** (Comsat March 3, 1989 memorandum highlighting issues discussed during February 20-28, 1989 meetings in Chile and Argentina); **PAS Ex. 90** (excerpt from *FCC Week*, October 7, 1991); **Argentina: Carroll Dep.** at 325-29 (referencing PAS Ex. 265 and meetings in Argentina regarding Comstar); **Belmar Dep.** Vol. 2 at 363-66 (referencing PAS Ex. 1359 and alleged February 1989 meetings with Entel Argentina regarding Comstar), 373-78 (referencing PAS Ex. 266 and two meetings with Entel Argentina regarding Comstar), 396 (referencing earlier referenced meeting in Florida about Comstar); **Alper Dep.** at 211-16 (referencing PAS Ex. 266 and alleged meeting with Entel Argentina regarding Comstar consultations); **PAS Ex. 265** (Comsat April 28, 1989 internal memorandum discussing Comstar competition with PAS in Argentine market); **PAS Ex. 266** (Comsat March 15, 1989 internal memorandum on status of Comstar negotiations in Argentina); **Chile: Crockett Dep.** Vol. 1 at 39-41 (referring to meetings in Chile); **Colombia: Crockett Dep.** Vol. 1 at 159-67 (discussing Comsat joint venture in Colombia and Comsat negotiations with ASETA); Vol. 2 at 352-54 (discussing PAS Ex. 1112 and meetings in Colombia over venture opportunities); **Vargo Dep.** at 46-47 (acknowledging meetings with Telecom Colombia in 1991 about revenue share agreement); **PAS Ex. 1112** (telex referencing meeting in Colombia (same as PAS Ex. 1109)); **Venezuela: Morgan Dep.** at 54-55 (reciting hearsay statement that prior to deregulation in 1992-93, C.A.N.T.V. refused to deal with PAS because C.A.N.T.V. was negotiating a joint venture with Comsat).

<sup>80</sup> Citing **Argentina: Crockett Dep.** Vol. 2 at 296-300 (discussing failures of Comsat Timeplex preemptible service and meetings with Entel Argentina, but disavowing knowledge of PAS negotiations with Entel, Argentina), 303-08 (denying having discussed with Entel Argentina political impact of PAS Intelsat coordination); **Brazil: Crockett Dep.** Vol. 2 at 249-52 (mentioning meetings with Embratel Brazil regarding venture opportunities but disavowing ever discussing PAS).

business like Kuwait, Saudi Arabia, Jordan, Israel, Singapore, Philippines, Thailand, Turkey, Russia, and Australia.  
<sup>81</sup> Plaintiffs have failed to rebut this evidence.

[\*\*147] Comsat has also shown that its presence in Latin America predated PAS with Comsat ventures in the 1970s in Panama (Intercomsa) and Nicaragua (Nicatelsat). See Def.'s Summ. J. Mem. at 25 n.34. <sup>82</sup> [\*\*148] Although it is true that those ventures were remote in time and wholly unrelated to the recent ventures, see Pls.' Opp'n Mem. at 28-29, <sup>83</sup> they nevertheless indicate that Comsat had previous experience in the region and support testimony claiming that Latin America was a natural and attractive market for Intelsat satellite services. See, e.g., Saralegui Dep. at 668 (citing country size, topography, underdeveloped infrastructure and general neglect of the market by PTTs as features which made Latin America an attractive market).

In Chile, Comsat joined with the Chilean telephone company Entel to form a joint venture called Satel. Plaintiffs argue that Satel competed directly with PAS in Chile, see Pls.' Opp'n Mem. at 30-31, <sup>84</sup> and that Satel "was in fact directed by Comsat not to deal with PAS." Pls.' Opp'n Mem. at 31 (citing Cummings Dep. 146-48 (stating that in 1992, Comsat's joint venture with Entel Chile, Satel, began looking for additional capacity and considered PAS)). The record does not support these claims.

[\*\*149] The record reflects that by 1988 Chile was among the first Latin American nations to have privatized its telecommunications markets, see Def.'s Summ. J. Mem. at 27-29, <sup>85</sup> and that in November of 1988, Comsat entered a MOU with Entel Chile concerning a possible IBS ("international business data services") venture. See PAS Ex. 305 (Comsat November 2, 1988 memorandum with Entel Chile). In 1989, Comsat and Entel Chile formed Satel. See Skjei Tr. 112-18 (discussing reasoning behind Satel, including diversification of Comsat and expansion into South America), 127 (acknowledging approval of the Chilean venture); PAS Ex. 2679 (excerpts of March 28,

<sup>81</sup> See **Crockett Dep.** at 35-36 (referencing pent-up demand for communications services back to the United States), 81 (referring to communications between Comsat/Intelsat and providers in Russia, Colombia, Argentina, Brazil, Venezuela, Singapore, Thailand and the Philippines); **Alper Dep.** at 122-23 (discussing Comsat ventures in Australia, Turkey, Russia, and Israel, in addition to South America); **Comsat Ex. 1004** (May 21, 1991 memorandum identifying--without reference to PAS--Comsat ventures in Argentina, Chile, Turkey, Venezuela, Romania, Colombia, Mexico, Guatemala, Singapore/Thailand, Bolivia, Hungary, Bulgaria, Poland, and the Philippines).

<sup>82</sup> Citing **Carroll Dep.** at 19-21 (stating that the Satel venture in Chile was based on Comsat's experience in Nicaragua and Panama); **Alper Dep.** at 116 (referencing Comsat interest in Panama in the 1960s); **Flower Dep.** at 196 (referencing ventures in Panama and Nicaragua in the 1970s); **Crockett Dep.** at 25-26 (referencing ventures in Panama and Nicaragua in the 1970s, and in Chile, Argentina, Venezuela, Turkey, the Soviet Union, and Czechoslovakia in the 1980s).

<sup>83</sup> Citing **Skjei Dep.** at 200-01 (describing Chile and Argentina as departures from Comsat's normal lines of business requiring board approval); **PAS Ex. 2679** at 58303 (March 28, 1989 corporate proprietary agreement between Comsat and Entel Chile for IBS service in Chile describing the venture as providing a foothold in Latin America and setting a precedent for other ventures), 58299 (acknowledging PAS's active pursuit of Chilean market and likely opposition to Satel venture before the FCC); **PAS Ex. 82** (notes of Skjei comparing PAS and Comsat).

<sup>84</sup> Citing **PAS Ex. 261** (report on the fourteenth meeting of Satel board of directors, December 18, 1991); **PAS Ex. 262** (Comsat briefing materials for May 24, 1991 Satel board of directors meeting); **PAS Ex. 313** (September 14, 1990 memorandum regarding promotion of Satel to customers Proctor & Gamble and Bank of America); **PAS Ex. 319** (report on the fifteenth meeting of Satel board of directors, February 25, 1992); **PAS Ex. 322** (May 8, 1991 facsimile of report on the eleventh meeting of the Satel board of directors); **PAS Ex. 1102** (March 24, 1989 Comsat/Entel Chile Joint Venture Proposal); **PAS Ex. 2679** (excerpts of March 28, 1989 corporate proprietary agreement between Comsat and Entel Chile for IBS service in Chile); **PAS Ex. 2743** (Comsat October 26, 1990 memorandum providing background on Cargill, including terms of alleged offer from PAS to Cargill). But see **PAS Ex. 1380** (Comsat briefing materials for July 1989 board of meeting listing Telex Chile, CTC, and PAS as possible competitors for Satel).

<sup>85</sup> Citing **Shubilla Dep.** at 10-11 (identifying his position in Comsat's World Systems Division); **Vargo Dep.** at 31-32 (stating that Comsat had been looking to diversify its services); **Belmar Dep.** at 122-23 (stating that Chile was selected because the market had already been privatized).

1989 corporate proprietary agreement between Comsat and Entel Chile for IBS service in Chile). The record further reflects that at that time, Satel faced competition from four companies, but that PAS was not one of them, see Def.'s Summ. J. Mem. at 29,<sup>86</sup> because at the time PAS concentrated on video transmission in Chile, and therefore did not directly compete with Satel's IBS service. See Saralegui Dep. at 26 (stating that in 1984 and 1985, there was no full-time, commercial television distribution to South America), 62 [\*\*150] (stating that initially PAS marketed primarily television services), 66 (considering PAS-1 the premiere satellite for video in South America); Shubilla Dep. at 87 (stating awareness that PAS was attempting to establish video market in Santiago, Chile, but not IBS services). Plaintiffs have offered no evidence to show that Satel was not a legitimate business enterprise which did not interfere with PAS.<sup>87</sup>

[\*\*151] The same is true for Argentina. Plaintiffs claim that Comsat negotiated a joint venture with Entel Argentina in order to thwart PAS's efforts to get landing rights, but nothing in the record supports this claim. The record reflects that Argentina, unlike Chile, remained a highly regulated market until 1990 or 1991, with restrictions on Entel Argentina's authority to enter agreements with foreign parties. See, e.g., Belmar Tr. at 210-11 (stating that Argentine government official could not legally provide a franchise or other agreement). The record also reflects that in April 1989, Comsat and Entel Argentina signed a non-binding Memorandum of Understanding ("MOU") to study business opportunities. See PAS Ex. 267 at 21420 (April 19, 1989 MOU explicitly stating that it "does not establish any business association between the parties"). Ultimately, Comsat formed a venture in 1990 called Satelital with IATA-Alcatel, a private Argentine company. Satelital competed with at least two companies other than PAS: Impsat and Satelnet. See Def.'s Summ. J. Mem. at 26 n.35.<sup>88</sup> Plaintiffs again have offered no evidence to show that the formation of Satelital and Comsat's negotiations [\*\*152] with Entel Argentina were not legitimate business enterprises which did not interfere with PAS.<sup>89</sup>

Similarly, nothing in the record suggests any inference of Comsat's interfering with PAS in Venezuela or Colombia. The record reflects that in Venezuela Comsat negotiated a joint venture with C.A.N.T.V., a local service provider, but due to restrictions in the Venezuelan [\*\*153] market the venture was never formed. See, e.g., Belmar Dep. at 415-16 (stating that ownership of any venture in Venezuela had to rest with C.A.N.T.V.). Comsat then pursued a venture with AT&T, but that venture did not operate until after the 1991 liberalization of Venezuela's market, by which time Comsat had already sold its interest, see Belmar Dep. at 421 (discussing AT&T/Comsat sale of IBS terminal back to C.A.N.T.V., which at that point was partially owned by AT&T); Crockett Dep. at 94-95 (Comsat sold its interest to AT&T and other owners), and even then the venture faced heavy competition from multiple companies, including PAS. See Def.'s Summ. J. Mem. at 26.<sup>90</sup> [\*\*154] The record further reflects that Comsat

<sup>86</sup> Citing **Alper Dep.** at 191 (identifying CTC, ChileSat, VTR, and Samarco, but not PAS, as competitors in Chile); **Lanni Dep.** at 185 (stating that Satel was not a competitor of PAS in Chile); see also **Gazzolo Dep.** at 112 (referencing competition in Chile, including ChileSat's ability to enter and compete with Satel).

<sup>87</sup> Defendant also cites the testimony of Patricio Northland, a former vice president of PAS (and brother of Marco Northland), who allegedly states that PAS's claims about Entel Chile are untrue. See Patricio Northland Dep. at 122. Again, this testimony was not provided to the Court but Plaintiffs do not refute Defendant's representation of the substance of the testimony. See Pls.' Opp'n Mem. at 22 n.5.

<sup>88</sup> Citing **Comsat Ex. 1006** (Comsat May 16, 1991 monthly operating report on Satelital identifying Impsat and Satelnet as its competition); **Cummings Dep.** at 66 (identifying Impsat and Satelnet, but not PAS, as competitors of Satelital); **Skjei Dep.** at 136-37 (identifying competitors of Satelital as Dynamic Systems and Impsat; but not PAS).

<sup>89</sup> Defendant again cites the testimony of Patricio Northland, who allegedly testified that PAS's claims about the Argentine joint venture are "definitely not true." Patricio Northland Dep. at 123. Again, the cited testimony was not provided to the Court, although Plaintiffs did not refute it.

<sup>90</sup> Citing **Belmar Dep.** at 421-22 (after liberalization Venezuela issued ten or twelve franchises, including one to a small carrier affiliated with PAS); **Gazzolo Dep.** at 339-41 (stating that PAS could have provided service in Venezuela through local, private companies licenses by the government, like Pequiven, which ultimately decided that PAS's service was too expensive for its needs).

entered the Colombian market after PAS filed this action and that Comsat then only offered of competing services. Nothing in the record suggests any inference of Comsat's hindering PAS in Colombia. See, e.g., Marco Northland Dep. at 159 (disavowing any personal knowledge of any facts supporting allegations concerning ventures in Colombia).<sup>91</sup>

The Court finds that Plaintiffs have failed to present evidence which would support a reasonable inference that Comsat entered or negotiated ventures in Chile, Argentina, Venezuela or Colombia in order to frustrate PAS marketing efforts.

#### **(B) Atlantic Television Service (ATV)**

ATV was an "end-to-end" service provided by Comsat and the PTTs in Italy, Britain, Spain and Portugal. ATV offered discounted rates, flexible volume-based contracts, one-stop booking for space segment and connectivity to and from Europe, Africa, and Central and South America.<sup>92</sup> Plaintiffs claim that ATV was designed for the sole purpose of putting PAS at a competitive disadvantage, insofar as the PTTs used ATV as a pretext for not dealing with PAS. See 3d Am. [\*\*155] Compl. P 28(e); Pls.' Opp'n Mem. at 31, 34.<sup>93</sup> [\*\*156] Plaintiffs therefore claim that ATV was an act in furtherance of the boycott in violation of § 1.<sup>94</sup> The record does not support these claims.

The record reflects that Comsat formed ATV in order to provide cost-effective service to large, occasional-use video customers and to generate economic utility from unused Intelsat satellite capacity. See, e.g., Carroll Dep. at 95 (stating that the only reason for developing ATV was to be more customer responsive); Crockett Dep. at 132-34 (discussing double-preemptible nature of ATV service)). Plaintiffs have not refuted this evidence.

Moreover, Plaintiffs' own citations recognize the value of an end-to-end service such as ATV. See Comsat Ex. 998 at 29 (SEC registration statement Form S-1 for PAS referencing end-to-end service as a customer-driven service); Albert Dep. at 83-85 (discussing as a significant advantage PAS's ability to offer end-to-end service). Although Plaintiffs claim that PAS was denied access to the markets serviced by ATV's end-to-end service option, Plaintiffs' do not offer a single citation [\*\*157] in support of this claim. See Pls.' Opp'n Mem. at 32-33 (without citation). Plaintiffs offer only conclusory assertions that the purpose of ATV was to support the alleged conspiracy. See Pls.' Opp'n Mem. at 32 (citing Pls.' 3(g) Statement at P 31, *supra* nn.45-55); Pls.' Resp. to Comsat Statements Nos. 75-88). These assertions are insufficient to support an inference of a conspiracy.

Plaintiffs next resort to circular logic, claiming that the failure of ATV within one year is proof that it was developed not for any legitimate business purpose but rather to impede PAS's negotiations in the ATV nations. Again, however, Plaintiffs offer no support for this claim. See Pls.' Opp'n Mem. at 33 (without citation). Defendant, on the other hand, has provided evidence that ATV was discontinued only after market and FCC regulatory changes

<sup>91</sup> Defendant again cites the testimony of Patricio Northland, who allegedly denied knowledge of a joint venture between Comsat and C.A.N.T.V. and disputed Plaintiffs' claim that Comsat interfered with PAS in Colombia. See Patricio Northland Dep. at 123. Again, the cited testimony was not provided to the Court, although Plaintiffs did not refute it.

<sup>92</sup> ATV marketed preemptible satellite capacity: transponder capacity that was traditionally placed in reserve in case of failures in the publicly switched telephonic capacity or ground cable systems. If a failure occurred in these primary systems, whatever customer that was then using the reserve capacity would be preempted. This capacity was therefore less attractive to customers. Comsat marketed ATV to video broadcasters and international business data services (IBS) users.

<sup>93</sup> Citing **PAS Ex. 3059** at 43-45 (Comsat commissioned report on competition in the market for trans-oceanic, facilities-based telecommunications services, showing doubling of trans-Atlantic satellite usage for video and audio services between 1988 and 1993), 70 (table showing Comsat market share in trans-oceanic video and audio services from 1986 to 1993); **Landman Dep.** Vol. 2 at 468-70 (repeating hearsay statements that PTTs in U.K. and Italy would not deal with PAS because the PTTs had satisfied their demand needs through ATV and Intelsat).

<sup>94</sup> Plaintiffs also claim that ATV was an act in furtherance of a conspiracy to monopolize in violation of § 2, and an abuse of Comsat's market power, also in violation of § 2.

eliminated its market. See Def.'s Summ. J. Mem. at 31-32.<sup>95</sup> Therefore no inference adverse to Defendant may be drawn from ATV's discontinuance.

[\*\*158] Finally, Plaintiffs half-heartedly allege that part of ATV was an express price fixing agreement. See Pls.' Opp'n Mem. at 33.<sup>96</sup> Plaintiffs, however, rather than alleging how a pricing agreement among the parties to a joint venture is impermissible, assert only that "when price fixing and a boycott coincide, *per se* illegality is the rule." Pls.' Opp'n Mem. at 33. This assertion begs the question, insofar as Plaintiffs' have not shown either price fixing or the existence of the alleged boycott, let alone Comsat's participation therein.

[\*\*159] The Court finds that Plaintiffs have failed to present evidence which would support a reasonable inference that Comsat formed and participated in ATV for the purpose of furthering the alleged conspiracy. The Court finds, therefore, that Plaintiffs have failed to provide sufficient evidence to permit a reasonable trier of fact to infer the existence of the alleged conspiracy or Comsat's conscious participation therein. Plaintiffs have failed to provide sufficient evidence of an alleged pattern of refusals by the PTT co-conspirators to grant PAS landing rights and operating agreements, coupled with additional considerations or "plus factors." Plaintiffs have failed to provide sufficient evidence of Comsat's alleged refusal to purchase space segment capacity from PAS. Plaintiffs have failed to provide sufficient evidence of Comsat's alleged "pattern and practice" of "tracking PAS throughout the world" and forming ventures in Europe and Latin America for the exclusive purpose of preventing PAS's entry into those markets. The Court therefore grants Defendant's motion for summary judgement as to Plaintiffs' claims under § 1 of conspiracy to boycott and conspiracy to restrain trade.

#### [\*\*160] B. Overt acts

Even if Plaintiffs had provided sufficient evidence of the alleged conspiracy and Comsat's participation therein, Plaintiffs have failed to provide sufficient evidence of any of the four acts alleged in the Complaint,<sup>97</sup> either as overt acts or as independent violations of the Sherman Act.

The four overt acts alleged are pricing without regard to cost [\*\*161] or at a predatory level; delaying PAS's entry into Great Britain, France, West Germany and Brazil; filing a sham objection with the FCC; and making disparaging representations to specified PAS customers. Defendant argues that even if the Court finds that Plaintiffs have shown questions of fact as to any of these acts, Plaintiffs have not shown that any of the acts was undertaken in furtherance of a conspiracy to deny PAS operating agreements. See Def.'s Reply Summ. J. Mem. at 19 (citing

<sup>95</sup> Citing **Tanner Dep.** at 77-78 (stating that ATV was discontinued because it lacked sufficient customer interest to justify the annual contract for capacity minutes); **S. Carroll Dep.** at 377-78 (explaining that FCC regulatory change required increase in ATV rate, effectively pricing it out of its niche market); **PAS Ex. 3059** at 43 (Comsat commissioned report on competition in the market for trans-oceanic, facilities-based telecommunications services, showing doubling of trans-Atlantic satellite usage for video and audio services between 1988 and 1993).

<sup>96</sup> Citing **PAS Ex. 1233** at 9 (draft ATV agreement stating that "each participating Signatory will determine its own rates for space segment, earth station and terrestrial service . . . provided however that each Signatory will charge a rate of five dollars (\$ 5.00) per minute . . . for its part of the space segment"); **Carroll Dep.** Vol. 1 at 150-60 (discussing proposal of France Telecom for rate of \$ 5.00 per minute); **PAS Ex. 1305** (Comsat July 5, 1988 memorandum discussing, without reference to PAS, June 29-30, 1988 meetings in Paris with six European signatories about ATV, including appended draft agreement).

<sup>97</sup> In P 28(k) of the Complaint, Plaintiffs alleged that Comsat interfered with PAS efforts to participate in "Worldnet:" a United States government program for transmissions to Latin America. See 3d Am. Compl. P 28(k). That claim has been withdrawn. See Comsat Ex. 1003 (Letter from Daniel R. Shulman, counsel for Plaintiffs, to Mark D. Wegener, counsel for Defendant (Nov. 1, 1994)).

In P 28(n) of the Complaint, Plaintiffs alleged that Comsat's refused to purchase capacity from PAS. That claim was examined above and dismissed both as an act in furtherance of the alleged conspiracy and as an independent claim. See supra at 112-117.

United States v. Castellano, 610 F. Supp. 1359, 1390 (S.D.N.Y. 1985) (discussing overt acts in context of venue)). Defendant also argues that these acts cannot survive as independent claims because Plaintiffs have not specified the damages arising from each act. See Def.'s Reply Summ. J. Mem. at 19 (citing J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 568, 101 S. Ct. 1923, 1927-28, 68 L. Ed. 2d 442 (1981) (requiring proof of actual injury caused by something the antitrust laws were designed to prevent); Henry Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 909-10 (2d Cir. 1961) (requiring proof of damages in some amount "reasonably susceptible of expression [\*\*162] in figures"), cert. denied, 369 U.S. 865, 8 L. Ed. 2d 85, 82 S. Ct. 1031 (1962)). The Court reaches Defendant's argument with respect to the pleading of damages after examining the factual support for each of the acts alleged.

## 1. Plaintiffs' pricing claims

Plaintiffs claim that Comsat engaged in pricing of preemptible video and IBS services "without regard to cost" or at "a predatory level." 3d Am. Compl. P 28(d).<sup>98</sup> This claim presumptively refers to the agreements between Comsat and several European PTTs on the pricing of ATV services. Plaintiffs, however, provide no argument or citations in support of this claim. Plaintiffs offer no showing of Defendant's costs at all. Absent some such showing, no reasonable inference of the alleged conspiracy or other anticompetitive conduct may be drawn. See, e.g., Matsushita 475 U.S. at 594, 106 S. Ct. at 1360 ("Cutting prices in order to increase business often is the very essence of competition. 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."). Nor have Plaintiffs made out any showing of predatory pricing. This claim [\*\*163] therefore fails both as an act in furtherance of the alleged conspiracy and as an independent claim.

## 2. Delaying PAS's entry into Great Britain, France, West Germany and Brazil

In P 28(l) of the Complaint, Plaintiffs allege that

in other countries of the world, such as Great Britain, France, West Germany, and Brazil, the combination and conspiracy to boycott PAS described above prevented PAS from obtaining a timely commercial operating agreement in these countries, and has thereby delayed and hindered the entry of PAS into such markets.

3d Am. Compl. P 28(l). Plaintiffs, however, do not develop this claim in their opposition papers as either an independent act in furtherance of the alleged conspiracy, or [\*\*164] as the basis of an independent claim. The claim therefore fails for the reasons discussed above, see supra at 45-12, principally Plaintiffs' failure to present sufficient evidence from which a reasonable trier of fact could infer the existence of the alleged conspiracy and Comsat's participation therein.

## 3. Comsat's FCC filing

In 1987 and 1988, in transactions unrelated to this action, Plaintiff Reynold Anselmo sold several broadcast stations, incurring approximately \$ 83 million in personal income capital gains. On March 22, 1988, Anselmo filed a request for a tax deferral certificate with the FCC seeking to defer income tax payments of approximately \$ 20 million.<sup>99</sup> HN22 The FCC may grant certificates where the gain is incurred while attempting to advance a

<sup>98</sup> Plaintiffs had also alleged that Comsat engaged in pricing "below average variable cost." 3d Am. Compl. P 28(d). This claim has been withdrawn. See Comsat Ex. 1003 (Letter from Daniel R. Shulman, counsel for Plaintiffs, to Mark D. Wegener, counsel for Defendant (Nov. 1, 1994)).

<sup>99</sup> See Comsat Ex. 966 at 21-22 (Request of Issuance of a Tax Certificate Pursuant to Section 1071 of the Internal Revenue Code, March 22, 1988); Comsat Ex. 971 at 5-6 n.15 (Supplement to Request of Issuance of a Tax Certificate Pursuant to Section 1071 of the Internal Revenue Code, April 21, 1988); Landman Dep. at 640-41 (acknowledging sales of stations and

change in government policy, see [26 U.S.C. § 1071\(a\)](#), and Anselmo argued that he sold the stations to raise funds to finance PAS and thereby to advance the United States' separate systems policy. On August 5, 1988, Comsat filed opposition with the FCC, claiming that Anselmo had no choice but to sell the stations because his majority partner was a Mexican national, in violation of federal regulations governing foreign [\[\\*165\]](#) ownership of broadcast stations. Comsat argued, therefore, that the gain did not result from any effort to change policy.<sup>100</sup>

[\[\\*166\]](#) In P 28(m) of the Complaint, Plaintiffs argue that Defendant's professed reason for its FCC filing was a sham and that Defendant intended only to interfere with PAS's financing and thereby to hinder PAS's ability to obtain landing rights and to fund new initiatives and new satellite launches. See 3d Am. Compl. P 28(m); Pls.' 3(g) Statement P 41.<sup>101</sup> Defendant moved to dismiss the claim under the *Noerr-Pennington* doctrine, which states that "concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability." [Allied Tube & Conduit Corp. v. Indian Head, Inc.](#), 486 U.S. 492, 499, 108 S. Ct. 1931, 1936, 100 L. Ed. 2d 497 (1988). This Court denied the motion, however, because Plaintiffs had framed the claim within the "sham filing exception." To violate antitrust laws in and of itself, a filing must have been objectively baseless and pursued for the purpose of interfering directly with PAS in the marketplace. See [Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.](#), 508 U.S. 49, 59, 113 S. Ct. 1920, 1928, 123 L. Ed. 2d 611 (1993). On the current motion, the Court finds that Plaintiffs have [\[\\*167\]](#) not adduced sufficient evidence of objective baselessness or improper motive.

On the evidence in the record, [\[\\*168\]](#) Plaintiffs cannot show that Defendant's filing was objectively baseless. Plaintiffs principally argue that objective baselessness can be shown procedurally by a clear lack of standing. See Pls.' Opp'n Mem. at 37 (citing [In re Burlington Northern, Inc.](#), 822 F.2d 518, 529-32 (5th Cir. 1987) (no *Noerr-Pennington* protection if filer knows he has no standing or has no reasonable basis for asserting standing), cert. denied 484 U.S. 1007 (1988)). Plaintiffs claim that [§ 1071\(a\)](#) of the Communications Act does not convey standing to Comsat and, moreover, that Comsat was aware at the time of its FCC filing that it lacked standing. See Pls.' Opp'n Mem. at 38. This issue was fully briefed before the FCC.<sup>102</sup> Without resolving the issue before the FCC, the Court finds that Defendant had a "sufficient personal stake in the outcome" of the FCC proceedings, see, e.g., [Marsh Media, Ltd.](#), 67 F.C.C.2d 1516, 1522-23 (citing [Baker v. Carr](#), 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962)), aff'd, 68 F.C.C.2d 712 (1978), insofar as a deferral would assist PAS in its competition with Comsat. See Def.'s Reply Summ. J. Mem. at 23; Comsat Ex. 1007 at 5 (PAS [\[\\*169\]](#) letter acknowledging that the tax deferral will "directly and substantially assist" PAS in competition with Comsat). The issue of Defendant's standing,

request for deferral of approximately \$ 20 million); **Costello Dep.** at 19 (acknowledging requested deferral of approximately \$ 20 million), 21 (deferral request covered approximately \$ 17 million and \$ 3 million in state liability).

<sup>100</sup> See **Comsat Ex. 970** at 2-5 (Comsat August 5, 1988 letter to the FCC opposing Anselmo request for issuance of a tax deferral certificate, explaining at length Comsat's view that the sales had nothing to do with any change in FCC policy); **Comsat Ex. 967** at 6-8 (Comsat September 28, 1988 letter to the FCC addressing Anselmo response to earlier Comsat letter and arguing that a grant of a certificate would be contrary to statutory law).

<sup>101</sup> Citing **Comsat Ex. 963** (May 10, 1988 PAS memorandum summarizing PAS position on Anselmo's request as serving the U.S. policy on separate satellite systems); **Comsat Ex. 966** (Request of Issuance of a Tax Certificate Pursuant to [Section 1071 of the Internal Revenue Code](#), March 22, 1988); **Comsat Ex. 970** (Comsat August 5, 1988 letter to the FCC opposing Anselmo request for issuance of a tax deferral certificate); **Comsat Ex. 971** (Supplement to Request of Issuance of a Tax Certificate Pursuant to [Section 1071 of the Internal Revenue Code](#) April 21, 1988); **Knauer Dep. at 14-19** (acknowledging that the FCC at the time of the commencement of this action addressed neither the deferral request nor the issue of Comsat's standing to object).

As of the filing of Defendant's summary judgment motion, the FCC had not ruled on Anselmo's tax deferral request. See Def.'s Summ. J. Mem. at 15.

<sup>102</sup> See **Comsat Ex. 1007** (September 2, 1988 letter to FCC from PAS counsel arguing that Comsat lacks standing); **Comsat Ex. 967** at 4 (arguing that Anselmo's application itself creates Comsat's standing by linking the deferral request to "the establishment of a competitive market structure for international satellites").

therefore, was at least open to serious consideration. Plaintiff therefore cannot show that Defendant's filing was objectively baseless on procedural grounds.

Neither can Plaintiff show that Defendant's filing was objectively baseless on the merits. The record reflects that Plaintiff Anselmo's own advisers clearly understood that a deferral was unlikely. See Def.'s Summ. J. Mem. at 16-18.<sup>103</sup> **[\*\*171]** Plaintiff Anselmo even undertook efforts to amend the law itself in order to assist his deferral application. See Def.'s Summ. J. Mem. **[\*\*170]** at 17-18.<sup>104</sup> Defendant's filing therefore cannot be found objectively baseless.

Moreover, even if Plaintiffs' had shown that the filing was objectively baseless because Comsat lacked standing before the FCC, Plaintiffs have failed to show any improper motive behind the filing. No improper motive may be inferred where the goal of the filing **[\*\*172]** was to win the ultimate product of the FCC process, in this case a denial of Plaintiff Anselmo's deferral request. See Def.'s Summ. J. Mem. at 18-19 (citing *Professional Real Estate Investors, 508 U.S. at 59, 113 S. Ct. at 1928; Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co., 730 F. Supp. 826, 937 (C.D. Ill. 1990)*, aff'd, *935 F.2d 1469 (7th Cir. 1991)*, cert. denied, 502 U.S. 1094, 117 L. Ed. 2d 415, 112 S. Ct. 1169 (1992); *Independence Public Media of Philadelphia, Inc. v. Pennsylvania Public Television Network Comm'n, 808 F. Supp. 416, 435-36 (E.D. Pa. 1992)*) (granting summary judgment on "sham" claim). Plaintiffs claim that Comsat knew that the mere filing of their opposition would "hinder PAS in obtaining operating agreements." See Pls.' Opp'n Mem. at 36-37. Plaintiffs, however, not only fail to provide a single citation in support of this claim, Plaintiffs fail even to explain how any delay before the FCC would hinder Plaintiffs' negotiations with PTTs throughout the world.

Plaintiffs have failed to show that Defendant's FCC filing was a sham. Plaintiffs' therefore cannot rely on the claim in P 28(m) of their Complaint, either as act in **[\*\*173]** furtherance of the alleged conspiracy, or as the basis of an independent claim.

#### 4. Commercial disparagement

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<sup>103</sup> Citing **Studley Dep.** at 28-30 (acknowledging that the status of the deferral request was so uncertain that PAS's counsel began lobbying for congressional intervention even before Comsat filed its opposition); **Comsat Ex. 961** (May 10, 1988 letter from Plaintiffs' counsel to Senate Subcommittee on Communications requesting congressional lobbying of FCC in favor of deferral); **Comsat Ex. 962** (May 10, 1988 PAS memorandum summarizing PAS position on Anselmo's request as serving the U.S. policy on separate satellite systems); **Comsat Ex. 963** (May 10, 1988 PAS memorandum summarizing PAS position on Anselmo's request as serving the U.S. policy on separate satellite systems and acknowledging that it is "unlikely that the FCC will issue a tax certificate"); **Comsat Ex. 968** (May 10, 1988 letter from Plaintiffs' counsel to executive assistant to Senator Inouye (HI) forwarding memorandum about Anselmo deferral request); **Comsat Ex. 969** (May 10, 1988 letter from Plaintiffs' counsel to Senate Subcommittee on Communications forwarding memorandum and FCC filings concerning deferral and Comsat opposition); **Costello Dep.** at 11-12 (acknowledging having prepared Anselmo's personal income tax returns), 102-04 (acknowledging that at the time of filing the deferral request, there was a reasonable basis for the FCC to deny the request); **Comsat Ex. 992** (October 5, 1992 letter from Plaintiffs' counsel to Anselmo stating that "people in the General Counsel's office of the [FCC]" are opposed to the grant); **Anselmo Dep.** at 511-12 (referencing and acknowledging receipt of Comsat Exs. 991 & 992); **Comsat Ex. 991** (November 13, 1992, letter from Plaintiffs' counsel to Anselmo discussing strategy for advancing the deferral request).

<sup>104</sup> Citing **Studley Dep.** at 11-12 (referencing Comsat Ex. 763), 14-16 (referencing Comsat Ex. 763 and lobbying effort to *amend I.R.S. Code § 1071* in Anselmo's favor), 16-17 (acknowledging taking part in the drafting of the statement of Senator Dodd included in the bill proposing amendment of I.R.S. Code *§ 1071*), 19-20 (acknowledging that I.R.S. Code *§ 1071* had been applied in a "confusing and inconsistent manner," and that Congress nevertheless did not amend the section); **Comsat Ex. 763** at DLJ 10720 (September 20, 1990 memorandum to Anselmo discussing and appending bill introduced by Senators Dodd and Lieberman to *amend I.R.S. Code § 1071* to favor PAS); **Comsat Ex. 960** at S13354 (September 18, 1990 Congressional Record, statement of Senator Dodd encouraging investment on competitive international satellite systems).

Plaintiffs allege that Comsat disrupted deals PAS had been negotiating with the United States Air Force, Cargill, CNN, AT&T, IBM and DuPont by representing that PAS did not have and could not get necessary landing rights, and that PAS lacked sufficient capacity and back-up capacity to effectively serve those clients. See 3d Am. Compl. PP 28(c) & (o). The record, however, completely fails to support Plaintiffs' claims.

**HN23** [+] To state a commercial disparagement claim a plaintiff must show a knowing publication of material derogatory to the plaintiff's business; that the material is false; that it is of a nature calculated to prevent others from dealing with the plaintiff or to interfere with the plaintiff's relations with others to its disadvantage; and that in material and substantial part induces others not to do business with the plaintiff with the result that special damages in the form of lost business are incurred. See Def.'s Summ. J. Mem. at 33-34 (citing *Kirby v. Wildenstein*, 784 F. Supp. 1112, 1115 (S.D.N.Y. 1992); USFL, 634 F. Supp. 1155 (dismissing [\*\*174] disparagement claims in antitrust action)). Plaintiffs have failed to show evidence of a single disparaging statement, let alone one which was false and which may reasonably be attributed to Defendant Comsat.

With respect to the United States Air Force, Plaintiff had alleged that at some unspecified time in 1989, an unidentified party at Comsat made a remark to an unspecified person in the United States Air Force that PAS "lacked landing rights in Norway, Portugal, Turkey, the [United Kingdom,] Italy and Germany, with the further implication that PAS could not obtain landing rights in these countries." See Comsat Ex. 620 at 9 (Pls.' Suppl. Resp. to Def.'s 2d Set of Interrogs., Interrog. No. 12 & Resp.). Putting aside the fatal lack of specificity in the claim, the record reflects that the statement would have been true if made. See Goldschmidt Dep. Vol. 1 at 188-89 (admitting that the statement that PAS did not have landing rights was true "if construed narrowly").

As to Cargill's business, Plaintiffs claim that in early 1991, Comsat employees Cummings and Torrico told Reuben Lanto of Cargill that PAS "could not obtain operating agreements and other approvals necessary [\*\*175] to handle Cargill business in Latin America." Comsat Ex. 620 at 11 (Pls.' Suppl. Resp. to Def.'s 2d Set of Interrogs., Interrog. No. 12 & Resp.). In deposition testimony, however, Torrico denied making the alleged remark to Cargill, see Torrico Dep. at 116 (denying ever having told Cargill anything about PAS), 160-61 (denying having discussed PAS with Cargill or any other client), and Cummings not only denied making the remark but testified that Cargill raised the issue, not Comsat, because Cargill had suspicions about PAS's representations that it possessed landing rights.<sup>105</sup>

[\*\*176] In an attempt to rebut these denials, Plaintiffs offer only the third-hand hearsay statements of their own employee, Alvaro Gazzolo. Although Plaintiffs submit an affidavit from Lanto, that affidavit does not contain a single reference to the alleged statements. See Lanto Aff. (Aug. 7, 1994). Instead, Plaintiffs cite to Gazzolo's claims that Lanto had been told by unidentified persons in Argentina that they in turn had been told by an unidentified representative of Comsat in Argentina that PAS's concessions from the Argentine ministry were not valid. See Gazzolo Dep. at 21, 66-67. This chain of unidentified declarants does not state an actionable disparagement claim.

Concerning CNN, Plaintiffs claim that sometime in 1987 or 1988 an unidentified source at Comsat told an unidentified source at CNN that PAS "would be unable to obtain all operating agreements and/or Intelsat consultations to handle the Turner/CNN business." Comsat Ex. 620 at 11 (Pls.' Suppl. Resp. to Def.'s 2d Set of Interrogs., Interrog. No. 12 & Resp.). Plaintiffs cite in support of this claim a July 29, 1988 meeting, but the notes of that meeting do not indicate any disparagement of PAS. See PAS Ex. [\*\*177] 2556 (Hannon notes of July 29, 1988 meeting with CNN listing Comsat and PAS strengths and weakness, but not identifying any disparagement of PAS); Hannon Dep. at 80-105 (discussing PAS Ex. 2556).<sup>106</sup>

<sup>105</sup> See **Cummings Dep.** at 68-69 (stating that the only time the issue of landing rights came up in a meeting with a customer, Cargill asked Comsat if PAS's representation to Cargill that PAS was getting landing rights in Argentina was true, and Comsat responded that it did not know), 75-80 (denying having ever said that PAS could not get landing rights in any country, stating "as far as [Comsat] knew, [Argentina] was a monopoly on international transmission and so, you know, it's news to us if PANAMSAT or somebody else can get landing rights"), 98-102 (acknowledging expressing surprise that PAS or any other company would represent that it was getting rights in Argentina, because Argentina was a monopoly).

<sup>106</sup> Defendant argues that the notes and testimony cited by PAS all describe statements by CNN, not by Comsat. See Def. Reply Summ. J. Mem. at 22 n.43 (citing **Hannon Dep.** at 76-77 (discussing concerns raised by CNN concerning backup capacity)), 82-

Plaintiffs also identify Comsat employees Joanne Tanner and Stephen Carroll as allegedly having personal knowledge of the alleged disparaging remark. But both denied having such knowledge. See Tanner Dep. at 302-08 (denying having made any such remarks **[\*\*178]** or having any knowledge that anyone else at Comsat made such remarks); Carroll Dep. at 392-93 (same). Plaintiffs have failed to show that the remark was ever made. Moreover, even if Plaintiffs had provided testimony substantiating the remark, the record indicates that the remark was true at the time, insofar as PAS did not have such the necessary authorizations.<sup>107</sup>

**[\*\*179]** With respect to AT&T, Plaintiffs claim that in 1992 Comsat employee Tom Barr represented to AT&T employees Whitney Maull and Denise Palaia that PAS "lacked relationships, both formal and informal, with foreign PTTs sufficient to serve AT&T as a space segment supplier for VSATs in Latin America." Comsat Ex. 620 at 11-12 (Pls.' Suppl. Resp. to Def.'s 2d Set of Interrogs., Interrog. No. 12 & Resp.). Plaintiffs again fail to provide any evidence that the statement was ever made. Although Plaintiffs cite to the deposition testimony of Maull, that testimony does not mention any representations by Comsat. See Maull Dep. at 7 (describing Maull as AT&T officer), 97-99 (denying that any Comsat employee ever made a disparaging remark about PAS in his presence, and describing AT&T's own investigation of PAS claims to have ability to provide service in many countries, resulting in AT&T uncertainty about PAS), 101-02 (stating that AT&T observed no collaboration among PTTs in its negotiations in each country, and observed lack of familiarity with PAS, rather than opposition or hostility to PAS).

Similarly, although Plaintiffs argue that Comsat also made disparaging representations about PAS **[\*\*180]** to potential customers IBM and DuPont, nothing in the record supports such claims. On the contrary, portions of the record specifically deny that such representations were ever made. See, e.g., Harris Dep. at 23 (IBM representative denying having discussed PAS with anyone from Comsat from 1987 through 1993); Toone Dep. at 23 (DuPont representative stating that DuPont conducted its own investigation of PAS representations in Brazil, and denying any reason to believe that Comsat had any role in PAS's inability to obtain the necessary authorizations).

Acknowledging that they have not shown evidence showing that Comsat made any disparaging remarks about PAS, Plaintiffs urge the Court to draw "at least the inference that such representations were made to Cargill, CNN, and AT&T." Pls.' Opp'n Mem. at 35. Plaintiffs asks the Court to draw this inference from evidence which shows that each of these customers raised their own independent concerns about PAS. See Pls.' Opp'n Mem. at 35; Pls.' 3(g) Statement P 40.<sup>108</sup> Nothing in these citations permits an inference of disparagement. Indeed, many of them clearly

85 (discussing PAS Ex. 2556, Hannon notes recording CNN's concerns), 121-22 (discussing CNN concerns about dealing with host country signatories); **PAS Ex. 2556** (Hannon notes of July 29, 1988 meeting with CNN listing Comsat and PAS strengths and weakness, but not identifying any disparagement of PAS).

<sup>107</sup> See **Comsat Ex. 924** at 1 (indicating that in Argentina, PAS secured Article XIV(c) consultations on May 17, 1989 and Article XIV(d) consultations on June 20, 1989); **Comsat Ex. 925** (indicating PAS received authorization for private telecommunications services in Argentina in February 1985, but did not receive an operating agreement or other authorizations until January 29, 1992); **Comsat Ex. 955** at PAS 834743 (indicating that as of April 20, 1990, PAS was authorized to provide private satellite services, including international video and domestic data, broadcast, and CATV services, but not yet authorized for international voice and data services); **Landman Dep.** at 460-61 (acknowledging having to offer discount rates on PAS because PAS lacked operating authority and the then-existing climate "put concern" that PAS would never get operating authority).

<sup>108</sup> Citing **Barr Dep.** Vol. 1 at 87-91 (discussing difference between VSAT and IBS service), 124-27 (acknowledging that AT&T had informed Comsat that AT&T was considering using PAS for VSAT services), 133 (acknowledging PAS's general desire to provide end-to-end service), 144-46 (discussing AT&T's professed advantages and disadvantages of dealing with PAS for VSAT service to Latin America), 151-53 (stating that AT&T was considering PAS services thinking that PAS could more rapidly provide VSAT services because PAS was not required to work with the PTTs through whom Comsat worked and with whom AT&T had been having trouble), 155-56 (discussing series of letters and meetings with PTTs to address AT&T's concerns in providing VSAT services), 165-67 (denying knowledge of communications taking place during trips that the witness did not take), 173 (acknowledging risk of losing AT&T Mastercard network business to PAS), 219-20 (referencing PAS Ex. 1025), 243 (referencing trip to visit PTTs around time of AT&T negotiations), 258 (referencing unspecified exhibit), Vol. 2 at 311-12 (recounting AT&T concerns about Comsat for VSAT services), 316 (acknowledging that other VSAT business would accrue to the company securing AT&T VSAT business); **Cummings Dep.** at 75-76 (denying that anyone from Comsat ever told anyone that PAS could not get landing rights); **Hannon Dep.** at 80-105 (discussing notes of July 29, 1988 meeting with CNN (PAS Ex. 2556) and

deny that Comsat ever raised the issue of PAS with these customers. See, **[\*\*181]** e.g., Cummings Dep. at 75-76 (denying that anyone from Comsat ever told anyone that PAS could not get landing rights); Hannon Dep. at 80-105 (indicating that CNN, not Comsat, raised and discussed issue of PAS bid for CNN business); Lantto Aff. (not alleging any misconduct by Comsat).

**[\*\*182]** Even if Plaintiffs had shown evidence showing the alleged disparaging statements or at least permitting an inference of disparagement, Plaintiffs have failed to show that the statements were false or that any injury resulted from the alleged statements. The record reflects that PAS was approved for the United States Air Force contract, see, e.g., Goldschmidt Dep. Vol. 1 at 186-87 (indicating that even after the alleged disparagement by Comsat, PAS was approved as a possible system), and ultimately secured CNN's business. See Comsat Ex. 620 at 11 (Pls.' Suppl. Resp. to Def.'s 2d Set of Interrogs., Interrog. No. 12 & Resp.). As for Cargill, Gazzolo testified that Lantto informed him that Cargill would not rely on the alleged statement but instead would conduct its own investigation of PAS's landing rights. See Gazzolo Dep. at 68; Landman Dep. at 558. Therefore no injury could be attributed to the alleged statement: if PAS's representation that it had landing rights was true, Cargill's investigation would only strengthen PAS's marketing. AT&T similarly conducted its own investigation of PAS's claims concerning landing rights, see Maull Dep. at 97-99 (AT&T officer denying **[\*\*183]** that any Comsat employee ever made a disparaging remark about PAS in his presence, and describing AT&T's own investigation of PAS claims to have ability to provide service in many countries, resulting in AT&T uncertainty about PAS), 101-02 (stating that AT&T observed no collaboration among PTTs in its negotiations in each country, and observed lack of familiarity with PAS, rather than opposition or hostility to PAS), and ultimately decided to use Comsat capacity because Comsat was technically superior for AT&T's needs. See *id. at 49-52* (stating that PAS represented to AT&T that PAS had obtained landing rights in many Latin American countries; indicating that AT&T wanted to deal with the PTTs regardless of which space capacity it used; and not implicating any conduct by Comsat), 53-54 (stating that technical limits of PAS footprint in the United States and South America was the deciding factor in choosing Comsat over PAS), 59-74 (discussing AT&T's decision to reject PAS and accept Comsat proposal for VSAT services to Latin America, naming Comsat's deployment of additional capacity as the most important issue).

Because Plaintiffs have failed to present evidence that Comsat published **[\*\*184]** any false, derogatory statements to PAS's potential customers, the Court does not reach Defendant's assertion that the alleged statements were not harmful to competition. The Court finds that no inference of commercial disparagement, either as an act in furtherance of the alleged conspiracy or as an independent cause of action, may be drawn against Defendant Comsat. The Court therefore grants Comsat's motion for summary judgment as to Plaintiffs' disparagement claims.

### C. Anticompetitive effects

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indicating that CNN, not Comsat, raised and discussed issue of PAS bid for CNN business); **Lantto Aff.** (asserting that Cargill would have used PAS instead of Comsat if PAS "had the necessary landing rights, correspondent relationships, and other approvals" and "if its prices were right," but not alleging any misconduct by Comsat); **Lowry-Gabriel Dep.** Vol. 2 at 250-51 (referencing a technical comparison of the Comsat and PAS proposals for AT&T VSAT service to Latin America), 330-47 (referencing PAS Exs. 87, 1038, & 2636, and discussing technical comparisons of PAS and Comsat for VSAT capacity to Latin America), 354 (acknowledging Comsat competition with PAS for VSAT service); **Maull Dep.** at 49-52 (stating that PAS represented to AT&T that PAS had obtained landing rights in many Latin American countries; stating that AT&T wanted to deal with the PTTs regardless of which space capacity it used; and not implicating any conduct by Comsat), 59-74 (discussing AT&T's decision to reject PAS and accept Comsat proposal for VSAT services to Latin America, naming Comsat's deployment of additional capacity as the most important issue); **Tanner Dep.** at 309-10 (denying any recollection of July 29, 1988 meeting with CNN); **PAS Ex. 2556** (Hannon notes of July 29, 1988 meeting with CNN listing Comsat and PAS strengths and weakness, but not identifying any disparagement of PAS); **PAS Ex. 2618** at 66806-08 (Cummings notes from Feb. 11, 1991, indicating that "Jorge" reported that he would send Comsat information on PAS landing rights in Argentina); **PAS Ex. 2646** (Comsat June 18, 1992, letter to AT&T providing pricing information for one-stop VSAT service on Intelsat, and indicating that Comsat would negotiate with foreign signatories on AT&T's behalf); **PAS Ex. 2762** (AT&T Tridom chronology of events for Skynet Global VSAT Service); **PAS Ex. 3034** (Comsat December 15, 1992 letter to AT&T providing updated pricing information for one-stop VSAT service on Intelsat).

Because Plaintiffs have failed to show evidence from which a reasonable trier of fact could infer that Defendant Comsat participated in an illegal contract, combination or conspiracy, the Court need not examine whether Plaintiff has shown antitrust injury in the form of an actual adverse effect on competition as a whole in the relevant market [\*895] or submarkets. See [Capital Imaging, 996 F.2d at 542-43](#); [International Distrib., 812 F.2d at 793](#). Had the Court reached this issue, however, Plaintiffs would have been required to show more than harm to PAS as an individual market actor.

**HN24**[] After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden [\*\*185] shifts to the defendant to offer evidence of the pro-competitive "redeeming virtues" of their combination. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole.

[Capital Imaging, 996 F.2d at 543](#) (citations omitted). In other words, Plaintiffs would have to have shown that the "anticompetitive effects of the alleged conspiracy outweighed its procompetitive effects." [International Distrib., 812 F.2d at 793](#) (citing [National Soc'y of Prof. Eng'rs, 435 U.S. at 691, 98 S. Ct. at 1365](#)).

#### IV. Sherman Act §2

**HN25**[] [Section 2](#) of the Sherman Act prohibits attempts "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](#). Plaintiffs assert seven claims in violation of [§ 2](#), including one claim of monopolization, three claims of attempted monopolization and three claims of conspiracy to monopolize. [\*\*186] See 3d Am. Compl. P 32.

##### A. Conspiracy to monopolize

Plaintiff alleges three claims of conspiring to monopolize in violation of [§ 2](#) respectively involving the United States market, domestic and regional markets in Central and South America, and domestic and regional markets in Europe. See 3d Am. Compl. P 32. **HN26**[] To sustain a claim under [§ 2](#) for conspiracy to monopolize, Plaintiffs must show "(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." [International Distrib., 812 F.2d at 795](#) (quoting [Paralegal Inst., Inc. v. American Bar Ass'n, 475 F. Supp. 1123, 1132 \(E.D.N.Y. 1979\)](#), aff'd, 622 F.2d 575 (2d Cir. 1980)). "Unlike the elements required to establish an attempt to monopolize, however, proof of a conspiracy to monopolize does not require a dangerous probability of success." [International Distrib., 812 F.2d at 795 n.8](#) (citing [American Tobacco Co. v. United States, 328 U.S. 781, 789, 66 S. Ct. 1125, 1129, 90 L. Ed. 1575 \(1946\)](#)).

For the reasons discussed above with respect to Plaintiffs' [§ 1](#) claims, the Court [\*\*187] finds that Plaintiffs have failed to present evidence from which a reasonable trier of fact could infer concerted action among the alleged conspirators or Defendant Comsat's participation in any such concerted action. See [supra at 41-130](#). The Court therefore need not examine whether Plaintiffs have shown evidence of any shared intent to monopolize among Comsat and the alleged conspirators. Also for the reasons discussed with respect to Plaintiffs' [§ 1](#) claims, the Court finds that Plaintiffs have failed to present sufficient evidence of the commission of any overt act in furtherance of the alleged conspiracy. See [supra at 130-146](#). The Court therefore grants Defendant's motion for summary judgment as to Plaintiffs' [§ 2](#) conspiracy to monopolize claims.

##### B. Monopolization

Plaintiff alleges that Defendant Comsat monopolized the market "for international satellite telecommunications services, including the transmission of audio, video, and data signals to and from the United States." 3d Am. Compl. P [HN27](#)<sup>↑</sup> 32. To sustain a claim under [§ 2](#) for monopolization, Plaintiffs must show that Defendant Comsat had the power to monopolize the relevant market, and that it willfully acquired [\[\\*\\*188\]](#) or maintained that power, causing unreasonable exclusionary or anticompetitive effects. See [Alpha Lyracom, 1993 U.S. Dist. LEXIS 3825, \\*21, 1993-1 Trade Cas. \(CCH\) P70,184 at 69,860-61, 1993 WL 97313](#) at \*5; see also [Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188-89 \(2d Cir. 1992\)](#); [AD/SAT, 920 F. Supp. at 1306](#) (citing [Ortho Diagnostic Sys., Inc. v. Abbott Lab., Inc., 822 F. Supp. 145, 153 \(S.D.N.Y. 1993\)](#) (quoting [United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed. 2d 778 \(1966\)](#)).

For the reasons discussed above with respect to Plaintiffs' [§ 1](#) claims, the Court finds that Plaintiffs have failed to present evidence from which a reasonable trier of fact could infer any conduct by Comsat intended to acquire or to maintain monopoly power. See [supra at 70-78](#). Neither have Plaintiffs shown that Comsat possessed monopoly power in any of the relevant markets outside of the United States.<sup>109</sup> [\[\\*\\*190\]](#) Rather, the record reflects that Comsat's market share has declined in all markets since the period of liberalization began in the 1980s.<sup>110</sup> Although Plaintiffs are correct in noting that entry barriers to the relevant markets were high, see Pls.' [\[\\*\\*189\]](#) 3(g) Statement P 13, the evidence of Comsat's declining market share shows that these barriers were not insurmountable. Plaintiffs' reliance on the testimony of their expert, Bruce M. Owen, does not alter this conclusion. See Pls.' Opp'n Mem. at p.24 n.6 (citing Owen Dep., Vol. 1, at 80-82, 92-108; Comsat Ex. 726 (report of expected testimony of Bruce M. Owen, revised June 2, 1994)). Finally, even if Defendant's formerly dominant market shares did constitute monopoly power, Plaintiffs have failed to show that Defendants market share is more likely than not the result of anticompetitive conduct and not merely an "historic accident" resulting from the pre-liberalization history of the Intelsat system. See [Ortho Diagnostic, 822 F. Supp. at 153](#) (quoting [Grinnell, 384 U.S. at 570-71, 86](#)

<sup>109</sup> Plaintiffs claim that the relevant markets include "the markets for broadcast satellite transmissions between the United States and each nation in South America, Europe, Asia, and Africa, as well as Australia and New Zealand, and between the United States and the Atlantic Ocean region; the markets for international business services ("IBS") transmissions in those geographic areas; and the actual or potential markets for VSAT satellite transmissions in those geographic areas." See Pls.' 3(g) Statement P 9 (citing [Comsat Ex. 726](#) at 1 (report of expected testimony of Bruce M. Owen, revised June 2, 1994); **Owen Dep.** Vol. 1 at 80-82, 92-108 (market for "satellite transmission of video between the United States and various countries in the Atlantic and Pacific Ocean regions")).

The record before the Court does not support this broad a pleading of the relevant markets. There is effectively no testimony in the record concerning Africa, Asia, Australia or New Zealand. The relevant markets therefore do not exceed the Atlantic Ocean region, including Europe, North America and South America. Moreover, Plaintiffs' expert, Bruce M. Owen, excludes Central America and the Caribbean from the relevant markets for purposes of Plaintiffs' claim for damages. See **Owen Dep.** at 94-96, 130. These regions therefore must also be excluded.

On the other hand, Plaintiffs attempt to exclude from consideration the markets for international telephony services, see Pls.' 3(g) Statement P 10 (citing [Comsat Ex. 1011](#) at 23, 55; **Landman Aff.**), and international coaxial and fiber optic cable services. See Pls.' 3(g) Statement P 11 (citing [Comsat Ex. 1011](#) at 53; **Landman Aff.; Comsat Ex. 998** at 31; **Crockett Dep.** Vol. 1, 47-49; **Kopinski Dep.** at 83-86; **Giarman Dep.** at 47-51; **Shubilla Dep.** at 20-21, 127-28; **Salvati Dep.** at 14-15; **Carroll Dep.** Vol. 1 at 58-60; **Hoff Dep.** at 14-18; **Twining Dep.** at 65-67). These services cannot reasonably be excluded, inasmuch as international telephony service providers are principal users of satellite capacity, particularly Intelsat capacity, and international cable service providers compete directly with satellite capacity providers for many services.

<sup>110</sup> See PAS Ex. 3059 at 8 (summary), 49 (decline from 70% in 1988 to 50% in 1993 in utilized capacity for trans-oceanic switched voice and private line services to Latin America, and approximately 60% to 25% for Europe), 61 (decline from 70% in 1988 to 50% in 1993 in AT&T switched voice services to Latin America, and approximately 60% to 40% for Europe), 70 (decline from 100% in 1986 to approximately 55% in 1993 (with projected decline to 40% by 1996) in utilized capacity for trans-oceanic video and audio services to Latin America, and 100% to approximately 90% by 1993 for trans-Atlantic services only (with projected decline to 65% by 1996)), 74 (decline from 100% in 1987 to approximately 30% in 1993 (with projected decline to 20% by 1996) in market share of revenues from video and audio services to Latin America, and 100% to approximately 90% by 1993 for trans-Atlantic services only (with projected decline to 50% by 1996)).

S. Ct. at 1703-04). The Court therefore grants Defendant Comsat's motion for summary judgment as to Plaintiffs' P 2 monopolization claim.

### C. Attempted monopolization

Plaintiff raises three claims of attempting to monopolize the United States market, domestic and regional markets in Central and South **[\*\*191]** America, and domestic and regional markets in Europe, respectively. See 3d Am. Compl. ¶ 32. To sustain a claim under § 2 for attempted monopolization, Plaintiffs must show Defendant's anticompetitive or exclusionary conduct, a specific intent to monopolize, and a dangerous probability that monopoly will be achieved. See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91, 122 L. Ed. 2d 247 (1993); International Distrib., 812 F.2d at 791; AD/SAT, 920 F. Supp. at 1296. As with Plaintiffs' monopolization claim, Plaintiffs' attempted monopolization claim requires some measure of market or monopoly power, defined as the power to control prices or to exclude competition in the relevant market. See International Distrib., 812 F.2d at 791 & n.3.

For the reasons discussed above with respect to Plaintiffs' § 1 claims, the Court finds that Plaintiffs have failed to present evidence from which a reasonable trier of fact could infer any conspiracy, see supra at 41-130, anticompetitive or exclusionary conduct by Comsat, see supra at 130-146, or any intent to monopolize. See supra at 70-78. Moreover, for the reasons discussed above with **[\*\*192]** respect to Plaintiffs' § 2 monopolization claim, the Court finds that Plaintiffs have failed to show that Defendant exercised monopoly power in the any of the relevant markets. See supra 150-152. The Court therefore grants Defendant's motion for summary judgment as to Plaintiffs' § 2 attempted monopolization claims.

### V. Damages

Defendant Comsat argues that Plaintiffs have also failed to show evidence of antitrust injury, failed to show evidence that Comsat caused any such injury, failed to plead damages resulting from each alleged injurious act, and failed to provide anything but the most speculative estimate of damages. Having already found that Plaintiffs' claims fail for lack of evidence, the Court need not address these arguments with specificity, but examines them briefly inasmuch as they relate to the Court's earlier examination of Plaintiffs' claims.

Defendants argue that Plaintiffs have failed to show evidence of antitrust injury, insofar as the injuries alleged in the record amount only to harm to PAS, a single competitor, and not to competition as a whole. Antitrust injury is injury to competition, not merely to a competitor. See Brunswick Corp., 429 U.S. 488, 97 S. Ct. at 697; Capital Imaging, 996 F.2d at 542-43; International Distrib., 812 F.2d at 793. Given the limited number of competitors in the relevant markets, however, as well as the barriers to market entry, had Plaintiffs shown the existence and operation of the conspiracy as alleged, an inference of antitrust injury could have been reasonably drawn from the record.

Defendant argues that Plaintiffs have failed to show evidence that Comsat caused any injury to PAS. Specifically, Defendant argues that Plaintiffs have failed to account for other possible causes of PAS's injury, such as regulatory barriers, the Intelsat signatory resolution, unrelated delays in obtaining Intelsat consultations, and the alleged boycott resolution of the European Conference of Postal and Telecommunications Administrations ("CEPT"). The Court agrees, and notes in particular that Plaintiffs have failed to show that any injury to PAS was caused by the alleged conspiracy and not by regulatory barriers that existed before liberalization. Although Plaintiffs claim that the alleged conspirators caused Plaintiffs' pre-liberalization injuries, Plaintiffs readily admit that PAS's success **[\*\*194]** was triggered by the liberalization and deregulation that swept the relevant markets after PAS's launch of its PAS-1 satellite:

Beginning in 1990 and continuing in 1991 and 1992, countries around the world began to liberalize and deregulate telecommunications . . . [and with] liberalization and deregulation, PAS was able to . . . either obtain licenses directly from governments, or operate without the necessity of government licensing. Once this occurred, PAS revenues and profits burgeoned, and PAS went from operating at a loss to becoming highly

profitable. In addition, PAS substantially increased its market share in areas it had been previously unable to penetrate.

Pls.' 3(g) Statement P 46 (internal citations omitted).

Defendant also argues that even if Plaintiffs had shown causation, Plaintiffs have failed to plead damages resulting from each alleged injurious act. Specifically, Comsat challenges Plaintiffs' damage claims for failing to discount for actions undertaken in Comsat's immune signatory role; failing to discount for acts of alleged co-conspirators in their immune signatory roles (including the Intelsat signatory resolutions and the alleged CEPT boycott); **[\*\*195]** failing to discount for the claims in PP 28(d), (j) and (k) of the Complaint which Plaintiffs withdrew; and failing to break out damages relative to the specific acts alleged in P 28 of the Complaint. In this regard, Plaintiffs adopted contradictory positions as to whether they intended to plead any of the many acts alleged in the Complaint as an independent cause of action as well as an act in furtherance of the alleged conspiracy. In their papers in opposition to Defendants' motion, Plaintiffs argued that a break out of damages was not necessary

because the underlying boycott was the cause of PAS's injury, and the other acts were incidental to and in furtherance of the boycott, PAS has not attempted to attribute damages to each of those subsidiary actions. Nor would such an exercise be particularly meaningful, if possible.

Pls.' Opp'n Mem. at 47. At oral argument, however, Plaintiffs argued that each of the acts alleged should be treated as an independent claim, and the Court treated them as such in its examination of the motion. The Court agrees with Defendant, however, that even if Plaintiff had shown evidence to support those independent claims, they would have **[\*\*196]** been dismissed for Plaintiffs' failure to attribute damages to each of the remaining acts alleged in P 28 of the Complaint.

Finally, Defendant argues that Plaintiffs have failed to provide anything but the most speculative estimate of damages. Essentially, Plaintiffs' claim is that PAS would have been successful two years earlier if not for Comsat's efforts to exclude PAS from various markets. See Pls.' 3(g) Statement PP 53-56. Plaintiffs therefore assert that PAS is entitled to the amount it would have made during the two years of exclusion, calculated as the amount it made in the two subsequent years, plus an amount on top of its actual earnings during the two years after the exclusion, representing the growth it would have experienced.<sup>111</sup> Although the Court agrees that Plaintiffs' damage claims are largely speculative, the claims would have sufficed. In exclusion cases, damage claims are rarely susceptible to concrete, detailed proof. See [Zenith, 395 U.S. at 123-24, 89 S. Ct. at 1576-77](#). That is not to say that Defendant could not have refuted Plaintiffs' claims before a trier of fact by showing that Plaintiffs' claims were largely speculative and not the result of Comsat's **[\*\*197]** conduct.

**[\*\*198]** In sum, the Court finds that Plaintiffs have failed to plead sufficiently damages resulting from the individual acts alleged in the Complaint. None of those acts could survive Defendant's motion as an independent cause of action. The Court also finds, however, that Plaintiffs pleaded sufficient damages resulting from the alleged conspiracy. If Plaintiffs had presented evidence of that conspiracy, Comsat's participation in it and acts in furtherance of it, that cause of action would have survived.

## VI. State law claims

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<sup>111</sup> Plaintiffs claim that because of Comsat's conduct the "financing, construction, launch, and realization of revenues from satellites PAS-2, PAS-3, and PAS-4 were delayed for a period of at least two years. See Pls.' 3(g) Statement P 2 (citing **Comsat Ex. 1011** at 3 & 8; **Landman Aff.**; **Landman Dep.** Vol. 1, at 119-22, Vol. 2 at 444-53; Vol. 3, at 528-39, 562-67, 669-70, Vol. 4, at 724-25, Vol. 5 at 1020-44). Plaintiffs also claim that the shortage in PAS capacity that resulted from this delay caused PAS to turn away business that represented \$ 100 million in revenues in the Atlantic Region alone. See Pls.' 3(g) Statement P 45 (citing **Landman Dep.** Vol. 3 at 529-32, 562-71, 664-65; **Comsat Ex. 17**). Plaintiffs' allege that a total of approximately \$ 233 million was lost to PAS during those two years. See Pls.' Opp'n Mem. at 39, 41-42; Pls.' 3(g) Statement PP 48-56 (citing, *inter alia*, **Owen Dep.** Vol. 1 at 43-45, 80, 193-94, 235-45, Vol.2 at 272-75, 279-80, 295-98; **Owen Aff.**; **Comsat Ex. 726**; **Comsat Ex. 730**; **Comsat Ex. 733**, **Comsat Ex. 737**; **Comsat Ex. 741**; **Comsat Ex. 742**. Plaintiffs then argue that because Comsat allegedly acted willfully, unreasonably and maliciously, Plaintiffs are entitled to treble damages.

The Complaint also contains two claims for interference with prospective advantage under the laws of New York and Connecticut, respectively. See 3d Am. Compl. PP 28(f) & (k). [HN28](#) Under New York law, PAS must establish that Comsat "interfered with a prospective contractual advantage through fraudulent, criminal or otherwise improper conduct." Def.'s Summ. J. Mem. at 48 n.69 (citing *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, *614 F.2d 832, 838 (2d Cir. 1980)*); see *PPX Enters., Inc. v. Audiofidelity Enters., Inc.*, *818 F.2d 266, 269 (2d Cir. 1987)*). Under Connecticut law, PAS must establish that Comsat "interfered with a prospective business [\*\*199] relationships using improper means that amount to an independent tort." Def.'s Summ. J. Mem. at 48 n.69 (citing *AroChem Int'l, Inc. v. Buirkle*, *968 F.2d 266, 272 (2d Cir. 1992)*); see *Sportsmen's Boating Corp. v. Hensley*, *192 Conn. 747, 474 A.2d 780, 785 (1984)*). Plaintiffs have failed to present sufficient evidence to permit a trier of fact to find in their favor under either of these standards.

In addition, Plaintiffs acknowledge in their opposition to the current motion that their state law claims are entirely derivative of Plaintiffs' federal antitrust claims. See Pls.' Opp'n Mem. at 49-50 ("Inasmuch as the evidence fully supports the federal antitrust claims of PAS, it also fully supports PAS's state law claim[s]."). Having found that Plaintiffs showing in support of its federal claims lacking, in particular Plaintiffs failure to show Comsat's alleged disparagement of PAS, see *supra* at 138-146, the Court grants Defendant's motion to dismiss Plaintiffs' state law claims.

## **VII. Act of state doctrine and indispensable parties**

Defendant also moved for summary judgment under the act of state doctrine and for failure to join the PTTs as indispensable parties. [\*\*200] The Court does not need to reach these arguments. The Court notes, however, that neither argument is likely to have prevailed.

Contrary to Comsat's assertion, the alleged PTT conspirators need not be joined in order for the Court to grant injunctive relief. While it is true that in their absence the Court could not direct the PTTs to provide PAS with operating agreements, it is questionable whether such relief would still be required and, even if it were, whether the Court could order it even if the PTTs were parties. Nevertheless, in their absence the Court could still have enjoined Defendant Comsat in its role as a common carrier from engaging in any conduct which violates federal antitrust laws. See *Alpha Lyracom*, *1993 U.S. Dist. LEXIS 3825*, \*23, *1993-1 Trade Cas. P70,184 at 69,863, 1993 WL 97313* at \*8; accord *Alpha Lyracom*, *946 F.2d at 175* (finding that any allegations against Comsat in its role as a common carrier are unlikely to encounter indispensable party concerns); cf. *Alpha Lyracom*, *1990 U.S. Dist. LEXIS 11964, 1990-2 Trade Cas. (CCH) P69,188 at 64,584-85, 1990 WL 135637* at \*9-10 (finding that Intelsat and the alleged PTT conspirators were indispensable to claims implicating signatory functions).

The act of state doctrine [\*\*201] is not implicated here because the effect of a government action is not at issue. See *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, *493 U.S. 400, 406, 110 S. Ct. 701, 705, 107 L. Ed. 2d 816 (1990)* (stating that act of state issues only arise "when a court *must decide*--that is, when the outcome of the case turns upon--the effect of official action by a foreign sovereign"). The issue before the Court in this action is not the effect of any governmental action, but whether any denial of access resulted from government action or from the conduct of nongovernmental entities conspiring with Defendant Comsat. See *Alpha Lyracom*, *1993 U.S. Dist. LEXIS 3825, 1993-1 Trade Cas. P70,184 at 69,863, 1993 WL 97313* at \*7.

## **Conclusion**

For the reasons discussed above, Plaintiffs's discovery motions are denied and the orders of the Magistrate Judge are affirmed in all respects. The Court directs Plaintiffs to pay Defendant's costs and fees incurred in opposing Plaintiffs' objections to the Magistrate Judge's order of July 20, 1994.

Defendant's motion for summary judgment is granted as to all claims.

There being no other claims before it, the Court directs the Clerk of the Court to close [\*\*202] this action and remove it from the Court's active calendar.

**SO ORDERED.**

Dated: New York, New York

September 4, 1996

**JOHN F. KEENAN**

**UNITED STATES DISTRICT JUDGE**

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End of Document

## Dill v. Board of County Comm's

Court of Appeals of Colorado, Division Four

September 5, 1996, Decided

No. 95CA1592

**Reporter**

928 P.2d 809 \*; 1996 Colo. App. LEXIS 265 \*\*; 1997-1 Trade Cas. (CCH) P71,665

Ernie Dill and Julie Dill, Plaintiffs-Appellants, v. Board of County Commissioners of Lincoln County, Charles R. Covington, Harvey Wann, and Cherry Seymour, as members of the Board, Defendants-Appellees.

**Subsequent History:** [\*\*1] Rehearing Denied September 5, 1996. Released for Publication December 18, 1996.

**Prior History:** Appeal from the District Court of Lincoln County. Honorable Norman L. Arends, Judge. No. 94CV38.

**Disposition:** JUDGMENT AFFIRMED

## **Core Terms**

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solid waste, moratorium, regulations, designated, local government, state interest, disposal site, landfill, guidelines, disposal, plaintiffs', site, trial court, Antitrust, authorizes, arbitrary and capricious, anti trust law, landfill site, police power, quasi-judicial, declaratory, facilities

## **LexisNexis® Headnotes**

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Governments > Courts > Authority to Adjudicate

Governments > Courts > Rule Application & Interpretation

### **HN1[ Courts, Authority to Adjudicate**

Colo. R. Civ. P. 106(a)(4) provides that relief is available in district courts where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law.

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

### **HN2[ Legislation, Effect & Operation**

Legislative action is prospective in nature, is of general application, and requires the balancing of questions of judgment and discretion. Moreover, the essence of a legislative decision is in the nature of the decision itself and the process by which that decision is reached.

Governments > Courts > Authority to Adjudicate

Governments > Legislation > Interpretation

### **HN3** Courts, Authority to Adjudicate

An action is quasi-judicial if the governmental decision is likely to affect adversely the protected interests of specific individuals by application of preexisting legal standards or policy considerations to facts presented to the governmental body. In contrast, legislation affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it.

Governments > Local Governments > Administrative Boards

Governments > Local Governments > Police Power

Governments > State & Territorial Governments > Legislatures

Governments > State & Territorial Governments > Relations With Governments

### **HN4** Local Governments, Administrative Boards

A county has no inherent sovereign authority, but has those powers expressly granted by the Colorado Constitution and statutes, and such incidental powers as are "reasonably necessary" to execute the expressly delegated powers.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Environmental Law > Solid Wastes > Disposal Standards

Real Property Law > Zoning > Judicial Review

Environmental Law > Solid Wastes > Permits > General Overview

Real Property Law > Environmental Regulations > General Overview

### **HN5** Zoning, Ordinances

The Solid Wastes Disposal Sites and Facilities Act (Act), [Colo. Rev. Stat. §§ 30-20-100.5 et seq.](#), provides a statutory basis for regulation of solid waste disposal sites. Although the statute does not explicitly authorize a moratorium, the authority to delay approval of permits while guidelines and regulations are being developed is reasonably incidental to this power to regulate. Specifically, the Act defines the county's authority to regulate the number, location, and type of disposal sites. The Act's legislative declaration states that solid waste is a matter of state and local concern and that both state and local governments must play important roles in the management of solid waste. [Colo. Rev. Stat. §§ 30-20-100.5\(1\)\(a\)](#) and 30-20- 100.5(1)(d)(I). Further, local governments and their citizens should be encouraged to work toward consensus concerning their solid waste disposal needs and

concerning the types and numbers of solid wastes sites and facilities necessary or desirable in their areas. [Colo. Rev. Stat. § 30-20-100.5\(1\)\(d\)\(II\)](#). Moreover, prior to issuance of a certificate of designation, the governing body having jurisdiction over a potential waste site shall be satisfied that the proposed solid wastes disposal site and facility conforms to the local government's comprehensive land use plan and zoning restrictions. [Colo. Rev. Stat. § 30-20-104\(3\)\(a\)](#).

Environmental Law > Solid Wastes > Disposal Standards

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Environmental Regulations > General Overview

#### [HN6](#) **Solid Wastes, Disposal Standards**

The Solid Wastes Disposal Sites and Facilities Act (Act), [Colo. Rev. Stat. §§ 30-20-100.5 et seq.](#), provides a local government with authority to evaluate permits on the basis of its own regulations, as well as to determine the number and type of facilities within its jurisdiction. To authorize a local government to regulate solid waste in this manner but without implied authority to adopt or amend regulations for that purpose would be to ignore the independent role of local governments in the review process. The ability to delay approval of permit applications by way of a moratorium for a reasonable time such that regulations can be revised may also be reasonably necessary to discharge the explicit statutory authority under the Act.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

Environmental Law > Solid Wastes > Disposal Standards

Governments > State & Territorial Governments > Relations With Governments

Governments > Legislation > Interpretation

#### [HN7](#) **Zoning, Administrative Procedure**

The Areas of State Interest Act, [Colo. Rev. Stat. § 24-65.1-101 et seq.](#), authorizes local governments to declare certain activities and areas as of state and local interest, [Colo. Rev. Stat. § 24-65.1-401](#), and requires that the local government develop guidelines for administration of the designated matters of state interest. [Colo. Rev. Stat. § 24-65.1-402\(1\)](#). [Colo. Rev. Stat. § 24-65.1-404](#) provides for notice and a hearing before an area or activity is designated and guidelines promulgated. [Colo. Rev. Stat. § 24-65.1-404\(3\)](#) provides that the local government may, within 30 days of the public hearing, adopt, modify, or reject the particular designation and guidelines, but in any case, the local government shall have the duty to designate any matter which has been finally determined to be a matter of state interest and adopt guidelines for the administration thereof. [Colo. Rev. Stat. § 24-65.1-406](#) sets time limits for the review and approval of proposed guidelines by the Colorado land use commission, and [Colo. Rev. Stat. § 24-65.1-404\(4\)](#) provides for a moratorium on development between the time a matter of state interest has been designated and guidelines for such area or activity are finally determined.

Environmental Law > Solid Wastes > Disposal Standards

Governments > State & Territorial Governments > Relations With Governments

Environmental Law > Solid Wastes > Flow Control

Governments > Legislation > Interpretation

#### [\*\*HN8\*\*](#) [] Solid Wastes, Disposal Standards

The Areas of State Interest Act, [Colo. Rev. Stat. §§ 24-65.1-101 et seq.](#), does not require that an area or activity be redesignated each time a local government finds it necessary to revise its applicable regulations. Indeed, the act does not explicitly provide for revision of guidelines, but a jurisdiction may adopt regulations interpreting and applying its adopted guidelines in relation to specific developments in areas of state interest and to specific activities of state interest. [Colo. Rev. Stat. § 24-65.1-402\(2\)](#).

Environmental Law > Solid Wastes > Disposal Standards

Real Property Law > Environmental Regulations > General Overview

#### [\*\*HN9\*\*](#) [] Solid Wastes, Disposal Standards

Lincoln County (Colorado) Resolution 294 provides that, [Colo. Rev. Stat. § 30-20-107](#), the Lincoln County Solid Waste Landfill Site is hereby declared to be and is the exclusive solid waste landfill site for disposal of solid waste within Lincoln County.

Environmental Law > Solid Wastes > Disposal Standards

Real Property Law > Environmental Regulations > General Overview

#### [\*\*HN10\*\*](#) [] Solid Wastes, Disposal Standards

[Colo. Rev. Stat. § 30-20-107](#) provides that the governing body of any county or municipality may by ordinance designate and approve one or more solid wastes disposal sites and facilities as its exclusive solid wastes disposal site and facility and thereafter each such site and facility shall be used by such county or municipality for the disposal of its solid wastes.

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

#### [\*\*HN11\*\*](#) [] Justiciability, Standing

Whether a party has standing requires a court to determine, based primarily on the allegations of the complaint, whether a plaintiff was injured in fact and whether the injury was to a legally protected interest. The plaintiff must demonstrate that there is an existing legal controversy that can be effectively resolved and not a mere possibility of a future legal dispute.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

## [\*\*HN12\*\*](#) [blue download icon] Reviewability, Exhaustion of Remedies

Exhaustion of administrative remedies is not necessarily a prerequisite to establish standing when issues presented to the court depend on interpretation of legislation adopted by a governmental entity. A party adversely affected by a law that he or she contends is invalid need not violate the law in order to obtain a judgment on its validity or invalidity.

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

## [\*\*HN13\*\*](#) [blue download icon] Justiciability, Standing

The injury-in-fact element of standing is established when the averments of the complaint, accepted as true, and the allegations, viewed in the light most favorable to plaintiff, as well as other submitted evidence, establish that the legislation threatened to cause injury to a plaintiff's present or imminent activities. Further, the injury must be to a legally protected interest, an interest emanating from a constitutional, statutory, or judicially created rule of law that entitles plaintiff to some form of judicial relief.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > General Overview

## [\*\*HN14\*\*](#) [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

The doctrine which exempts state government from operation of the federal antitrust laws, extends to exempt local governments when engaged in their traditional government functions. The state may sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability, when the state policy is clearly articulated and affirmatively expressed. Moreover, any person exempt or immune under federal antitrust law is exempt from the Colorado Antitrust Act of 1992, [Colo. Rev. Stat. § 6-4-108\(4\)](#).

**Counsel:** Gablehouse & Epel, Joshua B. Epel, Karina M. Thomas, Denver, Colorado, for Plaintiffs-Appellants.

Robert J. Safranek, Limon, Colorado, for Defendants-Appellees.

**Judges:** Opinion by JUDGE DAVIDSON. Briggs and Taubman, JJ., concur

**Opinion by:** DAVIDSON

## **Opinion**

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[\*811] Plaintiffs, Ernie and Julie Dill, brought this action pursuant to [C.R.C.P. 106\(a\)\(4\)](#) for judicial review and for injunctive and declaratory relief concerning actions taken by defendant, Board of County Commissioners of Lincoln County (Board), in adopting two resolutions regarding solid waste disposal. The trial court determined the

resolutions to be valid legislative action by the Board and dismissed plaintiffs' other requests for relief. On grounds somewhat different from those of the trial court, we affirm.

In early 1994, plaintiffs notified the Board of their intention to obtain a Certificate of Designation (CD) to build and operate a commercial sanitary landfill. In May 1994, following several citizen complaints about the [\*\*2] proposed landfill but before plaintiffs submitted their CD application, the Board published a notice of public hearing to consider a moratorium on all new landfill projects. In June 1994, the Board adopted Resolution 294, which designated the county's own landfill as the "exclusive solid waste landfill site" for the county. After a public hearing, the Board adopted Resolution 297, imposing a two- year moratorium on issuance of CDs. The purpose of the moratorium was to "adopt[] comprehensive rules, regulations and guidelines for the siting and operation of solid waste landfills within the County."

Plaintiffs filed a complaint seeking review of the Board's actions, arguing that adoption of the two resolutions was beyond its authority, as well as arbitrary and capricious, and that the resolutions interfered with plaintiffs' ability to participate in the statutorily established CD designation process. Plaintiffs also argued that Resolution 294 created a monopoly in derogation of federal and state **antitrust law**, and requested that the Board be enjoined from enforcing the resolution.

The trial court dismissed plaintiffs' claims, ruling that adoption of the resolutions was legislative, [\*\*3] rather than quasi-judicial, and, therefore, not subject to review as arbitrary and capricious under C.R.C.P. 106(a)(4). The court further ruled that the moratorium was properly adopted under implied statutory authority. In addition, it ruled that since plaintiffs had not as yet filed a CD application, they lacked standing to contest the Board's actions based on state and federal **antitrust law**. This appeal followed.

## I.

Plaintiffs first contend that the trial court erred in determining that enactment of the resolutions was a legislative rather than quasi-judicial action. Consequently, plaintiffs argue, the court erred in determining that the actions were not subject to judicial review under the arbitrary and capricious standard of C.R.C.P. 106(a)(4). We disagree.

**HN1**[] C.R.C.P. 106(a)(4) provides that relief is available in district courts:

Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded [\*812] its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law . . . .

Distinguishing between quasi-judicial and legislative action, the supreme court has stated that [\*\*4] **HN2**[] legislative action "is prospective in nature, is of general application, and requires the balancing of questions of judgment and discretion." City & County of Denver v. Eggert, 647 P.2d 216, 222 (Colo. 1982); see also Landmark Land Co. v. City & County of Denver, 728 P.2d 1281 (Colo. 1986). Moreover, the essence of a legislative decision is in the "nature of the decision itself and the process by which that decision is reached." Cherry Hills Resort Development Co. v. City of Cherry Hills Village, 757 P.2d 622, 626 (Colo. 1988).

**HN3**[] An action is quasi-judicial if the governmental decision is likely to affect adversely the protected interests of specific individuals by application of preexisting legal standards or policy considerations to facts presented to the governmental body. In contrast, legislation "affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it." Colorado Ground Water Commission v. Eagle Peak Farms, Ltd., 919 P.2d 212, 217 (Colo. 1996).

Here, if we accept plaintiffs' allegations as true, their participation in the CD process may be affected by both [\*\*5] resolutions. A further proceeding, however, would be required before either resolution would specifically affect the legal position of plaintiffs or any other potential landfill developer. Cf. City of Aspen v. Marshall, 912 P.2d 56 (Colo. 1996) (incomplete permit application creates no vested right of use); Williams v. City of Central, 907 P.2d 701 (Colo. App. 1995) (temporary moratorium did not effect taking of property).

Further, while plaintiffs assert that it was their interest in developing a commercial landfill that originally prompted the Board's actions, by their terms, both resolutions had a broad impact, i.e., they were applicable to all landfills, all land in the county, and all potential disposers of waste in Lincoln County. See [Jafay v. Board of County Commissioners, 848 P.2d 892 \(Colo. 1993\)](#).

Moreover, the resolutions were prospective in nature -- both by their terms and because, at the time of enactment, no CD applications had been submitted to which they might have been applied. Thus, despite the fact that the Board provided notice and public hearings before adopting the moratorium, factors which can be indicative of a quasi-judicial action, the Board's actions [\*\*6] were quasi-legislative. See [Jafay v. Board of County Commissioners, supra](#). Accordingly, plaintiffs are not entitled to judicial review of either resolution under the arbitrary and capricious standard of [C.R.C.P. 106\(a\)\(4\)](#).

## II.

In addition to challenging the specific actions of the Board as arbitrary and capricious, plaintiffs also challenge the Board's authority to adopt a moratorium. Although it is not precisely clear, this claim for relief appears to be a request for a declaratory judgment on the validity of Resolution 297. Accordingly, we review it as such, see [Bruce v. School District No. 60, 687 P.2d 509 \(Colo. App. 1984\)](#), and agree with the trial court's determination that the Board was authorized to enact a moratorium.

**HN4** [↑] A county has no inherent sovereign authority, but has those powers expressly granted by the Colorado constitution and statutes, and such incidental powers as are "reasonably necessary" to execute the expressly delegated powers of the Board. See [Orchard City v. Board of Delta County Commissioners, 751 P.2d 1003 \(Colo. 1988\)](#); see also [Meadowbrook-Fairview Metropolitan District v. Board of County Commissioners, 910 P.2d 681 \(Colo. 1996\)](#) (counties have such police [\*\*7] powers as granted by constitution or delegated by General Assembly).

There is no claim here of power to adopt a moratorium pursuant to an express constitutional grant or statutory authorization. Therefore, adoption of Resolution 297 was a valid exercise of authority only if a moratorium on approval of CD applications can be inferred to be reasonably necessary for the Board to execute its express powers regarding [\*813] solid waste management. See [Dollaghan v. Boulder County, 749 P.2d 444 \(Colo. App. 1987\)](#); cf. [Williams v. City of Central, supra, 907 P.2d at 706](#) ("Temporary moratoria . . . generally are upheld so long as the duration is reasonable under the circumstances and the enactment was made in good faith without discrimination.").

Here, authority to adopt a moratorium may be inferred from both the Solid Wastes Disposal Sites and Facilities statute (Solid Wastes Act), [§ 30-20-100.5, et seq., C.R.S.](#) (1986 Repl. Vol. 12A), and the Areas of State Interest Act, [§ 24-65.1-101, et seq., C.R.S.](#) (1988 Repl. Vol. 10B).

**HN5** [↑] First, the Solid Wastes Act provides a statutory basis for regulation of solid waste disposal sites within Lincoln County. Although the statute does not explicitly authorize [\*\*8] a moratorium, the authority to delay approval of permits while guidelines and regulations are being developed is reasonably incidental to this power to regulate.

Specifically, the Solid Wastes Act defines the county's authority to regulate the number, location, and type of disposal sites. The act's legislative declaration states that solid waste is a matter of state and local concern and that both state and local governments "must play important roles in the management of solid waste." [Sections 30-20-100.5\(1\)\(a\)](#) and 30-20-100.5(1)(d)(I), C.R.S. (1996 Cum. Supp.). Further:

Local governments and their citizens should be encouraged to work toward consensus concerning their solid waste disposal needs and concerning the types and numbers of solid wastes sites and facilities necessary or desirable in their areas. [Section 30-20-100.5\(1\)\(d\)\(II\), C.R.S.](#) (1996 Cum. Supp.).

Moreover, prior to issuance of a CD, the "governing body having jurisdiction [over a potential waste site] shall . . . be satisfied that the proposed solid wastes disposal site and facility conforms to the local government's comprehensive land use plan and zoning restrictions." [Section 30-20-104\(3\)\(a\), C.R.S.](#) (1996 [**\*\*9**] Cum. Supp.); see also [§ 30-20-104\(1\), C.R.S.](#) (1996 Cum. Supp.) (county has authority to evaluate applications for proposed solid wastes disposal sites and facilities); § 30-10-104(2), C.R.S. (1996 Cum. Supp.) (county can approve or disapprove applications for CDs, subject to judicial review). The factors a county must consider in evaluating a CD application include the location of the site, type of processing to be used, effects on surrounding property, as well as Colorado Department of Public Health and Environment standards and operating procedures. See [§ 30-20-104\(1\)](#).

Thus, [HN6](#)<sup>↑</sup> the Solid Wastes Act provides a local government with authority to evaluate permits on the basis of its own regulations, as well as to determine the number and type of facilities within its jurisdiction. To authorize a local government to regulate solid waste in this manner but without implied authority to adopt or amend regulations for that purpose would be to ignore the independent role of local governments in the review process. The ability to delay approval of permit applications by way of a moratorium for a reasonable time such that regulations can be revised may also be reasonably necessary to discharge [**\*\*10**] the Board's explicit statutory authority under the Solid Wastes Act.

Similarly, [HN7](#)<sup>↑</sup> the Areas of State Interest Act authorizes local governments to declare certain activities and areas as "of state and local interest," see [§ 24-65.1-401, C.R.S.](#) (1988 Repl. Vol. 10B), and requires that the local government "develop guidelines for administration of the designated matters of state interest." [Section 24-65.1-402\(1\), C.R.S.](#) (1988 Repl. Vol. 10B); see also [§ 24-65.1-204\(2\), C.R.S.](#) (1988 Repl. Vol. 10B) (criteria for developing solid waste disposal sites).

[Section 24-65.1-404, C.R.S.](#) (1988 Repl. Vol. 10B) provides for notice and a hearing before an area or activity is designated and guidelines promulgated. [Section 24-65.1-404\(3\), C.R.S.](#) (1988 Repl. Vol. 10B) provides that the local government may, within 30 days of the public hearing, adopt, modify, or reject the particular designation and guidelines, but "in any case, [the local government] shall have the duty to designate any matter which has been finally determined to be a matter of state interest and adopt guidelines for the administration thereof." See also [City & County of Denver v. Board of County Commissioners, I<sup>814</sup>I 782 P.2d 753 \(Colo. I<sup>\\*\\*11</sup> 1989\)](#). [Section 24-65.1-406, C.R.S.](#) (1988 Repl. Vol. 10B) sets time limits for the review and approval of proposed guidelines by the Colorado land use commission, and [§ 24-65.1-404\(4\), C.R.S.](#) (1988 Repl. Vol. 10B) provides for a moratorium on development between the time a matter of state interest has been designated and guidelines for such area or activity are "finally determined."

Here, pursuant to regulations, Lincoln County designated site selection and development of solid wastes disposal sites as a matter of state interest in March 1982, and adopted regulations pertaining to solid and hazardous waste in November 1982. Plaintiffs' contention notwithstanding, [HN8](#)<sup>↑</sup> the Areas of State Interest Act does not require that an area or activity be redesignated each time a local government finds it necessary to revise its applicable regulations. Indeed, the act does not explicitly provide for revision of guidelines, but a jurisdiction "may adopt regulations interpreting and applying its adopted guidelines in relation to specific developments in areas of state interest and to specific activities of state interest." [Section 24-65.1-402\(2\), C.R.S.](#) (1988 Repl. Vol. 10B).

Consequently, it is reasonable [**\*\*12**] to infer that the Board had authority pursuant to [§ 24-65.1-101, et seq.](#), to revise its regulations with regard to solid waste disposal. Further, as discussed in regard to the Solid Wastes Act, a moratorium on approval of permit applications for a reasonable time such that regulations can be updated may also be necessary to discharge the Board's explicit statutory authority under the Areas of State Interest Act.

Furthermore, we note that courts which have addressed this issue have generally found implied authority to enact moratoria under a jurisdiction's general police power authority, despite a lack of explicit statutory authority. Cf. [State ex rel. Diehl Co. v. City of Helena, 181 Mont. 306, 593 P.2d 458 \(Mont. 1979\)](#) (implied in power to restrict use of land as exercise of police power is authority to adopt reasonable moratoria); [Brazos Land, Inc. v. Board of County Commissioners, 115 N.M. 168, 848 P.2d 1095 \(N.M. App. 1993\)](#) (moratorium for promulgating more stringent subdivision waste disposal requirements a valid exercise of board's police power and its express and

implied authority where such requirements and restrictions reasonably advanced a legitimate state interest in the safety and health of the inhabitants); [\[\\*\\*13\] \*Sun Ridge Development, Inc. v. City of Cheyenne, 787 P.2d 583 \(Wyo. 1990\)\*](#) (moratorium was a reasonable response to drainage problems and a valid exercise of police powers); see generally I A. Rathkopf, *The Law of Zoning & Planning*, § 11.03[1] (1996).

### III.

Plaintiffs next contend that the trial court erred in dismissing for lack of standing their request that the Board be enjoined from enforcing Resolution 294, which designated the county's own landfill as the "exclusive solid waste landfill site" for the county. Plaintiffs essentially argue that the resolution is invalid as written because it violates the Sherman Antitrust Act, the Colorado Antitrust Act of 1992, and the [\*Commerce Clause of the United States Constitution\*](#).

[HN9](#) Resolution 294 provides that:

Pursuant to [CRS 30-20-107](#), the Lincoln County Solid Waste Landfill Site . . . is hereby declared to be and is the exclusive solid waste landfill site for disposal of solid waste within Lincoln County.

[HN10](#) [Section 30-20-107, C.R.S. \(1996 Cum. Supp.\)](#) provides that:

The governing body of any county or municipality may by ordinance designate and approve one or more solid wastes disposal sites and facilities . . . as its exclusive solid [\[\\*\\*14\]](#) wastes disposal site and facility . . .

and thereafter each such site and facility shall be used by such county or municipality for the disposal of its solid wastes . . . .

Although we disagree with the trial court's determination that plaintiffs lack standing, we agree that the claim was properly dismissed. See [\*Norwest Bank Lakewood v. GCC Partnership, 886 P.2d 299 \(Colo. App. 1994\)\*](#) (court may affirm on grounds different from those relied on by the trial court).

[\[\\*815\]](#) A.

We agree with plaintiffs that the trial court erred in dismissing their claim contesting the validity of Resolution 294 for lack of standing based on a failure to exhaust their administrative remedies because they had not submitted a CD application.

[HN11](#) Whether a party has standing requires a court to determine, based primarily on the allegations of the complaint, whether a plaintiff was injured in fact and whether the injury was to a legally protected interest. [\*Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535 \(1977\)\*](#). The plaintiff must demonstrate that there is an existing legal controversy that can be effectively resolved and not a mere possibility of a future legal dispute.

[HN12](#) Exhaustion of administrative remedies [\[\\*\\*15\]](#) is not necessarily a prerequisite to establish standing when issues presented to the court depend on interpretation of legislation adopted by a governmental entity. See [\*Colorado-Ute Electric Ass'n v. Air Pollution Control Commission, 648 P.2d 150 \(Colo. App. 1981\)\*](#), vacated on other grounds, [\*672 P.2d 993 \(Colo. 1983\)\*](#); see also [\*State of Colorado v. Veterans Administration, 430 F. Supp. 551 \(D. Colo. 1977\)\*](#), aff'd, [\*602 F.2d 926\*](#) (10th Cir.), cert. denied, [\*444 U.S. 1014, 100 S. Ct. 663, 62 L. Ed. 2d 643 \(1980\)\*](#). A party adversely affected by a law that he or she contends is invalid need not violate the law in order to obtain a judgment on its validity or invalidity. [\*Colorado State Board of Optometric Examiners v. Dixon, 165 Colo. 488, 440 P.2d 287 \(1968\)\*](#).

To the extent plaintiffs seek a declaratory judgment, [HN13](#) the injury-in-fact element of standing is established when the averments of the complaint, accepted as true, and the allegations, viewed in the light most favorable to plaintiff, as well as other submitted evidence, establish that the legislation threatened to cause injury to a plaintiff's present or imminent activities. See [\*CF&I Steel Corp. v. Colorado Air Pollution Control Commission, \[\\*\\*16\] 199 Colo. 270, 610 P.2d 85 \(1980\)\*](#). Further, the injury must be to a legally protected interest -- an interest emanating

from a constitutional, statutory, or judicially created rule of law that entitles plaintiff to some form of judicial relief. See [Board of County Commissioners v. Bowen/Edwards Associates, Inc., 830 P.2d 1045 \(Colo. 1992\)](#).

In Bowen/Edwards, plaintiff contested the validity of new county regulations without first applying for a permit under those regulations. Nevertheless, the court determined that plaintiff made an adequate, if "less than formidable" showing that the regulations could impede its ability to develop and produce oil and gas in the county.

Here, plaintiffs contend that by adopting Resolution 294, the Board interfered with their ability to participate in the CD process, Colorado's exclusive process for licensing of a landfill.

While Resolution 294 does not, on its face, preclude application for a permit, the resolution can be read to preclude approval of any CD application that might be submitted. Consequently, while plaintiffs' showing also is "less than formidable," it too is adequate to withstand dismissal for lack of standing in a declaratory judgment [\*\*17] action. See [Board of County Commissioners v. Bowen/Edwards Associates, Inc., supra](#).

## B.

We disagree, however, with plaintiffs' assertion that Resolution 294 necessarily violates the Sherman Antitrust Act, the Colorado Antitrust Act of 1992, and the [Commerce Clause of the United States Constitution](#).

[HN14](#) [↑] The Parker doctrine, which exempts state government from operation of the federal antitrust laws, extends to exempt local governments when engaged in their traditional government functions. The "state may sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability," when the state policy is "clearly articulated and affirmatively expressed." [Community Communications Co. v. Boulder, 455 U.S. 40, 51, 102 S. Ct. 835, 840-41, 70 L. Ed. 2d 810, 818-19 \(1982\)](#); cf. [Colorado Springs v. Mountain View Electric Ass'n, 925 P.2d 1378 \(Colo. App. 1995\)](#) (interpreting Colorado law prior to Colorado Antitrust Act of 1992). Moreover, any person exempt or immune under federal [antitrust](#) [\*816] [law](#) is exempt from the Colorado Antitrust Act of 1992. See [§ 6-4-108\(4\), C.R.S.](#) (1992 Repl. Vol. 2).

Consequently, to the extent that [§ 30-20-107](#) affirmatively [\*\*18] authorizes the Board to designate an exclusive solid waste landfill site, Resolution 294 violates neither state nor federal antitrust statutes.

In their briefs on appeal, plaintiffs imply that Resolution 294 is intended to be used to prohibit the siting of any other landfill for disposal of non-county waste. And, we note that the legislative history of [§ 30-20-107](#) indicates that this provision authorizes government entities to "designate disposal sites to be used for dumping waste materials collected in the [jurisdiction]" in order to "provide a stable source of refuse to disposal sites under their respective jurisdictions." Legislative Council Report to the Colorado General Assembly, Research Publ. # 129 at xxii and 42 (1967); see also Colo. Sess. Laws 1967, ch. 358, § 7 at 760. Thus, on its face, Resolution 294 is in accord with state policy, and the Board is immune from state and federal antitrust laws, but only to the extent that it establishes an exclusive site for disposal of county generated waste.

Plaintiffs' complaint, however, contains no allegation that the Board has applied the resolution to require that waste which is not collected within its jurisdiction be disposed [\*\*19] of in its exclusive site. Thus, any such inference is purely speculative and, therefore, not subject to review as the claims are postured here. See [Farmers Insurance Exchange v. District Court, 862 P.2d 944 \(Colo. 1993\)](#) (speculative inquiries inappropriate in declaratory judgment actions).

Similarly, we will not address plaintiffs' contention that Resolution 294 violates the Commerce Clause because this argument is brought for the first time on appeal. See [In re Estate of Stevenson v. Hollywood Bar & Cafe, Inc., 832 P.2d 718 \(Colo. 1992\)](#).

Accordingly, the judgment of the trial court is affirmed.

JUDGE BRIGGS and JUDGE TAUBMAN concur.

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End of Document

## In re Disposable Contact Lens Antitrust Litig.

United States District Court for the Middle District of Florida, Jacksonville Division

September 5, 1996, Decided ; September 5, 1996, FILED

MDL Docket No. 1030 ALL CASES

### **Reporter**

170 F.R.D. 524 \*; 1996 U.S. Dist. LEXIS 20760 \*\*; 1997-1 Trade Cas. (CCH) P71,811

IN RE: DISPOSABLE CONTACT LENS ANTITRUST LITIGATION

**Disposition:** [\*\*1] Defendants' Motion to Dismiss Class Plaintiffs' Consolidated Complaint for Failure to State a Claim (Doc. No. 28) DENIED; Plaintiffs' Motion for Class Certification (Doc. No. 32) GRANTED.

## **Core Terms**

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contact lens, class action, conspiracy, class member, Defendants', replacement, class certification, predominate, practitioners, antitrust, lenses, prices, memorandum, certification, manufacturers, purchasers, question of law, certify, Reply, prerequisites, questions, alleged conspiracy, motion to dismiss, common issue, generalized, channels, parties

## **LexisNexis® Headnotes**

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Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

### **HN1[] Parties, Joinder of Parties**

See [Fed. R. Civ. P. 23](#).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Class Members > Named Members

### **HN2[] Class Actions, Prerequisites for Class Action**

In order to maintain a suit as a class action, plaintiffs must show that the four prerequisites of [Fed. R. Civ. P. 23\(a\)](#) have been met and that one of the provisions of Fed. R. Civ. P 23(b) applies. A court must further find that the class representative is a member of the class and that the class has been precisely defined.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN3** Class Actions, Certification of Classes

Persons seeking to certify their suit as a class action bear the burden of establishing the specific prerequisites of [Fed. R. Civ. P. 23](#).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Class Members > Named Members

### **HN4** Class Actions, Prerequisites for Class Action

In determining whether named plaintiffs have met their burden, a court's inquiry is limited to whether the requirements of [Fed. R. Civ. P. 23](#) have been satisfied. However, a court may look beyond the pleadings in determining whether a motion for class certification should be granted.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

### **HN5** Parties, Joinder of Parties

The first prong of [Fed. R. Civ. P. 23\(a\)](#) mandates that the class be so numerous that joinder of all members is impracticable. In order to satisfy this requirement, the plaintiffs generally must proffer some evidence or reasonable estimate of the number of members comprising the purported class.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN6** Class Actions, Class Members

The second factor under [Fed. R. Civ. P. 23\(a\)](#) requires that there be questions of law or fact common to the class. This provision does not require a complete identity of legal claims. Rather the requirement is usually satisfied if all class members are in a "substantially identical factual situation" and the questions of law raised by the plaintiff are applicable to each class member. Commonality is satisfied when there is at least one issue whose resolution will affect all or a significant number of the putative class members.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [HN7](#) Antitrust & Trade Law, Clayton Act

While it is not proper to reach the merits of a claim when determining class certification in making its predominance determination, a court must determine whether plaintiffs have made a threshold showing that the proof they intend to offer at trial of the alleged conspiracy will be sufficiently generalized in nature to warrant certification of the class.

[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](#)

## [HN8](#) Clayton Act, Claims

To recover treble damages under § 4 of the Clayton Act, [15 U.S.C.S. § 12 et seq.](#), plaintiffs must prove: (1) that defendants violated the antitrust laws; (2) that the alleged violations caused plaintiffs to suffer some injury to their "business or property;" and (3) that the extent of this injury can be quantified with requisite precision.

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Evidence > Inferences & Presumptions > General Overview](#)

## [HN9](#) Antitrust & Trade Law, Clayton Act

In an antitrust action, proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred; however, the evidence must give rise to more than speculation.

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Civil Procedure > Special Proceedings > Class Actions > Certification of Classes](#)

[Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview](#)

## [HN10](#) Antitrust & Trade Law, Clayton Act

The impact element of an antitrust cause of action is the key to class determination.

[Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview](#)

## [HN11](#) Class Actions, Prerequisites for Class Action

The typicality factor requires that the claims of the representative parties be typical of the class claims. The requirement of typicality is satisfied where the interests of the named parties arise from the same course of conduct

that gave rise to the claims of the class they seek to represent, and are based on the same legal or remedial theory. Typicality will not be destroyed by factual variations.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Parties > Real Party in Interest > Required Representation

## [HN12](#) [blue document icon] **Class Actions, Prerequisites for Class Action**

The adequacy requirement actually consists of two inquiries. First, the representative must not possess interests that are antagonistic to the interests of the class. Second, plaintiffs must be represented by counsel of sufficient diligence and competence to fully litigate the claim.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [HN13](#) [blue document icon] **Prerequisites for Class Action, Predominance**

In order to determine whether questions of law and fact common to the class predominate, it is necessary to examine the nature of the proof required at trial.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

## [HN14](#) [blue document icon] **Class Actions, Prerequisites for Class Action**

The determination of whether a class action is superior to individual actions is discretionary and is primarily determined by considering whether the class action is superior to, and not just as good as, other available methods of handling the controversy.

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For JOHN MORRIS, on behalf of himself and all others similarly situated, plaintiff: Steve W. Berman (See above), George W. Sampson (See above), Dennis Stewart (See above).

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**Judges:** HARVEY E. SCHLESINGER, United States District Judge

**Opinion by:** HARVEY E. SCHLESINGER

## **Opinion**

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### **[\*526] ORDER**

Before the Court is Defendants' Motion to Dismiss Class Plaintiffs' Consolidated Complaint for Failure to State a Claim (Doc. No. 28) and supporting memorandum (Doc. No. 29), to which Plaintiffs filed a response (Doc. [\*527]

No. 35), and Defendants were granted leave to refile a reply to Plaintiffs' response (Doc. No. 43). Defendants' Motion for Leave to File Supplemental Motion to Dismiss Plaintiffs' Complaint (Doc. No. 97), which Plaintiffs oppose (Doc. No. 100), is **DENIED**, as the Court can decide Defendants' motion on the record before it.

Also before the Court is Plaintiffs' Motion for Class Certification (Motion)(Doc. No. 32) and supporting memorandum (Memorandum) (Doc. No. 33), to which Defendants filed a memorandum in opposition (Response)(Doc. No. 39) and Plaintiffs filed a reply memorandum (Reply)(Doc. No. 44). The Court held a hearing on both motions, including hearing extensive testimony **[\*\*2]** from both parties' experts on the motion for class certification. See Transcript of Hearing on Motions, Doc. Nos. 57-58.

## **BACKGROUND**

Plaintiffs filed their Consolidated Complaint (Complaint) alleging that Defendants Johnson & Johnson Vision Products, Inc. (Vistakon), Bausch & Lomb, Inc. (B&L) and CIBA Vision Corporation (CIBA), the largest manufacturers of contact lenses in the United States, have unlawfully conspired among themselves and with two trade organizations <sup>1</sup> **[\*\*3]** for eye care practitioners (ECPs), to restrict the supply of replacement contact lenses <sup>2</sup> to alternative channels of distribution. <sup>3</sup> Plaintiffs are contact lens wearers from across the country who have purchased replacement lenses from ECPs at "supracompetitive" prices, who have marked-up prices on replacement lenses as much as 100%. Complaint at P 1; Memorandum at 2.

## **MOTION TO DISMISS**

Defendants move for dismissal on the grounds that Plaintiffs' theory of injury does not provide them antitrust standing under the principles of 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). After reviewing the papers submitted and the relevant law, the Court finds that Defendants' motion to dismiss (Doc. No. 28) is due to be and is **DENIED**. The Court has carefully considered the arguments propounded by Defendants in the related cases in this action, and has determined that Plaintiffs are not barred from bringing this action. See Doc. No. 57 in Case No. 94-1215-Civ-J-20 **[\*\*4]** and Doc. No. 79 in Case No. 94-619-Civ-J-20. Accordingly, the Court will consider Plaintiffs' motion to certify this case as a class action under Fed. R. Civ. P. 23(b) (3).

## **MOTION FOR CLASS CERTIFICATION**

Plaintiffs seek to certify a putative class of replacement contact lens purchasers, defined as follows:

All purchasers of Vistakon, B&L and CIBA replacement contact lenses from eye care practitioners during the period 1988 to the present, excluding consumers in Florida represented by the Florida Attorney General in State of Florida v. Johnson & Johnson Vision Products, et al., Case No. 94-619-Civ-J-20.

Motion at [unnumbered] 1. Plaintiffs request that this action proceed as a class action, pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure.

<sup>1</sup> The two trade organizations are the American Optometric Association (AOA) and the Contact Lens and Anterior Segment Society, Inc. (CLASS). See Complaint at PP 1, 37(d). Only the AOA was made a party to this action, as CLASS filed a suggestion of bankruptcy shortly after this action was filed. Complaint at P 20; Memorandum at n.2.

<sup>2</sup> The lenses that are the subject of this lawsuit are disposable contact lenses which are designed to be worn for a short period of time, ordinarily one to two weeks, and then thrown away and replaced with an identical fresh pair of lenses. Disposable lenses are usually sold in multipaks of six pairs of lenses. Complaint at P 4; Memorandum at 3.

<sup>3</sup> Pharmacies and mail order businesses.

Rule 23, Fed.R.Civ.P., sets forth the requirements for certifying and maintaining a class action. The rule provides, in pertinent part:

**HN1**[<sup>1</sup>] (a) Prerequisites to a Class Action. One or more members of a class may sue ... as representative parties on behalf of all only if (1) the class is so numerous that [\*528] joinder of all members is impracticable, (2) there are questions of law or fact [\*5] common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior over any other available method for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(a), (b)(3). Thus, **HN2**[<sup>1</sup>] "in [\*6] order to maintain a suit as a class action, plaintiffs must show that the four prerequisites of Rule 23(a) have been met and that one of the provisions of Rule 23(b) applies." In re Amerifirst Securities Litigation, 139 F.R.D. 423, 427 (S.D.Fla. 1991) (citing Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 721 n.2 (11th Cir. 1987), cert. denied, 485 U.S. 959, 108 S. Ct. 1220, 99 L. Ed. 2d 421 (1988)). The Court must further find that the class representative is a member of the class and that the class has been precisely defined. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 52 L. Ed. 2d 453, 97 S. Ct. 1891 (1977).

**HN3**[<sup>1</sup>] Those seeking to certify their suit as a class action bear the burden of establishing the specific prerequisites of Rule 23. Gilchrist v. Bolger, 733 F.2d 1551, 1556 (11th Cir. 1984). In this sense, "[a] Court can only certify a class 'after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" Kaser v. Swann, 141 F.R.D. 337, 339 (M.D.Fla. 1991) (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)). In In re Amerifirst, the court set forth the inquiry as follows: [\*7]

**HN4**[<sup>1</sup>] in determining whether the named plaintiffs have met their burden, the court's inquiry is limited to whether the requirements of Rule 23 have been satisfied; therefore, the court shall not consider the merits of the plaintiff's claims. Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 2152, 40 L. Ed. 2d 732, 748 (1974); Kirkpatrick, 827 F.2d at 722; Love v. Turlington, 733 F.2d 1562, 1564 (11th Cir. 1984). However, this principle should not be invoked so rigidly so as to artificially limit a trial court's examination of the factors necessary to make a reasoned determination of whether Rule 23 has been satisfied. Love v. Turlington, 733 F.2d at 1564. Accordingly, a court may look beyond the pleadings in determining whether a motion for class certification should be granted. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740, 752 (1982); Kirkpatrick, 827 F.2d at 722.

In re Amerifirst, 139 F.R.D. at 427.

Finally, the Local Rules of the Middle District of Florida set forth other distinct requirements. Local Rule 4.04(a) mandates that the Complaint contain "detailed allegations [\*8] of fact showing the existence of the several prerequisites to a class action as enumerated in Rule 23(a) and (b), Fed. R. Civ. P." Additionally, Rule 4.04(b) provides, in pertinent part, that "if a determination is sought that the action be maintained under Rule 23(b)(3), the motion shall also suggest the means of providing, and defraying the cost of, the notice required by Rule 23(c)(2), Fed. R. Civ. P."

## A. Rule 23(a) Requirements

### 1. Numerosity

**HN5** The first prong of Rule 23(a) mandates that the class be so numerous that joinder of all members is impracticable. In [\*529] order to satisfy this requirement, the plaintiffs generally must proffer some evidence or reasonable estimate of the number of members comprising the purported class. Zeidman v. J. Ray McDermott & Co., Inc., 651 F.2d 1030, 1038 (5th Cir. 1981).<sup>4</sup> The Court finds that Plaintiffs have satisfied their burden with respect to this requirement.

[\*\*9] Numerosity does not appear to be an issue in this case. Plaintiffs allege the class includes millions of soft contact lens wearers located throughout the United States. Based on a total market size of approximately twenty million wearers of soft contact lenses in the country, and that ECPs enjoy a 90% or greater share of the replacement lens market, Plaintiffs estimate the class to consist of between 15,000,000 and 18,000,000 members. Memorandum at 7 and Exhibit B; Complaint at P 36. Joinder of all class members clearly would be impracticable. See e.g., In re Domestic Air Transportation Antitrust Litigation, 137 F.R.D. 677 (N.D. Ga. 1991)(certifying class of approximately 12.5 million airline ticket purchasers). Defendant does not contend that Plaintiffs have not met the numerosity requirement.

### 2. Common Questions of Law or Fact and the Predominance of these Questions Over Individual Questions

**HN6** The second factor under 23(a) requires that there be questions of law or fact common to the class. This provision does not require a complete identity of legal claims. Johnson v. American Credit Co. of Georgia, 581 F.2d 526, 532 (5th Cir. 1978). "Rather the requirement is usually [\*\*10] satisfied if all class members are in a 'substantially identical factual situation' and the 'questions of law raised by the plaintiff are applicable to each class member.'" In re Amerifirst, 139 F.R.D. at 428 (quoting, Weiss v. York Hospital, 745 F.2d 786, 809 (3rd Cir. 1984), cert. denied, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985)). Commonality is satisfied when there is "at least one issue whose resolution will affect all or a significant number of the putative class members." Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982).

The Court will consider the Rule 23(a)(2)(commonality) and Rule 23(b)(3)(predominance) requirements together in this opinion, because the question of whether there are common issues is closely related to the question of whether these common issues predominate. See Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669, 674 (N.D.Ill. 1989).

Plaintiffs contend the following questions of law and fact are common to the class:

- (1) Whether Defendants violated Section 1 of the Sherman Act;
- (2) The existence, duration, and illegality of the alleged combination, contract, and/or conspiracy;
- (3) Whether Defendants [\*\*11] are or were members of, or participants in, the alleged combination, contract, and/or conspiracy;
- (4) The fact of injury, including the impact and extent of injury sustained by class members; and
- (5) Whether class members are entitled to injunctive relief.

Memorandum at 8. Plaintiffs contend that because every class members purchased Vistakon, B&L or CIBA replacement lenses from an eye care practitioner, who Plaintiffs contend are the "intended beneficiaries of the contract to eliminate competition so as to keep prices high," each class member can prove the antitrust violation with evidence of the same conspiracy. Thus, the argument goes, common issues of law and fact exist. Id. at 8-9.

<sup>4</sup> All cases decided by the former Fifth Circuit Court of Appeals prior to the close of business on September 30, 1981, are binding on the Eleventh Circuit and on all district courts within the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Defendants do not contend that common questions of law and fact are not presented in this case. Rather, Defendants focus the gist of their argument on the predominance requirement, contending that the "unique facts" establish that common questions do not predominate over individual questions with respect to any of essential elements of Plaintiffs' antitrust action, but, in particular, the impact requirement. Response at 8. [\*530] Defendants cite the Court to two recent state court decisions<sup>5</sup> [\*512] in which the courts denied class certification to putative classes of contact lens consumers.

In Harbin, plaintiffs alleged that Vistakon and B&L, two of the defendants in this case, conspired with the AOA to preclude the distribution of defendants' contact lenses through alternative suppliers, in violation of state antitrust law. Plaintiffs sought to certify a class of contact lens purchasers of defendants' lenses during a specified period. The Alabama court held a one-day evidentiary hearing in which the two witnesses testified for the defendants. Without discussing its reasoning in any detail, the court found that plaintiffs did not meet the predominance requirement because:

individual questions of fact predominate over questions of fact common to members of the [\*513] alleged class, because, among other reasons, to establish the requisite fact of injury (or "impact") as well as measurement of damages, each and every purchaser of defendants' contact lenses have to be questioned to ascertain that he or she had (a) purchased contact lenses from an Alabamian ECP or retail optical chain, (b) during the applicable time, (3) in some certain amount, and (d) at a certain price.

Id. at 2-3. Lethbridge involved a similar action in California in which the court denied certification because "the liability issue of antitrust injury (impact), as well as the issue of damages cannot be established through common proof... [as] plaintiff [would] have to establish that all class members paid higher prices as a result of the conspiracy." Id. at 2. Since it determined that there are "many different chains of causation affecting individual pricing and purchasing decisions" which would require individualized inquiry, the Court found that class certification was inappropriate.

HN7 While it is not proper to reach the merits of a claim when determining class certification, Love, 733 F.2d at 1564, in making its predominance determination the Court [\*514] must determine whether Plaintiffs have made a threshold showing that the proof they intend to offer at trial of the alleged conspiracy will be sufficiently generalized in nature to warrant certification of the class. 137 F.R.D. at 685. The substantive law underlying Plaintiffs' claim for alleged antitrust violation is § 4 of the Clayton Act. HN8 To recover treble damages under this section, Plaintiffs must prove: "(1) that defendants violated the antitrust laws; (2) that the alleged violations caused plaintiffs to suffer some injury to their 'business or property'; and (3) that the extent of this injury can be quantified with requisite precision." Id. at 685 (citation omitted).

Defendants first assert that Plaintiffs' claim is a "vertical conspiracy" between the AOA and each Defendant which will necessarily require separate inquiry with respect to each manufacturer to determine whether the evidence as to that defendant establishes that its policy of not selling to alternative suppliers was the product of the alleged coercive activities of the AOA and CLASS rather than unilateral decision-making. Defendants cite the Court to cases alleging vertical conspiracies in which courts have [\*515] denied certification on the ground that proof of illegal conduct may not be accomplished by generalized means. See Response at n.13. Defendants also contend individual issues predominate concerning Plaintiffs' proof of antitrust injury or "impact" to class members. According to Defendants, Plaintiffs have failed to come forward with any viable theory employing generalized proof that "absent the alleged boycott, all eye care practitioners 'would have to have lowered their prices' to each and every absent class member." Response at 12 (emphasis in original).

Plaintiffs reply to Defendants' first argument that they are not alleging a series of separate, unrelated conspiracies, but a "plan of action" between the three manufacturers and the AOA and CLASS to eliminate alternative channels of distribution, a so-called "hub and spoke" conspiracy which involves only a discrete handful of defendants, unlike

<sup>5</sup> Harbin v. Johnson & Johnson Vision Products, Inc., Case No. CV94-002872 (Ala. Cir. Ct., Sept. 12, 1995) and Lethbridge v. Johnson & Johnson Vision Products, Inc., et al., Case No. BC113271 (Cal. Super. Ct., June 26, 1996).

in the cases cited by Defendants. Reply at [\*531] 4-8. Further, Plaintiffs respond Defendants have misstated the impact element of their claim, which Plaintiffs contend is "conceptually simple:" that "Defendants' conspiracy to eliminate competition to eye care practitioners maintained [\*\*16] artificially inflated prices for replacement contact lenses nationwide." Reply at [unnumbered] 1-2. According to Plaintiffs, the conspiracy (1) eliminated competition to eye care practitioners from alternative channels of distribution, (2) deprived consumers of alternative sources for their purchases of replacement lenses, and (3) insulated eye care practitioners from having to price replacement lenses competitively. Plaintiffs contend that "whether eye care practitioners, having benefited for years from the conspiracy, might now profess that they would not have lowered their prices if faced with competition is irrelevant to the legitimate question with respect to impact -- whether the price that each class member actually paid was supracompetitive." Reply at 3 (emphasis in original).

The Court rejects both of Defendants' arguments. As to the first, that this is a vertical conspiracy which is not susceptible to common proof, the Court is satisfied that Plaintiffs have made a threshold showing that the proof they intend to offer at trial of the alleged conspiracy will be sufficiently generalized in nature to warrant certification of the class. In this case, the alleged conspiracy [\*\*17] involves parallel agreements reached between the leading trade associations and the three largest contact lens manufacturers. Plaintiffs have produced evidence from which a reasonable juror could infer there was agreement to limit the supply of replacement lenses. [HN9](#) [ ] "Proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred. . . . however the evidence must give rise to more than speculation." [Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1013 \(3rd Cir. 1994\)](#)(noting that "a particularly detailed memorandum of a telephone call can give rise to a reasonable inference of agreement"), cert. denied, 131 L. Ed. 2d 556, 115 S. Ct. 1691 (1995). Again, the Court need not determine at this juncture whether Plaintiffs ultimately will prevail on the *merits* of their claims; that is for the jury to decide.

Likewise, Defendants' argument that Plaintiffs cannot prove impact using generalized proof is without merit.<sup>6</sup> The Court agrees that [HN10](#) [ ] the impact element of an antitrust cause of action is the key to class determination [Alabama v. Blue Bird Body Co., 573 F.2d 309, 320 \(5th Cir. 1978\)](#). In [Blue Bird](#), [\*\*18] the Fifth Circuit reversed the trial court's national certification of a class of government entities alleging a conspiracy among school bus body manufacturers and distributors. The defendants had argued that because school buses were unique products made to customer specifications and *sold through various pricing procedures*, plaintiffs could not present common proof of a nationwide conspiracy. In making its ruling, however, the court did not deny certification because the industry was fragmented and heterogeneous, as defendants argued. Rather, the court found that plaintiffs had failed to show *what type of proof was available* on their claims; therefore, it was unable to make a determination. [573 F.2d at 322-23](#). In this case, Plaintiffs have come forward with a considerable amount of evidence<sup>7</sup> concerning the alleged antitrust violation. The Court finds that Plaintiffs have demonstrated at least a "colorable method" of proving impact at trial. See generally 7B C. Wright, A. Miller, & M. Kane, [Federal Practice and Procedure](#) § 1781 (1986); Solow Declaration; Solow testimony, Doc. No. 58. That Defendants' expert disagrees with the methodology and conclusions propounded [\*\*19] by Dr. Solow is not reason to deny class certification. Whether or not plaintiffs will be successful in persuading the jury that there has been a common impact remains to be seen. For purposes of this motion, however, the Court finds Plaintiffs' allegations and the methodology they will advance to prove their claims [\*532] are sufficient to satisfy [Rule 23](#). See also [In re Domestic Air Transportation](#), 137 F.R.D. at 687-88 (finding that for purposes of class certification, air passenger service is a standardized product, in spite of the many pricing alternatives offered by defendants, as there is an order in those pricing alternatives). Accordingly, the Court concludes that the commonality requirement is met, and that common issues predominate over individual issues.

#### [\*\*20] 3. Typicality

<sup>6</sup>The cases cited by Defendants, [Harbin](#) and [Lethbridge](#), are not controlling, nor are they helpful to the determination in this case. Neither case provides sufficient detail of the particular facts of that case and the evidence presented for the Court to apply their reasoning to the facts of this case.

<sup>7</sup> Some of which has been submitted under seal.

The test for typicality, like commonality, is not demanding. [\*Shipes v. Trinity Industries, 987 F.2d 311, 316\*](#) (5th Cir.), cert. denied, 510 U.S. 991, 114 S. Ct. 548, 126 L. Ed. 2d 450 (1993). [HN11](#)[] The typicality factor requires that the claims of the representative parties be typical of the class claims. "The Eleventh Circuit has held that the requirement of typicality is satisfied where the interests of the named parties arise from the same course of conduct that gave rise to the claims of the class they seek to represent, and are based on the same legal or remedial theory; furthermore, typicality will not be destroyed by factual variations." [\*Tapken v. Brown\*, \(1992 Transfer Binder\) Fed. Sec. L. Rep. \(CCH\) P 96,805 at 93,175 \(S.D.Fla. 1992\)\(citing, \*Kornberg v. Carnival Cruise Lines, Inc.\*, 741 F.2d 1332, 1337 \(11th Cir. 1984\), cert. denied, 470 U.S. 1004, 84 L. Ed. 2d 379, 105 S. Ct. 1357 \(1985\)\). See also \*Appleyard v. Wallace\*, 754 F.2d 955, 958 \(11th Cir. 1985\)\(stating that "a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences"\).](#)

In the case at hand, all class members' claims arise [\*\*21] from the same alleged practices of Defendants which gave rise to the named Plaintiffs' claims: that Defendants' conspiracy to restrict channels of distribution of lenses resulted in each plaintiff paying supra-competitive prices for their replacement lenses. Furthermore, the same legal theory is advanced on behalf of each proposed class. Accordingly; the Court finds that the low threshold requirement of typicality is easily met in this case.

#### 4. Adequacy

[HN12](#)[] The adequacy requirement actually consists of two inquiries. First, the representative must not possess interests which are antagonistic to the interests of the class. [\*Kirkpatrick, 827 F.2d at 726\*](#). Second, Plaintiffs must be represented by counsel of sufficient diligence and competence to fully litigate the claim. *Id.* The Court finds that the adequacy requirement is met in this case. Plaintiffs and the class members for whom they would represent have sufficient identity of claims that Plaintiffs' interests would not be antagonistic to the interests of the class. The Class Plaintiffs each have purchased replacement contact lenses from an eye care practitioner which were manufactured by one of the three Defendant manufacturers. [\*\*22] Each allege they were overcharged for those lenses resulting from the conspiracy to restrict the channels of distribution. It is of no moment that one Plaintiff purchased her lenses from CIBA, and another from Johnson & Johnson. Each named Plaintiff has a common interest in representing all class members, as the alleged conspiracy involves a nationwide plan to elimination competition to ECPs between all three manufacturers and the trade association that represents eye care practitioners. Moreover, Plaintiffs are represented by counsel who appear to be experienced and competent to litigate a complex antitrust class action.

### B. Requirements of [\*Rule 23\(b\)\(3\)\*](#)

#### 1. Predominance of Common Issues

Plaintiffs seek certification under 23(b)(3). [HN13](#)[] In order to determine whether questions of law and fact common to the class predominate, it is necessary to examine the nature of the proof required at trial. [\*White v. Deltona Corp., 66 F.R.D. 560, 562 \(S.D.Fla. 1975\)\*](#). As discussed, Plaintiffs have met this requirement.

#### 2. Superiority

[HN14](#)[] The determination of whether a class action is superior to individual actions is discretionary and is primarily determined by considering "whether [\*\*23] the class action is superior to, and not just as good as, other available [<sup>\*</sup>533] methods of handling the controversy." [\*Coleman v. Cannon Oil Co., 141 F.R.D. 516, 529\*](#) (M.D.Ala. 1992)(citing [\*Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668 \(9th Cir. 1975\)\*](#)). The Court finds that in cases such as this one, in which there exist a large number of small or medium-sized claims against Defendants which would make individual litigation economically infeasible, a class action is a superior method of litigation. See, e.g., In [\*Re Folding Carton Antitrust Litigation, 75 F.R.D. 727, 732 \(N.D.Ill. 1977\); Brady v. LAC, Inc., 72 F.R.D. 22, 28 \(S.D.N.Y. 1976\)\*](#).

As the Court concludes that all the requirements for class certification have been met, certification under 23(b)(3) is appropriate.

Finally, the Court has received correspondence concerning potential settlement by one of the Defendants in this case, and concerns on the part of another Defendant that such information would lead the Court to consider the potential settlement when ruling on Plaintiffs' motion for class certification. The Clerk is directed to docket the two letters so that they remain part of the record.

In reaching **[\*\*24]** its decision, the Court was in no way influenced one way or the other by the fact there may be a potential settlement between Plaintiffs and one of the Defendants only if a class is certified. As outlined herein, the Court independently has determined this case meets the requirements for class certification.

## **CONCLUSION**

Accordingly, it is **ORDERED AND ADJUDGED**:

- (1) Defendants' Motion to Dismiss Class Plaintiffs' Consolidated Complaint for Failure to State a Claim (Doc. No. 28) is **DENIED**;
- (2) Plaintiffs' Motion for Class Certification (Doc. No. 32) is **GRANTED**; in that

A class is certified, pursuant to [Rule 23\(b\)\(3\)](#), defined as follows:

All purchasers of Vistakon, B&L and CIBA replacement contact lenses from eye care practitioners during the period 1988 to the present, excluding consumers in Florida represented by the Florida Attorney General in [State of Florida v. Johnson & Johnson Vision Products, et al.](#), Case No. 94-619-Civ-J-20; and

- (3) The Clerk is directed to docket the correspondence received from Defendants CIBA and Johnson & Johnson.

DONE AND ENTERED at Jacksonville, Florida, this 5th day September, 1996.

HARVEY **[\*\*25]** E. SCHLESINGER

United States District Judge

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End of Document

## Wilson v. Mobil Oil Corp.

United States District Court for the Eastern District of Louisiana

September 9, 1996, Decided ; September 9, 1996, FILED; September 10, 1996, ENTERED

CIVIL ACTION NO. 95-4174 SECTION "R"

**Reporter**

940 F. Supp. 944 \*; 1996 U.S. Dist. LEXIS 13339 \*\*; 1996-2 Trade Cas. (CCH) P71,610

WES WILSON, ET AL. VERSUS MOBIL OIL CORP., ET AL.

**Disposition:** **[\*\*1]** Defendants' motion to dismiss plaintiffs' tying claims under the Sherman Act and the Louisiana antitrust laws denied. Motion granted as to plaintiffs' claims for per se illegal pricefixing, tying under Section 3 of the Clayton Act, violations of Section 5 of the Federal Trade Commission Act and fraud. Fraud claim against the SpeeDee defendants dismissed without prejudice.

## Core Terms

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franchise, prices, products, franchisees, costs, tied product, market power, franchise agreement, switching, plaintiffs', supplier, tying arrangement, tie-in, plaintiff's claim, aftermarket, allegations, lubricant, market share, defendants', lifecycle, financial services, Sherman Act, price-fixing, Oil, tying product, consumers, fail to state a claim, per se rule, disclosure, franchisor

## LexisNexis® Headnotes

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

### [HN1](#) [down arrow] Motions to Dismiss, Failure to State Claim

A federal court must deny a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#) unless the complaint fails to state any set of facts upon which relief could be granted. All well-pleaded facts in the complaint are accepted as true and viewed in the light most favorable to the plaintiff. In deciding a motion to dismiss, the court's inquiry is limited to the facts stated in the complaint and documents either attached to or incorporated into the complaint. The court treats a defendant's [Fed. R. Civ. P. 9\(b\)](#) motion to dismiss for failure to plead fraud with particularity under the same standard as the [Rule 12\(b\)\(6\)](#) motion.

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

### [HN2](#) [down arrow] Price Fixing & Restraints of Trade, Tying Arrangements

A tying arrangement is an agreement by a party to sell one product but only on condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. An agreement requiring the buyer to purchase the tied product from some third party can also amount to a tying arrangement, if the tying seller receives some economic benefit or has some economic interest in the third party's sales of the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

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 > Scope > General Overview

Trademark Law > Conveyances > General Overview

Trademark Law > ... > Licenses > Licensable Subject Matter > Tying Arrangements

### **HN3** **Tying Arrangements, Clayton Act**

Not every tying arrangement is illegal. A tying 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 the arrangement affects a substantial volume of commerce in the tied product market. Under Fifth Circuit authority, plaintiffs may establish that a tying arrangement is illegal per se under the antitrust laws by demonstrating that the defendant had sufficient control over the tying market to have a likely anticompetitive affect on the tied product market. Alternatively, plaintiff may prevail by establishing that the arrangement is invalid under the rule of reason, under which plaintiff must allege an actual adverse effect on competition in the tied product market.

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

### **HN4** **Price Fixing & Restraints of Trade, Tying Arrangements**

Invocation of the per se rule requires significant market power in the tying market. Market power is generally measured by market share, but it can be demonstrated by direct evidence that defendants raised prices and drove out competition in the tied product market. When market share is offered as the measure of market power, some courts have used 30 percent as a benchmark below which market share is insufficient to establish sufficient market power to invoke the per se rule.

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

## [\*\*HN5\*\*](#) Price Fixing & Restraints of Trade, Tying Arrangements

To state a claim under the rule of reason, the plaintiffs must allege that the tying arrangement had an actual adverse affect on competition in the tied product market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

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

Antitrust & Trade Law > Clayton Act > General Overview

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

## [\*\*HN6\*\*](#) Tying Arrangements, Clayton Act

Section 3 of the Clayton Act, [15 U.S.C.S. § 14](#), requires both the tying and tied products to be goods.

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

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

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

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

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

## [\*\*HN7\*\*](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The per se rule against price-fixing applies to agreements by horizontal competitors to fix prices and to vertical agreements to fix resale prices.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

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

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

## [\*\*HN8\*\*](#) Tying Arrangements, Clayton Act

Section 5 of the Federal Trade Commission Act, [15 U.S.C.S. § 45](#), does not provide a private right of action.

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

## [\*\*HN9\*\*](#) [down] **Private Actions, Standing**

Whether a duty exists is a question of law.

Governments > Fiduciaries

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## [\*\*HN10\*\*](#) [down] **Governments, Fiduciaries**

Absent a duty to disclose, silence with respect to the details of a business transaction does not constitute fraud. A duty to disclose does not arise absent special circumstances, such as a fiduciary or confidential relationship between the parties.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## [\*\*HN11\*\*](#) [down] **Pleadings, Heightened Pleading Requirements**

*Federal R. Civ. P. 9(b)* requires allegations of the particulars of time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.

**Counsel:** For WES WILSON, plaintiff: James Frederick Willeford, James F. Willeford, Attorney at Law, New Orleans, LA.

For JIMMY L ELLIOT, plaintiff: James Frederick Willeford, (See above).

For JIMMY AND DAUGHTERS, INC., plaintiff: James Frederick Willeford, (See above).

For MILTON I RIZAN dba Tript Enterprises, Inc., plaintiff: James Frederick Willeford, (See above).

For AXTELL ENTERPRISES, INC., plaintiff: James Frederick Willeford, (See above).

For RICHARD AXTELL, plaintiff: James Frederick Willeford, (See above).

For JOHN SPENCER, and all others similarly situated, plaintiff: James Frederick Willeford, (See above).

For SUSAN SPENCER, plaintiff: James Frederick Willeford, (See above).

For JOHN W. SPENCER INTERESTS, INC., plaintiff: James Frederick Willeford, (See above).

For **[\*\*2]** GEORGE GERHART, plaintiff: James Frederick Willeford, (See above).

For SAGE SERVICES INC, plaintiff: James Frederick Willeford, (See above).

For TRIPT ENTERPRISES, INC., plaintiff: James Frederick Willeford, (See above).

For MOBIL OIL CORP, defendant: Charles Kirk Reasonover, Deutsch, Kerrigan & Stiles, New Orleans, LA. Andrew J. Kilcarr, Maureen O'Bryon, William L. Monts, III, Lowell R. Stern, Hogan & Hartson, Washington, DC.

For SPEEDEE OIL CHANGE SYSTEMS, INC., defendant: Steven W. Copley, Ernest Enrique Svenson, Gordon, Arata, et al, New Orleans, LA. Thomas E. O'Keefe, SpeeDee Oil Change & Tune-Up General Counsel, Madisonville, LA.

For G.C. & K.B. INVESTMENTS, INC., defendant: Steven W. Copley, (See above). Ernest Enrique Svenson, (See above). Thomas E. O'Keefe, (See above).

**Judges:** SARAH S. VANCE, UNITED STATES DISTRICT JUDGE

**Opinion by:** SARAH S. VANCE

## Opinion

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### **[\*946] ORDER AND REASONS**

This matter is before the Court on the motions to dismiss of defendants, Mobil Oil Corporation ("Mobil"), SpeeDee Oil Change Systems, Inc. ("SpeeDee"), and G.C. & K.B. Investments, Inc. (SpeeDee and G.C. & K.B. Investments, Inc. will be collectively referred to as the "SpeeDee defendants"). **[\*\*3]** The Court heard oral argument on the motions. For the reasons stated below, defendants' motions are granted in part and denied in part.

#### I. **BACKGROUND**

This is an action for violation of [Section 1](#) of the Sherman Act <sup>1</sup>, Section 3 of the Clayton Act <sup>2</sup>, and Section 5 of the Federal Trade Commission Act <sup>3</sup> brought by nine current or former SpeeDee franchisees. <sup>4</sup> Plaintiffs also sue under the Louisiana antitrust laws <sup>5</sup> and for fraud under [Louisiana Civil Code article 1953](#). Plaintiffs alleged that defendants have **[\*947]** engaged in illegal tying by requiring that they purchase motor oil lubricant products, equipment and financial services from Mobil in order to become and remain SpeeDee franchisees. In addition, they claim that defendants have conspired illegally to fix the price of Mobil's products. Plaintiffs also claim that defendants defrauded them by failing to disclose the nature of the financial and other arrangements between them. Although plaintiffs argue in their brief that they have asserted a monopolization claim under [Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#), there are no such allegations in their first amended and restated complaint, and therefore no such claim **[\*\*4]** has been stated.

The complaint in this action contains allegations that are at times vague, confusing and contradictory. Nevertheless, the Court will attempt to recount the factual background of this dispute as it relates to the pending motions.

The SpeeDee defendants sell business format franchises to operate quick car-care service outlets under SpeeDee trademarks and service marks. The outlets provide goods and services for oil change, tune-ups, transmission services, and other car-care needs. Compl. at PP 25-27, 30. Plaintiffs are present or former SpeeDee franchisees located in Louisiana, Mississippi, Texas and Alabama. Plaintiffs allege that SpeeDee ranks fourth **[\*\*5]** or fifth in the "national fast lube" market. *Id.* at PP 15, 35.

Between 1987 and 1989, the SpeeDee defendants contracted with Castrol Oil Company to be the provider of lubricant products to the SpeeDee franchise system. *Id.* at P 37. SpeeDee allegedly had the right to require

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<sup>1</sup> [15 U.S.C. § 1](#).

<sup>2</sup> [15 U.S.C. § 14](#).

<sup>3</sup> [15 U.S.C. § 45](#).

<sup>4</sup> Wes Wilson; Jimmy L. Elliott; Jimmy and Daughters, Inc.; Milton Rizan, Jr.; Tript Enterprises, Inc.; Axel Enterprises, Inc.; John and Susan Spencer; John W. Spencer Interests, Inc.; George Gerhart; and Save Services, Inc.

<sup>5</sup> [La. Rev. Stat. Ann. § 51:122, et seq.](#).

franchisees to use only approved suppliers. *Id.* at P 38. The contract between SpeeDee and Castrol was terminated in 1989 when SpeeDee agreed that Mobil would become the exclusive lubricant supplier to all SpeeDee Oil Change & Tune-Up locations. In 1991, SpeeDee and Mobil entered into a 15-year agreement for Mobil to become the exclusive supplier of automotive products at all franchised units in exchange for \$ 650,000.00. *Id.* at P 39. Plaintiffs claim that the \$ 650,000.00 was never used for its intended purpose of assisting franchisees with advertising but was instead pocketed by SpeeDee's principals. *Id.* at PP 40-41, 44. Further, the 1991 agreement secured Mobil against breach by SpeeDee by providing for liquidated damages ranging from \$ 1.5 million to \$ 3.5 million, secured by the pledge of 40% of SpeeDee's stock. *Id.* at PP 42-43. Plaintiffs allege that the SpeeDee defendants received [\*\*6] the \$ 650,000.00 for tying the sale and continued operations of SpeeDee franchises to the exclusive use of Mobil's products. *Id.* at P 44. Plaintiffs allege that Mobil and SpeeDee formed an illegal joint venture in which Mobil provided financial backing in exchange for making the SpeeDee franchise network a captive market for its products. *Id.* at P 68.

It is clear from plaintiffs' complaint that they allege that the use of Mobil as an exclusive supplier was a condition precedent to being sold a franchise. Compl. at P 50. However, it is not clear from the complaint what information was disclosed about the arrangement with Mobil and at what stage of the dealings between the parties the information was provided. Plaintiffs clearly allege that they were not apprised of the extent of the financial arrangements between Mobil and SpeeDee, such as that SpeeDee would have to pay liquidated damages of up to \$ 3.75 million secured by the pledge of 40% of SpeeDee's stock if it allowed the franchisees to purchase elsewhere. Further, plaintiffs assert that "all of the franchisees' purchase agreements with Mobil constituted a hidden condition of their SpeeDee franchise agreement and a condition [\*\*7] of their continuing to do business as a SpeeDee franchisee." Compl. at P 51. On the other hand, plaintiffs allege that they had information about the Mobil supply arrangements at least by the time they signed their local franchise agreements because they were required to sign Mobil supply and equipment agreements at the same time as they signed the franchise agreement. *Id.* at P 50. They also allege that the requirements agreement was "integrated" into SpeeDee's offering circular, but, in their opposition brief, they state that this did not occur until 1991, and then the disclosure was misleading. *Id.*; Oppos. Memo. at 13. Plaintiffs also allege that neither SpeeDee's FTC disclosure statement, nor the [\*948] franchise agreement disclosed that franchisees were required to purchase Mobil's products under ten-or-fifteen year, "take-or-pay" supply contracts requiring the purchase of substantial volumes at undisclosed prices to be set by Mobil without negotiation. *Id.* at P 46. Plaintiffs claim that certain information about the Mobil arrangement was included in the SpeeDee operating manual, which they did not receive until after they signed the franchise agreement. *Id.* at P 46.

[\*\*8] Plaintiffs allege that defendants have refused to permit them to purchase automotive supplies and financial services from suppliers other than Mobil, which has resulted in their paying higher prices for these products than were available from other suppliers. *Id.* at PP 56, 60. Plaintiffs claim that breach of the Mobil agreement would also constitute a breach of the franchise agreement. Plaintiffs allege that defendants foreclosed competing suppliers from selling to the franchise network by threatening them with litigation if they sold their products to SpeeDee's franchisees. *Id.* at P 65. Plaintiffs further allege that Mobil's products are inferior because Mobil does little advertising, its products lack name recognition, and there are no Mobil stations in their areas. *Id.* at P 65. As a result, plaintiffs claim that they are at a competitive disadvantage by being forced to purchase the inferior products from Mobil when they would prefer to purchase superior products at better prices elsewhere. Plaintiffs claim to have suffered damages in the form of loss of their investments, good will, profits, and business reputation. *Id.* at P 80. They claim that there are no legitimate [\*\*9] business justifications for defendants' restrictive practices. *Id.* at P 75.

Plaintiffs define the relevant product market as the SpeeDee trademarks, trade names and copyrights, or alternatively the market for providing quick automotive oil change, goods and services. *Id.* at PP 9, 10. Although plaintiffs alleged that the relevant geographic market was local in their complaint, they have retracted this allegation in their opposition brief to assert that the geographic market is nationwide.

Plaintiffs allege that the tying product is SpeeDee's franchise and associated trade and service marks, while the tied products are Mobil lubricants and financial services. *Id.* at P 12. They allege that SpeeDee has significant market power in the tying product market. *Id.* at P 13. Plaintiffs allege that defendants exercise sufficient control over the

tying product market to have an anticompetitive effect on the tied product market for Mobil lubricant and financial services.

Plaintiffs also allege that defendants committed fraud by failing to disclose the details of the 15-year contract they signed in 1991 in which SpeeDee received \$ 650,000.00 in exchange for Mobil's becoming the [\*\*10] exclusive supplier to the SpeeDee franchise system.

Defendants now bring this motion to dismiss for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#) and for failure to allege fraud with particularity under [Fed. R. Civ. P. 9\(b\)](#).

## **II. DISCUSSION**

**HN1** A federal court must deny a motion to dismiss under [Rule 12\(b\)\(6\)](#) unless the complaint fails to state any set of facts upon which relief could be granted. [Conley v. Gibson, 355 U.S. 41, 45-47, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#). All well-pleaded facts in the complaint are accepted as true and viewed in the light most favorable to the plaintiff. [Truman v. United States, 26 F.3d 592, 594 \(5th Cir. 1994\)](#). In deciding a motion to dismiss, the court's inquiry is limited to the facts stated in the complaint and documents either attached to or incorporated into the complaint. <sup>6</sup> [Lovelace v. Software Spectrum, Inc., 78 F.3d 1015, 1017 \(5th Cir. 1996\)](#). The Court will treat defendants' [Rule 9\(b\)](#) motion to dismiss for failure to plead fraud with particularity under the same standard as the [Rule 12\(b\)\(6\)](#) motion. *Id.*

### **[\*\*11] [\*949] A. Tying Claims**

**HN2** A tying arrangement is "an agreement by a party to sell one product but only on condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." [Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 461, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#) (quoting [Northern Pacific R. Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#)). An agreement requiring the buyer to purchase the tied product from some third party can also amount to a tying arrangement, if the tying seller receives some economic benefit or has some economic interest in the third party's sales of the tied product. See [White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 104 \(4th Cir. 1987\)](#) (no tie-in because hospital had no economic interest in CT scan interpretation market); [Roberts v. Elaine Powers Figure Salons, Inc., 708 F.2d 1476 \(9th Cir. 1983\)](#) (favorable loans to franchisor from designated supplier created financial interest). But see [Gonzalez v. St. Margaret's House Housing Devel. Fund Corp., 880 F.2d 1514, 1518 \(2d Cir. 1989\)](#) (financial interest [\*\*12] in tied product not required because this requirement was never adopted by Supreme Court); [Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1579 n. 12 \(11th Cir. 1991\), cert. denied, 506 U.S. 903, 121 L. Ed. 2d 219, 113 S. Ct. 295 \(1992\)](#) (economic interest requirement only applied in and is most needed in franchise cases). Here, plaintiffs' allegations suffice to suggest that SpeeDee had an economic interest in Mobil's sales to the franchisees. Plaintiffs allege that defendants formed a joint venture under which Mobil was to provide financial backing for the development of the franchise system and that SpeeDee's obligations to Mobil, including that its franchisees continue to sell Mobil products exclusively, were secured by liquidated damages and 40% of its stock.

**HN3** Not every tying arrangement is illegal. A tying arrangement violates [Section 1](#) of the Sherman Act if the seller has "appreciable economic power" in the tying product market, and the arrangement affects a substantial volume of commerce in the tied product market. [Kodak, 504 U.S. at 462](#). Under Fifth Circuit authority, plaintiffs may establish that a tying arrangement is illegal per se under the antitrust laws by demonstrating that SpeeDee [\*\*13] had sufficient control over the tying market, here allegedly the SpeeDee trademarked franchise for fast lube businesses, to have a likely anticompetitive affect on the tied product market, the sale of lubricant products and

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<sup>6</sup> Therefore, the Court will not consider the offering circular that was attached to plaintiffs' opposition brief because it was neither attached to nor incorporated into the complaint. In addition, since none of the documents referred to as attached to the complaint were served on defendants, these documents will likewise not be considered in the Court's decision on this motion.

related equipment and services to the SpeeDee franchise network. See *Breaux Brothers Farms, Inc. v. Teche Sugar Co., Inc.*, 21 F.3d 83, 86 (5th Cir. 1994). Alternatively, plaintiff may prevail by establishing that the arrangement is invalid under the rule of reason, under which plaintiff must allege an actual adverse effect on competition in the tied product market. *Id. at 87*.

**HN4**Invocation of the per se rule requires "significant market power in the tying market." *Id.* Market power is generally measured by market share, but it can be demonstrated by direct evidence that defendants raised prices and drove out competition in the tied product market. See *id. at 87* & 87 n.3 (citing *Kodak*, 504 U.S. at 477) (reasonable to infer defendant has power to raise prices and drive out competition in aftermarket if plaintiffs provide evidence that defendants did so). When market share is offered as the measure of market power, some courts have used 30% as [\*\*14] a benchmark below which market share is insufficient to establish sufficient market power to invoke the per se rule. See, e.g., *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 (7th Cir. 1985), cert. denied, 475 U.S. 1129, 90 L. Ed. 2d 201, 106 S. Ct. 1659 (1986). This result is based on the Supreme Court's decision in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984), in which the Court found a 30% market share insufficient to warrant application of the per se rule to a challenged tying arrangement. *466 U.S. at 27*. The Fifth Circuit has not specifically endorsed a 30% safe harbor. See *Breaux Brothers*, 21 F.3d 83, 87 [\*950] (discussing but not expressly adopting 30% benchmark).

Defendants challenge plaintiffs' tying claim on the grounds that plaintiffs have failed to allege that the defendants have market power in the tying product market or that the arrangement creates the potential for anticompetitive harm in the tied product market. Defendants assert that a single-brand market power theory is inapplicable here and that, since plaintiffs [\*\*15] admit that SpeeDee is the fourth or fifth largest player in the national fast lube market, it cannot have more than a 25% market share, which is insufficient under *Jefferson Parish* to invoke the per se rule against tying.

In response, plaintiffs state that this case involves a conspiracy between a business format franchisor, who licenses a bundle of intellectual property rights to a business system, and a supplier to impose "aftermarket" ties on the franchise system for the purchase of 100% of their requirements for equipment, lubricants and financial services for a period of ten years. Plaintiffs claim that these tied products constitute a separate market from the franchise because they are sold separately by other oil companies. Plaintiffs claim that they have alleged that defendants actually exercised market power in the tied product market because they have alleged that Mobil's prices for the tied products are supracompetitive and that defendants have foreclosed access to the aftermarket to competitive suppliers based on coercion and not on competition on the merits. Plaintiffs claim that they had inadequate information to evaluate the Mobil arrangement and they are locked [\*\*16] into the tying product, the SpeeDee franchise, by virtue of high "switching costs" associated with a long-term franchise agreement, in which the franchisees have invested up to \$ 1 million, which is subject to a post-term covenant not to compete. Plaintiffs claim that their tie-in allegations pass muster under the United States Supreme Court's decision in *Eastman Kodak & Co. v. Image Technical Serv., Inc., supra*.

In *Kodak*, the United States Supreme Court affirmed a reversal of a summary judgment in favor of Kodak. Kodak had been sued for illegal tying and monopolization under the Sherman Act. Kodak manufactured and sold photocopiers and micrographic equipment. It also sold service and replacement parts for its equipment.

The Kodak plaintiffs were independent service organizations ("ISO's"), who had serviced Kodak equipment for lower prices than Kodak until Kodak adopted policies to limit the availability of parts to them and to make it more difficult for them to service Kodak's equipment. As a result, ISO's could not get Kodak parts from reliable sources and they were either forced out of business or lost substantial revenues. The ISO's introduced evidence that some customers [\*\*17] switched to Kodak's service even though they preferred the ISO's service, and that Kodak's prices were higher than the ISO's.

The Kodak plaintiffs alleged that Kodak tied the sale of service of its machines to the sale of its parts. Kodak had less than 25% of the market for the primary equipment, and it argued that, as a matter of law, its lack of market power in the primary equipment market precluded it from having market power in derivative parts and service

aftermarkets. Kodak claimed that even if it had a monopoly over the parts market, competition in the equipment market would prevent it from raising parts and service prices to supracompetitive levels because consumers would simply switch to other equipment with lower service costs.

The Supreme Court refused to adopt a substantive legal rule that equipment competition precluded a finding of market power in the derivative aftermarkets because defendants had produced no facts or data indicating that the proposed rule actually reflected market realities. Defendant's argument was based principally on economic theory. The Court exposed the factual assumptions underlying Kodak's proposed rule and found them wanting. First, if higher [\\*\\*18](#) service prices ineluctably led to a precipitous drop in equipment sales, then one would expect to see Kodak's sales drop when service prices rose. Yet, there was no evidence that Kodak lost equipment sales as a result of rising service prices.

[\[\\*951\]](#) The Court accepted the reasonableness of the ISO's proffered explanation for the lack of responsiveness of equipment demand to service and parts prices. It found that the existence of significant information and switching costs could "create a less responsive connection between service and equipment sales." [504 U.S. at 473](#). In order for consumers to take service and parts prices into account at the time of purchasing Kodak's equipment, they would need accurate information about the cost of the total package of equipment, parts and service, *i.e.*, accurate lifecycle prices. *Id.* In the case of complex durable equipment, the information needed to arrive at an accurate lifecycle price was substantial and it required sophisticated analysis. Further, the Court indicated that this information was difficult if not impossible to obtain at the time of purchase because service and parts prices and warranties, as well as the consumers' specific repair [\\*\\*19](#) needs could change over the life of the machine. Further, to the extent that sophisticated purchasers could figure out the unattractiveness of Kodak's parts and service prices, Kodak could buy them off with a better package deal, while still reaping the benefits of higher prices from the unsophisticated consumer. [Id. at 475](#). The Court indicated that given these possibilities it made little sense to assume without proof that consumers bought equipment based on an accurate assessment of the total cost of equipment, services and parts over the life of the machine.

The second factor that could undermine the relationship between primary equipment sales and service and parts prices was the costs to the current owners of switching to different products. [Id. at 476](#). If the costs of switching are high relative to the increase in service prices, customers who already owned Kodak equipment would tolerate some degree of supracompetitive pricing in the aftermarket for services. The Court found that there was evidence of such high switching costs, given the expense and uniqueness of Kodak's equipment, and that there was evidence that Kodak discriminated in package prices to various customers. [\\*\\*20](#) In sum, the Court found that evidence of information and switching costs created fact issues regarding Kodak's ability to exercise market power in the service and parts markets even though it competed in the primary equipment market.

Plaintiffs argue that *Kodak* applies in the franchise context and that SpeeDee's control over its trademarked franchise permitted it to force them to purchase unwanted, inferior and overpriced Mobil products over the life of the franchise. Plaintiffs argue that they were prevented or "locked-in" by high switching costs from abandoning their investment in the franchise because they would lose their significant capital investment (up to \$ 1.0 million in plant and equipment), they would face significant penalty payments to both Mobil and SpeeDee, and would be barred from the industry by virtue of a noncompetition covenant.

Defendants respond by making two basic arguments: (1) that *Kodak* does not apply to the franchisor/franchisee relationship; and (2) that plaintiffs were aware of the tying arrangement before entering the franchise agreement, so that they could have shopped around for another, comparable franchise.

Defendants rely on a recent district [\\*\\*21](#) court case, [Queen City Pizza, Inc. v. Domino's Pizza, Inc., 922 F. Supp. 1055 \(E.D. Pa. 1996\)](#), for the proposition that *Kodak* does not apply to the franchise context. In *Queen City*, plaintiffs were franchisees who by virtue of their franchise agreement with Domino's Pizza were required to purchase their pizza ingredients from the franchisor. [Id. at \\*1-2](#). The district court dismissed plaintiffs' illegal tying claim and rejected their attempt to invoke *Kodak*. It reasoned that *Kodak* did not apply because the service market in *Kodak* arose out of the unique nature of Kodak machines, not by virtue of a franchise agreement. [Id. at \\*7](#). This Court is not convinced that a principled distinction can be drawn as a matter of law between the franchise context

and the durable equipment market involved in *Kodak*. No facts have been adduced to indicate that a business format franchise cannot create a derivative aftermarket for the purchase and sale of products that must be used in the franchise [\*952] operation by the franchise network. Nor have facts been adduced that such an aftermarket could not be subject to the same economic dislocations that permitted market power [\*\*22] to be possible in *Kodak*. The *Kodak* court did not purport to base its market power analysis solely on the fact that *Kodak's* machines were unique, nor did it limit the application of its reasoning to durable equipment markets. If anything, *Kodak* cautions against making economic assumptions on a blank factual record. See [\*Kodak\*, 504 U.S. at 466-67.](#)

Indeed, it would appear that franchisees could face the same type of switching and information costs as the *Kodak* equipment owner because the size of the capital investment in a business format franchise may well outstrip the cost of investing in a *Kodak* copier, and the franchise agreement can involve a long-term arrangement in which the franchisee invests in brand development, which may make switching to another franchise costly. Moreover, franchisees may also have high information costs in obtaining an accurate lifecycle price of the franchise plus the tied items. This is particularly true if both the franchise and the supply arrangements are long-term, without full disclosure about current and future prices and requirements for the tied items, and the franchisee is unable to predict or assess his total product, equipment [\*\*23] and financing needs over the life of the franchise at the point of purchase. Further, the *Queen City* decision is contrary to much learned economic and legal commentary on the potential impact of the *Kodak* decision on franchise tie-in claims.<sup>7</sup> For all of these reasons, the Court declines to follow the *Queen City* decision.

[\*\*24] The Court is also mindful of the Fifth Circuit's recent decision in [\*United Farmers Agents Association, Inc. v. Farmers Insurance Exchange\*, 89 F.3d 233 \(5th Cir. 1996\)](#). There, the Court affirmed a summary judgment dismissing tying claims by insurance agents who asserted that five insurance companies had tied access to computerized policyholder information to the purchase of specially configured IBM computers. The Court found that the insurance companies lacked sufficient market power in any market to support an illegal tying claim. Although the Court stated that market power is not conferred simply by virtue of a franchise or contract relationship, it expressly addressed the issues of whether there was evidence of high information or switching costs to justify invocation of *Kodak*. Finding no such evidence, the Court affirmed summary judgment for the insurers. If anything, this decision suggests that when parties seek to invoke *Kodak*, issues of information costs and switching costs must be addressed before tying claims can be rejected out of hand.

Defendants' next argument is that even if *Kodak* applies to a franchise situation, the plaintiffs are unable to state a per [\*25] se tying claim because they were aware of the tying arrangement when they entered the franchise agreement. This is a far more serious obstacle to plaintiffs' claims. Defendants' thesis is that if plaintiffs were told of the tie-in before they were locked-in to the franchise, high information costs would not prevent them from shopping around for a better deal with another franchisor before they locked into the franchise. This would allow competition in the primary market for competing franchises to constrain the exercise of market power in the aftermarkets for lubricant products and financial services. See [\*Digital Equipment Corp. v. Uniq Digital Technologies, Inc.\*, 73 F.3d 756, 763 \(7th Cir. 1996\)](#) (reading *Kodak* to suggest that had [\*953] *Kodak* informed its customers about its policies prior to purchase, purchasers could have gotten competitive lifecycle prices); [\*Lee v. Life Ins. Co. of North America\*, 23 F.3d 14, 20](#) (*Kodak* means that if customers had been aware at the time they bought *Kodak's* equipment that *Kodak* would implement its restrictive parts policy, market power would only have been as significant as *Kodak's* market share in the copier market.).

<sup>7</sup> See, e.g., Janet L. McDavid, *Kodak Decision Revitalizes Tying Claims*, 12 Franch. L. J. 3, 6 (1992); Philip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, § 1709.2(c)(2) (Supp. 1995); Margaret E. Guerin-Calvert, *Assessing the Implications of Kodak for Franchise Market Power Issues, Assessing Market Power in the Post-Kodak World*, 1, 3-5 (ABA Section of *Antitrust Law* Spring Meeting, March 27, 1996); Andrew C. Selden, *Franchise Market Power in a Post-Kodak Universe, Assessing Market Power in the Post-Kodak World*, 10 (ABA Section of *Antitrust Law* Spring Meeting, March 27, 1996); Jonathan Solish, *Market Power in Per Se Franchise Tying Claims: Virtual Maintenance Decision Addresses "Locked-In" Buyers*, 13 Franch. L. J. 73 (1994); Arthur I. Cantor, *Tying, Exclusive Dealing, and Franchising Issues*, 890 PLI 869 (1995); George A. Hay, *Is the Glass Empty or Half Full?: Reflections on the Kodak Case*, 62 Antitrust L. J. 177, 185-88 (1993).

Defendants in essence [\*\*26] urge the Court to adopt a rule of law that if the tie-in is disclosed at the outset of the franchise relationship there can be no exercise of market power in the aftermarket for products used in the franchise if the franchisor does not have a sizable market share in the primary market. The Court agrees that availability of information about SpeeDee's policy is highly relevant to the existence of information and switching costs. See [United Farmers Agents Ass'n, 89 F.3d at 238](#) (agents who were hired after implementation of policy had virtually no information or switching costs because policy was disclosed, and there was no evidence that costs of electronic access could not be easily obtained). However, it is not at all clear on this record what was disclosed to these plaintiffs about the Mobil supply arrangements or when it was disclosed. Second, it is not self-evident to this Court that before-the-fact disclosure of the tie-in means in all cases that information costs are not so high as to preclude accurate lifecycle pricing. Although *Kodak* involved a situation in which some consumers were not aware of the tying arrangement until they were "locked in," the court's discussion [\*\*27] of information costs did not presume that consumers were already locked-in. Instead, the court examined the problems of acquiring accurate lifecycle prices for the package of equipment, parts and services at the point of purchase. It may well be that disclosure that a tie-in exists does not allow accurate lifecycle pricing of a long-term franchise agreement and the purchase of ten-years' worth of tied products, equipment and financial services. See generally Selden, *Franchise Market Power* at 19 (*Kodak* "suggests that a single brand after market tie-in may still be illegal, even if practice is disclosed at the time of sale of the franchise, and is imposed from the outset of the franchise relationship"); McDavid, *Kodak Decision Revitalizes* at 7 ("likely to be fact issues concerning the ability of buyer or franchisee to predict costs of being 'locked in' at the time of initial investment"). As noted, the complaint does not make clear what plaintiffs knew and did not know before they entered the franchise agreement about the Mobil tie-in. Reading their allegations in their favor, as the Court must do on a [Rule 12](#) motion, they assert that the scope of the tie-in was not fully [\*\*28] disclosed and that it was a "hidden condition" of the franchise agreement. They also allege that their ignorance of the financial relationships between Mobil and SpeeDee prevented them from understanding that SpeeDee would never approve alternative suppliers and would tolerate Mobil's overcharging them for tied products. It is also apparent from plaintiffs' brief, but not from the complaint, that some plaintiffs were franchisees prior to SpeeDee's alleged imposition of the Mobil supply arrangement, so that they could have substantial switching costs associated with losing their franchise investment if they chose to extricate themselves from the franchise instead of accepting the tie-in. Further, as was the case in *Kodak*, it appears from the complaint that, despite Mobil's supracompetitive prices, SpeeDee has not lost market share in the primary fast lube franchise market and may have increased it. Compl. at P 70 (with Mobil's assistance, SpeeDee attained market share just behind Pennzoil, Quaker State and Valvoline).

Plaintiffs allege that they were forced to purchase Mobil's products on a take-or-pay basis over a ten-year period at prices to be set by Mobil and to use Mobil's [\*\*29] financial services and equipment. These facts suggest that the lifecycle costs of the franchise and the tied products could be difficult to predict accurately at the point of purchasing the franchise. It could be difficult to assess what one's needs for Mobil's products and services would be over a ten-year period. Moreover, Mobil was not locked in to the prices it would charge over the life of the agreement so that future prices for the whole range of tied [\*954] products could not be assessed at the point of purchase.

In sum, absent a factual record as to the information that was available to each plaintiff at the time that he entered the franchise agreement, as well as a factual record that would permit a determination that available information was sufficient to permit accurate lifecycle pricing, the Court cannot as a matter of law find that plaintiffs have failed to allege a claim under *Kodak*. This is true because switching costs once the franchisee is locked-in to the franchise were allegedly substantial (loss of investment, penalties, liability to Mobil, enforcement of noncompetition covenant).

Defendants also claim that plaintiffs have failed to state a tie-in claim under the [\*\*30] Rule of Reason. [HN5↑](#) To state a claim under the Rule of Reason, the plaintiffs must allege that the tying arrangement had an "actual adverse affect on competition" in the tied product market. [Jefferson Parish, 466 U.S. at 31; Breaux Brothers, 21 F.3d at 87](#). Plaintiffs have alleged an anticompetitive effect on the tied product market in that they allege that other suppliers of lubricant products have been foreclosed from marketing their products to the SpeeDee franchise network by virtue of the coercive force of Mobil's exclusive supply arrangements. Plaintiffs also claim that Mobil's prices are supracompetitive, that its products are inferior, and they are unable to purchase the competitive products they desire by virtue of the tying arrangement. Accepting these allegations as true, they are sufficient to assert an

anticompetitive effect in the tied product market. See *Kodak, 504 U.S. at 465* (evidence of increased prices, excluded competition and unwanted purchases in tied service market would entitle plaintiffs to trial).

Finally, the Court agrees with defendants that plaintiffs have failed to state a claim for illegal tying under [HN6](#)<sup>↑</sup> Section 3 of the Clayton Act, [15 U.S.C. § 14](#). This section requires both the tying and tied products to be goods. *Crossland v. Canteen Corp., 711 F.2d 714, 718 n.1 (5th Cir. 1983)*. Here the tying product, a trademarked franchise, is not a commodity, and plaintiffs have therefore failed to state a claim under Section 3 of the Clayton Act.

## B. Price-Fixing

Defendants argue that plaintiffs have failed to state a claim for price fixing in violation of [Section 1](#) of the Sherman Act. Plaintiffs pled that Mobil's supply contracts with the franchisees give Mobil the "unilateral" right to set the price for its products to the franchise network, a practice that constitutes per se illegal price-fixing. See First Amend. Compl. at P 50. Plaintiffs also alleged conclusorily that defendants have unlawfully conspired to fix the price of lubricants to plaintiffs, which they allege is a per se violation of the Sherman Act.

Defendants argue that plaintiffs' allegation that Mobil had the "unilateral" right to set its prices is an admission that there was no conspiracy to fix prices as is required for a price-fixing violation. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 81 L. Ed. 2d 628, 104 S. Ct. 2731* [\\*\\*321](#) (1984) ([Section 1](#) of the Sherman Act does not reach unilateral action). Reading the complaint in plaintiffs' favor, it is apparent that the "unilateral" language pled by plaintiffs means only that Mobil had the right to impose prices on the plaintiffs without negotiation. Nevertheless, the Court finds that plaintiffs have failed to state a claim for per se illegal price-fixing. Mobil and SpeeDee are not horizontal competitors, since they do not sell the same products in the same markets. [HN7](#)<sup>↑</sup> The per se rule against price-fixing applies to agreements by horizontal competitors to fix prices (e.g., *United States v. Trenton Potteries Co., 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927)*) and to vertical agreements to fix resale prices. *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. SpeeDee's alleged agreement with Mobil does not eliminate price competition between them because there was no competition between Mobil and SpeeDee to eliminate. Nor is SpeeDee a reseller of Mobil's products. Since plaintiffs have failed to allege a situation to which the per se rule applies, plaintiffs have failed to state a claim [\\*\\*33](#) for per se illegal price-fixing. [\*955] Hence, plaintiffs' claim for per se illegal price-fixing is dismissed.

## C. Federal Trade Commission Act

Plaintiffs claim that defendants' tying arrangement violates Section 5 of the Federal Trade Commission Act, [15 U.S.C. § 45](#). Defendants are correct that [HN8](#)<sup>↑</sup> Section 5 does not provide a private right of action, so that plaintiffs have no claim under the FTC Act. See *Fulton v. Hecht, 580 F.2d 1243, 1249 n.2 (5th Cir. 1978)*, cert. denied, 440 U.S. 981, 60 L. Ed. 2d 241, 99 S. Ct. 1789 (1979). Accordingly, plaintiffs' claim for violation of the Federal Trade Commission Act is dismissed.

## D. Fraud

Mobil attacks plaintiffs' fraud claim on the ground that it had no duty to disclose the details of its agreements with the SpeeDee defendants. [HN9](#)<sup>↑</sup> Whether a duty exists is a question of law. E.g., *Mundy v. Dept. of Health and Human Resources, 620 So. 2d 811, 813 (La. 1993)*. The Court agrees that [HN10](#)<sup>↑</sup> absent a duty to disclose, silence with respect to the details of a business transaction does not constitute fraud. See *Guidry v. Bank of LaPlace, 661 So. 2d 1052, 1059 (La. App. 4th Cir. 1995)*, writ denied, 666 So. 2d 295 (La. 1996); *First Downtown Development v. Cimochowski, 613 So. 2d 671, 677 (La. App. 2d Cir. 1993)*, writ denied, 615 So. 2d 340 (La. 1993). A duty to disclose does not arise absent special circumstances, such as a fiduciary or confidential relationship between the parties. *Greene v. Gulf Coast Bank, 593 So. 2d 630, 632 (La. 1992)*; *First Downtown, 613 So. 2d at 677*. Plaintiffs do not allege in their complaint that Mobil was a party to the franchise agreement, and they have not alleged any facts that would give rise to a fiduciary or other confidential relationship between Mobil and

themselves. Although they allege a contractual fiduciary duty, fiduciary duties do not arise from ordinary supplier-customer contracts. The Court therefore finds that Mobil had no duty of disclosure to the plaintiffs, so that they have failed to state a claim for fraud against Mobil.

Both Mobil and the SpeeDee defendants further contend that plaintiffs have failed to allege fraud with particularity as is required by [Rule 9\(b\) of the Federal Rules of Civil Procedure](#). [HN11](#) [↑] [Rule 9\(b\)](#) requires allegations of the "particulars of time, place and contents of the false representations, as well as the identity of the person making the misrepresentation [\*\*35] and what he obtained thereby." [Tel-Phonic Services, Inc. v. TBS International, Inc., 975 F.2d 1134, 1139 \(5th Cir. 1992\)](#) (quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1297, at 590 (1990)). It is true that plaintiffs have made some allegations concerning misleading statements or omissions but their allegations of time, place, and contents of the statements, as well as of the identity of the person making the representations or omissions are deficient. As the Court noted elsewhere in this opinion, it is difficult to determine from plaintiffs' complaint what information the defendants are alleged to have disclosed to the plaintiffs and what information they are alleged to have failed to disclose. The complaint is internally contradictory on these issues. Accordingly, plaintiffs' fraud claims are dismissed under [Rule 9\(b\)](#) against the SpeeDee defendants. The dismissal is without prejudice and with leave to amend to assert the particulars of the time, place, and contents of the misrepresentations and nondisclosures relied on, as well as of the identities of the parties involved in making the alleged representations to the plaintiffs.

### **III. CONCLUSION**

[\*\*36] The Court's ruling on the tying issue means only that plaintiffs have made sufficient allegations to survive a motion to dismiss. Many of defendants' arguments would have been made more appropriately on a well-developed summary judgment record. Given the Supreme Court's distaste for the imposition of legal rules divorced from evidence of marketplace realities, this Court is constrained to deny defendants' motion on the tying claims.

Accordingly, defendants' motion to dismiss plaintiffs' tying claims under the Sherman Act and the Louisiana antitrust laws is denied. [\*956] The motion is granted as to plaintiffs' claims for per se illegal pricefixing, tying under Section 3 of the Clayton Act, violations of Section 5 of the Federal Trade Commission Act and fraud. The fraud claim against the SpeeDee defendants is dismissed without prejudice.

New Orleans, Louisiana, this 9th day of September, 1996.

SARAH S. VANCE

UNITED STATES DISTRICT JUDGE

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## **Chicago Professional Sports Ltd. Pshp. v. NBA**

United States Court of Appeals for the Seventh Circuit

June 4, 1996, ARGUED ; September 10, 1996, DECIDED

Nos. 95-1341, 95-1376, 95-3935, 95-4021

**Reporter**

95 F.3d 593 \*; 1996 U.S. App. LEXIS 23942 \*\*; 1996-2 Trade Cas. (CCH) P71,554

CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP and WGN CONTINENTAL BROADCASTING COMPANY, Plaintiffs-Appellees, Cross-Appellants, v. NATIONAL BASKETBALL ASSOCIATION, Defendant-Appellant, Cross-Appellee.

**Subsequent History:** [\[\\*\\*1\]](#) Rehearing Denied October 7, 1996, Reported at: [1996 U.S. App. LEXIS 26354](#).

**Prior History:** Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 90 C 6247. Hubert L. Will, Judge.

**Disposition:** Vacated and remanded.

## **Core Terms**

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league, teams, sports, broadcast, games, single entity, antitrust, district court, economic interest, ownership, cooperation, decisions, joint venture, superstation, basketball, entertainment, decisionmaking, telecasts, output, firms, anti trust law, market power, Sherman Act, characterization, compete, rights, fans, maximize, advertisers, inefficient

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

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

### [\*\*HN1\*\*](#) **Antitrust & Trade Law, Sherman Act**

The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. A high price is not itself a violation of the Sherman Act.

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

Trademark Law > Conveyances > General Overview

### [\*\*HN2\*\*](#) **Regulated Industries, Sports**

Courts must respect a sports league's disposition of issues related to the operations of its league that do not violate antitrust laws, just as they respect contracts and decisions by a corporation's board of directors.

Antitrust & Trade Law > Sherman Act > General Overview

### **HN3** Antitrust & Trade Law, Sherman Act

**Antitrust law** permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers. To say that participants in an organization may cooperate is to say that they may control what they make and how they sell it.

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

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

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

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

### **HN4** Business & Corporate Law, Joint Ventures

Like a single firm, the parent-subsidiary combination cooperates to increase efficiency. However, conduct of related entities that deprives the marketplace of the independent centers of decisionmaking that competition assumes, without the efficiencies that come with integration inside a firm, are considered "concerted." And there are entities in the middle -- mergers, joint ventures, and various vertical agreements -- that reduce the number of independent decisionmakers yet may improve efficiency. These are assessed under the Rule of Reason.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

### **HN5** Antitrust & Trade Law, Sherman Act

In determining the characterization of a business entity for purposes of **antitrust law**, the district court plays the leading role, followed by deferential appellate review. An appellate court is not authorized to announce and apply its own characterization unless the law admits of only one choice.

Business & Corporate Law > Joint Ventures > General Overview

Energy & Utilities Law > Utility Companies > Contracts for Service

Mergers & Acquisitions Law > Antitrust > Joint Ventures

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

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Cooperatives > General Overview

## **HN6** Business & Corporate Law, Joint Ventures

Lower court cases are split as to whether professional sports leagues are best characterized as single firms or joint ventures. These cases do not yield a clear principle about the proper characterization of sports leagues -- and the United States Supreme Court does not impose one "right" characterization in determining a business entity's status under antitrust law. Sports are sufficiently diverse that it is essential to investigate their organization and ask the functional question used to determine whether an entity's status under antitrust law one league at a time--and perhaps one facet of a league at a time.

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

Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason in antitrust law.

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**Judges:** Before BAUER, CUDAHY, and EASTERBROOK, Circuit Judges. CUDAHY, Circuit Judge, concurring.

**Opinion by:** EASTERBROOK

## Opinion

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**[\*595]** EASTERBROOK, *Circuit Judge*. In the six years since they filed this antitrust suit, the Chicago Bulls have won four National Basketball Association titles and an equal number of legal victories. Suit and titles are connected. The Bulls want to broadcast more of their games over WGN television, a "superstation" carried on cable systems nationwide. The Bulls' popularity makes WGN attractive to these cable systems; the large audience makes WGN attractive to the Bulls. Since 1991 the Bulls and WGN have been authorized by injunction to broadcast 25 or 30 games per year. [754 F. Supp. 1336 \(1991\)](#). We affirmed that injunction in 1992, see [961 F.2d 667](#), and the district court proceeded to determine whether WGN could carry even more games--and whether the NBA could impose a "tax" on the games broadcast to a national audience, for which other superstations have paid a pretty penny to the league. After holding a nine-week trial and receiving 512 stipulations of fact, the district court made a 30-game allowance permanent, **[\*\*6]** [874 F. Supp. 844 \(1995\)](#), and held the NBA's fee excessive, 1995-2 Trade Cas. P 71,253. Both sides appeal. The Bulls want to broadcast 41 games per year over WGN; the NBA contends that the antitrust laws allow it to fix a lower number (15 or 20) and to collect the tax it proposed. With apologies to both sides, we conclude that they must suffer through still more litigation.

Our 1992 opinion rejected the league's defense based on the Sports Broadcasting Act, [15 U.S.C. §§ 1291-95](#), but our rationale implied that the NBA could restructure its contracts to take advantage of that statute. [961 F.2d at 670-72](#). In 1993 the league tried to do so, signing a contract that transfers all broadcast rights to the National Broadcasting Company. NBC shows only 26 games during the regular season, however, and the network contract allows the league and its teams to permit telecasts at other times. Every team received the right to broadcast all 82 of its regular-season games (41 over the air, 41 on cable), unless NBC telecasts a given contest. The NBA-NBC

contract permits the league to exhibit 85 games per year on superstations. Seventy were licensed to the Turner stations (TBS and TNT), leaving 15 potentially [\*\*7] available for WGN to license from the league. It disdained the opportunity. The Bulls sold 30 games directly to WGN, treating these as over-the-air broadcasts authorized by the NBC contract--not to mention the district court's injunction. The Bulls' only concession (perhaps more to [\*596] the market than to the league) is that WGN does not broadcast a Bulls game at the same time as a basketball telecast on a Turner superstation.

Back in 1991 and 1992, the parties were debating whether the NBA's television arrangements satisfied § 1 of the Sports Broadcasting Act, [15 U.S.C. § 1291](#). We held not, because the Act addresses the effects of "transfers" by a "league of clubs," and the NBA had prescribed rather than "transferred" broadcast rights. The 1993 contract was written with that distinction in mind. The league asserted title to the copyright interests arising from the games and transferred all broadcast rights to NBC; it received some back, subject to contractual restrictions. Section 1 has been satisfied. But the league did not pay enough attention to § 2, [15 U.S.C. § 1292](#), which reads:

Section 1291 of this title shall not apply to any joint agreement described in the first [\*\*8] sentence in such section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing at home.

The NBA-NBC contract permits each club to license the broadcast of its games, and then, through the restriction on superstation broadcasts, attempts to limit telecasts to the teams' home markets. Section 2 provides that this makes § 1 inapplicable, so the Sports Broadcasting Act leaves the antitrust laws in force.

Our prior opinion observed that the Sports Broadcasting Act, as a special-interest exception to the antitrust laws, receives a beady-eyed reading. A league has to jump through every hoop; partial compliance doesn't do the trick. The NBA could have availed itself of the Sports Broadcasting Act by taking over licensing and by selling broadcast rights in the Bulls' games to one of the many local stations in Chicago, rather than to WGN. The statute offered other options as well. Apparently the league did not want to use them, in part for tax reasons and in part because it sought to avoid responsibilities that come from being [\*\*9] a licensor, rather than a regulator, of telecasts. Such business decisions are understandable and proper, but they have consequences under the Sports Broadcasting Act. By signing a contract with NBC that left the Bulls, rather than the league, with the authority to select the TV station that would broadcast the games, the NBA made its position under the Sports Broadcasting Act untenable. For as soon as the Bulls picked WGN, any effort to control cable system retransmission of the WGN signal tripped over § 2. The antitrust laws therefore apply, and we must decide what they have to say about the league's effort to curtail superstation transmissions.

Three issues were left unresolved in 1992. One was whether the Bulls and WGN, as producers, suffer antitrust injury. [961 F.2d at 669-70](#). The NBA has not pursued this possibility, and as it is not jurisdictional (plaintiffs suffer injury in fact), we let the question pass. The other two issues are related. We concluded in 1992 that the district court properly condemned the NBA's superstation rule under the quick-look version of the Rule of Reason, see [National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, I<sup>\\*\\*101</sup> 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 \(1984\)](#), because (a) the league did not argue that it should be treated as a single entity, and (b) the anti-freeriding justification for the superstation rule failed because a fee collected on nationally telecast games would compensate other teams (and the league as a whole) for the value of their contributions to the athletic contests being broadcast. [961 F.2d at 672-76](#). Back in the district court, the NBA argued that it is entitled to be treated as a single firm and therefore should possess the same options as other licensors of entertainment products; outside of court, the league's Board of Governors adopted a rule requiring any club that licenses broadcast rights to superstations to pay a fee based on the amount the two Turner stations pay for games they license directly from the league.

Plaintiffs say that the single-entity argument was forfeited by its omission from the first appeal, but we think not. As our 1992 opinion observed, the case went to initial trial and decision within seven weeks, [961 F.2d at 676](#), a salutary development made possible in [\*597] part by judicial willingness to entertain in subsequent rounds of the case arguments that could not be fully developed [\*\*11] in such short compass. If defendants in complex cases

feared that any arguments omitted from the first phase of the case would be lost forever, they would drag their heels in order to ensure that nothing was overlooked, a step that would benefit no one. Cf. [Schering Corp. v. Illinois Antibiotics Co.](#), 89 F.3d 357 (7th Cir. 1996). That is why we noted that the argument would be available in the ensuing stages of the case, 961 F.3d at 672-73, and why the district court properly entertained and resolved it on the merits.

The district court was unimpressed by the NBA's latest arguments. It held that a sports league should not be treated as a single firm unless the teams have a "complete unity of interest"--which they don't. The court also held the fee to be invalid. Our opinion compelled the judge to concede that a fee is proper in principle. [961 F.2d at 675-76](#). But the judge thought the NBA's fee excessive. Instead of starting with the price per game it had negotiated with Turner (some \$ 450,000), and reducing to account for WGN's smaller number of cable outlets, as it did, the judge concluded that the league should have started with the advertising revenues WGN generated [\*\*12] from retransmission on cable (the "outer market revenues"). Then it should have cut this figure in half, the judge held, so that the Bulls could retain "their share" of these revenues. The upshot: the judge cut the per game fee from roughly \$ 138,000 to \$ 39,400.

The district court's opinion concerning the fee reads like the ruling of an agency exercising a power to regulate rates. Yet the antitrust laws do not deputize district judges as one-man regulatory agencies. [HN1](#)[ The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. A high price is not itself a violation of the Sherman Act. See [Broadcast Music, Inc. v. CBS, Inc.](#), 441 U.S. 1, 9-10, 19-20, 22 n.40, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979); [Buffalo Broadcasting Co. v. ASCAP](#), 744 F.2d 917 (2d Cir. 1984). WGN and the Bulls argue that the league's fee is excessive, unfair, and the like. But they do not say that it will reduce output. They plan to go on broadcasting 30 games, more if the court will let them, even if they must pay \$ 138,000 per telecast. Although the fee exceeds WGN's outer-market revenues, the station evidently obtains other benefits--for example, [\*\*13] (i) the presence of Bulls games may increase the number of cable systems that carry the station, augmenting its revenues 'round the clock; (ii) WGN slots into Bulls games ads for its other programming; and (iii) many viewers will keep WGN on after the game and watch whatever comes next. Lack of an effect on output means that the fee does not have antitrust significance. Once antitrust issues are put aside, how much the NBA charges for national telecasts is for the league to resolve under its internal governance procedures. It is no different in principle from the question how much (if any) of the live gate goes to the visiting team, who profits from the sale of cotton candy at the stadium, and how the clubs divide revenues from merchandise bearing their logos and trademarks. [HN2](#)[ Courts must respect a league's disposition of these issues, just as they respect contracts and decisions by a corporation's board of directors. [Charles O. Finley & Co. v. Kuhn](#), 569 F.2d 527 (7th Cir. 1978); cf. [Baltimore Orioles, Inc. v. Major League Baseball Players Association](#), 805 F.2d 663 (7th Cir. 1986).

According to the league, the analogy to a corporate board is apt in more ways than this. The NBA [\*\*14] concedes that it comprises 30 juridical entities--29 teams plus the national organization, each a separate corporation or partnership. The teams are not the league's subsidiaries; they have separate ownership. Nonetheless, the NBA submits, it functions as a single entity, creating a single product ("NBA Basketball") that competes with other basketball leagues (both college and professional), other sports ("Major League Baseball", "college football"), and other entertainments such as plays, movies, opera, TV shows, Disneyland, and Las Vegas. Separate ownership of the clubs promotes local boosterism, which increases interest; each ownership group also has a powerful [<sup>\*</sup>598] incentive to field a better team, which makes the contests more exciting and thus more attractive. These functions of independent team ownership do not imply that the league is a cartel, however, any more than separate ownership of hamburger joints (again useful as an incentive device, see Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & Econ. 345 (1985)) implies that McDonald's is a cartel. Whether the best analogy is to a system of franchises (no one expects a McDonald's [\*\*15] outlet to compete with other members of the system by offering pizza) or to a corporate holding company structure (on which see [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)) does not matter from this perspective. The point is that [HN3](#)[ **antitrust law** permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers. To say that participants in an organization may cooperate is to say that they may control what they make and how they

sell it: the producers of *Star Trek* may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the number of times episodes appear on TV in a given market, just as the NBA's superstation rule does.

The district court conceded this possibility but concluded that all cooperation among separately incorporated firms is forbidden by § 1 of the Sherman Act, except to the extent *Copperweld* permits. *Copperweld*, according to the district court, "is quite narrow, and rests solely upon the fact that a parent corporation and its wholly-owned subsidiary have a 'complete unity of interest'" (quoting [\\*\\*16](#) from [467 U.S. at 771](#)). Although that phrase appears in *Copperweld*, the Court offered it as a statement of fact about the parent-subsidiary relation, not as a proposition of law about the limits of permissible cooperation. As a proposition of law, it would be silly. Even a single firm contains many competing interests. One division may make inputs for another's finished goods. The first division might want to sell its products directly to the market, to maximize income (and thus the salary and bonus of the division's managers); the second division might want to get its inputs from the first at a low transfer price, which would maximize the second division's paper profits. Conflicts are endemic in any multi-stage firm, such as General Motors or IBM, see Robert G. Eccles, *Transfer Pricing as a Problem of Agency*, in *Principals and Agents: The Structure of Business* 151 (Pratt & Zeckhauser eds. 1985), but they do not imply that these large firms must justify all of their acts under the Rule of Reason. Or consider a partnership for the practice of law (or accounting): some lawyers would be better off with a lockstep compensation agreement under which all partners with the same seniority [\\*\\*17](#) have the same income, but others would prosper under an "eat what you kill" system that rewards bringing new business to the firm. Partnerships have dissolved as a result of these conflicts. Yet these wrangles--every bit as violent as the dispute among the NBA's teams about how to generate and divide broadcast revenues--do not demonstrate that law firms are cartels, or subject to scrutiny under the Rule of Reason their decisions about where to open offices or which clients to serve.

*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities. Instead it asks why the antitrust laws distinguish between unilateral and concerted action, and then assigns a parent-subsidiary group to the "unilateral" side in light of those functions. [HN4](#) Like a single firm, the parent-subsidiary combination cooperates internally to increase efficiency. Conduct that "deprives the marketplace of the independent centers of decisionmaking that competition assumes", [467 U.S. at 769](#), without the efficiencies that come with integration inside a firm, go on the "concerted" side of the line. And there are entities in the middle: "mergers, joint ventures, and various vertical agreements" [\\*\\*18](#) ([id. at 768](#)) that reduce the number of independent decisionmakers yet may improve efficiency. These are assessed under the Rule of Reason. We see no reason why a sports league cannot be treated as a single firm in this typology. It produces a single product; cooperation is essential (a [\\*599](#) league with one team would be like one hand clapping); and a league need not deprive the market of independent centers of decisionmaking. The district court's legal standard was therefore incorrect, and a judgment resting on the application of that standard is flawed.

Whether the NBA itself is more like a single firm, which would be analyzed only under § 2 of the Sherman Act, or like a joint venture, which would be subject to the Rule of Reason under § 1, is a tough question under *Copperweld*. It has characteristics of both. Unlike the colleges and universities that belong to the National Collegiate Athletic Association, which the Supreme Court treated as a joint venture in *NCAA*, the NBA has no existence independent of sports. It makes professional basketball; *only* it can make "NBA Basketball" games; and unlike the *NCAA* the NBA also "makes" teams. After this case was last here the NBA [\\*\\*19](#) created new teams in Toronto and Vancouver, stocked with players from the 27 existing teams plus an extra helping of draft choices. All of this makes the league look like a single firm. Yet the 29 clubs, unlike GM's plants, have the right to secede (wouldn't a plant manager relish that!), and rearrange into two or three leagues. Professional sports leagues have been assembled from clubs that formerly belonged to other leagues; the National Football League and the NBA fit that description, and the teams have not surrendered their power to rearrange things yet again. Moreover, the league looks more or less like a firm depending on which facet of the business one examines. See Phillip E. Areeda, 7 *Antitrust Law* P 1478d (1986). From the perspective of fans and advertisers (who use sports telecasts to reach fans), "NBA Basketball" is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet. But from the perspective of college basketball players who seek to sell their skills, the teams are distinct, and because the

human capital of players [\*\*20] is not readily transferable to other sports (as even Michael Jordan learned) the league looks more like a group of firms acting as a monopsony. That is why the Supreme Court found it hard to characterize the National Football League in *Brown v. Pro Football, Inc.*, 135 L. Ed. 2d 521, 116 S. Ct. 2116, 2126 (1996): "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival. . . . In the present context, however, that circumstance makes the league more like a single bargaining employer, which analogy seems irrelevant to the legal issue before us." To say that the league is "more like a single bargaining employer" than a multi-employer unit is not to say that it necessarily is one, for every purpose.

The league wants us to come to a conclusion on this subject (six years of litigation is plenty!) and award it the victory. Yet as we remarked in 1992, "characterization is a creative rather than exact endeavor." [961 F.2d at 672](#). [HN5](#) The district court plays the leading role, followed by deferential appellate review. We are not authorized to announce and apply our own favored characterization unless [\*\*21] the law admits of only one choice. The Supreme Court's ambivalence in *Brown*, like the disagreement among judges on similar issues, implies that more than one characterization is possible, and therefore that the district court must revisit the subject using the correct legal approach.

Most courts that have asked whether professional sports leagues should be treated like single firms or like joint ventures have preferred the joint venture characterization. E.g., *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994); *North American Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982); *Smith v. Pro Football, Inc.*, 193 U.S. App. D.C. 19, 593 F.2d 1173, 1179 (D.C. Cir. 1978). But Justice Rehnquist filed a strong dissent from the denial of certiorari in the soccer case, arguing that "the league competes as a unit against other forms of entertainment", *NFL v. North American Soccer League*, 459 U.S. 1074, 1077, 74 L. Ed. 2d 639, 103 S. Ct. 499 (1982), and the fourth circuit concluded that the Professional Golf Association should be treated as one firm for antitrust purposes, even though that sport is less economically integrated than the NBA. *Seabury Management, Inc. v. PGA of America, Inc.*, 878 F. Supp. 771 (D. Md. 1994), affirmed [\*\*22] in relevant part, 52 F.3d 322 (4th Cir. 1995). Another court of appeals has treated an electric cooperative as a single firm, *Mt. Pleasant v. Associated Electric Cooperative*, 838 F.2d 268 (8th Cir. 1988), though the co-op is less integrated than a sports league. [HN6](#) These cases do not yield a clear principle about the proper characterization of sports leagues--and we do not think that *Copperweld* imposes one "right" characterization. Sports are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld*'s functional question one league at a time--and perhaps one facet of a league at a time, for we do not rule out the possibility that an organization such as the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities. Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not [\*\*23] imply an ability to set wages for players. See Jesse W. Markham & Paul V. Teplitz, *Baseball Economics and Public Policy* (1981); Arthur A. Fleisher III, Brian L. Goff & Robert D. Tollison, *The National Collegiate Athletic Association: A Study in Cartel Behavior* (1992).

However this inquiry may come out on remand, we are satisfied that the NBA is sufficiently integrated that its superstation rules may not be condemned without analysis under the full Rule of Reason. We affirmed the district court's original injunction after applying the "quick look" version because the district court had characterized the NBA as something close to a cartel, and the league had not then made a *Copperweld* argument. After considering this argument, we conclude that when acting in the broadcast market the NBA is closer to a single firm than to a group of independent firms. This means that plaintiffs cannot prevail without establishing that the NBA possesses power in a relevant market, and that its exercise of this power has injured consumers. Even in the NCAA case, the first to use a bobtailed Rule of Reason, see Diane P. Wood, *Antitrust 1984: Five Decisions in Search of a Theory*, 1984 Sup. [\*\*24] Ct. Rev. 69, 110-12, the Court satisfied itself that the NCAA possesses market power. The district court had held that there is a market in college football telecasts on Saturday afternoon in the fall, a time when other entertainments do not flourish but college football dominates. Only after holding that this was not clearly erroneous did the Court cast any burden of justification on the NCAA. 468 U.S. at 111-13; see also *International Boxing Club v. United States*, 358 U.S. 242, 3 L. Ed. 2d 270, 79 S. Ct. 245 (1959).

**HN7** [↑] Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason. *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756, 761 (7th Cir. 1996); *Sanjuan v. American Board of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994); *Hardy v. City Optical, Inc.*, 39 F.3d 765, 767 (7th Cir. 1994); *Chicago Professional Sports Limited Partnership v. National Basketball Association*, 961 F.2d 667, 673 (7th Cir. 1992); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 670-74 (7th Cir. 1985); *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development Co.*, 758 F.2d 203, 210 (7th Cir. 1985). During the [\*\*25] lengthy trial of this case, the NBA argued that it lacks market power, whether the buyers are understood as the viewers of games (the way the district court characterized things in NCAA) or as advertisers, who use games to attract viewers (the way the Supreme Court characterized a related market in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)). College football may predominate on Saturday afternoons in the fall, but there is no time slot when NBA basketball predominates. The NBA's season lasts from November through June; games are played seven days a week. This season overlaps all of the other professional and college sports, so even sports fanatics have many other options. From advertisers' perspective--likely the right one, because advertisers are the ones who actually pay for telecasts--the market [\*601] is even more competitive. Advertisers seek viewers of certain demographic characteristics, and homogeneity is highly valued. A homogeneous audience facilitates targeted ads: breakfast cereals and toys for cartoon shows, household appliances and detergents for daytime soap operas, automobiles and beer for sports. If the NBA assembled for advertisers an audience [\*\*26] that was uniquely homogeneous, or had especially high willingness-to-buy, then it might have market power even if it represented a small portion of airtime. The parties directed considerable attention to this question at trial, but the district judge declined to make any findings of fact on the subject, deeming market power irrelevant. As we see things, market power is irrelevant only if the NBA is treated as a single firm under *Copperweld*; and given the difficulty of that issue, it may be superior to approach this as a straight Rule of Reason case, which means starting with an inquiry into market power and, if there is power, proceeding to an evaluation of competitive effects.

Perhaps this can be accomplished using the materials in the current record. Although the judge who presided at the trial died earlier this year, the parties may be willing to agree that an assessment of credibility is unnecessary, so that a new judge could resolve the dispute after reviewing the transcript, exhibits, and stipulations, and entertaining argument. See *Fed. R. Civ. P. 63*. At all events, the judgment of the district court is vacated, and the case is remanded for proceedings consistent with this [\*\*27] opinion. Pending further proceedings in the district court or agreement among the parties, the Bulls and WGN must respect the league's (and the NBC contract's) limitations on the maximum number of superstation telecasts.

**Concur by:** CUDAHY

## Concur

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CUDAHY, Circuit Judge, concurring:

Although I agree with the majority's firm conclusion that the "quick look" doctrine does not apply to these complex facts, I must indicate some differences in significant matters that are reached in the course of the majority opinion. Thus, in arriving at its conclusion that a full Rule of Reason analysis is required, the majority seems to be extrapolating from its discussion of whether the NBA may be a "single entity." Classification as a "single entity" means immunity from Sherman Act, § 1, considerations, a distinction much more drastic than the conclusion that the conduct in question here deserves a "quizzical look" rather than a mere "quick look." So, although it is not entirely clear, the majority seems to be saying that, since the NBA may be a single entity, its conduct certainly merits more than a quick look. Perhaps so, but, since the single entity question is unresolved, I would prefer to address [\*\*28] the problem from a slightly different direction.

For the "quick look" approach should have a narrow application, reflecting its recent and sharply delimited origin in the NCAA case. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984). That case, involving a loose alliance of colleges which had agreed on price and

output restrictions on broadcast of their football games, held that under some circumstances a full analysis of market power is not required to determine that an agreement is anticompetitive. This framework should not be extended to the more highly integrated and economically unitary NBA.

The colleges which made up the NCAA were entirely separate economic entities, competing with each other in many areas unrelated to their athletic encounters. There is, of course, a sort of continuum of economic integration, with entities at different points along the continuum warranting differing levels of antitrust concern. At one end are loose alliances of economic actors having independent concerns (like the NCAA), the anticompetitive nature of whose agreements is obvious from a "quick look." At the other end are fully-integrated entities **[\*\*29]** in which the economic interests of the participants are so completely aligned that antitrust scrutiny of their policies is unnecessary except where § 2 of the Sherman Act is violated. In the center is the broad range of organizations (generally like the NBA) whose separate constituents are individually owned but are closely but not completely tied economically to their organizations. These entities are **[\*602]** capable of anticompetitive agreements, but a full Rule of Reason analysis is necessary to ensure that productive cooperation is not mistaken for anticompetitive conduct. Single entity aside, there is certainly enough concern here for the efficiency of the league as a competitor in the entertainment market to require full Rule of Reason analysis.

On a more clear-cut point, I think it was appropriate for Judge Will to examine the size of the NBA's fee for the WGN broadcasts of Bulls games. In this connection, the majority rejects considerations of fairness "and the like" and asserts that, "The core question in antitrust is output." Maj. Op. at 5, 6. For better or for worse, under the highly reductive view that currently prevails in antitrust matters, this somewhat grating aphorism appears **[\*\*30]** to be correct. The Holy Grail of consumer welfare means that more is better no matter how the more is distributed. Taking these principles as a given, it is still difficult for me to understand how output can be disjoined from cost under the circumstances of this case. In fact, Judge Will found as a fact that, "[the NBA's proposed fee] may well at some future date decrease output and distribution of Bulls games on WGN . . ." Dist. Ct. Findings of Fact, Conclusions of Law and Opinion, NBA App. at 77a. But, particularly since output is currently constrained to 30 games, rather than whatever the market would produce, it is difficult to ascertain whether the fee is high enough to reduce output below the competitive level. Since it is not clear to me that the magnitude of Judge Will's adjustment was justified by antitrust considerations alone, I would include this issue with other matters to be considered on remand.

That said, I turn to the single entity issue, where the discussion of the majority is deserving of comment both as to substance and to procedure. My first reservation is procedural and concerns whether this issue may be reached at all. The majority announces an exception--without **[\*\*31]** precedent to my knowledge--from the usual rules of waiver of issues on appeal. The exception applies, according to the majority, to "defendants in complex cases" without elaboration. Why we should have more forgiving policies for highly skilled and highly compensated counsel in big corporate cases than for pro se litigants or appointed counsel of perhaps lesser qualification is certainly unclear to me. Our earlier opinion in this case states that "the NBA did not contend in the district court that the NBA is a single entity, let alone that it is a single entity as a matter of law." *[Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n](#), 961 F.2d 667, 673 (7th Cir. 1992)*, cert. denied, 506 U.S. 954, 121 L. Ed. 2d 334, 113 S. Ct. 409 (1992). We also stated that:

Characterization is a creative rather than exact endeavor. Appellate review is accordingly deferential. The district court held a trial, heard the evidence, and concluded that the best characterization of the NBA is the third we have mentioned: a joint venture in the production of games but more like a cartel in the sale of its output. Whether this is the best characterization of professional sports is a subject that has divided **[\*\*32]** courts and scholars for some years, making it hard to characterize the district judge's choice as clear error.

[961 F.2d at 672](#). No one seems to have argued that the basic structure of the NBA has changed since that opinion. I think, therefore, that, despite dicta in our earlier opinion speculating that "perhaps the parties will join issue more fully [regarding the single entity status of the NBA] in the proceedings still to come in the district court," [961 F.2d at 673](#), there is a real question whether we can reach the single entity issue--fascinating though it may be.

However, on the assumption that the "single entity" question may be reached (and presumably will be reached on remand) a number of considerations will be relevant. Assuming as I must that the sole goal of antitrust is efficiency or, put another way, the maximization of total societal wealth, the question whether a sports league is a "single entity" turns on whether the actions of the league have any potential to lessen economic competition among the separately owned **[\*603]** teams.<sup>1</sup> The fact that teams compete on the floor is more or less irrelevant to whether they compete economically--it is only their economic competition **[\*\*33]** which is germane to antitrust analysis. In principle, of course, a sports league could actually be a single firm and the individual teams could be under unified ownership and management. Such a firm would, of course, be subject to scrutiny only under § 2 of the Sherman Act and not under § 1. From the point of view of wealth maximization, a league of independently-owned teams, if it is no more likely than a single firm to make inefficient management decisions, should be treated as a single entity. The single entity question thus would boil down to "whether member clubs of a sports league have legitimate economic interests of their own, independent of the league and each other." *Sports Leagues Revisited* at 127. It follows that a sports league, no matter what its ownership structure, can make inefficient decisions only if the individual teams have some chance of economic gain at the expense of the league.

**[\*\*34]** Another form of the same question is whether a sports league is more like a single firm or like a joint venture. With efficiency the sole criterion, a joint venture warrants scrutiny for at least two reasons--(1) the venture could possess market power with respect to the jointly produced product (essentially act like a single firm with monopoly power) or (2) the fact that the venturers remain competitors in other arenas might either distort the way the joint product is managed or allow the venturers to use the joint product as a smokescreen behind which to cut deals to reduce competition in the other arenas. The most convincing "single entity" argument involving the NBA is that the teams produce only the joint product of "league basketball" and that there is thus no significant economic competition between them. NBA Br. at 25-27. If this is the case, the argument goes, type (2) concerns drop out and only type (1) concerns remain. Type (1) concerns, of course, are exactly those appropriate for § 2 analysis of a single firm.

There are, however, flaws in this single entity argument. The assumption underlying it is that league sports are a different and more desirable product than a **[\*\*35]** disorganized collection of independently arranged games between teams. For this reason, it is contended that joining sports teams into a league is efficiency-enhancing and desirable. I will accept this premise.<sup>2</sup> It is perhaps true, as argued by the NBA and many commentators, that sports are different from many joint ventures because the individual teams cannot, even in principle, produce the product--league sports. However, the fact that cooperation is necessary to produce league basketball does not imply that the league will necessarily produce its product in the most efficient fashion. There is potential for inefficient decisionmaking regarding the joint product of "league basketball" even when the individual teams engage in no economic activity *outside* of the league. This potential arises because the structure of the league is such that all "owners" of the league must be "owners" of individual teams and decisions are made by a vote of the teams. This means that the league will not necessarily make efficient decisions about the number of teams fielded or, more generally, the competitive balance among teams. Thus, the fact that several teams are required to make a league does **[\*\*36]** not necessarily imply that the current makeup of the league is the most desirable or "efficient" one.

The NBA's justification for its restriction of Bulls broadcasts centers on the need to maintain a competitive balance among teams. **[\*604]** Such a balance is needed to ensure that the league provides high quality entertainment throughout the season so as to optimize competition with other forms of entertainment. Competitive balance is not

<sup>1</sup> See, e.g., Michael S. Jacobs, *Professional Sports Leagues, Antitrust and the Single-Entity Theory: a Defense of the Status Quo*, [67 Ind. L.J. 25 \(1991\)](#); Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, [64 Tul. L. Rev. 117 \(1989\)](#); Myron C. Grauer, *The Use and Misuse of the Term "Consumer Welfare": Once More to the Mat on the Issue of Single Entity Status for Sports Leagues Under Section 1 of the Sherman Act*, [64 Tul. L. Rev. 71 \(1989\)](#); Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, [63 Tul. L. Rev. 751 \(1989\)](#); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, [32 UCLA L. Rev. 219 \(1984\)](#), for discussions of this issue.

<sup>2</sup> But the Green Bay Packers and the Chicago Bears played, presumably before enthusiastic crowds, before there was a National Football League.

the only contributor to the entertainment value of NBA basketball, however. Fan enjoyment of league sports depends on both the opportunity to identify with a local or favorite team and the thrill of watching the best quality of play. A single firm owning all of the teams would presumably arrange for the number of teams and their locations efficiently to maximize fan enjoyment of the league season. There is, however, no reason to expect that the [\*\*37] current team owners will necessarily make such decisions efficiently, given their individual economic interests in the financial health of their own teams.

It's not surprising that farflung fans want to watch the Bulls' superstars on a superstation. The NBA argues that the broadcasting of more Bulls games to these fans will disturb the competitive balance among teams. However, one can also speculate that, since sports viewing has become more of a television activity than an "in the flesh" activity, these fans might prefer to have a league composed of fewer, better teams (like the Bulls). If this were the case, league policies designed to shore up *all* of the current teams would be inefficient. The point, of course, is not that this speculation is necessarily correct, but that the efficient number of teams (or, more generally, the efficient competitive balance) may not be obtained as a matter of course given the current league ownership framework.

The team owners thus retain independent economic interests. This would be the case even if they did not compete for the revenues of the league. Teams do compete for broadcast revenues, however. "A conflicting economic interest between [\*\*38] the league and an individual club can exist only when league revenues are distributed unequally among the member clubs based on club participation in the games generating the revenue." *Sports Leagues and the Sherman Act* at 297-99. When teams receive a disproportionate share of the broadcast revenues generated by their own games, such a situation exists.

The analysis of this issue is tricky, however, since decisions about how to allocate broadcasting revenues are made by the league. It may be that "member clubs of a league do not have any legitimate independent economic interests in the league product" and "each team has an ownership interest in every game" (including an equal a priori ownership interest in the broadcast rights to every game). *Sports Leagues Revisited* at 135-36. If this assumption is correct, then whatever arrangements for revenue distribution the league decides to make will be, like bonuses to successful salespeople in an ordinary firm, presumptively efficient. If, however, broadcast rights inure initially to the two teams participating in a particular game and if, as is certainly the case, some games are more attractive to fans than others, the league cannot [\*\*39] be presumed to have made decisions allocating those broadcast revenues efficiently.

The analogy, within the context of an ordinary firm, is to allow the salespeople to vote on the bonuses each is to get. Each salesperson has some incentive, of course, to promote the overall efficiency of the firm on which his or her salary, or perhaps the value of his or her firm stock, depends and therefore to award the larger bonuses to the most productive salespersons. However, in this scenario each salesperson has two ways of maximizing personal wealth--increasing the overall efficiency of the firm and redistributing income within the firm.<sup>3</sup> [\*\*40] The result of

<sup>3</sup> Those favoring the single entity treatment of sports leagues frequently compare them to law firms, making the argument that sports leagues are like law firms, law firms are single entities, therefore sports leagues are single entities. See, e.g., Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, [82 Mich. L. Rev. 1, 23-35 \(1983\)](#); Maj. Op. at 7-8. This argument is only valid, however, if law firms should be treated as single entities. If law firms do, in fact, have some of the same potential for inefficiencies as sports leagues because of the diverse economic interests of the partners, the economically correct solution is still to treat sports leagues as joint ventures. A mere analogy to law firms is not convincingly invoked by those seeking to defend their arguments on purely economic (rather than precedential) grounds.

Applying the same logic in reverse, there is considerable precedent for treating sports leagues as joint ventures. [Nat'l Collegiate Athletic Assoc. v. Bd. of Regents of the Univ. of Oklahoma](#), 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984); [Sullivan v. National Football League](#), 34 F.3d 1091, 1099 (1st Cir. 1994), cert. denied, [513 U.S. 1190, 131 L. Ed. 2d 133, 115 S. Ct. 1252 \(1995\)](#); [Los Angeles Memorial Coliseum Comm'n v. National Football League](#), 726 F.2d 1381, 1388-90 (9th Cir. 1984), cert. denied, [469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 \(1984\)](#); [North American Soccer League v. NFL](#), 670 F.2d 1249, 1252 (2d Cir. 1982), cert. denied, [459 U.S. 1074, 74 L. Ed. 2d 639, 103 S. Ct. 499 \(1982\)](#); [Smith v. Pro Football, Inc.](#), 193 U.S. App. D.C. 19, 593 F.2d 1173, 1179 (D.C. Cir. 1978); [Levin v. National Basketball Ass'n](#), 385 F. Supp. 149, 150 (S.D.N.Y. 1974). Therefore,

[\*605] the vote might not be to distribute bonuses in the most efficient fashion. The potential for this type of inefficiency is particularly great when, as with the NBA, the league is "the only game in town" so that a team does not have the option of going elsewhere if it is not receiving revenues commensurate with its contribution to the overall league product.<sup>4</sup> In any event, a group of team owners who do not share all revenues from all games might well make decisions that do not maximize the profit of the league as a whole.<sup>5</sup>

As this discussion demonstrates, determining whether the potential for inefficient decisionmaking survives within a joint venture because of the independent economic interests of the partners is extraordinarily complex and confusing. For this reason, a simple, if not courageous, way out of the problem might be to establish a legal presumption that a single entity cannot exist without single ownership. To avoid the complexities [\*41] and confusions of attempted analysis, one might simply ordain that combinations that lack diverse economic interests should opt for joint ownership of a single enterprise to avoid antitrust problems. On the other hand, judges may want to play economist to the extent of resisting simplifying assumptions.

In any event, sports leagues argue that they must maintain independent ownership of the teams because separate ownership enhances the appearance of competitiveness demanded by fans. But the leagues cannot really expect the courts to aid them in convincing consumers that competition exists if it really does not. If consumers want economic competition between sports teams, then independent ownership and preservation of independent economic interests is likely an efficient choice for a sports league. But that choice, as with other joint ventures, brings with it the attendant antitrust risks. The NBA cannot have it both ways.

Relating all of this to the majority's treatment of the single entity issue, I see two problems with the majority analysis. First, as already noted, divorcing the question of single entity from the question of ownership is likely to lead to messy and inconsistent [\*42] application of antitrust law. The bottom line may be that the inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis.

Second, some of the majority's discussion of independent interests is puzzling. The majority contends that the district court "concluded that all cooperation among separately incorporated firms is forbidden by § 1 of the Sherman Act, except to the extent *Copperweld* permits." Maj. Op. at 7, citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984). *Copperweld* concluded that a parent corporation and its wholly-owned subsidiary have a "complete unity of interest" and hence should be treated [\*606] as a single entity. Here the district court simply concluded that the NBA, because it involved cooperation between separately-owned teams, was subject to antitrust analysis. Dist. Ct. Findings of Fact, Conclusions of Law and Opinion, NBA App. at 34a. This conclusion is a far cry from deciding that all cooperation among separately incorporated firms is *forbidden*.

I also cannot agree with the majority's analysis of the type of "unity [\*43] of interest" required for single entity status. The majority states, Maj. Op. at 7, that "even a single firm contains many competing interests." The opinion goes on to cite the competition for salary and bonuses between division managers as an example. However, when *Copperweld* talks about unity of interests in the single entity context, I think it must be taken to mean unity of *economic* interests of the *decisionmakers*. See *Copperweld*, 467 U.S. at 769. A single firm does not evidence diverse *economic* interests to the outside world because final decisions are made by the owners or stockholders, who care only about the overall performance of the firm. Only because this is the case can single firms be assumed

one might equally well argue that sports leagues have never been treated as single entities and, to the extent that law firms are like them, law firms should not be treated as single entities either.

<sup>4</sup>The hypothetical example of a team taking its broadcast rights elsewhere does seem to suggest, however, that broadcast rights are at bottom the property of the teams participating in a given game. Indeed, if the team does not own the broadcast rights to the games in which it participates, it is hard to understand what it means to own a team at all.

<sup>5</sup>See Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1 (1995), for a general discussion of the ways in which joint ventures can act inefficiently either by excluding members (or, here perhaps, overincluding members) or by excluding products (superstation broadcasts, perhaps?).

to behave in the canonical profit-maximizing fashion. The diverse interests mentioned in the majority opinion seem as irrelevant to the antitrust analysis as is the on-court rivalry between teams in the NBA.

Thus, when *Copperweld* refers to conduct that "deprives the marketplace of the independent centers of decisionmaking that competition assumes," it does not refer to "decisionmakers" whose economic independence is only potential. The antitrust issue is really **[\*\*44]** whether, as a result of some cooperative venture, economic interests *which remain independent* coordinate their decisions. As *Copperweld* notes, "the officers of a single firm are not separate economic actors pursuing separate economic interests . . . ." *Id.* Therefore, their joint decisionmaking is of no antitrust concern. Employees or divisions within a firm, on the other hand, may remain separate economic actors pursuing separate economic interests but they do not make the final decisions governing the firm's operations. They may compete for shares of the firm's revenues, but they do not decree how that revenue will be shared. Thus their conflict or cooperation does not pose antitrust issues either. Joint ventures, on the other hand, are subject to antitrust scrutiny precisely because separate economic interests are joined in decisionmaking, with the potential for distorted results.

As long as teams are individually owned and revenue is not shared in fixed proportion, the teams both retain independent economic interests and make decisions in concert. Where this is the case, there is a strong argument that sports leagues should be treated as joint ventures rather than **[\*\*45]** single entities because there remains a potential that league policy will be made to satisfy the independent economic interests of some group of teams, rather than to maximize the overall performance of the league. Thus, it is possible, if more Bulls games were broadcast, league profits might increase. But, if the revenue from the broadcast of Bulls games goes disproportionately to the Bulls, the other league members may not vote for this more efficient result.

There may, of course, be cases in which independent ownership of the partners in a joint venture does not pose any real possibility of inefficient decisionmaking. This would be the case if the parties did not compete in any other arena and if all revenues were shared in fixed proportions among the partners. In general, however, a plausible case can be made for the proposition that independent ownership should presumptively preclude treatment as a single entity. This certainly does not mean, of course, that "all cooperation among separately incorporated firms is forbidden by § 1 of the Sherman Act," Maj. Op. at 7. It would mean only that such cooperation must ordinarily be justified under the Rule of Reason. Justification might **[\*\*46]** not be more difficult than the elusive search for treatment as a single entity.

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## Aurora Gas Co. v. Presque Isle Elec. & Gas Co-op

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

September 11, 1996, Decided ; September 11, 1996, Filed

Case No. 96-CV-10093-BC

### **Reporter**

1996 U.S. Dist. LEXIS 21815 \*

AURORA GAS COMPANY, Plaintiff, v. PRESQUE ISLE ELECTRIC & GAS CO-OP, MARTIN THOMSON, ALLAN BRUDER, GLEN ALSO BROOKS, ROBERT WAGMEYER, SALLY KNOPF, ALLAN BARR, JOHN F. BROWN, ARTHUR OESCH, THOMAS SPAULDING, MELVIN BASEL, and RAYMOND WOZNIAK, jointly and severally, Defendants.

**Disposition:** [\*1] Defendants' motion to dismiss DENIED. Defendants' motion for summary judgment DENIED.

## **Core Terms**

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Electric, municipalities, rates, state action doctrine, franchises, supervision, bids, pricing, defendants', leveraging, natural gas, regulated, allegations, predatory, motion to dismiss, public service commission, antitrust, interstate commerce, state policy, costs, summary judgment motion, summary judgment, anticompetitive, articulated, monopoly, public utility, private party, light bulb, purchases, immunity

## **LexisNexis® Headnotes**

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

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

In deciding a motion to dismiss the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. A complaint need only give fair notice of what plaintiff's claim is and the ground upon which it rests. A judge may not grant a Fed. R. Civ. P. 12(b)(6) motion to dismiss based on a disbelief of a complaint's factual allegations. While this standard is decidedly liberal, it requires more than a bare assertion of legal conclusions. In practice, 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 > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Evidence > ... > Documentary Evidence > Writings > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

Civil Procedure > ... > Summary Judgment > 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

## **HN2** [down] Entitlement as Matter of Law, Appropriateness

Under Fed. R. Civ. P. 56, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate. Summary judgment is not appropriate when the evidence presents a sufficient disagreement to require submission to a jury. The existence of some factual dispute does not defeat a properly supported motion for summary judgment; the disputed factual issue must be material.

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

Antitrust & Trade Law > Sherman Act > General Overview

## **HN3** [down] Exemptions & Immunities, Parker State Action Doctrine

The state action doctrine permits the states to impose certain anticompetitive restraints that would otherwise violate the Sherman Act, 15 U.S.C.S. § 1 et seq. The Supreme Court has established a two-prong test for determining when a defendant's actions are entitled to the state action exemption. First, the anticompetitive behavior must derive from a clearly articulated state policy. Second, when the actor is a private party, as opposed to a municipality, the anticompetitive behavior must be actively supervised.

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

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Energy & Utilities Law > Antitrust Issues > General Overview

## **HN4** [down] Exemptions & Immunities, Parker State Action Doctrine

In seeking and obtaining a permitted monopoly, the state action doctrine does not protect against unlawful activity in pursuit of that monopoly.

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

**HN5** Exemptions & Immunities, Parker State Action Doctrine

In the absence of active supervision there can be no state-action immunity for what were otherwise private price fixing arrangements. The possibility that the state could supervise the challenged activity is not sufficient to establish active supervision.

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

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

**HN6** Exemptions & Immunities, Parker State Action Doctrine

The active supervision prong of the state action doctrine requires active state supervision. Active municipal supervision is not sufficient.

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Governments > Local Governments > Employees & Officials

**HN7** Electric Power Rates, Retail Rates

The Local Government Antitrust Act of 1984, [15 U.S.C.S. § 35\(a\)](#), bars recovery in an antitrust action against any local government, or official or employee thereof acting in an official capacity. Suit against private parties is likewise barred in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity. [15 U.S.C.S. § 36\(a\)](#).

**Counsel:** For AURORA GAS COMPANY, plaintiff: David A. Ettinger, Howard B. Iwrey, Honigman, Miller, Detroit, MI.

For PRESQUE ISLE ELECTRIC AND GAS CO-OP, MARTIN THOMSON, ALLAN BRUDER, GLEN ALSO BROOKS, ROBERT WAGMEYER, SALLY KNOPF, ALLAN BARR, JOHN F. BROWN, ARTHUR OESCH, THOMAS D. SPAULDING, MELVIN BASEL, RAYMOND WOZNIAK, defendants: Gregory L. Curtner, Mark T. Boonstra, Miller, Canfield, Detroit, MI. David P. Werth, Richard G. Boyce, Boyce, White, Alpena, MI.

For PRESQUE ISLE ELECTRIC AND GAS CO-OP, MARTIN THOMSON, ALLAN BRUDER, GLEN ALSO BROOKS, ROBERT WAGMEYER, SALLY KNOPF, ALLAN BARR, JOHN F. BROWN, ARTHUR OESCH, THOMAS D. SPAULDING, MELVIN BASEL, RAYMOND WOZNIAK, counter-claimants: Gregory L. Curtner, Mark T. Boonstra, Miller, Canfield, Detroit, MI. David P. Werth, Richard G. Boyce, Boyce, White, Alpena, MI.

For AURORA GAS COMPANY, counter-defendant: David A. Ettinger, Howard B. Iwrey, Honigman, Miller, Detroit, MI.

**Judges:** ROBERT H. CLELAND, UNITED STATES DISTRICT JUDGE

**Opinion by:** ROBERT H. CLELAND

## Opinion

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### **ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT**

#### **I. Introduction**

[\*2] This matter is before the court on defendants' Motion to Dismiss or for Summary Judgment. The defendants are Presque Isle Electric & Gas Co-op ("Presque Isle Electric"), members of its board of directors, a former member of the board of directors, and the general manager of Presque Isle Electric (collectively "defendants"). Plaintiff Aurora Gas Company ("plaintiff") has timely responded.

Plaintiff and Presque Isle Electric are Michigan corporations which distribute natural gas in northeast Michigan. Plaintiff and Presque Isle Electric competed for franchises to provide residential gas distribution from certain municipalities, including: Village of Atlanta, Village of Hillman, Canada Creek, Ranch,<sup>1</sup> Allis Township, Case Township, Village of Millersburg. Local gas distribution companies ("LDC's") compete for local residential distribution of natural gas by obtaining multi-year franchises or franchises of indefinite duration from various municipalities. The franchises permit the LDC's to lay gas distribution pipes in the public right-of-way. There are additional regulatory barriers to entry of the market once that market is receiving service, including a certificate of convenience [\*3] and necessity under M.C.L.A. § 464.501 *et seq.* ("Act 69"). The franchises exist to allow a monopoly to the LDC awarded the franchise.

Presque Isle Electric also provides distribution of electric power in certain communities within the following counties: Alcona, Alpena, Emmet, Montmorency, Oscoda, Otsego, Cheboygan and Presque Isle.

In 1994, Presque Isle Electric first began to compete for natural gas franchises in northeast Michigan, and began, plaintiff alleges, to attempt "to extend its local electric power distribution monopoly power into the local and residential natural gas distribution markets." (Compl. at P 13.) In April, 1994, Presque Isle Electric attempted to purchase plaintiff, but plaintiff refused. (Compl. at P 14.) Plaintiff asserts that Presque Isle Electric's

bids were successful only because they reflected unlawful predatory prices and/or were accepted as a result of fraudulent [\*4] statements by Defendants about, among other things, Presque Isle's costs and Aurora's costs, the ability of Presque Isle's pipelines to deliver an adequate amount of gas to the communities, and Presque Isle's intent not to raise its predatory prices in subsequent years.

(Compl. at P 15.) Presque Isle Electric's bids included a rate pegged to the rate of Michigan Consolidated Gas Company's ("Mich Con's") regulated rate. Presque Isle Electric's rate floats 5 cents per MCF below Mich Con's rate. (Def. Br. at 4.) Presque Isle Electric avers that plaintiff's gas rates are approximately 50% higher than Presque Isle Electric's. (*Id.*) Plaintiff alleges that these rates are substantially below Presque Isle Electric's actual costs. (Compl. at PP 16, 24.)

Plaintiff further alleges that Presque Isle Electric has either foreclosed or attempted to foreclose competition in bidding for franchises in Village of Atlanta, Village of Hillman, Canada Creek Ranch, Allis Township, Case Township, Village of Millersburg,<sup>2</sup> and others by spreading false rumors that it would be purchasing plaintiff. (Compl. at P 16.) Plaintiff also avers that Presque Isle Electric has used the money gained from [\*5] overcharging its electricity customers to monopolize or attempt to monopolize the gas distribution market. (Compl. at P 17.)

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<sup>1</sup> Canada Creek Ranch is a private subdivision association. (Pl. Br., Exh. A, Tierney Aff. at P 10.)

<sup>2</sup> Of these, Presque Isle Electric has secured franchises in all but Allis Township. Its application to Allis Township has not yet been granted; plaintiff maintains the current franchise.

Counts one and two of plaintiff's verified complaint allege that defendants' actions amount to monopolization by predatory pricing, which violates federal **antitrust law**. Count three avers that defendants have attempted to use their electric power distribution monopoly to gain improper advantage in the gas distribution market, in violation of federal **antitrust law**. Count four states that defendants' actions violate the Michigan Antitrust Reform Act, M.C.L.A. § 445.773 et seq. Counts five and six allege that defendants tortiously interfered with prospective business advantage and with contractual relationship by, among other things, falsely representing to various municipalities that Presque Isle [\*6] Electric would be purchasing plaintiff. Count seven alleges that the individual defendants--members of Presque Isle Electric's board of directors, a former member, and the general manager--specifically directed the unlawful activities of Presque Isle Electric.

## II. Standard

The standard to be applied in deciding a motion to dismiss is as follows:

**HN1**[ This Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. A complaint need only give "fair notice of what plaintiff's claim is and the grounds upon which it rests." A judge may not grant a Fed. R. Civ. P. 12(b) (6) motion to dismiss based on a disbelief of a complaint's factual allegations. While this standard is decidedly liberal, it requires more than a bare assertion of legal conclusions. "In practice, a . . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory."

*In Re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th [<sup>\*</sup>7] Cir. 1993)* (internal citations omitted) (emphasis in original).

**HN2**[ Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). Summary judgment is not appropriate when "the evidence presents a sufficient disagreement to require submission to a jury." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The existence of some factual dispute does not defeat a properly supported motion for summary judgment; the disputed factual issue must be material.

## III. Discussion

### A. State Action Doctrine <sup>3</sup>

[\*8] Defendants contend that the state action doctrine immunizes its actions; plaintiff argues that the state action doctrine does not apply to defendants' alleged unlawful behavior.

The Supreme Court enunciated **HN3**[ the state action doctrine in Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943). That doctrine permits the states to impose certain anticompetitive restraints that would otherwise violate the Sherman Act, 15 U.S.C. § 1 et seq. In *Parker*, the state permitted certain anticompetitive actions to occur in the raisin production and distribution markets in order to stabilize prices. The Court stated that "we find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain

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<sup>3</sup> The court will assume without deciding that the state action doctrine applies with respect to defendants' alleged actions in their bid to Canada Creek Ranch, although it is a private subdivision association, rather than a branch of state or local government.

a state or its officers or agents from activities directed by its legislature." [Parker, 317 U.S. at 350-51](#). The Court concluded that because the state created the machinery needed to establish the program and enforces the program, although the organization of the program itself is proposed and voted on by producers, the state action of imposing a restraint on trade was not unlawful under the Sherman Act.

The Supreme Court has established [\*9] a two-prong test for determining when a defendant's actions are entitled to the state action exemption. First, "the anticompetitive behavior [must] derive from a clearly articulated state policy". [Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 769 F.2d 324 \(6th Cir. 1985\), modified, 774 F.2d 162](#). Second, when the actor is a private party, as opposed to a municipality, the anticompetitive behavior must be actively supervised. *Id.* See [California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#); [Town of Hallie v. City of Eau Claire, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 \(1985\)](#); [Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 \(1985\)](#).

## 1. State Policy

The court will first address whether the challenged behavior "derives from a clearly articulated state policy." Plaintiff and defendants disagree about what the challenged activity in this case is. Defendants highlight that the municipalities in each instance approved of Presque Isle Electric's prices as included in its bids and that the grant of those franchises is [\*10] considered state action. Plaintiff contends that the challenged activity is not the award of franchises, but rather Presque Isle Electric's use of predatory prices in its bids.

If the question presented to the court is whether the municipalities had the authority to grant franchises (monopolies) to distribute natural gas, the state action doctrine would likely apply. The State of Michigan does permit municipalities to grant franchises for the distribution of power--electric or gas. [M.C.L.A. § 460.601](#). However, based on the court's reading of the complaint, the question presented is whether defendants' alleged behavior of predatory pricing violates **antitrust law**. The state action doctrine does not protect defendants from suit in such an instance. [HN4↑](#) In seeking and obtaining a permitted monopoly, the state action doctrine does not protect against unlawful activity in pursuit of that monopoly.

As noted in the Supreme Court cases cited above, where private parties act, the court must look at the nature of the *challenged* actions to determine whether the state action doctrine applies. [Midcal, 445 U.S. at 105](#) ("First, the challenged restraint must be 'one clearly articulated and [\*11] affirmatively expressed as state policy.'"); [Town of Hallie, 471 U.S. at 38-39](#) ("To obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'") In this case, those challenged actions are the bids in which Presque Isle Electric allegedly submitted bids below their costs (predatory pricing). (Compl. at PP 15, 24, 25, 30.)

Michigan has a clear policy to permit municipalities to grant monopolies to firms providing electric or gas power. Michigan has established a public utilities commission which is charged with the duty of fixing the rates and charges of public utilities within the state. Michigan statute provides:

The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d (footnote omitted), and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, [\*12] charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of all public utilities, including . . . gas companies . . .

[M.C.L.A. § 460.6](#).

The commission may provide advice to any municipality regarding a municipally-owned utility, but the commission does not have the power to change or alter any rates or charges by the municipality, unless the municipality or utility operating under franchise seeks the commission's assistance in that regard. [M.C.L.A. § 460.54](#). [Section 460.54](#) reads in part:

In no case shall the commission have power to change or alter the rates or charges fixed in, or regulated by, any franchise or agreement heretofore or hereafter granted or made by any city, village or township. It shall be competent for any municipality and any public utility operating within the limits of said municipality, whether such utility is operating under the terms of a franchise, or otherwise, to join in submitting [\*13] to the commission any question involving the fixing or determination of rates or charges, or the making of rules or conditions of service, and the commission shall thereupon be empowered, and it shall be its duty to make full investigation as to all matters so submitted and to fix and establish such reasonable maximum rates and charges, and prescribe such rules and conditions of service and make such determination and order relative thereto as shall be just and reasonable.

The provision of gas power and the rates charged are thus highly regulated by the state. As noted above, however, it is the rates submitted in Presque Isle Electric's bids that are challenged. Although the public service commission may have a clearly articulated policy of regulating the rates of public utilities, it does not regulate the bidding process by which municipalities award franchises. The state policy of regulation is not addressed to and does not encompass the prices submitted in those bids, whether predatory or otherwise. It is the bids of Presque Isle Electric that are the challenged conduct, not the municipalities' grant of a franchise.

This is not, as defendants argue, "hair-splitting". (Reply [\*14] Br. at 1.) The court must look only at the challenged activity, not at a general regulatory scheme for the industry. For example, the Supreme Court was faced with a similar case in [Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 \(1976\)](#). In *Cantor*, the plaintiff challenged the practice of the defendant to provide light bulbs to residential customers. The price of the light bulbs was included as part of Detroit Edison's charged rates. Although the "distribution of electricity in Michigan is pervasively regulated by the Michigan Public Service Commission", the Court focused on the fact that "the distribution of electric light bulbs in Michigan is unregulated." [Cantor, 428 U.S. at 584](#). Because the Supreme Court concentrates on a narrower view of "challenged activity" than defendants urge, the court must define the "challenged activity" in this case as predatory pricing rather than the provision of natural gas.

Defendants' arguments that the rates submitted by Presque Isle Electric were not set by it are unpersuasive. First, defendants contend that the municipalities, rather than Presque Isle Electric, set the rates to be charged users. There is [\*15] no evidence in the record, as plaintiff points out, that the municipalities did anything other than adopt the rates as set forth in Presque Isle Electric's bids.<sup>4</sup> Nor is there any evidence that the municipalities had any hand in setting the bid. Second, defendants assert that because Presque Isle Electric's rates are pegged to the Mich Con rates, which must be approved by the public service commission, Michigan "effectively" regulates Presque Isle Electric's rates. The court does not find this argument persuasive, either. A claim of predatory pricing is hinged on a claim that a competitor is pricing its goods or services below marginal or average variable costs. That Presque Isle Electric's rates are tied to that of a competitor says nothing about whether Presque Isle Electric is pricing its gas at below Presque Isle Electric's relevant costs. The public service commission factors in the relevant costs in approving a company's rates--there is no evidence that Presque Isle Electric's rates are lower or higher than those of Mich Con.

[\*16] Accordingly, the statutes cited by defendants, though they clearly demonstrate pervasive regulation of public utilities, are inapposite. Therefore, given the allegations in plaintiff's complaint and the evidence in the record,

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<sup>4</sup> Although the court has serious doubts as to whether Martin A. Thomson's Declaration is sufficient to provide facts necessary to support a motion for summary judgment, the court finds that even if the declaration is sufficient, there is a genuine issue of material fact. John Tierney's affidavit, attached to plaintiff's brief as exhibit B, states that municipalities do not set rates included in bids. (Tierney Aff. at PP 14, 15.)

defendants are entitled neither to their motion to dismiss nor to their motion for summary judgment on the grounds that the state action doctrine applies.

## 2. Active Supervision

Having found that the state action doctrine does not apply in this case because the State of Michigan does not have a clearly articulated policy authorizing predatory pricing in submitting bids to obtain a natural gas distribution franchise, the court will additionally address the second prong of the state action doctrine as it applies to private parties. As noted above, the Supreme Court requires proof of a clearly articulated policy and active supervision of the challenged behavior in order to invoke the state action doctrine. *Midcal, 445 U.S. at 105* ("[The Court's earlier] decisions establish two standards for antitrust immunity under *Parker v. Brown*. . . . Second, the policy must be 'actively supervised' by the State itself.").

Defendants contend that since the [\*17] individual municipalities set Presque Isle Electric's rates and since the municipalities granted Presque Isle Electric franchises, the municipalities were the effective decision makers. Thus, defendants assert, the court does not need to determine whether there was active supervision of the challenged behavior. Defendants accurately state that where the municipality is acting pursuant to a clearly articulated state policy, the active supervision prong of the state action doctrine does not apply. *Town of Hallie, 471 U.S. at 46* ("We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality."). If plaintiff were challenging the municipalities' grant of natural gas distribution franchises, this rule of law would apply. However, plaintiff's complaint clearly seeks to hold defendants liable for their alleged predatory pricing in seeking to obtain those franchises. Therefore, defendants, not the municipalities, are the relevant actors and the active supervision prong applies in this case.

The Supreme Court most recently addressed the "active supervision" requirement in *FTC v. Ticor Title Ins. Co., 504 U.S. 621, [\*18] 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992)*. The Court stated:

Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

*Ticor, 504 U.S. at 634-35*. In *Ticor*, the Supreme Court considered whether Wisconsin and Montana actively supervised the setting of rates for title insurance companies. Both states had "negative option rules" which gave the states veto power over rates submitted to the state. In the case of Wisconsin's scheme, rates went into effect without the states having done much more than checking the supporting [\*19] data for accuracy. The states did not substantively scrutinize the rates. The Court found that *HN5* [↑] "in the absence of active supervision, in fact, there can be no state-action immunity for what were otherwise private price fixing arrangements." *Ticor, 504 U.S. at 638*.

Therefore, the possibility that the state could supervise the challenged activity is not sufficient to establish active supervision. The *Ticor* Court elaborated:

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 pricesetting or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State.

*Ticor, 504 U.S. at 638*. Defendants argue that state supervision exists in this case because Presque Isle Electric's rates are pegged to Mich Con's rates, which are set by the public service commission. There is no argument--or evidence--that the state actively supervised the setting of Presque Isle Electric's rates, as submitted to municipalities [\*20] in its bids.

Defendants also contend that the municipalities' grant of franchises to Presque Isle Electric essentially set the rate charged to users, and thus, that the municipalities' actions suffice to fulfill the second prong of the state action doctrine. The Sixth Circuit has directly held that [HN6](#) the active supervision prong requires active *state* supervision. Active municipal supervision is not sufficient. *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 774 F.2d 162, 163 (6th Cir. 1985); *City Communications, Inc. v. City of Detroit*, 660 F. Supp. 932, 935 (E.D. Mich. 1987).

Because defendants have not pointed to any active state supervision of Presque Isle Electric's bids, the state action doctrine does not immunize them. Thus, defendants are not entitled to their motion to dismiss or to their motion for summary judgment on this claim.

### 3. Leveraging Claim

Defendants contend that plaintiff's claim that defendants sought to leverage their monopoly power in the distribution of electricity to gain improper advantage in natural gas distribution should be dismissed because it is barred by the state action doctrine. Defendants assert that the state [\*21] action doctrine applies since the natural gas distribution market is not a competitive one and because it "makes no sense to suggest that one can leverage monopoly power from one regulatory area into another." (Def. Br. at 14.)

The Supreme Court addressed the state action doctrine in the context of a leveraging claim in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976). In *Cantor*, the plaintiff alleged that Detroit Edison was attempting to leverage its monopoly power in the distribution of electricity to gain an improper advantage in the market for light bulbs. Detroit Edison was the only supplier of electricity in southeastern Michigan; as part of its rate structure, it included the price of light bulbs that it supplied to its residential customers. The rate structure was approved by the Michigan Public Service Commission and could not be altered without permission of the commission. Detroit Edison supplied approximately 50% of the standard size light bulbs to residential customers.

The Supreme Court applied the state action doctrine as enunciated in the cases discussed earlier and found that there was no state policy regarding provision [\*22] of light bulbs by utilities. The Court likewise did not find active state supervision because the choice to provide light bulbs as part of its service was Detroit Edison's choice, not the state's.

Because the state action doctrine applies as explained above to the leveraging claim, the court finds that defendants are not entitled to dismissal of or summary judgment on plaintiff's leveraging claim. Defendants have not alleged or provided evidence to demonstrate any active state supervision of the electric rates it charges other than to make the same allegations they did regarding gas rates. There is no evidence that the public service commission ever looked at, examined, analyzed, or approved of Presque Isle Electric's electricity rates. Accordingly, the state action doctrine does not immunize defendants against the leveraging claim.

Defendants' argument that plaintiff's leveraging claim should be dismissed because one cannot leverage monopoly power from one regulated area to another also fails to convince. The cases cited by defendants to support this proposition fail to support it. In *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 [\*23] U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980), the Second Circuit discussed monopoly leveraging in various markets relating to photography. It described leveraging as a firm "using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market." *Berkey Photo*, 603 F.2d at 275. Because Berkey Photo and Eastman Kodak competed in competitive, not highly regulated, markets, the Second Circuit's opinion cannot be read as disapproving of leveraging claims in regulated markets. The focus of the leveraging claim is the use of economic power--there is no evidence or argument that firms in heavily regulated industries do not possess or cannot use economic power in ways deemed improper under the Sherman Act.

Likewise, in *International Audiotext Network, Inc. v. American Telephone & Telegraph Co.*, 893 F. Supp. 1207 (S.D.N.Y. 1994), aff'd, 62 F.3d 69 (1995), the district court considered whether AT&T attempted to leverage its near-monopoly over overseas calls into the United States to inhibit competition among information providers. Again, the court did not make any statements in its opinion that would limit [\*24] leveraging claims to firms competing in at least one highly competitive market.

Because the allegations in the complaint are sufficient to withstand a motion to dismiss on the basis of the state action doctrine and on the basis of defendants' economic argument, the court will not grant defendants' motion to dismiss. Similarly, there is no evidence in the record, as it stands now, to overcome this result. Therefore, defendants' motion for summary judgment should be denied.

#### **4. State Antitrust Claims**

Defendants maintain that the Michigan Antitrust Reform Act ("MARA") largely mirrors the Sherman Act and that Michigan courts rely on federal court interpretations of the Sherman Act in construing MARA. On this basis, defendants argue that the state action doctrine bars plaintiff's state antitrust claims. Plaintiff does not directly address this argument.

For the reasons stated above, the state action doctrine does not immunize defendants in this case. There is no articulated state policy regulating or removing competition from the bidding process for natural gas franchises. There is no active state supervision of the bidding process. Defendants cannot succeed under either prong [\*25] of the state action doctrine, and accordingly, their motion to dismiss and motion for summary judgment should be denied.

#### **B. Local Government Antitrust Act of 1984**

Defendants argue that the Local Government Antitrust Act of 1984 ("LGAA") protects them against antitrust actions because they are acting pursuant to the directions of the municipalities which granted Presque Isle Electric franchises. [HN7](#) The LGAA bars recovery in an antitrust action against "any local government, or official or employee thereof acting in an official capacity." [15 U.S.C. § 35\(a\)](#). Suit against private parties is likewise barred "in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity." [15 U.S.C. § 36\(a\)](#).

Plaintiff contends that the LGAA does not apply because no municipality directed defendants to submit the bids that they did. The court agrees. If defendants submitted bids which set rates at below Presque Isle Electric's costs, as plaintiff alleges, they were not directed to do so by anyone. Thus, by the express terms of the LGAA, it does not apply to defendants' allegedly anticompetitive behavior. [\*26] Further, the case cited to by defendants, *Sandcrest Outpatient Services v. Cumberland County Hospital System, Inc.*, 853 F.2d 1139 (4th Cir. 1988), used the state action doctrine to determine whether the LGAA applied to a private party. As noted previously, the state action doctrine does not apply in this case. Therefore, defendants are not entitled either to their motion to dismiss or their motion for summary judgment on the grounds that the LGAA bars suit.

#### **C. Interstate Commerce Requirement**

Defendants contend that the challenged conduct must substantially affect interstate commerce, and that in this case, there is no such effect because Presque Isle Electric purchases "all or virtually all of [its] natural gas" locally. Therefore, defendants assert, there is only an incidental effect on interstate commerce. Plaintiff maintains that the court should look at the effect of interstate commerce that results from the actions of plaintiff. Plaintiff claims that due to Presque Isle Electric's predatory pricing, it has had to substantially reduce its purchases of natural gas and equipment from out-of-state. (Pl. Br., Exh. A, Tierney Aff. at PP 16-18.)

The court finds that [\*27] plaintiff has sufficiently alleged and proved a substantial effect on interstate commerce to withstand a motion to dismiss and a motion for summary judgment. In [James R. Snyder Co. v. Associated General Contractors of America, Detroit Chapter, Inc., 677 F.2d 1111](#) (6th Cir.), cert. denied, 459 U.S. 1015, 74 L. Ed. 2d 508, 103 S. Ct. 374 (1982), the Sixth Circuit found that the defendant's anticompetitive behavior affected the purchases plaintiff would have made from out-of-state. Based on this evidence, the court concluded that defendant's behavior did affect interstate commerce such that the district court had jurisdiction:

A substantial amount of products which were involved in plaintiffs' businesses was purchased from out of state. Plaintiffs' purchases of those products decreased as result of the defendants' conduct. Therefore, the targeted activity (labor) as shown to have been interrelated with a specified aspect of interstate commerce (purchase of out-of-state products), and defendants' conduct was shown to have had a not insubstantial effect on plaintiffs' purchases of those products from interstate commerce.

[James R. Snyder, 677 F.2d at 1115](#). This [\*28] case is closely analogous. Taking the allegations in plaintiff's complaint as true, and the evidence in the record in the light most favorable to plaintiff, the court finds that there is a substantial enough effect on interstate commerce to confer jurisdiction on the court.

#### D. Tortious Interference Claims

Defendants contend that plaintiff cannot establish one of the prongs necessary to set forth a tortious interference claim--that defendants acted "illegally, unethically, or fraudulently". Defendants claim that since they are heavily regulated in the distribution both of electricity and of natural gas, that they acted with "legal justification". Plaintiff counters with the argument that it has alleged fraudulent activity in the complaint--that defendants falsely told representatives of certain municipalities that Presque Isle Electric was going to purchase plaintiff, that Presque Isle Electric would reliably provide natural gas to residents, that plaintiff had much higher costs than Presque Isle Electric, and that Presque Isle Electric would not raise prices after securing a franchise. (Compl. at P 49.) Taken as true, the allegations set forth a claim of fraudulent activity, [\*29] so the motion to dismiss should be denied. As relates to a motion for summary judgment, there is no evidence in the record either to support or to dispute these claims. Based on the existing record, defendants are not entitled to summary judgment.

#### IV. Conclusion

Accordingly, for the reasons stated above, IT IS ORDERED that defendants' motion to dismiss is hereby DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is hereby DENIED.

September 11, 1996

ROBERT H. CLELAND

UNITED STATES DISTRICT JUDGE



## Crosby v. Hospital Auth.

United States Court of Appeals for the Eleventh Circuit

September 11, 1996, Decided

No. 95-8187

**Reporter**

93 F.3d 1515 \*; 1996 U.S. App. LEXIS 23886 \*\*; 1996-2 Trade Cas. (CCH) P71,563; 10 Fla. L. Weekly Fed. C 334

R. Derry CROSBY, Plaintiff-Appellant, v. HOSPITAL AUTHORITY OF VALDOSTA AND LOWNDES COUNTY, D/B/A South Georgia Medical Center, Earl L. Creech, M.D., John R. Kendrick, M.D., Oscar E. Aguero, M.D., Archie L. Griffin, et al., Defendants-Appellees.

**Subsequent History:** [\*\*1] As Amended. Certiorari Denied March 17, 1997, Reported at: [1997 U.S. LEXIS 1659](#).

**Prior History:** Appeal from the United States District Court for the Middle District of Georgia. (No. 90-CV-23-VAL). Wilbur D. Owens, Jr., Judge.

**Disposition:** AFFIRMED.

## Core Terms

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immunity, state action, political subdivision, hospital authority, municipality, articulated, recommendations, medical staff, supervision, purposes, anticompetitive conduct, staff, local government, peer review committee, entity, district court, state policy, authorities, orthopedic, decisions, staff privileges, private party, credentialing, Bylaws, doctrine of immunity, sovereign immunity, challenged action, staff member, peer review, Sherman Act

## LexisNexis® Headnotes

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Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Healthcare Law > ... > Actions Against Facilities > Defenses > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

An appellate court reviews de novo a district court's grant of summary judgment.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

## [\*\*HN2\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

Under the state action immunity doctrine, also known as the Parker doctrine, states are immune from federal antitrust law for their actions as sovereign.

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

Governments > Local Governments > Claims By & Against

## [\*\*HN3\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

The state action immunity doctrine does not apply directly to a state's political subdivisions because subdivisions are not themselves sovereign; they do not receive all the federal deference of the states that create them. Accordingly, actions by the state and actions by municipalities are evaluated under different standards.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > State & Territorial Governments > Claims By & Against

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

Governments > Local Governments > Claims By & Against

Governments > Public Improvements > General Overview

## [\*\*HN4\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

The Parker doctrine exempts anticompetitive conduct engaged in as an act of government by the state as sovereign, or by its subdivisions pursuant to state policy to displace competition with regulation or monopoly public service.

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

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Duties & Powers

## [\*\*HN5\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

Under the Town of Hallie test, a municipality is entitled to state action immunity if it acts pursuant to clearly articulated and affirmatively expressed state policy.

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

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

#### **[HN6](#)[] Exemptions & Immunities, Parker State Action Doctrine**

Private parties are entitled to less federal deference than either the state or its political subdivisions. When a private party seeks the protection of state action immunity, it must show, under the Midcal test, both that (1) the challenged restraint was clearly articulated and affirmatively expressed as state policy; and (2) the policy was actively supervised by the state.

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

Governments > Local Governments > Claims By & Against

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

#### **[HN7](#)[] Exemptions & Immunities, Parker State Action Doctrine**

A greater level of state involvement in the anticompetitive conduct must be demonstrated if the defendant is a private party seeking immunity rather than a political subdivision. If the defendant is a "political subdivision," it travels under the single-prong Town of Hallie test. If the defendant is a private party, it travels under the two-prong Midcal test.

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

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Finance

#### **[HN8](#)[] Exemptions & Immunities, Parker State Action Doctrine**

Once it is clear that state authorization exists, there is no need to require the state to supervise actively the municipality's execution of what is a properly delegated function for purposes of state action immunity.

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

Governments > Local Governments > Claims By & Against

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

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

In determining whether a private actor may claim state action immunity, a court must examine the state's statutes to determine whether the actor is a "political subdivision," that is, whether imposition of the active state supervision requirement is necessary to determine whether the challenged actions are those of the state as sovereign.

Governments > Local Governments > Administrative Boards

#### **[HN10](#)[] Local Governments, Administrative Boards**

See [O.C.G.A. § 31-7-72](#).

Governments > Local Governments > Administrative Boards

**HN11**[ **Local Governments, Administrative Boards**

See [O.C.G.A. § 31-7-75](#).

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Local Governments > Claims By & Against

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

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

Governments > State & Territorial Governments > Claims By & Against

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

**HN12**[ **Antitrust & Trade Law, Exemptions & Immunities**

The definition of "political subdivisions" for purposes of state sovereign immunity does not control its definition for purposes of antitrust state action immunity. A court focuses instead on whether the nexus between the state and the hospital authority is sufficiently strong that there is little real danger that the hospital authority is involved in a private price-fixing arrangement.

Governments > Local Governments > Administrative Boards

Torts > ... > Punitive Damages > Availability > Governmental Entities

**HN13**[ **Local Governments, Administrative Boards**

The Georgia Supreme Court summarizes factors tending to establish a hospital authority's governmental nature. The factors include that it is a creature of statute; that it is defined as a "public body corporate and politic"; that its board is appointed by the governing body of the relevant political subdivision or subdivisions; that it is tax exempt; that it is deemed to exercise public and essential governmental functions; that it may exercise the power of eminent domain; that it receives tax revenues; and that the governing bodies of the relevant political subdivisions have a role in determining the disposition of its property upon dissolution.

Governments > Local Governments > Claims By & Against

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

93 F.3d 1515, \*1515LÁ996 U.S. App. LEXIS 23886, \*\*1

Governments > Local Governments > Administrative Boards

Governments > State & Territorial Governments > Claims By & Against

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

#### **HN14** [blue icon] Local Governments, Claims By & Against

Georgia's hospital authorities are political subdivisions for state action immunity purposes.

Governments > Local Governments > Administrative Boards

#### **HN15** [blue icon] Local Governments, Administrative Boards

Georgia's hospital authorities are "public bodies" which exercise public and essential governmental functions.  
[O.C.G.A. §§ 31-7-72](#) and -75.

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

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > County, Municipal & State Liability

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

#### **HN16** [blue icon] Exemptions & Immunities, Parker State Action Doctrine

The fact that a hospital authority engages in the competitive business of health care, or operating a hospital, does not remove it from the protective cloak of state action immunity. It is axiomatic that state action immunity includes protection for states when they engage in business.

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

#### **HN17** [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

[Section 1](#) of the Sherman Act does not apply to unilateral action; it proscribes only concerted action which imposes an unreasonable restraint on trade. Under the intraenterprise immunity doctrine, unilateral actions of a single enterprise do not constitute the type of concerted action proscribed by [§ 1](#) of the Sherman Act. Accordingly, an officer and an employee of the same company are legally incapable of conspiring with one another. Likewise, coordinated conduct of a corporation and its unincorporated divisions or its wholly owned subsidiaries does not constitute a conspiracy, but rather, unilateral conduct.

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

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

Healthcare Law > ... > Actions Against Facilities > Agency Relationships > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

#### **HN18** [blue icon] Exemptions & Immunities, Parker State Action Doctrine

A hospital and its staff can be separate entities for purposes of intraenterprise immunity, but the staff physicians may in certain contexts be agents of the hospital for purposes of state action immunity. The policies underlying these two immunity doctrines are different, as are the factors that guide a court's analysis.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Healthcare Law > ... > Actions Against Facilities > Agency Relationships > General Overview

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

#### **HN19** [blue icon] Exemptions & Immunities, Parker State Action Doctrine

To determine whether individual doctors are agents of a hospital authority during the performance of challenged actions, a court looks to the policies underlying the state action immunity doctrine and the context of the particular activities of the doctors in the case. What is critical is that the action be truly that of the state and not that of an individual or private actor. The "clear articulation" and "active state supervision" tests reflect this core policy.

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

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

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

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

#### **HN20** [blue icon] Exemptions & Immunities, Parker State Action Doctrine

To determine whether challenged actions are those of a hospital authority qua political subdivision, a court is guided by the Town of Hallie test. The appropriate inquiry focuses on whether there is little or no danger that the actor is involved in a private price-fixing arrangement as opposed to state action vindicating a truly governmental interest. As is true with respect to a hospital authority, a court examines whether the nexus between the state and the actions of the doctors on peer review committees is sufficiently strong that there is little real danger that these doctors are involved in a private price-fixing arrangement.

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

## **HN21[] Business Administration & Organization, Facility & Personnel Licensing**

Under [O.C.G.A. § 31-7-15](#), hospitals are required to provide for the review of professional practices in the hospital. Specifically, hospitals are directed to evaluate the qualifications and professional competence of persons seeking to perform medical and health care services at the hospital. [§ 31-7-15\(a\)\(3\)](#). Hospitals must undertake such evaluations to be entitled to a permit. [§ 31-7-15\(c\)](#). The statute permits peer review committees to perform such evaluations. [§ 31-7-15\(b\)](#). Peer review committees may be appointed by, inter alia, the governing board or medical staff of a licensed hospital.

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

## **HN22[] Business Administration & Organization, Peer Review**

See [O.C.G.A. § 31-7-15\(a\)](#).

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > County, Municipal & State Liability

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

## **HN23[] Governmental & Nonprofit Liability, County, Municipal & State Liability**

The Lee County test establishes a three-part inquiry to determine whether an entity satisfies the single-prong Town of Hallie test. The entity must show (1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct.

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

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > County, Municipal & State Liability

## **HN24[] Exemptions & Immunities, Parker State Action Doctrine**

The third requirement under the Lee County test is that the state must, through its statutes, clearly articulate a policy authorizing the challenged anticompetitive conduct. The Supreme Court notes that the phrase "clearly expressed" does not require the legislature to state explicitly that it anticipates anticompetitive effects. Rather, it simply requires that the anticompetitive conduct be a foreseeable result of the powers granted to the political subdivision. The Eleventh Circuit requires only that the anticompetitive conduct be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute.

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

## **HN25** [blue icon] Business Administration & Organization, Facility & Personnel Licensing

See [O.C.G.A. § 31-7-7.](#)

Civil Procedure > ... > Justiciability > Mootness > General Overview

Governments > Legislation > Effect & Operation > General Overview

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

## **HN26** [blue icon] Justiciability, Mootness

Because injunctive relief is prospective, a party seeking an injunction must show a threat of future injury. A prospective remedy will provide no relief for an injury that is, and likely will remain, entirely in the past. This concept is described as one of mootness.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Governments > Legislation > Effect & Operation > Amendments

Civil Procedure > Remedies > Injunctions > General Overview

## **HN27** [blue icon] Justiciability, Mootness

At every stage in the proceedings the court must stop, look, and listen to determine the impact of changes in the law on the case before it. Where a law is amended so as to remove its challenged features, the claim for injunctive relief becomes moot as to those features. Thus, a superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law.

Healthcare Law > Business Administration & Organization > Covenants not to Compete > Enforcement

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

93 F.3d 1515, \*1515L 1996 U.S. App. LEXIS 23886, \*\*1

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

## **HN28** [blue icon] Covenants not to Compete, Enforcement

Hospitals may make staff privilege decisions based on any reasonable objective, including, but not limited to, the appropriate utilization of hospital facilities. [O.C.G.A. § 31-7-7](#).

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

Governments > Local Governments > Administrative Boards

Healthcare Law > Business Administration & Organization > Covenants not to Compete > Enforcement

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

## **HN29** [blue icon] Injunctions, Grounds for Injunctions

"Reasonable anticipation" for purposes of injunctive relief does not require explicit authorization to engage in anticompetitive conduct.

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

Governments > Legislation > Interpretation

## **HN30** [blue icon] Exemptions & Immunities, Parker State Action Doctrine

Courts do not sit to determine whether a state statute violates state law for purposes of state action immunity. It is sufficient that the state has generally authorized the challenged anticompetitive conduct.

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

## **HN31** [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason protects those contracts that are reasonable in light of the interests of the parties and the interests of the public.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

**HN32** [blue download icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason protects contracts executed pursuant to [O.C.G.A. § 31-7-7](#).

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Local Governments > Employees & Officials

**HN33** [blue download icon] Remedies, Damages

See [15 U.S.C.S. § 36\(a\)](#).

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

Antitrust & Trade Law > Clayton Act > General Overview

**HN34** [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

Whether actions are directed by an official, as contemplated by the Local Government Antitrust Act of 1984, [15 U.S.C.S. § 34 et seq.](#), is determined by borrowing and applying the state action doctrine two-prong test.

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**Judges:** Before ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

**Opinion by:** ANDERSON

**Opinion**

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[\*1518] ANDERSON, Circuit Judge:

This case involves a doctor, R. Derry Crosby, who was denied staff privileges by the Hospital Authority of Valdosta and Lowndes County ("the Authority"). Dr. Crosby claimed that the Authority, its board members, and the individual doctors on hospital peer review committees (collectively "defendants") violated federal antitrust law when they denied his application for hospital privileges.<sup>1</sup> The district court granted defendants' motion for summary judgment

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<sup>1</sup> Dr. Crosby presented other state law claims which are not relevant to this appeal.

on the ground that their actions were shielded by the doctrine of state action antitrust immunity. *Crosby v. Hospital Authority of Valdosta*, 873 F. Supp. 1568, 1581 (M.D.Ga.1995). We affirm.

## I. FACTS

Dr. [\*\*2] Crosby graduated from West Virginia College of Osteopathy, an osteopathic medical school, where he earned a Doctor of Osteopathy ("D.O.") degree.<sup>2</sup> Upon completion [\*1519] of medical school, Dr. Crosby completed a one year osteopathic internship at Memorial Hospital in York, Pennsylvania. He remained at Memorial Hospital for another four years to complete an osteopathic orthopedic surgical residency program.

[\*\*3] On September 20, 1986, Dr. Crosby applied for orthopedic surgical staff privileges at South Georgia Medical Center ("SGMC"), the hospital doing business for the Authority. After review by numerous committees and the Authority, his application was denied. Dr. Crosby contends that the doctors on the peer review committees which gave recommendations to the Authority and the Authority itself conspired to deprive him of staff privileges because he is not an allopathic doctor and as part of a conspiracy in restraint of trade in violation of [15 U.S.C.A. § 1](#), and monopolization (or an attempt to monopolize) in violation of [15 U.S.C.A. § 2](#).

The context of this case makes it necessary to review the creation of hospital authorities in Georgia and the peer review process at SGMC and the Authority. The Authority was created pursuant to Georgia's Hospital Authorities Law, [O.C.G.A. § 31-7-70 et seq.](#) See generally *Cox Enterprises v. Carroll City/County Hosp. Auth.*, 247 Ga. 39, 273 S.E.2d 841, 844-45 (1981). Pursuant to the Hospital Authorities Law, the Georgia legislature "created in and for each county and municipal corporation of the state a public body corporate and politic to be known [\*\*4] as the 'Hospital Authority' of such county or city...." [O.C.G.A. § 31-7-72\(a\)](#). A hospital authority's board is appointed by the governing body of the county or municipal corporation in which it was created. *Id.* Hospital authority board members receive no compensation for their work, although they are permitted reimbursement for actual expenses. [O.C.G.A. § 31-7-74\(a\)](#). Hospital authorities are granted the same exemptions and exclusions from taxes as are granted to cities and counties for similar facilities. [O.C.G.A. § 31-7-72\(e\)](#).

A hospital authority is "deemed to exercise public and essential governmental functions and [has] all the powers necessary and convenient to carry out and effectuate the purposes and provisions of [the Hospital Authorities Law]." [O.C.G.A. § 31-7-75](#). These powers include, in addition to those necessary to operate a hospital, the power to sue and be sued, to execute contracts, to exercise the right of eminent domain, to receive proceeds from the sale of general obligation or county bonds, and to issue revenue anticipation certificates or other evidence of indebtedness. *Id.* An authority may not operate for profit, but rather, must adjust its prices [\*\*5] to produce only enough revenue to cover costs with reasonable reserves. [O.C.G.A. § 31-7-77](#). Hospital authorities are authorized to sell "negotiable revenue anticipation certificates" for the purpose of funding their activities. [O.C.G.A. §§ 31-7-75\(16\), 31-7-78](#). These certificates, however, are not a debt of the city, the county, the State, or any political subdivision. [O.C.G.A. § 31-7-79](#). Although not a debt of any "political subdivision," these certificates "are declared to be issued for an essential public and governmental purpose and together with interest thereon and income therefrom, [are] exempt

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<sup>2</sup>This case involves Crosby's claim that he was denied staff privileges because he was an osteopathic as opposed to an allopathic physician. We have described the difference between the two as follows:

Generally, osteopathy assists the body's remedial capabilities by focusing on the interaction of the biological systems and stressing musculoskeletal manipulative therapy, while allopathy treats disease by producing effects incompatible with the condition to be alleviated.... Although Georgia licenses both D.O.'s and M.D.'s to practice medicine, the state distinguishes between the two medical educations, referencing them separately in the licensing statutes. [O.C.G.A. §§ 43-34-20\(3\), 43-34-26](#) (1984).

from all taxes." [O.C.G.A. § 31-7-79](#). Although an authority does not have the power to tax, counties and cities possess the power to levy an ad valorem tax for the purpose of contracting with the authority for the provision of specific services. [O.C.G.A. § 31-7-84\(a\)](#). Indeed, counties and their component municipalities are specifically authorized to contract with hospital authorities for the purpose of providing medical care to indigent residents of that county or municipality. [O.C.G.A. § 31-7-85](#). Upon dissolution, a hospital authority is not authorized, in the absence of other [\[\\*\\*6\]](#) specific legislation, to convey [\[\\*1520\]](#) any of its property to a private person, association, or corporation. [O.C.G.A. § 31-7-89](#). Finally, the board of trustees of each authority is required to file with the governing body of the particular municipality an annual report of its activities. [O.C.G.A. § 31-7-90](#).

Dr. Crosby's application for staff privileges was governed by the bylaws of SGMC's medical staff (the "Bylaws").<sup>3</sup> In particular, Article X, [§ 2\(b\)\(4\)](#) sets forth educational and other related requirements for orthopedic surgeons applying for staff privileges: "Physicians applying for Staff Membership in the specialty of Orthopedics must demonstrate by training, experience, and performance the requirements for eligibility in the specialty as designated by the American Board of Orthopedics and be either board certified or board eligible." (Bylaws, Art. X, [§ 2\(b\)\(4\)](#)).

Pursuant to [\[\\*\\*7\]](#) the Bylaws, Dr. Crosby's application for staff privileges was reviewed by the following committees of the medical staff: (1) the Orthopedic Service of the Department of Surgery; (2) the Credentials Committee; (3) the Executive Committee; and (4) the Ad Hoc Hearing Committee. The Orthopedic Service recommended denial of Dr. Crosby's application because he did not have the background (i.e., training, experience, and performance) required by the Bylaws.<sup>4</sup> In addition, the Orthopedic Service stated that its decision was based on its determination that there were a sufficient number of orthopedic surgeons already on the hospital staff. Next, the Credentials Committee recommended denial of Dr. Crosby's application for failure to comply with the Bylaws' orthopedic residency requirements.<sup>5</sup> The Executive Committee reviewed the Credentials Committee's denial and affirmed its conclusion. The Ad Hoc Hearing Committee then conducted a hearing and concluded that the recommendation of the Executive Committee was appropriate. Pursuant to the Bylaws, the application was referred back to the Executive Committee, which voted to uphold the Ad Hoc Hearing Committee's recommendation of denial on the [\[\\*\\*8\]](#) grounds that Dr. Crosby failed to meet the criteria established by the Bylaws.

Finally, the Authority, acting through its Appellate Review Committee, conducted a thorough hearing<sup>6</sup> during which it considered Dr. Crosby's application in light of the recommended denial by the staff committees.<sup>7</sup> As a result of this hearing, the Authority unanimously voted to deny Dr. Crosby's application. It stated its grounds for this denial as follows:

- (1) The medical staff of South Georgia Medical Center, [\[\\*\\*9\]](#) through its Executive Committee, has found that the applicant has not demonstrated by training, experience and performance the requirements for eligibility in the specialty of orthopedics.

<sup>3</sup> All members of the medical staff agreed to abide by the Bylaws. Further, the Bylaws were adopted and approved by the Authority.

<sup>4</sup> Specifically, Dr. Crosby was not "board certified or board eligible" as designated by the American Board of Orthopedics ("ABO") because he had not completed an osteopathic orthopedic residency training program that was approved by the ABO. Accordingly, the Orthopedic Service concluded, in part, that Dr. Crosby did not satisfy the Bylaws' residency requirements.

<sup>5</sup> In other words, the recommendation of the Credentials Committee dropped the Orthopedic Service's second ground for denying Dr. Crosby's application.

<sup>6</sup> Dr. Crosby was represented by counsel at this hearing.

<sup>7</sup> Under the Bylaws, although the various staff committees provide recommendations to the Authority, the Authority wields ultimate decisionmaking power over staff credentialing decisions. (Bylaws, Article V, [§ 2](#)). In this regard, the Authority exercises meaningful control over the ultimate decision. It has the power to follow, modify, or even disregard staff committee recommendations. (*Id.* at Article V, [§ 2\(g\)-\(l\)](#)).

(2) The applicant has not met the "burden" placed on him by Article V, § 1, b of the Medical Staff Bylaws of South Georgia Medical Center.

(3) The applicant fails to meet the requirements of Article X, § 2, b.--Surgical Service, 4., in that he has not demonstrated that he is either Board Certified or Board Eligible by the American Board of Orthopedics.

**[\*\*10] [\*1521]** Thereafter, on March 14, 1990, Dr. Crosby filed the present action against three groups of defendants: 1) the Authority, d/b/a South Georgia Medical Center; 2) the board members of the Authority; and 3) the physicians who participated in the various review committees. He alleged violations of federal antitrust law (restraint of trade and monopolization) and Georgia law.<sup>8</sup>

The district court, in a well-reasoned opinion, granted summary judgment, holding that all defendants were immune from suit by virtue of state action immunity under Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), and its progeny. Crosby, 873 F. Supp. at 1580-81. The Authority and its members, it reasoned, were a "political subdivision" of the State and Georgia had clearly articulated a policy authorizing the challenged anticompetitive conduct. Id. at 1575-81. Further, it found that the [\*\*11] individual staff members on peer review committees, because they acted as the Authority's agents, were protected by the Authority's state action immunity. Id. at 1576-77. Finally, the court held that, even if defendants were not entitled to state action immunity, they were immune from damages under the Local Government Antitrust Act ("LGAA"), 15 U.S.C.A. §§ 35-36, and the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C.A. §§ 11101-11152. Crosby, 873 F. Supp. at 1581-84. On appeal, Dr. Crosby challenges each of these determinations.<sup>9</sup>

## II. DISCUSSION

### A. State Action Immunity

**HN1** We review *de novo* the district court's grant of summary judgment to defendants on their state action immunity defense. FTC v. Hospital Board of Directors of Lee County, 38 F.3d 1184, 1187 (11th Cir. 1994) (citation [\*\*12] omitted); Bolt v. Halifax Hosp. Medical Ctr. ("Bolt IV"), 980 F.2d 1381, 1384 (11th Cir. 1993). **HN2** Under the state action immunity doctrine, also known as the *Parker* doctrine, states are immune from federal antitrust law for their actions as sovereign. Parker v. Brown, 317 U.S. 341, 351-53, 63 S. Ct. 307, 314, 87 L. Ed. 315 (1943); Lee County, 38 F.3d at 1187. The doctrine is grounded in and derived from principles of federalism and state sovereignty. Parker, 317 U.S. at 350-52, 63 S. Ct. at 313-14.

**HN3** The state action immunity doctrine "does not apply directly to a state's political subdivisions because these subdivisions "are not themselves sovereign; they do not receive all the federal deference of the States that create them.' " Lee County, 38 F.3d at 1187 (quoting City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 412, 98 S. Ct. 1123, 1136, 55 L. Ed. 2d 364 (1978)). Accordingly, actions by the State and actions by municipalities are evaluated under different standards. **HN4** The *Parker* doctrine "exempts ... anticompetitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions pursuant to state [\*\*13] policy to displace competition with regulation or monopoly public service." City of Lafayette, 435 U.S. at 413, 98 S. Ct. at 1137 (Brennan, J., plurality opinion). The extension of *Parker* immunity to political subdivisions reflects the Court's conclusion that because "municipal corporations are instrumentalities of the State for the convenient administration of government within their limits, [cit.], the actions of municipalities may reflect state policy." Id. (citation omitted).

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<sup>8</sup> By consent of parties, Dr. Crosby abandoned all but his federal antitrust claims. Crosby, 873 F. Supp. at 1570.

<sup>9</sup> Because we affirm the district court's ruling with respect to state action immunity and immunity from damages under the LGAA, we need not reach its decision regarding immunity under the HCQIA.

Accordingly, [HN5](#)<sup>10</sup> the Court has made clear that a municipality<sup>10</sup> [\\*\\*15](#) is entitled to state [\[\\*1522\]](#) action immunity if it acted pursuant to "clearly articulated and affirmatively expressed state policy." [\*Town of Hallie v. City of Eau Claire\*, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 1720, 85 L. Ed. 2d 24 \(1985\)](#); [\*City of Lafayette\*, 435 U.S. at 410, 98 S. Ct. at 1135](#); see also [\*Bolt IV\*](#), 980 F.2d at 1385-86.<sup>11</sup> [HN6](#)<sup>11</sup> Private parties are entitled to even less federal deference than either the State or its political subdivisions. When a private party seeks the protection of state action immunity, it must show both that: (1) the challenged restraint was clearly articulated and affirmatively expressed as state policy; [\[\\*14\]](#) and (2) the policy was actively supervised by the state. [\*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 \(1980\)](#). In *Town of Hallie*, the Court explained that the second prong of the *Midcal* test, the active state supervision requirement, is unnecessary when the actor is a municipality because whereas there is a real danger that a private party acts to further his or her own interest rather than the governmental interests of the State, there is less danger that a municipality is involved in a *private* price-fixing arrangement. [471 U.S. at 47, 105 S. Ct. at 1720](#). Although there is some danger that a municipality will pursue its own goals rather than those of the State,<sup>12</sup> this concern is addressed by the first prong of the *Parker* doctrine, i.e., the municipality must act pursuant to clearly articulated state policy.

In sum, [HN7](#)<sup>12</sup> a greater level of state involvement [\\*\\*16](#) in the anticompetitive conduct must be demonstrated if the defendant is a private party rather than a political subdivision. If the defendant is a "political subdivision," it travels under the single-prong *Town of Hallie* test (i.e., the defendant must show "clear articulation"). If the defendant is a private party, it travels under the two-prong *Midcal* test (i.e., defendant must show both "clear articulation" and "active state supervision"). Accordingly, we must determine whether the Authority, its board members and SGMC's staff members should be evaluated as a political subdivision or as private actors.

#### B. Political Subdivision or Private Actors?

##### 1. The Authority and its Board Members

The district court found that the Authority is a political subdivision of Georgia. It based its decision on several cases involving similar issues in Alabama and Florida. See [\*FTC v. Hosp. Board of Directors of Lee County\*, 38 F.3d 1184 \(11th Cir. 1994\)](#); [\*Askew v. DCH Reg. Health Care Authority\*, 995 F.2d 1033 \(11th Cir.\), cert. denied, 510 U.S. 1012, 114 S. Ct. 603, 126 L. Ed. 2d 568 \(1993\); \*Todorov v. DCH Healthcare Authority\*, 921 F.2d 1438 \(11th Cir. 1991\); \[\\[\\\*17\\]\]\(#\) see also \[\\*Sweeney v. Athens Regional Medical Center\\*, 705 F. Supp. 1556, 1565 \\(M.D.Ga. 1989\\)\]\(#\) \(interpreting Georgia statute\).](#)

<sup>10</sup> We use the terms "municipality" and "political subdivision" interchangeably throughout this opinion. Cf. [\*Askew v. DCH Regional Health Care Authority\*, 995 F.2d 1033, 1037](#) (11th Cir.), cert. denied, **510 U.S. 1012, 114 S. Ct. 603, 126 L. Ed. 2d 568 (1993)** ("Ordinarily, when a local government entity seeks immunity from antitrust liability, it must show that it is a political subdivision of the state and that the challenged conduct is authorized under a "clearly articulated and affirmatively expressed policy of the state."); *Bolt IV*, 980 F.2d at 1385 ("Political subdivisions, including municipalities, ... can obtain protection under the state-action immunity doctrine if they can "demonstrate that [they] acted pursuant to a clearly articulated stated policy displacing competition with regulation.").")

<sup>11</sup> In *City of Lafayette*, the Court suggested that state action immunity would apply to a municipality only if: (1) the municipality acted pursuant to clearly articulated and affirmatively expressed state policy; and (2) the anticompetitive conduct was actively supervised by the State. 435 U.S. at 410, 98 S. Ct. at 1135. In *Town of Hallie*, the Court held that only the first of the these two prongs applies to municipalities. [471 U.S. at 46-47, 105 S. Ct. at 1720](#). In [\*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 Court held that both prongs apply to private parties.

<sup>12</sup> Cf. [\*City of Lafayette\*, 435 U.S. at 412-13, 98 S. Ct. at 1136-37](#) ("In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, ... we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.").

In determining whether the Authority is a "political subdivision" for purposes of state action immunity, we are guided by [Town of Hallie, 471 U.S. at 46-47, 105 S. Ct. at 1720](#). There, the Court held that municipalities, and perhaps state agencies, need not satisfy the active state supervision requirement. *Id.* It based its conclusion on the realization that states often act through their municipalities and, accordingly, action by a municipality often is equivalent to action by the State as sovereign.

**[\*1523]** Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a **[\*\*18]** clearly articulated state policy. [HN8](#) Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

[Id. at 47, 105 S. Ct. at 1720](#). The Court discounted the importance of active supervision in the context of examining a political subdivision's actions, noting that the "requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." [Id. at 46, 105 S. Ct. at 1720](#). Such evidence is not necessary where a political subdivision, a creation and arm of the State, acts pursuant to clearly articulated state policy. See [Hass v. Oregon State Bar, 883 F.2d 1453, 1461 \(9th Cir.1989\)](#), cert. denied, 494 U.S. 1081, 110 S. Ct. 1812, 108 L. Ed. 2d 942 (1990).

We have held that state hospital authorities can be political subdivisions for purposes of state action immunity. See, e.g., [Askew, 995 F.2d at 1037-38](#). Of course, this does not end the inquiry; [HN9](#) in each case we must examine the State's statutes to determine whether the actor is a "political **[\*\*19]** subdivision," i.e., whether imposition of the active state supervision requirement is necessary to determine whether the challenged actions are those of the State as sovereign.<sup>13</sup>

The Authority was created pursuant to [O.C.G.A. § 31-7-72](#) which provides, in relevant part:

[HN10](#) (a) There is created in and for each county and municipal corporation of the state a public body corporate and politic **[\*\*20]** to be known as the "hospital authority" of such county or city, which shall consist of a board of not less than five nor more than nine members to be appointed by the governing body of the county or municipal corporation of the area of operation for staggered terms as specified by resolution of the governing body....

(e) Nothing in this Code section is intended to invalidate any of the acts of existing boards of authorities. Hospital authorities shall be granted the same exemptions and exclusions from taxes as are now granted to cities and counties for the operation of facilities similar to facilities to be operated by hospital authorities as provided for under this Title.

Further, [O.C.G.A. § 31-7-75](#) provides, in relevant part:

[HN11](#) Every hospital authority shall be deemed to exercise public and essential governmental functions and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Article.

The Authority concludes from this language that, because hospital authorities are public bodies, they also must be political subdivisions of the State for purposes of *Parker* immunity. See [FTC v. \[\\*\\*21\] Hospital Board of Directors](#)

<sup>13</sup> Appellees cite a number of factually-distinguishable cases for the proposition that "hospital authorities" in general are political subdivisions. In [Todorov v. DCH Healthcare Authority, 921 F.2d 1438 \(11th Cir.1991\)](#) and [Askew, supra](#), for example, we examined hospital authorities created by the Alabama Health Care Authorities Act. This Act specifically provided that Alabama's hospital authorities acted as political subdivisions of the State when exercising their powers, even if such exercise violated federal [antitrust law](#). These cases are not dispositive because Georgia's statutes are not nearly so explicit.

of Lee County, 38 F.3d 1184, 1188 (11th Cir.1994) (concluding that a health care authority was a "political subdivision" subject to the single-prong test because it was a special purpose unit of local government).

Dr. Crosby argues that the Georgia Supreme Court has conclusively determined that Georgia hospital authorities are not "political subdivisions" for purposes of state action [\*1524] immunity. See Thomas v. Hospital Authority, 264 Ga. 40, 440 S.E.2d 195 (1994). In *Thomas*, the court examined whether a hospital authority in Georgia was entitled to sovereign immunity from an action arising out of a slip and fall injury. The court examined Art. I, § 2, P 9(e) of the Georgia Constitution, which provides, in relevant part: "Sovereign immunity extends to the state and all of its departments and agencies." The court held that "hospital authorities, because they are neither the State nor a department or agency of the State, are not entitled to the defense of sovereign immunity." Thomas, 440 S.E.2d at 196. The court unambiguously stated that "neither the language of [the code section] which refers to a hospital authority as a "body corporate and [\*\*22] politic,' nor that which assigns to it "public and essential governmental functions' is sufficient to constitute it a political subdivision of the state...." *Id.* (quotation omitted). The court concluded that the hospital authority was not a "political subdivision": "There is a clear distinction between a political subdivision such as a county and a corporate body such as a hospital authority, which is a creation of the county." *Id.*

*Thomas* indicates that Georgia does not consider its hospital authorities to be "political subdivisions" for purposes of sovereign immunity under the Georgia Constitution. In *Thomas*, the court supported its conclusion by reference to the public policy underlying sovereign immunity in Georgia. Id., 440 S.E.2d at 196-97. It found that a hospital authority's functions are not the type of conduct Georgia's doctrine of sovereign immunity was designed to protect. Sovereign immunity was intended to protect the government from lawsuits as it goes about the business of governing. *Id.* By contrast,

the operation of a hospital is not the kind of function, governmental or otherwise, entitled to the protection of sovereign immunity. The very [\*\*23] functions performed by the Hospital Authority are performed by private hospitals and the Hospital Authority is in direct competition with these private hospitals for patients.[] If an instrumentality of the government chooses to enter an area of business ordinarily carried on by private enterprise, i.e., engage in a function that is not "governmental," there is no reason why it should not be charged with the same responsibilities and liabilities borne by a private corporation.

*Id., 440 S.E.2d at 197.*

We recognize that the decision to "authorize" anticompetitive conduct is wisely left to the State. See FTC v. Ticor Title Insurance Co., 504 U.S. 621, 636, 112 S. Ct. 2169, 2178, 119 L. Ed. 2d 410 (1992) (emphasizing that careful application of state action immunity doctrine insures that the State remains responsible "for the price fixing it has sanctioned and undertaken to control"). However, HN12[<sup>12</sup>] the definition of "political subdivisions" for purposes of state sovereign immunity does not control its definition for purposes of antitrust state action immunity. As directed by Town of Hallie, 471 U.S. at 46-47, 105 S. Ct. at 1720, we focus instead on whether the nexus [\*\*24] between the State and the Authority is sufficiently strong that there is little real danger that the Authority is involved in a private price-fixing arrangement. See *id.*

Georgia public purpose authorities are unique entities, lying somewhere between a local, general-purpose governing body (such as a city or county) and a corporation. See generally Paul W. Bonapfel, "The Legal Nature of Public Purpose Authorities: Governmental, Private or Neither?" 8 Ga.L.Rev. 680 (1974) ("An authority is [typically] an entity possessing both corporate and governmental characteristics and created by general purpose governments to accomplish specific purposes...."). Indeed, although Georgia's hospital authorities possess many of the attributes of a sovereign, they are clearly limited in their character and are private actors in many respects.

In *Thomas*, the court focused on the fact that hospital authorities have a separate existence from the State, i.e., they are an instrumentality created by the State and county for a special purpose. In other contexts, however, the Georgia Supreme Court has recognized that hospital authorities are governmental entities. For example, in Martin [\*\*25] v. Hospital Authority of Clarke County, 264 Ga. 626, 449 S.E.2d 827, 828 (1994), a case [\*1525] decided after *Thomas*, the Georgia Supreme Court held that hospital authorities are not liable for punitive damages because

they are "governmental entities." Indeed, the fact that hospital authorities are governmental entities is demonstrated by the statutes creating and regulating them. [HN13](#)<sup>14</sup>] The Georgia Supreme Court has summarized those factors illustrating the Authority's governmental nature:

Factors tending to establish the Authority's governmental nature include that it is a creature of statute; that it is defined as a "public body corporate and politic" (emphasis supplied); that its Board is appointed by the governing body of the relevant political subdivision or subdivisions; that it is tax exempt; that it is deemed to exercise public and essential governmental functions; that it may exercise the power of eminent domain; that it receives tax revenues; and that the governing bodies of the relevant political subdivisions have a role in determining the disposition of its property upon dissolution.

[Cox Enterprises v. Carroll City/County Hospital Authority](#), 247 Ga. 39, [\[\\*26\]](#) 273 S.E.2d 841, 845 (1981). After careful analysis, the court in *Cox Enterprises*, concluded that hospital authorities are instrumentalities of the state, i.e., they are the manner in which the state has determined to conduct its business. [Id.](#), 273 S.E.2d at 846. Accordingly, the court held that, as a governmental entity, the authority's attempt to bring a libel action was unconstitutional. *Id.*

We are satisfied that the Authority is an instrumentality, agency, or "political subdivision" of Georgia for purposes of state action immunity; thus, we need not apply the active state supervision requirement. Although Thomas held that hospital authorities are not part of the State or county for purposes of state sovereign immunity, the different policy reasons underlying state action immunity indicate that [HN14](#)<sup>15</sup>] Georgia's hospital authorities are political subdivisions for state action immunity purposes. As noted above, this determination is guided by the rationale of *Town of Hallie*. Applying that rationale, we conclude that the nexus between the State and the Authority is sufficiently strong that, when combined with a clearly articulated policy in favor of the challenged anticompetitive [\[\\*27\]](#) conduct, there is little danger that it is involved in a *private* price fixing arrangement. See [Town of Hallie](#), 471 U.S. at 47, 105 S. Ct. at 1720. Cf. [Porter Testing Laboratory v. Board of Regents](#), 993 F.2d 768, 772 (10th Cir.), cert. denied, 510 U.S. 932, 114 S. Ct. 344, 126 L. Ed. 2d 309 (1993) (holding that the active state supervision requirement applies only to purely private parties).

Georgia has chosen to operate its hospitals through the instrumentality of hospital authorities and, accordingly, it has clothed these authorities with certain necessary governmental qualities. Cf. [Cox Enterprises](#), 273 S.E.2d at 846 ("Certainly the government is authorized to operate hospitals, either directly or, as here, indirectly."). Although hospital authorities may not possess all of the powers enjoyed by municipalities or by the State, they enjoy numerous governmental powers. Further, the legislature has unambiguously stated that [HN15](#)<sup>16</sup>] they are "public bodies" which exercise "public and essential governmental functions." [O.C.G.A. §§ 31-7-72, 31-7-75](#). Georgia has also empowered hospital authorities to act as market participants in several respects by granting them several powers [\[\\*28\]](#) which resemble those of a private corporation. The mere grant of such powers, however, does not transform an otherwise governmental entity into a private actor of the type we would expect to engage in a private price-fixing agreement. The governmental powers enjoyed by the Authority are similar in material respects to those of a hospital that is directly operated by the State. None of its non-governmental aspects create a danger that it is involved in a private price-fixing arrangement.

The policy rationale employed by the court in *Thomas*, does not aid Dr. Crosby's cause. [HN16](#)<sup>17</sup>] The fact that the Authority engages in the competitive business of health care, or operating a hospital, does not remove it from the protective cloak of state action immunity. It is axiomatic that state action immunity includes protection for states when they engage in business. To follow the policy rationale in *Thomas* and withhold immunity in those cases where the [\[\\*1526\]](#) state chooses "to enter an area of business ordinarily carried on by private enterprise," would be to virtually eliminate state action immunity altogether.<sup>14</sup>

<sup>14</sup> The parties have not argued and we decline to address the Supreme Court's invitation to employ a "market participant" exception to state action immunity. See [City of Columbia v. Omni Outdoor Advertising](#), 499 U.S. 365, 374-75, 379, 111 S. Ct. 1344, 1351, 1353, 113 L. Ed. 2d 382 (1991). See also [Genentech, Inc. v. Eli Lilly and Co.](#), 998 F.2d 931, 948 (Fed.Cir.1993), cert. denied, 510 U.S. 1140, 114 S. Ct. 1126, 127 L. Ed. 2d 434 (1994).

[\*\*29] Accordingly, we hold that the Authority is a "political subdivision" of Georgia such that it is unnecessary to apply *Midcal's* active state supervision requirement. Further, there has been no argument that we should apply a different test to the Authority's board members, and we decline to do so.

## 2. Members of peer review committees

Appellants also argue that the district court erred in its determination that the individual doctors who served on the various peer review committees were agents of the Authority and, therefore, were entitled to the single-prong *Town of Hallie* test. See [Crosby, 873 F. Supp. at 1576](#). The district court relied on [Cohn v. Bond, 953 F.2d 154, 158 \(4th Cir. 1991\)](#), cert. denied, 505 U.S. 1230, 112 S. Ct. 3057, 120 L. Ed. 2d 922 (1992), for the conclusion that individual hospital staff members in this case should be treated as the Authority's agents, i.e., as a political subdivision, for state action immunity purposes.

In *Cohn*, the Fourth Circuit held that medical staff members of a municipally owned and operated hospital, when making their recommendations to deny hospital privileges, acted as agents of that hospital. [953 F.2d at 157-58](#).

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When members of the medical staff recommend action on an application for privileges, as authorized by the municipal hospital, they are acting in their capacity as employees, as opposed to private parties. [[Oksanen v. Page Mem. Hosp., 945 F.2d 696 \(4th Cir. 1991\)](#) (en banc), cert. denied, 502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992) ]. Physicians who make peer review decisions at the behest of, or by delegation from, the hospital's board of trustees, are acting as agents of the hospital and are, therefore, indistinguishable from the hospital.

*Id.* Because the doctors were agents of the hospital, the court held that the "active supervision" prong was inapplicable. *Id.* at 158-59. "The actions of the staff are immune when as is true here, they are acting as agents of ... a municipal hospital ... in making their recommendations." *Id.* The court relied exclusively on [Oksanen, supra](#), for its conclusion that physicians on peer review committees act as agents of the hospital. [Cohn, 953 F.2d at 158](#) ("As previously discussed, members of the medical staff acted as agents of [the] Hospital in making their recommendation to deny hospital [\*\*31] privileges. The second, "active supervision" prong is, therefore, inapplicable in this case.").

In *Oksanen*, the Fourth Circuit examined whether plaintiff had established the existence of a contract, combination, or conspiracy under section one of the Sherman Act. 945 F.2d at 702. Section one of the Sherman Act [HN17](#) does not apply to unilateral action; it proscribes only concerted action which imposes an unreasonable restraint on trade. [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 760-61, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 \(1984\)](#); [Albrecht v. Herald Co., 390 U.S. 145, 148, 88 S. Ct. 869, 871, 19 L. Ed. 2d 998 \(1968\)](#). Under the intraenterprise immunity doctrine announced in [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69, 104 S. Ct. 2731, 2740-41, 81 L. Ed. 2d 628 \(1984\)](#), unilateral actions of a single enterprise do not constitute the type of concerted action proscribed by section one of the Sherman Act. Accordingly, an officer and an employee of the same company are legally incapable of conspiring with one another. [Id. at 769, 104 S. Ct. at 2741](#). ("Officers or employees of the same firm do not provide the plurality of actors imperative [\*\*32] for a § 1 conspiracy.") (citation omitted). In *Copperweld*, the Court emphasized that an "internal "agreement' to implement a single, unitary firm's policies" does not raise the anticompetitive concerns targeted by the Sherman Act. [Id. at 769, 104 S. Ct. at 2740](#). "The officers of a single firm are [\*1527] not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." [Id. at 769, 104 S. Ct. at 2740-41](#). Likewise, coordinated conduct of a corporation and its unincorporated divisions or its wholly owned subsidiaries does not constitute a conspiracy, but rather, unilateral conduct. [Id. at 771, 104 S. Ct. at 2741-42](#):

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.... With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining [\*\*33] of economic resources that had previously served different economic interests, and there is no justification for [§ 1](#) scrutiny.

*Id.*

In *Oksanen*, the court held that, under *Copperweld*'s intraenterprise immunity doctrine, a hospital and its medical staff lack the capacity to conspire during the peer review process. [945 F.2d at 703](#). In examining the relationship between a hospital and its medical staff during the peer review process, the court concluded that the medical staff works "as the Board's agent under an "internal "agreement' to implement a single, unitary firm's policies' of evaluating the conduct and competence of those to whom the hospital extends privileges." *Id.* (quoting [Copperweld, 467 U.S. at 769, 104 S. Ct. at 2740](#)). As such, "the peer review process does not represent the sudden joining of independent economic forces that section one is designed to protect." *Id.*; see also [Copperweld, 467 U.S. at 767-69, 104 S. Ct. at 2740](#). Instead, the hospital and its medical staff display a unity of interest when the staff takes part in hospital management decisions. [Oksanen, 945 F.2d at 703](#). In addition, the court found it relevant to the *Copperweld* [\*\*34] inquiry that the hospital retained ultimate control over staff credentialing decisions. [Id. at 704](#) ("In *Copperweld*, the parent corporation's ability to exercise control over its subsidiary if the subsidiary failed to act in its best interests influenced the Court's decision that the coordinated activity of the two entities should be treated as that of a single entity.") (citing [Copperweld, 467 U.S. at 769-73, 104 S. Ct. at 2741-42](#)).

The holding in *Oksanen* dictated the result in *Cohn*. If a hospital and its staff during the course of peer review are functionally one entity, then, *a fortiori*, the staff members are (at the very least) agents of the hospital during peer review. Accordingly, *Cohn*'s rationale persuades us only to the extent this circuit has embraced the rationale of *Oksanen*.

This circuit's counterpart to *Oksanen* is [Bolt v. Halifax Hosp. Medical Center \(Bolt III\), 891 F.2d 810, 819 \(11th Cir. 1990\)](#), implicitly overruled in part by [City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 \(1991\)](#). *Bolt III* involved a physician whose medical staff privileges had been revoked at three different [\*\*35] hospitals. The plaintiff-physician brought an antitrust action against the hospitals, their medical staffs, and a local medical society. In our first panel opinion, we held that the hospitals and their medical staffs were immune from suit under state action immunity. See [Bolt v. Halifax Hosp. Medical Center \(Bolt I\), 851 F.2d 1273, 1284 \(11th Cir. 1988\)](#). *Bolt I* was vacated when the case was taken en banc. See [Bolt v. Halifax Hosp. Medical Center, 861 F.2d 1233, 1234 \(11th Cir. 1988\)](#). Before the en banc court, the hospitals and their medical staffs withdrew their arguments based on state action immunity. The en banc court directed the panel to reconsider its opinion in light of this explicit waiver. See [Bolt v. Halifax Hosp. Medical Center \(Bolt II\), 874 F.2d 755, 756 \(11th Cir. 1989\)](#) (en banc). Accordingly, on remand in *Bolt III*, the panel considered the case anew, largely without state action immunity.<sup>15</sup>

[\*\*36] [\*1528] In particular, in *Bolt III* we considered whether plaintiff had made out the contract, combination, or conspiracy element of his Sherman Act claim. Like the court in *Oksanen*, we examined *Copperweld*'s intraenterprise immunity doctrine in the context of peer review credentialing decisions. Noting that the "directed verdicts in this case would ... have been proper if, as the defendants contend, the [hospital] defendants were legally incapable of concerted action within the meaning of [section 1](#) of the Sherman Act," the court in *Bolt III* examined whether such a conspiracy was possible. [891 F.2d at 818-19](#). The court rejected application of the intraenterprise immunity doctrine on the ground that the analogy between a corporation and its officers (or subsidiaries) and a hospital and its medical staff was inapt in some circumstances.

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<sup>15</sup> State action immunity remained an issue in the case as to one of the hospital defendants who had presented a new state-action argument in its brief on rehearing en banc. [Bolt III, 891 F.2d at 818 n. 12, 823 n. 22](#).

The rule for corporations is based on considerations unique to the corporate context. Theoretically, a "conspiracy" involving a corporation and one of its agents would occur every time an agent performed some act in the course of his agency, for such an act would be deemed an act of the corporation. Thus, the rule that a corporation [\*\*37] is incapable of conspiring with its agents is necessary to prevent erosion of the principle that section 1 does not reach unilateral acts. A hospital and the members of its medical staff, in contrast, are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be bootstrapped into a "conspiracy." See Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1450 (9th Cir. 1988).

891 F.2d at 819. Cf. St. Joseph's Hosp., Inc. v. Hospital Corp. of America, 795 F.2d 948, 956 (11th Cir. 1986) ("While a corporation's officers and its employees are legally incapable of conspiring among themselves, if the officers or employees act for their own interests, and outside the interests of the corporation, they are legally capable of conspiring with their employees for purposes of Section 1." ) (quotation omitted). Further, because each member of the medical staff practiced medicine individually, the court concluded that each is a "separate economic entity potentially in competition with other physicians." Bolt III, 891 F.2d at 819.<sup>16</sup> Unlike Oksanen, Bolt III rejected application of the intraenterprise immunity doctrine [\*\*38] to agreements between a hospital and its staff regarding staff privilege decisions.

[\*\*39] Relying on Bolt III, in Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1446 n. 13 (11th Cir. 1991), we held that the individual doctors on the medical staff of defendant hospital were separate economic actors, not employees of the hospital, when they performed the challenged actions, and, therefore, were not entitled to share in the hospital's state action immunity. Id. at 1446 n. 13. Plaintiff in Todorov was a doctor of neurology and a staff member of the DCH Regional Medical Center (DCH), where he had been granted privileges to practice neurology. After becoming a member of the hospital staff, plaintiff applied for the privilege to perform certain procedures in DCH's radiology department.<sup>17</sup> [\*1529] After review of his application, the credentials committee sought recommendations from two of the physicians plaintiff had named as references; both were radiologists who practiced at DCH. These doctors did not recommend plaintiff. Indeed, they questioned his technical competence. The credentials committee then solicited the advice of the chairman of DCH's radiology department, who also recommended denial of plaintiff's application for privileges. The hospital, acting on the [\*\*40] recommendation of the final peer committee to review plaintiff's case, denied plaintiff's application. Plaintiff initiated an action against

<sup>16</sup> The court in Bolt III also examined whether one of the hospital defendants was entitled to state action immunity. Id. at 823-25. See *supra* note 15. It held that the Florida legislature had not clearly articulated a policy to displace competition because it had not foreseen that the hospital would conspire with its medical staff to deny plaintiff staff privileges on pretextual grounds. 891 F.2d at 825. Accordingly, because the State had not foreseen that particular type of anticompetitive conduct, the court found that the hospital was not protected by Parker immunity. However, in Bolt v. Halifax Hosp. Medical Center (Bolt IV), 980 F.2d 1381 (11th Cir. 1993), we held that the Supreme Court in City of Columbia rejected this part of Bolt III:

The Court [in City of Columbia] rejected federal judicial inquiry into the state officials' intent in undertaking the challenged action. Such an inquiry, the Court stated, "would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." [Cit.] ...

The inquiry into whether the reasons for [the hospital's] denial of staff privileges were pretextual would require probing into the "official intent" of HHMC, an inquiry expressly denounced by the Supreme Court. [Cit.]

Bolt IV, 980 F.2d at 1388 (quotation omitted). Accordingly, we held that City of Columbia implicitly overruled Bolt III in part.

City of Columbia left untouched, however, Bolt III's rejection of Copperweld's intraenterprise immunity doctrine in the context of hospital peer review decisions. This portion of Bolt III remains the law of this circuit.

<sup>17</sup> The hospital bylaws at DCH required a peer review process for credentialing decisions that was similar in relevant respects to the process at issue in the instant case.

DCH and the three radiologists who provided the negative recommendations. The district court held that DCH was immune from antitrust liability under the *Parker* doctrine because it was a local governmental entity and had acted pursuant to state authority in denying plaintiff's application for privileges. [921 F.2d at 1445](#). It also held that the individual radiologists were immune because they were "acting as employees of DCH and, as such, enjoyed DCH's immunity."<sup>18</sup> [Id. at 1446](#). On appeal, this Court agreed that DCH was entitled to state action immunity; but, relying on *Bolt III*, we rejected the district court's rationale with respect to the radiologists' immunity:

In [*Bolt III*], we held that members of a hospital's medical staff should be considered independent legal entities for antitrust purposes if they are not employed by the hospital and are acting as separate economic actors.... Here, the physicians are separate economic actors; thus, their actions are legally distinct from the hospital's actions. Accordingly, [\[\\*\\*41\]](#) the district court could not properly base its summary judgment on the ground that the radiologists and DCH were a single legal entity.

[Id. at 1446 n. 13.](#)

The foregoing discussion demonstrates that *Cohn*'s reasoning is not persuasive in this case. *Cohn* was dictated by *Oksanen*'s holding that the hospital and its staff members on peer review committees are functionally one entity. In other words, if the hospital and the individual doctors are a single legal entity, it readily follows that the doctors are agents who should share the hospital's state action immunity. By contrast, [\[\\*\\*42\]](#) in *Bolt III* we held that a hospital and its staff members on peer review committees are not functionally one entity to which *Copperweld*'s intraenterprise immunity doctrine applies. Accordingly, in *Todorov* we rejected the district court's rationale of treating the individual doctors as the same legal entity as the hospital. See [Todorov, 921 F.2d at 1446 n. 13](#) ("Accordingly, the district court could not properly base its summary judgment *on the ground that the radiologists and DCH were a single legal entity.*") (emphasis added).

However, the rationale of *Bolt III* and *Todorov* does not govern the different issue in this case. Even though the Authority and its individual doctors are not *per se* the same legal entity, we must nevertheless inquire whether the particular actions of the individual doctors which are challenged in this case were actions taken by the doctors in performing official duties as agents of the hospital such that they should share the hospital's state action immunity. In other words, the fact that a hospital and its staff are separate economic or legal entities does not mean that a staff physician cannot be the agent of a hospital for certain [\[\\*\\*43\]](#) purposes and in certain circumstances (e.g., certain administrative functions like peer review activities). [HN18](#)↑ In short, a hospital and its staff can be separate entities for purposes of intraenterprise immunity, but the staff physicians may in certain contexts be agents of the hospital for purposes of state action immunity. The policies underlying these two immunity doctrines are different, as are the factors which guide our analysis.<sup>19</sup>

[\[\\*\\*44\] \[\\*\\*1530\]](#) [HN19](#)↑ To determine whether the individual doctors here were agents of the Authority during the performance of the challenged actions, we look to the policies underlying the state action immunity doctrine and the context of the particular activities of the doctors in this case. The core policy underlying *Parker* immunity is that actions by the State, as sovereign, lie beyond the intended scope of the antitrust laws. See [Parker, 317 U.S. at 352, 63 S. Ct. at 314](#) ("The state ..., as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.") (citation omitted); [Town of Hallie, 471 U.S. at 38, 105 S. Ct. at 1716](#) ("In *Parker*, ... the Court refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through

<sup>18</sup> In the alternative, the district court held that the radiologists were protected by the *Noerr-Pennington* doctrine. *Id.* Opting to base our decision on other grounds, we declined to affirm on these grounds. [Id. at 1446 n. 14.](#)

<sup>19</sup> In the text we explain how *Todorov* is distinguished from this case because it merely rejected the same-legal-entity rationale. *Todorov* is also distinguishable on its facts. In *Todorov*, the challenged actions of the individual doctors were not actions in the performance of official duties as peer review committee members; rather, the individual doctors merely gave negative recommendations about plaintiff to the relevant peer review committees. By contrast, the challenged actions of the individual doctors in the instant case were all taken within the scope of their official duties as members of the hospital's peer review committees. See *infra* note 20.

its legislature.... Rather, it ruled that the Sherman Act was intended to prohibit *private* restraints on trade....") (quotation omitted); *Patrick v. Burget*, 486 U.S. 94, 99, 108 S. Ct. 1658, 1662, 100 L. Ed. 2d 83 (1988) ("The Sherman Act ... was not intended "to restrain state action or official action directed by the state.'") (quotation omitted). What is critical is that the [\*\*45] action be truly that of the State and not that of an individual or private actor. The "clear articulation" and "active state supervision" tests reflect this core policy. These tests are designed to ensure that the action taken was truly *state* action inasmuch as they require different levels of state involvement in the challenged action depending on whether the actor is a municipality or a private party. See, e.g., *Patrick*, 486 U.S. at 100, 108 S. Ct. at 1662 ("We ... established a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws.").

The actions of the individual doctor-defendants which are challenged in this case consisted exclusively of official actions taken as members of the hospital's peer review committees.<sup>20</sup> Accordingly, the issue in this case is whether the doctors' activities on SGMC peer review committees should be considered action taken by the Authority (i.e., by the political subdivision) or action taken by the individual doctors (i.e., by private parties). **HN20**[] To determine whether the challenged actions were those of the Authority qua political [\*\*46] subdivision, we are guided by *Town of Hallie, supra*. There, the Supreme Court distinguished between actions by political subdivisions, which are presumptively intended to further governmental interests if undertaken pursuant to clearly articulated state policy, and actions by private parties, which are presumptively intended to further private interests. See *Town of Hallie*, 471 U.S. at 47, 105 S. Ct. at 1720. The appropriate inquiry focuses on whether "there is little or no danger that [the actor] is involved in a *private* price-fixing arrangement," *id.*, as opposed to state action vindicating a truly governmental interest. As was true with respect to the Authority, we examine whether the nexus between the State and the actions of the doctors on peer review committees is sufficiently strong that there is little real danger that these doctors are involved in a *private* price-fixing arrangement.

[\*\*47] Because of the control exercised by the Authority over peer review decisions and the statutory context of peer review in Georgia, we conclude that the actions of individual doctors on peer review committees should be considered actions of the Authority such that the "active state supervision" requirement is unnecessary to ensure that the challenged actions are truly those of the State. First, the control exercised by the Authority over all staff credentialing decisions is strong evidence [**\*1531**] that it is the Authority and not its staff members acting. Under the Bylaws, the Authority retains power over decisions to grant or deny hospital privileges. Although the numerous layers of staff committees recommend the grant or denial of staff privileges to the Authority, the Authority is the repository of ultimate decisionmaking power and exercises plenary review of all credentialing decisions. Cf. *Ramey v. Hospital Auth. of Habersham County*, 218 Ga. App. 618, 462 S.E.2d 787, 788 (1995) ("Under the law of this state the hospital authority, and not the medical staff, is responsible for selecting staff members."). Under the Bylaws, the Authority does not merely "rubber stamp" the committee recommendations; [\*\*48] instead, it conducts an independent, meaningful review. It retains the power to follow, modify, or even disregard the recommendations of staff committees. In this case, it rendered its decision only after a full hearing at which Dr. Crosby was represented by counsel.<sup>21</sup>

Second, our conclusion derives strong support from the statutory context of peer review in Georgia. **HN21**[] Under *O.C.G.A. § 31-7-15*, hospitals are required to provide for the review of professional practices in the hospital.<sup>22</sup> [\*\*50] Specifically, hospitals are directed [\*\*49] to evaluate the qualifications and professional competence of

<sup>20</sup> The district court found that each individual doctor defendant acted within the scope of his or her duty as a member of the various credentialing committees. *Crosby*, 873 F. Supp. at 1571. This finding is not clearly erroneous.

<sup>21</sup> At this hearing before the Authority, Crosby was free to present evidence and argument that the several recommendations of the hospital's peer review committees were influenced by improper and irrelevant anticompetitive motives. We must assume that the Authority would have favorably entertained such arguments and evidence had they been persuasive; we must neither deconstruct the Authority's mental processes nor probe its intent. *City of Columbia*, 499 U.S. at 377, 111 S. Ct. at 1352.

persons seeking to perform medical and health care services at the hospital. [§ 31-7-15\(a\)\(3\)](#). Indeed, hospitals must undertake such evaluations to be entitled to a permit. [§ 31-7-15\(c\)](#). The statute permits peer review committees to perform such evaluations. [§ 31-7-15\(b\)](#). These committees may be appointed by, *inter alia*, the governing board or medical staff of a licensed hospital. *Id.* This statutory scheme reflects the reality of management at the Authority (and other hospitals). Physicians at hospitals often work in a variety of capacities. Primarily, they are "separate economic entities," i.e., independent contractors, as noted by the court in *Bolt III*. At times, they also function as part of the hospital's management structure.<sup>23</sup> In particular, they are called on to aid in staff credentialing decisions because they are in the best position to measure the quality of a physician's work and credentials, a proposition recognized by [§ 31-7-15](#).

For these reasons, we are satisfied that there is little or no danger of a private price fixing arrangement in this case such that the imposition of "active state supervision" is required. The Authority is a political subdivision of Georgia. As explicitly authorized by statute, it receives recommendations as to staff privilege decisions from peer review committees. It has not delegated absolute control to these committees;<sup>24</sup> **[\*\*51] [\*1532]** instead, the Authority alone exercises ultimate control over all credentialing decisions. The only actions in this case were those of the Authority, a political subdivision of Georgia. Were we to rule otherwise, the state action immunity afforded the Authority would be meaningless because as a practical matter the Authority must act through its agents. In this case, we hold that the individual peer review committee members are immune from federal antitrust liability to the extent the Authority is immune.<sup>25</sup>

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<sup>22</sup> [O.C.G.A. § 31-7-15](#), provides, in relevant part:

**HN22** (a) A hospital ... shall provide for the review of professional practices in the hospital ... for the purpose of reducing morbidity and mortality and for the improvement of the care of patients in the hospital.... This review shall include, but shall not be limited to, the following: ...

(3) The evaluation of medical and health care services or the qualifications and professional competence of persons performing or seeking to perform such services.

(b) The functions required by subsection (a) of this Code section may be performed by a "peer review committee," defined as a committee of physicians appointed by a state or local or specialty medical society or appointed by the governing board or medical staff of a licensed hospital or ambulatory surgical center or any other organization formed pursuant to state or federal law and engaged by the hospital ... for the purposes of performing such functions required by subsection (a) of this Code section.

(c) Compliance with the above provisions of subsection (a) of this Code section shall constitute a requirement for granting or renewing the permit of a hospital....

(e) Nothing in this or any other Code section shall be deemed to require any hospital or ambulatory surgical center to grant medical staff membership or privileges to any licensed practitioner of the healing arts.

<sup>23</sup> See, e.g., William S. Brewbaker, "Antitrust Conspiracy Doctrine and Hospital Enterprise," [74 B.U.L.Rev. 67 \(1994\)](#).

<sup>24</sup> In this case, we need not and do not address the issue of whether *Midcal*'s active state supervision requirement would apply to the activities of peer review committee members if the peer review committees exercised unbridled discretion in making staff privilege decisions--i.e., if the Authority had completely delegated this function to the peer review committees of the medical staff.

<sup>25</sup> Dr. Crosby rejoins that the reasons proffered by the various peer review committees were a mere pretext for their true anticompetitive motives. As *City of Columbia* directs, however, once it is determined that the denial of Crosby's application for staff privileges was "state action," the individual motives underlying that action become irrelevant. [City of Columbia, 499 U.S. at 377-78, 111 S. Ct. at 1352](#) ("Where the action complained of ... was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." (quotation omitted). "Any action that qualifies as state action is '*ipso facto* ... exempt from the operation of the antitrust laws'...." *Id.*, [499 U.S. at 379, at 1353](#) (quoting *Hoover v. Ronwin*, [466 U.S. 558, 568, 104 S. Ct. 1989, 1995, 80 L. Ed. 2d 590 \(1984\)](#)). Because the individual staff members were acting as agents of the Authority in making their peer review recommendations, they were acting at the behest of and as an arm of the State and, therefore, their motives are irrelevant so long as the challenged actions were undertaken pursuant to clearly articulated state

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### C. Clear Articulation

In this circuit, we have [HN23](#)<sup>26</sup> established a three-part inquiry to determine whether an entity satisfies the single-prong ("clear articulation") test set forth in [Town of Hallie, supra](#). The entity must show: "(1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct." [FTC v. Hospital Board of Directors of Lee County, 38 F.3d 1184, 1187-88 \(11th Cir. 1994\)](#). Because we have determined that defendants are a political subdivision of the State and the parties concede that Georgia generally authorizes them to perform the challenged action,<sup>26</sup> we proceed to the third part.

[\*\*53] [HN24](#)<sup>27</sup> The third requirement under the *Lee County* test is that the State must, through its statutes, clearly articulate a policy authorizing the challenged anticompetitive conduct. [38 F.3d at 1187-88](#). The Supreme Court has noted that the phrase "clearly expressed" does not require the legislature to state explicitly that it anticipates anticompetitive effects. [Town of Hallie, 471 U.S. at 42, 105 S. Ct. at 1718](#); see also [Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 64-65, 105 S. Ct. 1721, 1731, 85 L. Ed. 2d 36 \(1985\)](#) ("If the State's intent to establish an anticompetitive regulatory program is clear ..., the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of federal antitrust laws."). "Rather, it simply requires that the anticompetitive conduct be a foreseeable result of the powers granted to the political subdivision." [Lee County, 38 F.3d at 1189](#) (citing [Town of Hallie, supra](#)). This circuit requires "only that the anticompetitive conduct be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute." [Id. at 1190-91](#).

Accordingly, we must determine [\*\*54] whether the alleged anticompetitive conduct is a reasonably foreseeable result of the statutes authorizing [\*1533] the Authority to grant or deny staff privilege applications. To do so, we must identify precisely the alleged anticompetitive conduct. Dr. Crosby alleges that the Authority denied his application for staff privileges at SGMC because its doctors determined there to be a sufficient number of orthopedic surgeons with such privileges. As he sees it, the hospital sought to suppress competition at SGMC so as to maintain each doctor's current level of business and income and to inflate prices.<sup>27</sup>

In this case, the Authority's power to grant or deny staff privileges derives from [O.C.G.A. § 31-7-7](#), which provides in relevant part:

[HN25](#)<sup>28</sup> (a) Whenever any licensed *doctor of medicine, doctor of podiatric medicine, doctor of osteopathic medicine, or doctor of dentistry* shall make application for permission to treat patients in any hospital owned or operated by the state, any political subdivision thereof, or any municipality, the hospital shall act in a nondiscriminatory manner upon such application expeditiously and without unnecessary delay considering the applicant on the basis of the applicant's demonstrated training, experience, competence, and availability and reasonable objectives, including, but not limited to, the appropriate utilization of hospital facilities....

policy. Crosby had an opportunity at the hearing before the Authority to demonstrate that the peer review committee members made their recommendations for improper and irrelevant anticompetitive reasons. We cannot probe the Authority's intent in rejecting any such arguments by Crosby.

<sup>26</sup> The district court stated that whether Georgia has authorized the challenged conduct was not at issue. [873 F. Supp. at 1578 n. 10](#). Crosby has not argued otherwise and, accordingly, we do not specifically address this issue. We note, however, that in examining whether Georgia, through its statutes, has clearly articulated a state policy in favor of the alleged anticompetitive conduct, we necessarily touch on this issue.

<sup>27</sup> Dr. Crosby also alleges that the Authority denied his application because he is an osteopathic physician. To the extent this claim fits into the antitrust model, it is subsumed in the argument set forth in the text.

(b) Whenever any hospital owned or operated by the state, any political subdivision thereof, or any municipality shall refuse to grant a *licensed doctor of medicine, doctor of podiatric medicine, doctor of osteopathic medicine, or doctor of dentistry* the privilege of treating patients in the hospital, wholly or in part, or revoke the privilege of such licensed medical practitioner for treating patients in such hospital, wholly or in part, the hospital shall furnish to the licensed medical practitioner whose privilege has been refused or revoked, within ten days of such action, a **[\*\*56]** written statement of the reasons therefor....

(emphasis added).

The emphasized language reflects relevant amendments incorporated into the statute in 1990. The parties generally base their arguments on the previous version of the statute which, *inter alia*, omitted the language in subsection (a) which authorizes the Authority to consider applications based on the "appropriate utilization of hospital facilities." Appellant assumes that, because the events in this case took place in 1986 and 1987, the prior version of the statute applies.

The district court applied the new version of the statute without discussion of the prior version. [Crosby, 873 F. Supp. at 1579](#). It concluded that "the Georgia legislature could have foreseen, or at least reasonably anticipated, that authorities would consider the number of market participants in determining the "appropriate utilization of hospital facilities.' " *Id.*

The district court was correct to apply the new version of the statute. As discussed *infra*,<sup>28</sup> Dr. Crosby's action for damages against all defendants is barred by the Local Government Antitrust Act. Consequently, he is limited to injunctive relief. [HN26](#)<sup>↑</sup> Because injunctive **[\*\*57]** relief is prospective, a party seeking an injunction must show a threat of future injury. "Logically, "a prospective remedy will provide no relief for an injury that is, and likely will remain, entirely in the past.' " [Church v. City of Huntsville, 30 F.3d 1332, 1337 \(11th Cir.1994\)](#) (quoting [American Postal Workers Union v. Frank, 968 F.2d 1373, 1376 \(1st Cir.1992\)](#)). This concept has been described as one of mootness.

[HN27](#)<sup>↑</sup> At every stage in the proceedings the court must "stop, look, and listen' to determine the impact of changes in the law on the case before it. [Kremens v. Bartley, 431 U.S. 119, 135, 97 S. Ct. 1709, 1718, 52 L. Ed. 2d 184 \(1977\)](#) (impact of changes in challenged statute on composition of certified **[\*1534]** class of plaintiffs). Where a law is amended so as to remove its challenged features, the claim for injunctive relief becomes moot as to those features. [Cits].

[Naturist Soc., Inc. v. Fillyaw, 958 F.2d 1515, 1519-21 \(11th Cir.1992\)](#). "Thus, a superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law." *Id.*

**[\*\*58]** In this case, by way of injunctive relief, Crosby does not seek reinstatement, but rather, an order directing the Authority to review his application anew.<sup>29</sup> Assuming, arguendo, we undertook a review of the old (1984) version of [O.C.G.A. § 31-7-7](#) and concluded that the Authority did not act pursuant to a clearly articulated state policy, any order we issued would not solve Dr. Crosby's problem. If we ordered that the Authority review Dr. Crosby's application again, such review would take place under the new (1990) version of [O.C.G.A. § 31-7-7](#). Accordingly, the issue of whether the old version of the statute clearly articulates the requisite policy is moot. We must review the current statute as amended to determine whether Georgia has clearly articulated the challenged anticompetitive conduct. In short, because injunctive relief is prospective, Dr. Crosby's claim travels under the new version of the statute. See [Landgraf v. USI Film Products, 511 U.S. 244, 257, 114 S. Ct. 1483, 1501, 128 L. Ed. 2d 229 \(1994\)](#) ("Relief by injunction operates *in futuro*....").

<sup>28</sup> See *infra* Section II.D.

<sup>29</sup> In his brief, Dr. Crosby states:

Appellant, Dr. Crosby, has not and does not seek an order directing that the Authority grant him staff privileges. He seeks to have injunctive relief to ensure that he is placed on a level playing field with his allopathic competitors. He also seeks monetary damages for the conduct of the private defendant physicians who participated in the denial of his staff privileges.

[\*\*59] The clear articulation question is not a close one. [HN28](#)<sup>↑</sup> Hospitals may make staff privilege decisions based on any reasonable objective, "including, but not limited to, the appropriate utilization of hospital facilities." [O.C.G.A. § 31-7-7](#). We agree with the district court that it "is at the very least foreseeable, and most certainly reasonably anticipated, that this language would enable a hospital authority to engage in anticompetitive conduct through its peer review activities." [Crosby, 873 F. Supp. at 1579](#). This is not the type of case in which we must discern what type of conduct is reasonably anticipated from a broad authorization to act. Rather, the statute explicitly provides for precisely the anticompetitive conduct about which Dr. Crosby complains. At worst, Dr. Crosby alleges that the SGMC orthopedic surgeons determined that their services were sufficient to meet the demand for their specialty at the hospital and, therefore, agreed to deny Dr. Crosby hospital privileges. This is exactly what the statute directs SGMC and the Authority to do. We readily conclude that [O.C.G.A. § 31-7-7](#) evidences a state policy in favor of the anticompetitive conduct challenged in this case [\*\*60] and hold that all defendants are shielded from suit for injunctive relief by state action immunity.<sup>30</sup>

The foregoing result is more readily reached than the similar results in [Bolt IV, 980 F.2d at 1386](#) (reinstating, in part, the rationale of [Bolt III, 891 F.2d at 825](#) ("One could correctly say that when Florida's legislature authorized peer review in licensed medical facilities, ... it could foresee that [the hospital] would rely on recommendations made by a physician's peers and refuse to deal with (i.e., boycott) that physician.")); and [Lee County, 38 F.3d at 1192](#) (holding that when the [\*\*61] state legislature expanded the hospital board's powers to acquire other hospitals, it was foreseeable that new acquisitions would result and that this would increase the board's market share in an anticompetitive manner). These cases illustrate that [HN29](#)<sup>↑</sup> "reasonable anticipation" does not require explicit authorization to engage in anticompetitive conduct.

Our conclusion is not altered by Dr. Crosby's argument that Georgia's Constitution [\*1535] establishes a policy against restraints on trade. [Article III, § 6, P 5 of the Georgia Constitution](#) of 1983 provides that

the General Assembly shall not have the power to authorize any contract or agreement which may have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void.

We will not undertake an examination of whether the legislature's clear articulation of anticompetitive policy in [O.C.G.A. § 31-7-7](#) violates this constitutional provision; [HN30](#)<sup>↑</sup> we do not sit to determine whether a state statute violates state law for purposes of state action immunity. It is sufficient that Georgia has generally authorized the challenged anticompetitive conduct. Cf. [City of Columbia I<sup>\\*\\*621</sup> v. Omni Outdoor Advertising, 499 U.S. 365, 371-72, 111 S. Ct. 1344, 1350, 113 L. Ed. 2d 382 \(1991\)](#) ("In order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law."). Insofar as Crosby argues that the constitutional provision simply clarifies state policy<sup>31</sup> (i.e., not that it renders the statute unconstitutional), we find that such policy has been tempered by a "rule of reason." See [Ferrero v. Assoc. Materials, Inc., 923 F.2d 1441, 1447 \(11th Cir.1991\)](#). [HN31](#)<sup>↑</sup> "The rule of reason protects those contracts which are reasonable in light of the interests of the parties and the interests of the public." *Id. at 1447*. As the district court found, [HN32](#)<sup>↑</sup> the rule of reason protects contracts executed pursuant to [O.C.G.A. § 31-7-7](#). The parties to SGMC's by-laws and the public have an interest in "the appropriate utilization of hospital facilities," i.e., maintaining a proper mix of doctors and specialties at the hospital so as to attract the optimal number of qualified professionals. [O.C.G.A. § 31-7-7](#) [\*\*63] is a reasonable response to such interest because it allows hospitals to make their staff credentialing decisions based on such criteria. See [Crosby, 873 F. Supp. at 1579-81](#).

<sup>30</sup> Our conclusion that Georgia has reasonably anticipated the anticompetitive effects of hospital peer review decisions also derives strong support from [O.C.G.A. § 31-7-15](#), the statute authorizing peer review. See *supra* note 22. This statute indicates the legislature's recognition that staff credentialing decisions will be aided by the use of peer review committees. Accord [Bolt IV, 980 F.2d at 1386](#).

<sup>31</sup> Cf. [Atlanta Center Ltd. v. Hilton Hotels Corp., 848 F.2d 146, 148 \(11th Cir.1988\)](#) ("The state of Georgia has expressed, both in its constitution and in its statutory law, a strong public policy disfavoring contractual restraints on competition and trade.").

In sum, the statutory language here easily surpasses the "clear articulation" mark. Further, given the mitigating influence of the rule of reason, it is at the very least reasonably foreseeable that [O.C.G.A. § 31-7-7](#) would lead hospital decisionmakers to act anticompetitively in determining the "appropriate utilization of facilities" notwithstanding [Article III, § 6, P 5 of the Georgia Constitution](#). Accordingly, we readily conclude that all defendants are shielded from suit for injunctive relief by state action immunity.<sup>32</sup>

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#### D. Local Government Antitrust Act

The district court held that the Local Government Antitrust Act of 1984 ("LGAA"), [15 U.S.C.A. § 34 et seq.](#), precludes Dr. Crosby's action for damages against all defendants. [Crosby, 873 F. Supp. at 1581](#). Dr. Crosby does not contest this conclusion as to the Authority or its board members. He argues, however, that the individual committee members are not immunized by the LGAA.

The LGAA provides, in relevant part:

[HN33](#) [↑] No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton act ([15 U.S.C. 15, 15a, or 15c](#)) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

[\*1536] [15 U.S.C.A. § 36\(a\)](#). Section 4 of the Clayton Act provides the damages remedy for violations of the Sherman Act; thus, it applies to Dr. Crosby's allegations. We must determine whether the actions of the individual committee members constitute "official actions directed by a local government, or official or employee thereof acting in an official capacity."<sup>33</sup>

[\*\*65] As to the phrase "action directed by a local government," the Joint Report of the Conference Committee explains:

In Referring in section 4 to the applications of the antitrust laws to the conduct of non-governmental parties *directed by a local government*, the conferees borrowed the phrase "*official action directed by*" a local government from [Parker v. Brown, 317 U.S. 341, 351](#) [[63 S. Ct. 307, 313, 87 L. Ed. 315](#)] (1941); and the conferees intend that *Parker* and subsequent cases interpreting it shall apply by analogy to the conduct of a local government in directing the actions of non-governmental parties, as if the local government were a state.

H.R. Conf. Rep. No. 1158, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S.C.C.A.N. 4602, 4626-27 (emphasis added). The analogy to the *Parker* doctrine is confirmed by comparing the language in the statute to that in *Parker*. *Parker* held that the federal antitrust laws were not intended "to restrain a state or its officers or agents from activities *directed by its legislature*." [317 U.S. at 350-51, 63 S. Ct. at 313](#) (emphasis added); see also [City of Lafayette, La. v. La. Power & Light](#) [\*\*66] [Co., 435 U.S. 389, 409, 98 S. Ct. 1123, 1134, 55 L. Ed. 2d 364 \(1978\)](#). It is clear that the language in the statute (i.e., "action directed by a local government") was based on the above-quoted language in *Parker*.

<sup>32</sup> Dr. Crosby urges that a different conclusion is mandated by [FTC v. Ticor Title Ins. Co., 504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410 \(1992\)](#). His argument focuses on *Ticor*'s insistence on real compliance with the active supervision requirement. *Id.*, [504 U.S. at 633-39, 112 S. Ct. at 2177-79](#). The foregoing discussion makes clear that this aspect of *Ticor* has no bearing on this case because we need not reach the "active supervision" requirement. As to the "clear articulation" requirement, the Court in dicta reiterated that "in the usual case, *Midcal*'s requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence...." [Id., 504 U.S. at 636, 112 S. Ct. at 2178](#). As the discussion *supra* makes clear, Georgia's statutory action reasonably portends the challenged anticompetitive conduct in this case.

<sup>33</sup> Dr. Crosby essentially concedes that the Authority falls within the definition of "local government" and that the individual committee members are "persons" within the meaning of the LGAA by failing to argue otherwise on appeal. See [Cheffer v. Reno, 55 F.3d 1517, 1519 n. 1 \(11th Cir. 1995\)](#) (issues not argued in brief deemed abandoned); see also [Fed.R.App.P. 28\(a\)\(6\)](#).

As discussed *supra*, the *Parker* doctrine has developed such that, where the defendant is a private actor (i.e., not a "municipality"), he or she must show both that: 1) the challenged restraint is one clearly articulated and affirmatively expressed as state policy; and 2) the policy is actively supervised by the state. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633, 112 S. Ct. 2169, 2176, 119 L. Ed. 2d 410 (1992); *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).

Following the legislative intent embodied in the Joint Report of the Conference Committee, we apply by analogy the *Parker* doctrine to the relationship between the Authority (i.e., the entity under the LGAA which is analogous to the State in the state action immunity context) and the individual committee members (i.e., the entities under the LGAA which are analogous to private parties in the state action immunity [\*\*67] context).<sup>34</sup> See *Cohn v. Bond*, 953 F.2d 154, 157 (4th Cir. 1991), cert. denied, 505 U.S. 1230, 112 S. Ct. 3057, 120 L. Ed. 2d 922 (1992) **HN34** ("Whether actions are directed by an official, as contemplated by the LGAA, is determined by borrowing and applying the State Action Doctrine two prong test."); *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hospital System, Inc.*, 853 F.2d 1139, 1143 (4th Cir. 1988) (Powell, Associate Justice (retired)) (undertaking similar analysis).

The challenged actions of the individual committee members in this case easily satisfy the two-prong *Midcal* test of clear articulation and active supervision. First, the individual committee members acted pursuant to clearly articulated policy of the Authority to deny privileges when the applicant had not completed the necessary residency. Specifically, the individual committee members acted pursuant to the Bylaws (adopted and approved by the Authority) in making recommendations to the Authority [\*\*68] to deny Crosby's hospital privileges. Second, the Authority itself actively supervised the committees; as noted above, the Authority made the final decision to deny Crosby's privileges after a full hearing thereon. As noted *supra*, [\*1537] the language of the statute (contemplating immunity for the actions of a private person "based on any official action directed by a local government, or official or employee thereof acting in an official capacity"), the legislative history, and the case law (*Cohn, supra*; *Sandcrest, supra*) make it clear that the second prong of the *Midcal* test is satisfied when the local government, in this case the Authority, actively supervises the challenged conduct.

Thus, we readily conclude that the two-prong *Midcal* test is satisfied, and that the challenged actions of the individual committee members in this case fall comfortably within the phrase "official action directed by a local government."<sup>35</sup> We hold that the individual committee members are immune from damages under the LGAA.

### [\*\*69] III. CONCLUSION

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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<sup>34</sup> See *infra*, note 35.

<sup>35</sup> We recognize that our holding, *supra*, that the actions of the individual doctors should be considered actions of the Authority for purposes of state action immunity may mean the individual doctors are directly immune under the LGAA, *15 U.S.C.A. § 35(a)*. *Section 35(a)* provides that no damages may be recovered from a local government, or an official or employee thereof acting in an official capacity. However, we also recognize that the specificity of the LGAA's language in *§ 35(a)* ("local government, or official or employee") might suggest that agents other than "officials" or "employees" are not directly immune. In any event, we need not decide whether the individual committee members should be deemed the equivalent of the local government, or an official or employee of the local government for purposes of the LGAA because the two-prong *Midcal* test is so readily satisfied, and the doctors are clearly immune under *§ 36(a)*.



## *In re Potash Antitrust Litig.*

United States District Court for the District of Minnesota, Third Division

September 13, 1996, Decided ; September 13, 1996, FILED

MDL Docket No. 981 Civ. No. 3-93-197

**Reporter**

954 F. Supp. 1334 \*; 1996 U.S. Dist. LEXIS 14981 \*\*

In Re Potash Antitrust Litigation

**Subsequent History:** Sanctions allowed by [\*In re Potash Antitrust Litig., 1996 U.S. Dist. LEXIS 19614 \(D. Minn., Sept. 13, 1996\)\*](#)

Accepted by, Adopted by, Motions ruled upon by *In re Potash Antitrust Litig.*, 954 F. Supp. 1334, 1997 U.S. Dist. LEXIS 54 (D. Minn., Jan. 2, 1997)

**Prior History:** [\*In re Potash Antitrust Litig., 896 F. Supp. 916, 1995 U.S. Dist. LEXIS 11743 \(D. Minn., July 17, 1995\)\*](#)

**Disposition:** [\*\*1] The Motion of PCA and Rio Algom for Summary Judgment be granted. Kalium's Motion for Summary Judgment is granted. Noranda's Motion for Summary Judgment is granted. Cominco's Motion for Summary Judgment is granted. The Joint Motion of the Defendants for Summary Judgment is granted. IMC's Motion for Summary Judgment is granted. PPG's Motion for Summary Judgment is granted. Motion of New Mexico Potash and Eddy Potash for Summary Judgment is granted.

## **Core Terms**

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potash, prices, Pltfs, producers, conspiracy, Deposition, Plaintiffs', customers, Sales, increased price, summary judgment, margins, communications, competitors, announced, Suspension, dumping, Defendants', alleged conspiracy, price list, infer, antidumping, market share, percent, conspiratorial, antitrust, reveals, marketplace, complaints, stabilize

## **LexisNexis® Headnotes**

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

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

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

## **HN1**[ **Entitlement as Matter of Law, Appropriateness**

In antitrust cases, as in other civil actions, a motion for summary judgment should 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\(c\)](#). For these purposes, a disputed fact is "material" if it must inevitably be resolved and the resolution will determine the outcome of the case, while a dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party.

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 > Genuine Disputes

## **HN2**[ **Summary Judgment, Motions for Summary Judgment**

As [Fed. R. Civ. P. 56\(e\)](#) makes clear, once the moving party presents a properly supported motion, the burden shifts to the non-moving party to demonstrate the existence of a genuine dispute. In rebutting the showings of the movant, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing that there is a genuine issue for trial.

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

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

## **HN3**[ **Summary Judgment, Entitlement as Matter of Law**

A party is entitled to summary judgment where its opponent has failed to establish the existence of an element essential to its case, and on which it will bear the burden of proof at trial. In such a case, no genuine issue of material fact will be found to exist because a complete failure of proof concerning an essential element of that party's case necessarily renders all other facts immaterial. Of course, in determining whether a material factual dispute exists, the court views the evidence through the prism of the controlling legal standard.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

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

## **HN4**[ **Antitrust & Trade Law, Sherman Act**

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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 declared to be illegal. 15 U.S.C.S. § 1. The essence of a § 1 claim is concerted action and, because the law requires an agreement between two or more persons, unilateral actions of a single entity do not give rise to antitrust liability under § 1 of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

#### [HN5](#) [] Antitrust & Trade Law, Sherman Act

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. The standard is whether the evidence, direct or circumstantial, reasonably tends to prove that the alleged violator and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. More recently, the United States Supreme Court has elaborated upon this standard, and has determined that, in order to successfully oppose a motion for summary judgment, the nonmoving party must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

#### [HN6](#) [] Antitrust & Trade Law, Sherman Act

The precepts of antitrust law do not alter the principle that, on summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Nevertheless, there is no direct evidence of collusion, antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 of the Sherman Act case. Specifically, conduct as consistent with permissible conduct as with an illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. In such cases, the plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

#### [HN7](#) [] Antitrust & Trade Law, Sherman Act

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The absence of any plausible motive to engage in the conduct charged is highly relevant to whether a genuine issue for trial exists within the meaning of Fed. R. Civ. P. 56(e). In such an instance, the record on summary judgment must contain further persuasive evidence if it is to support the claim for recovery.

Antitrust & Trade Law > Sherman Act > General Overview

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

#### **HN8** [down] **Antitrust & Trade Law, Sherman Act**

If the plaintiff's theory in a § 1 of the Sherman Act claim is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

#### **HN9** [down] **Antitrust & Trade Law, Sherman Act**

Participation in a price fixing conspiracy need not be, nor rarely is, shown by direct evidence, for most conspiracies are proved through inferences that are drawn from the behavior of the alleged conspirators.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

#### **HN10** [down] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is neither an acceptable means of resolving triable issues, nor is it a disfavored procedural shortcut when there are no issues which require the unique proficiencies of a jury to weigh the evidence and to render credibility determinations.

Antitrust & Trade Law > Sherman Act > Penalties

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

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN11** [down] **Sherman Act, Penalties**

Only concerted action is within the proscriptions of the Sherman Act and, therefore, courts have the added responsibility of assuring that any underlying, lawful conduct is not, inadvertently, condemned and penalized.

Antitrust & Trade Law > Sherman Act > General Overview

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

#### [\*\*HN12\*\*](#) [L] Antitrust & Trade Law, Sherman Act

Whether the underlying, circumstantial evidence is sufficient to support a reasonable inference of collusion remains a legal question for the court's resolution. Thus, evidence which permits equally competing inferences, without tending to point in one direction, should not be sent to the jury, for the court may not invite the factfinder to speculate on the consummation of an agreement to restrain trade. Of course, if the underlying conduct is sufficient to support such an inference, then the question of what weight should be assigned to competing permissible inferences is within the province of the fact-finder at trial.

Antitrust & Trade Law > Sherman Act > General Overview

#### [\*\*HN13\*\*](#) [L] Antitrust & Trade Law, Sherman Act

One means by which the courts may ensure that unilateral, nonconspiratorial conduct is not unintentionally punished is to require the plaintiffs to demonstrate something more than mere paralleling or mimicking conduct. Of course, if persons acted in near unison, but independently of one another and without any agreement or mutual understanding amongst them, then there is no conspiratorial showing. In effect, individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under [§ 1](#) of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

#### [\*\*HN14\*\*](#) [L] Antitrust & Trade Law, Sherman Act

The existence of mere parallel pricing, in an oligopoly, is not, standing alone, actionable.

Antitrust & Trade Law > Sherman Act > General Overview

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

#### [\*\*HN15\*\*](#) [L] Antitrust & Trade Law, Sherman Act

In order to present a jury question as to the existence of a conspiracy, there must be a parallelism in pricing that is accompanied by competent, additional evidence.

Antitrust & Trade Law > Sherman Act > General Overview

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

#### [\*\*HN16\*\*](#) [L] Antitrust & Trade Law, Sherman Act

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It is now settled **antitrust law** that only when the plaintiff shows the existence of additional evidence - often referred to as the plus factors - does the evidence tend to exclude the possibility that the defendants were actually acting independently.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

### **HN17** [blue icon] **Summary Judgment, Evidentiary Considerations**

Where an examination of the proffered plus factors leads to an equally plausible inference that merely interdependent behavior is at hand, then there is no triable issue that would preclude a grant of summary judgment, so long as there is no evidence which tends to exclude the possibility that the alleged conspirators acted independently. This is so, because ambiguous evidence cannot be sent a jury as a court may not invite the factfinder to speculate that an agreement existed. In the final analysis, a failure on the part of the plaintiff to produce evidence from which a jury could infer reasonably that conduct was conspiratorial, not unilateral, will lead to summary judgment for the defendant.

Antitrust & Trade Law > Sherman Act > General Overview

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

### **HN18** [blue icon] **Antitrust & Trade Law, Sherman Act**

The examination of a price fixing claim, in the unique environs of an oligopolistic market, requires more of a showing than the mere existence of the spontaneous forces which cause oligopolists to parrot the pricing decisions of a market leader. In the parlance, the price fixing claimant must present "plus factors" - that is, reliable indicators of unlawful price fixing - if a genuine issue of material fact is to be presented for a jury's resolution.

Antitrust & Trade Law > Sherman Act > General Overview

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

### **HN19** [blue icon] **Antitrust & Trade Law, Sherman Act**

Where the empirically established principles, which govern the operation of an oligopolistic market, and which reliably confirm that, left to spontaneity, the market will be driven by a price leader, who the other participants in the market will follow, something more than a suspicion of culpability should properly stave an award of summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

#### [\*\*HN20\*\*](#) [L] Antitrust & Trade Law, Sherman Act

While proof of an occasion to conspire may, as a practical matter, satisfy a necessary precondition of a conspiracy, a jury cannot reasonably infer the existence of a conspiracy merely from the opportunity to form one.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

#### [\*\*HN21\*\*](#) [L] Antitrust & Trade Law, Sherman Act

While the absence of motive may negate an inference of conspiracy, its presence is not sufficient to infer that a conspiracy has occurred. If motive were sufficient to show conspiracy, then parallel pricing, especially in oligopoly, would be automatically conspiratorial, but it is not.

Antitrust & Trade Law > Sherman Act > General Overview

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

#### [\*\*HN22\*\*](#) [L] Antitrust & Trade Law, Sherman Act

The fact that a firm's action is against its self-interest might well be suggestive of the existence of a conspiracy. However, to support a reasonable inference of conspiracy, the conduct must reveal more than the mere recognition that an act is unwise - unless it is followed by its rivals - for it must competently disclose individual action that would be so perilous in the absence of advance agreement that no reasonable firm would make the challenged move without such agreement.

Antitrust & Trade Law > Sherman Act > General Overview

#### [\*\*HN23\*\*](#) [L] Antitrust & Trade Law, Sherman Act

Standing alone, an attempt by one member of an oligopoly to exercise price leadership, by reducing its price, is not unlawful. It would be an unsound expression of antitrust policy to discourage a price leader, in an oligopolistic market, from reducing its price.

Antitrust & Trade Law > Sherman Act > General Overview

#### [\*\*HN24\*\*](#) [L] Antitrust & Trade Law, Sherman Act

The fact that many, if not all, firms in an industry react similarly to a particular practice does not evidence an industry-wide agreement when there is a legitimate business purpose for each firm's behavior.

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Antitrust & Trade Law > Sherman Act > General Overview

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

## **HN25** [ ] Antitrust & Trade Law, Sherman Act

A court deciding whether to grant summary judgment should not view each piece of evidence in a vacuum. Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place.

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

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

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

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

## **HN26** [ ] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A conspiracy cannot be established merely by proof that a manufacturer terminated a distributor in response to dealer complaints. According to the United States Supreme Court, complaints about price cutters are natural - and from the manufacturer's perspective, unavoidable - reactions by distributors to the activities of their rivals.

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

Antitrust & Trade Law > Sherman Act > General Overview

## **HN27** [ ] Per Se Rule & Rule of Reason, Per Se Violations

The dissemination of price information is not itself a per se violation of the Sherman Act. Because the mere exchange of price information, without more, is not unlawful, plaintiffs must demonstrate that the price verifications were motivated by an anticompetitive intent and, indeed, caused injury to competition.

Antitrust & Trade Law > Sherman Act > General Overview

## **HN28** [ ] Antitrust & Trade Law, Sherman Act

In order to hold a defendant liable as an actor in an antitrust violation, the plaintiffs must demonstrate that the defendant performed acts sufficient to create liability, or actively influenced, a violation.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

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## [\*\*HN29\*\*](#) [blue] Shareholder Duties & Liabilities, Piercing the Corporate Veil

A corporation's inaccurate description of its relationship with a related corporation usually does not justify piercing the corporate veil.

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview](#)

[Governments > Legislation > Statute of Limitations > Time Limitations](#)

[Governments > Legislation > Statute of Limitations > General Overview](#)

## [\*\*HN30\*\*](#) [blue] Inchoate Crimes, Conspiracy

A conspiracy is presumed to exist until there has been an affirmative showing that it has terminated, and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn. Accordingly, the statute of limitations does not begin to run on a co-conspirator until the final act in furtherance of the conspiracy has occurred or until a co-conspirator withdraws from the conspiracy.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements](#)

[Torts > ... > Concerted Action > Civil Conspiracy > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview](#)

## [\*\*HN31\*\*](#) [blue] Antitrust & Trade Law, Sherman Act

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. While the mere cessation of activities may not be sufficient to activate the period of limitations, a conspirator need not take action to stop, obstruct or interfere with the conspiracy in order to withdraw from it.

[Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

## [\*\*HN32\*\*](#) [blue] Motions to Dismiss, Failure to State Claim

Motions to dismiss are directed to the sufficiency of the allegations in the complaint, whereas, on motions for summary judgment, the court looks to the evidence before it.

**Counsel:** For BLOMKEST FERTILIZER, INC., plaintiff: Mark Reinhardt, Reinhardt & Anderson, St Paul, MN. Orrin S Estebo, Estebo Schnobrich Frank & Solie, Redwood Falls, MN. Warren Rubin, Gross Sklar & Metzger, Philadelphia, PA. Michael J Freed, Steven A Kanner, Much Shelist Freed Denenberg Ament & Eiger, Chicago, IL. Joseph Goldberg, Freedman Boyd & Daniels, Albuquerque, NM. James D Sonda, James W Rankin, Alex Dimitrief, L Roger Board, Kirkland & Ellis, Chicago, IL. Jack Weston Hanson, Hanson & Assoc, Mpls, MN. Lynn L Sarko, Keller Rohrback, Seattle, WA. Steve W Berman, Hagens & Berman, Seattle, WA. Thomas J Potter, Ludens Potter & Burch, Morrison, IL. Francis O Scarpulla, Scarpulla Law Office, San Francisco, CA. Vernon N Reaser, Reaser &

Wall, Victoria, [\*\*2] TX. Joel C Meredith, Meredith & Cohen, Philadelphia, PA. Robert N Kaplan, Kaplan & Kilsheimer, New York, NY. Charles R Watkins, Susman Saunders & Buehler, Chicago, IL. Eugene A Spector, Mark S Goldman, Paul J Scarlato, Spector & Roseman, Philadelphia, PA. Eric D Freed, Freed Law Office, Los Angeles, CA. Gregory J Fata, Dominick Finer foods Inc, Northlake, IL. For COBDEN GRAIN & FEED, on behalf of themselves and all others similarly situated, plaintiff: Steven A Kanner, Much Shelist Freed Denenberg Ament & Eiger, Chicago, IL. For HAHNAMAN ALBRECHT, INC., plaintiff: Steven A Kanner, Much Shelist Freed Denenberg Ament & Eiger, Chicago, IL. Lynn L Sarko, Keller Rohrback, Seattle, WA. Charles R Watkins, Susman Saunders & Buehler, Chicago, IL. For JOHN PETERSON dba Almelund Feed & Grain, plaintiff: Charles Harley Johnson, Johnson & Assoc, St Paul, MN. Mark Reinhardt, Reinhardt & Anderson, St Paul, MN. Steven A Kanner, Much Shelist Freed Denenberg Ament & Eiger, Chicago, IL. For LAING-GRO FERTILIZERS, INC., plaintiff: Elliott S Kaplan, Linda S Foreman, Lateesa Thamani Agunbiade, Robins Kaplan Miller & Ciresi, Mpls, MN. Steven A Kanner, Much Shelist Freed Denenberg Ament & Eibert, Chicago, [\*\*3] IL. Joseph W Cotchett, Susan Y Illston, Mark D Eibert, John L Fitzgerald, Cotchett & Pitre, Burlingame, CA. Arthur N Bailey, Bailey Law Office, Jamestown, NY. Leoanrd B Simon, Dennis Stewart, Milberg Weiss Bershad Hynes & Lerach, San Diego, CA. For CLEARBROOK AG SERVICE, INC., on behalf of itself and all others similarly situated, plaintiff: Steven A Kanner, Much Shelist Freed Denenberg Ament & Eiger, Chicago, IL. Joseph Goldberg, Freedman Boyd & Daniels, Albuquerque, NM. John P Bailey, Bailey Law Office, Bemidji, MN. James S Bailey, Jr, Bailey Harring & Peterson, Denver, CO. For REAMFORD LIQUID FERTILIZER INC, on behalf of itself and all others similarly situated, plaintiff: Steven A Kanner, Much Shelist Freed Denenberg Ament & Eiger, Chicago, IL. James B Sloan, Pedersen & Houpt, Chicago, IL. William T Gotfryd, Gotfryd Law Office, Chicago, IL. For TOLLEY'S INC, on behalf of itself and all others similarly situated, JAMES RIVER FARM SERVICE INC, on behalf of itself and all other similarly situated, plaintiffs: Steven A Kanner, Much Shelist Freed Denenberg Ament & Eiger, Chicago, IL. James B Sloan, Pedersen & Houpt, Chicago, IL. William T Gotfryd, Gotfryd Law Office, Chicago, IL. Eliot [\*\*4] Norman, Thompson & McMullan, Richmond, VA. For ANGELA COLEMAN, on behalf of herself and all others similarly situated, plaintiff: Mark C Rifkin, Greenfield & Rifkin, Ardmore, PA. Steven A Kanner, Much Shelist Freed Denenberg Ament & Eiger, Chicago, IL. Patrick J Grannan, Chimicles Burt Jacobsen & McNew, Los Angeles, CA. C Oliver Burt, III, Chimicles Jacobson & Tikellis, Haverford, PA. Eugene Mikolajczyk, Prorgay & Mikolajczyk, Pacific Palisades, CA. For AG NETWORK, INC., plaintiff: Linda S Foreman, Robins Kaplan Miller & Ciresi, Mpls, MN. Steven A Kanner, Much Shelist Freed Denenberg Ament & Eiger, Chicago, IL. Joseph W Cotchett, Mark D Eibert, Ruth Silver Taube, Jack P Hug, Cochett & Pitre, Burlingame, CA. Arthur N Bailey, Bailey Law Office, Jamestown, NY. For MARCELLINE FARM SUPPLY, INC., on behalf of itself and all others similarly situated, plaintiff: Mark Reinhardt, Harvey H Eckart, Reinhardt & Anderson, St Paul, MN. Steven A Kanner, Much Shelist Freed Denenberg Ament & Eiger, Chicago, IL. Fredric N Goldberg, Mika Meyers Beckett & Jones, Grand Rapids, MI. Eugene A Spector, Mark S Goldman, Spector & Roseman, Philadelphia, PA. Eric D Freed, Freed Law Office, Los Angeles, CA.

For [\*\*5] POTASH CORPORATION OF SASKATCHEWAN, INC., defendant: Jerome B Pederson, Fredrikson & Byron, Mpls, MN. Michael Evan Jaffe, Arent Fox Kintner Plotkin & Kahn, Washington, DC. George S Cary, Irell & Manella, Newport Beach, CA. For POTASH CORPORATION OF SASKATCHEWAN SALES, LTD., defendant: Jerome B Pederson, Fredrikson & Byron, Mpls, MN. Michael Evan Jaffe, Eugene J Meigher, James P Mercurio, Gerald Zingone, Arent Fox Kintner Plotkin & Kahn, Washington, DC. For POTASH COMPANY OF AMERICA, INC., defendant: Leon R Goodrich, Oppenheimer Wolff & Donnelly, St Paul, MN. Victor S Friedman, Fried Frank Harris Shriver & Jacobson, New York, NY. Stephen D Alexander, Fried Frank Harris Shriver & Jacobson, Los Angeles, CA. For IMC FERTILIZER GROUP, INC., defendant: Gordon Gene Busdicker, John Dwyer French, Faegre & Benson, Mpls, MN. Richard J Favretto, Marc Gary, Kerry Lynn Edwards, Lawrence S Robbins, Mayer Brown & Platt, Washington, DC. For KALIUM CHEMICALS LTD, defendant: Roger B Harris, Julie Ann Swanson, Altheimer & Gray, Chicago, IL. Douglas E Rosenthal, Amy L Bess, Sonnenschein Nath & Rosenthal, Washington, DC. For KALIUM CANADA, LTD., defendant: Douglas E Rosenthal, Amy L Bess, Sonnenschein Nath [\*\*6] & Rosenthal, Washington, DC. For NORANDA MINERALS INC, defendant: Bradley Grayson Clary, Oppenheimer Wolff & Donnelly, Mpls, MN. David C Gustman, William C Holmes, Michael J Kelly, Freeborn & Peters, Chicago, IL. For CENTRAL CANADA POTASH CO., defendant: Leon R Goodrich, Oppenheimer Wolff & Donnelly, St Paul, MN. David C Gustman, Michael J Kelly, Freeborn & Peters, Chicago, IL. For NORANDA SALES CORPORATION, LTD, defendant: Leon R Goodrich, Oppenheimer Wolff & Donnelly, St Paul, MN. David C Gustman, Michael J Kelley, Freeborn & Peters, Chicago, IL. For COMINCO, LTD., COMINCO AMERICAN INCORPORATED, defendants:

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Gerald A Connell, Ronald F Wick, Baker & Hostetler, Washington, DC. Ralph Zarefsky, Baker & Hostetler, Los Angeles, CA. For MISSISSIPPI CHEMICAL CORP., defendant: Carol Alice Peterson, Dorsey & Whitney, Mpls, MN. Wayne A Cross, Erin L Ringham, Dewey Ballantine, New York, NY. Mark Crane, Hopkins & Sutter, Chicago, IL. Stephen A Marshall, Rubin Baum Levin Constant & Friedman, New York, NY. For EDDY POTASH, INC., defendant: Carol Alice Peterson, Dorsey & Whitney, Mpls, MN. Stephen A Marshall, Martin P Michael, Rubin Baum Levin Constant & Friedman, New York, NY. For NEW MEXICO POTASH [\*\*7] CORPORATION, defendant: Carol Alice Peterson, Dorsey & Whitney, Mpls, MN. Wayne A Cross, Dewey Ballantine, New York, NY. Stephen A Marshall, Martin P Michael, Rubin Baum Levin Constant & Friedman, New York, NY. Robert Shelley Draper, O'Melveny & Myers, Los Angeles, CA. For RIO ALGOM, LTD, defendant: Victor S Friedman, Fried Frank Harris Shriver & Jacobson, New York, NY. For PPG CANADA LIMITED, PPG INDUSTRIES INC, defendants: Scott Kimrey Goldsmith, Frank Alan Taylor, Popham Haik Schnobrich & Kaufman, Mpls, MN.

**Judges:** Raymond L. Erickson, UNITED STATES MAGISTRATE JUDGE

**Opinion by:** Raymond L. Erickson

## Opinion

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### [\*1339] REPORT AND RECOMMENDATION

At Duluth, in the District of Minnesota, this 13th day of September, 1996.

#### I. *Introduction*

This matter came before the undersigned United States Magistrate Judge pursuant to a special assignment, made in accordance with the provisions of Title [28 U.S.C. § 636\(b\) \(1\) \(A\)](#) and [\(B\)](#), upon the Motions of the Defendants for Summary Judgment.<sup>1</sup>

[\*\*8] [\*1340] A Hearing on the Motions was conducted on April 18, 1996, at which time the parties appeared by lead and liaison counsel.<sup>2</sup>

[\*\*9] For reasons which follow, we recommend that the Defendants' Motions for Summary Judgment be granted.

#### II. *Factual and Procedural Background*

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<sup>1</sup> In addition to the filing of a Joint Motion and Memorandum in Support of Summary Judgment, the Defendants -- with the exception of Potash Corporation of Saskatchewan, Inc. and Potash Corporation of Saskatchewan Sales Limited (collectively "PCS") -- filed Supplemental Motions for Summary Judgment, which separately addressed those issues that were unique to each, individual Defendant.

<sup>2</sup> Appearances were as follows: the Plaintiff Class appeared by Joel C. Meredith, Bruce Cohen, Mark Reinhardt, and Harvey Eckart, Esqs.; Richard J. Favretto, Marc Gary, Kerry Lynn Edwards, and Gordon G. Busdicker, Esqs., appeared on behalf of IMC Fertilizer Group, Inc. ("IMC"); Stephen A. Marshall, and Martin P. Michael, Esqs., appeared on behalf of New Mexico Potash Corporation, and Eddy Potash, Inc. (collectively "NMP/Eddy"); David C. Gustman, and Michael Kelly, Esqs., appeared on behalf of Noranda Minerals Inc., Noranda Sales Corporation, Ltd., and Central Canada Potash Company, Limited (collectively "Noranda"); Michael Evan Jaffe, and Gerald Zingone, Esqs., appeared on behalf of PCS; Gerald A. Connell, and Ronald M. Wick, Esqs., appeared on behalf of Cominco, Ltd., and Cominco American Incorporated (collectively "Cominco"); Victor S. Friedman, and Eric Queen, Esqs., appeared on behalf of Potash Company of America, Inc. ("PCA"), and Rio Algom, Limited ("Rio Algom"); Frank A. Taylor, and Kathryn M. Walker, Esqs., appeared on behalf of PPG Canada Limited and PPG Industries, Inc. (collectively "PPG"); Douglas E. Rosenthal, and Amy L. Bess, Esqs., appeared on behalf of Kalium Chemicals, Ltd., and Kalium Canada, Ltd. (collectively "Kalium"); and Leon R. Goodrich, Esq., appeared on behalf of Cominco, Kalium, Noranda, and PCA.

954 F. Supp. 1334, \*1340 (1996 U.S. Dist. LEXIS 14981, \*\*9

This action was commenced on April 1, 1993, when the first of twelve Complaints was filed in this Court, alleging that the Defendants had violated Section 1 of the Sherman Act, *Title 15 U.S.C. § 1*, by engaging in a conspiracy to fix the sales price of potash, a mineral that is widely used in the manufacture of fertilizers.<sup>3</sup> [\*\*10] On May 19, 1993, the District Court, the Honorable Richard H. Kyle presiding, directed the parties to file an Amended Consolidated Class Action Complaint which would combine the twelve separate proceedings.<sup>4</sup>

The Plaintiffs' First Amended Consolidated Class Action Complaint was filed on June 4, 1993. Thereafter, the Defendants informed the Court that Keith Barton ("Barton"), who had previously served as the General Counsel to PCS, had furnished counsel for the Plaintiffs with confidential information about PCS, which Barton had acquired as legal counsel to that company. By Order dated December 8, 1993, the District Court concluded that Barton had breached his ethical obligations, by impermissibly disclosing certain of PCS's confidences. As a necessary, remedial sanction, the District Court disqualified the bulk of the counsel, who had then been retained by the Plaintiffs, and whose capacity, to ethically serve [\*\*11] in this litigation, had been irreconcilably compromised by their involvement with Barton, and directed the Plaintiffs to file Amended Complaints which would be free from the taint of Barton's disclosures. See, *In re Potash Antitrust Litigation, 1993 U.S. Dist. LEXIS 19065*, Civ. No. 3-93-197, M.D.L. Docket No. 981, 1993 WL 543013 (D. Minn., December 8, 1993).

In a Third Amended Complaint, which was served and filed on July 8, 1994, the Plaintiffs have alleged that the Defendants conspired, from April of 1987, to and including July 8, [\*1341] 1994, to fix, stabilize, and maintain potash prices, and that, as a result of that conspiracy, price competition in the sale of potash, among the Defendants and their co-conspirators, had been restrained. Specifically, the Plaintiffs have asserted that the Defendants, and their co-conspirators, raised, fixed, maintained and stabilized the price of potash throughout the United States, at artificially high and noncompetitive levels, thereby depriving their customers of the benefit of free and open competition. *Third Amended Complaint* at P 55. The Plaintiffs seek injunctive relief and the recovery of treble damages, together with their costs and attorneys' fees, pursuant to Sections [\*\*12] 4 and 16 of the Clayton Act, *Title 15 U.S.C. PP15 and 26*.

Included within the Plaintiff Class are all of those persons, who directly purchased potash from one of the Defendants, during the period of the alleged conspiracy. Accordingly, by Order dated January 12, 1995, the District Court certified the following class of Plaintiffs:

All purchasers (excluding governmental entities, defendants, subsidiaries and affiliates of defendants, co-conspirators of defendants, and other producers of potash and their subsidiaries and affiliates) in the United States of potash directly from defendants or any subsidiary or affiliate thereof at any time during the period April 1987 to and including July 8, 1994.

*In re Potash Antitrust Litigation, 159 F.R.D. 682, 700 (D. Minn. 1995).*

<sup>3</sup> "Potash" is a generic name for a variety of potassium forms. The potassium found in potash, together with nitrogen and phosphorus, constitute the three basic raw materials used in the production of fertilizers. The predominant form of potash is "muriate of potash," which is otherwise known as "potassium chloride." Muriate of potash, which constitutes nearly all of the potash consumed in the United States, is available in three varieties of particle size: standard, coarse, and granular. *Plaintiffs' Third Amended and Consolidated Class Action Complaint* ("Third Amended Complaint") at P136. In addition to its employment as a fertilizer, a small portion of potash is consumed in various industrial applications. Potash is typically mined from underground land deposits, either through conventional or through "solution" mining. The potash, that is produced through solution mining, is white in color, whereas the potash, that is mined through conventional means, is typically red. Only white potash is suitable for industrial uses. *Expert Report of Andrew W. Rosenfield ("Rosenfield Rept.")* at P59, attached as *Exhibit 17, Defendants' Joint Memorandum in Support of Summary Judgment, Affidavit of Gordon Busdicker ("Defs.'Jt.Memo. Aff.")*.

<sup>4</sup> On August 19, 1993, the Judicial Panel on Multidistrict Litigation transferred to this Court, in order that they might be consolidated with the twelve actions that this Court had previously combined, certain proceedings, which had originated in the District Courts for the Northern District of Illinois, and for the Western District of Virginia, and which involved the same or similar issues.

By Order dated May 2, 1995, the Court drafted, for distribution, a Notice which was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Potash Antitrust Litigation, 161 F.R.D. 411, 412 (D. Minn. 1995)*. Insofar as we are aware, the Court-sanctioned Notice was published, [\*\*13] and was mailed, in accordance with our directions, on or about June 30, 1995.

With the exception of PPG and Rio Algom, the Defendants are either Canadian or American producers of potash, or are the marketing subsidiaries of those producers.<sup>5</sup> Although the attributes, which are said to distinguish the Defendants, will be addressed when relevant to our subsequent analysis, a brief discussion of the potash market will provide a helpful backdrop.

[\*\*14] PCS, which is the largest producer of potash in North America, was created, in 1975, by the Saskatchewan Government, and was vested with the authority to acquire up to 50 percent of the productive capacity for potash in that Province. In 1989, PCS was privatized -- a process that the Defendants assert was initiated in the latter part of 1986 -- with the result that a change in its merchandising was introduced, from one of production to one of profit. Kalium, which is another Canadian producer of potash, contends that, during the period of the alleged conspiracy, it was able to increase its market share by exploiting the superiority of its product -- white potash -- through a patented method of solution mining. Noranda's marketing plan, on the other hand, is somewhat distinguishable, since 80 percent of its sales are consummated with only two customers, whose purchase agreements have required that Noranda sell its potash at the market price. In [\*1342] contrast, PCA's marketing in the United States has been less successful than that of the other Defendants, as is reflected in its dwindling market share, from approximately 8 percent, in 1986, to 1.3 percent, in 1993, see, *PCA/Rio Algom Jt. [\*\*15] Memo.* at p. 6, as well as by its resort to purchasing potash from a co-Defendant, as a result of the loss of its mine, in February of 1987, to flooding. The remaining Canadian producers include Cominco and IMC, while New Mexico Potash ("NMP"), and Eddy Potash, are the only Defendants who are located in the United States.

The Plaintiffs contend that, after PCS increased its potash prices, in April of 1987, the other producers -- acting in concert -- followed suit by increasing their prices. *Third Amended Complaint* at P50. According to the Plaintiffs, this same pattern of pricing continued throughout the remainder of 1987; so that, by the beginning of 1988, price increases for potash had exceeded 74 percent. *Id.* at P51. Since the Third Amended Complaint has principally focused upon this particular period of time, a brief overview of the potash industry, together with a recitation of what appear to have been the key operative events which led up to January of 1988, will provide some additional context for the discussion that follows.

The North American potash industry is, and has been, highly concentrated. For example, in the 1985/1986 fertilizer year,<sup>6</sup> the Defendants comprised [\*\*16] over 80 percent of the productive capacity for potash in North America. *Expert Report of Gordon C. Rausser ("Rausser Rept.")* at P 12, attached as *Tab 59 Plaintiffs' Joint Brief in*

<sup>5</sup> As to PPG and Rio Algom, their involvement in the sale of potash, in the United States, arises from their ownership of one or more of the co-Defendants. For example, until November of 1987, PPG owned and operated Kalium as a business unit. *PPG's Memorandum in Support of Summary Judgment ("PPG Memo.")* at 1. On August 20, 1987, PPG agreed to sell its interest in Kalium to S&P Canada, Ltd. and S&P U.S., Inc. (collectively "S&P"), and that transaction was completed on November 17, 1987. *Id.* at 1 n. 1. Rio Algom, on the other hand, acquired, in 1986, the Potash Company of America, Inc. ("PCA Canada"), which is a Canadian company that operated two Canadian potash mines, and that merchandised potash in the United States. *Declaration of John A.H. Bush* at P2, attached to *PCA's and Rio Algom's Memorandum in Support of Summary v Judgment ("PCA/Rio Algom Jt.Memo.")*. PCA Canada operated as a wholly-owned subsidiary of Rio Algom until December 31, 1987, when Rio Algom created a division ("Division") which oversaw the operations of the two mines. *Id.* at P3. On that same date, Rio Algom transferred the responsibility, for the sale and marketing of potash in the United States, to PCA, which operated as a wholly-owned subsidiary of Rio Algom. *Id.* at P4. Thereafter, in October of 1993, PCA's assets, and the potash mining assets of the Division, were sold to PCS. *Id.* at P5.

<sup>6</sup> The "fertilizer year" runs from July 1 through June 30. *Expert Report of Louis A. Guth* at P9 n. 7 ("The crop year runs from July 1 through June 30."), attached as *Exhibit Q. NMP/Eddy Memorandum in Support of Summary Judgment. Affidavit of Steven A. Marshall ("NMP/Eddy Jt.Memo.Aff.")*.

*Opposition to Summary Judgment Affidavit of Harvey H. Eckhart ("Plts. 'Jt.Opp. Aff.").* By the 1993/1994 fertilizer year, the Defendants' productive capacity had increased to over 90 percent. *Id.*

In addition to the limited number of producers who serve the potash market, it is significant that potash is an essentially homogeneous product, with the result that its purchasers largely consider the output, from different producers, to be interchangeable. *Id.* at P7. Moreover, the demand for potash is inelastic -- that is, a decrease [\*\*17] in the price of potash will not necessarily lead to a comparable increase in consumption -- principally because potash is primarily employed in agricultural uses, where it has no effective substitute, and where it is inexpensive in relation to the total cost of crop production. *Id.* at P10.

As a result of the fungibility of potash, the inelasticity of the demand for the product, and the relatively small number of potash producers, the industry operates in an oligopolistic market, which causes the market participants to be "interdependent." Put simply, "one firm's actions are interdependent with those of another when their utility depends on the other firm's response." VI P. Areeda & H. Hovenkamp, Antitrust Law P 1411, at 70 (1986) (hereafter "VI Areeda"). As a consequence, in an oligopoly, each producer is generally required to account for the conduct of its competitors, when pricing its product, as the oligopolist cannot, unilaterally, maintain a higher price without losing its market share.<sup>7</sup>

[\*\*18] [\*1343] As alleged in the Third Amended Complaint, "by the 1980's, the potash industry was faced with a major oversupply situation, coupled with high fixed costs, leading to major losses for the producers." *Third Amended Complaint* at P 45. This circumstance of oversupply has been attributed, in part, to a miscalculation of the demand for potash, which declined, in the early 1980's, as the acreage under cultivation decreased in the United States, and as a result of a strategy on PCS's part, as a state-owned employer, to increase employment opportunities in Saskatchewan. See, e.g., Haglund & von Bredow, *The Politics of Antidumping: The Potash "War" of 1986-1988*, in U.S. Trade Barriers and Canadian Minerals: Copper, Potash and Uranium (1990), p. 66, attached as *Exhibit 5, Defs. 'Jt. Memo.Aff.; PCS 1981 Annual Report (PC 420978)*, attached as *Exhibit 14, Defs.'Jt.Memo.Aff.* The decline in the demand for potash, combined with the increase in production to stimulate a "price war." By October of 1986, the real price of potash had fallen to historically low levels. Indeed, the Defendants' expert, Andrew M. Rosenfield ("Rosenfield"), has calculated that, in real price terms, the price [\*\*19] of potash, in October of 1986, was 21 percent lower than the previous historical low. *Rosenfield Rent.* at P76, attached as *Exhibit 17, Defs.'Jt. Memo.Aff.* Notably, on three separate occasions in 1986, Noranda, Kalium, PCA, and PCS attempted to unilaterally increase prices, but they were forced to rescind the increases when the prices went unmatched. *Defs. 'Jt.Memo.* at 5; *Plts.'Jt.Opp.Memo.* at 3 and 45.

The effect of these low price levels, in an oversupplied market, caused record losses at PCS. In March of 1987, the Provincial Government replaced the upper level of management at PCS with a team led by Charles Childers ("Childers") and William Doyle ("Doyle"), both of whom had previously been employed at IMC.<sup>8</sup> Childers served as

<sup>7</sup> The mechanics at play here, in the context of a concentrated industry, were succinctly recounted by then Circuit Judge, and now Justice Breyer, as follows:

A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry.

*Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 484 (1st Cir. 1988); see also, *United States v. FMC Corp.*, 306 F. Supp. 1106, 1139 (E.D.Pa. 1969) ("Due to the relative inelasticity of demand for the products a lower price will not increase the size of the total market; no producer can successfully sell at a higher price than its competitors; and if a seller attempts to sell at a lower price \* \* \* its competitors will be given the opportunity to meet its lower price, thereby resulting in uniform prices again, but at a lower level; and without any increase in the original seller's net share of the market."), order supplemented, *317 F. Supp. 443 (E.D.Pa. 1970)*.

PCS's president and CEO, while Doyle became the president of PCS's sales subsidiary. In assuming leadership at PCS, Childers sought to make the operations profitable, in part, in order to prepare the company for privatization, which ultimately occurred in November of 1989. To accomplish the goal of profitability, Childers aspired to position PCS as a leader in the industry. See, e.g., "Tough Decisions Return Balance to the Bottom Line," [**\*\*20**] *Custom Applicator*, Feb. 1989, attached as *Exhibit 24. Defs.' Jt.Memo.Aff.*

Against this background of falling prices and, contemporaneous with the change in PCS's management, on February 10, 1987, two American potash producers, Lundberg Industries ("Lundberg") and NMP, petitioned the United States Department of Commerce ("DOC") to initiate an antidumping proceeding against the Canadian producers. In order for an antidumping action to proceed, the United States International Trade Commission ("ITC") has to preliminarily establish that there was a "reasonable indication" that an industry in the United States was being materially injured by reason of imports which are, [**\*\*21**] assertedly, being sold in the United States at less than their fair market value. See, *Title 19 U.S.C. § 1673b(a)*. On March 27, 1987, the ITC determined that a "reasonable indication" had been shown that the United States potash industry had suffered a material injury because of imports. *Potassium Chloride From Canada*, 52 Fed. Reg. 10641 (April 2, 1987), attached as *Exhibit 31, Defs. 'Jt.Memo.Aff.* Thereafter, the investigation returned to the DOC, which preliminarily determined, on August 21, 1987, that imports of potash were being sold in the United States at "less than fair value." *Potassium Chloride From Canada: Preliminary Determination of Sales at Less than Fair Value*, 52 Fed. Reg. 32151 (August 26, 1987), attached as *Exhibit 32. Defs.'Jt.Memo.Aff.*

Based upon this preliminary finding, the DOC ordered the Canadian producers to pay cash deposits, on all future exports to the United States, or to post bonds, that would [**\*1344**] be equal to the amount by which the Canadian producers were determined to be selling below fair market value -- otherwise known as the "dumping margin." *Id. at 32154* ("The Customs Service shall require a cash deposit or the posting of a bond [**\*\*22**] equal to the estimated amounts by which the foreign market values of potassium chloride exceed the United States price."). A separate dumping margin was calculated for each producer, based upon fair value comparisons of that producer's sales to the United States, during the period from September 1, 1986, through February 28, 1987. *Id.* The dumping margins were established, as follows:

	9.14%
Kalium	6.67%
PCS	51.9%
PCA	77.4%
Noranda	85.2%
All Others	36.6%

*Id.* In general terms, IMC and Kalium were determined to produce potash at lower costs than Noranda and PCA.

During the course of the antidumping investigation, the Saskatchewan Government was considering the enactment of legislation that would control the production of potash in that Province. Throughout July and August of 1987, Pat Smith ("Smith"), who was the Minister of Energy and Mines in Saskatchewan, met with representatives of the Canadian producers in order to discuss the implications of any such legislation. *Declaration of Pat Smith* at P6, attached as *Exhibit 5. Defendants' Joint Reply Memorandum in Support of Summary Judgment. Supplemental Affidavit of John D. French ("Defs.'Jt.Ren.Aff.")*. [**\*\*23**] On September 1, 1987, less than two weeks after the announcement of the dumping margins, the Saskatchewan Government introduced the Potash Resources Act. The Act, which was approved by the Saskatchewan Parliament on September 18, 1987, allowed for the creation of a Potash Management Board, which would be empowered to set quotas for each Saskatchewan mine, so as to control the quantity of potash that could be produced in the Province.<sup>9</sup> *Potash Resources Act*, attached as *Exhibit*

<sup>8</sup> The ensuing portions of this Report are unavoidably rife with the *dramatis personae* of the potash industry, as it existed during the period of the alleged conspiracy. For ease of reference, we append to this Report a listing of the identities of those persons whose names reoccur in our discussion of the issues. See, *Appendix A*.

37. *Defs.'Jt. Memo.Aff.* Notations of a meeting, that was attended by representatives of the Provincial Government, and by Noranda, reveal that, while the Government viewed itself as a victim of the antidumping action, it was keenly aware that the price of potash was too low and that the supply was too high. *Noranda Memorandum dated July 31, 1987 (NOR 406039)*, attached as *Exhibit 42. Defs.'Jt.Memo.Aff.*

[\*\*24] In response to the preliminary dumping margins, on September 4, 1987, PCS announced a \$ 35 price increase, effective immediately, which resulted in a total price of \$ 93 for a short ton of granular grade potash. Assertedly, PCS arrived at the \$ 35 figure because it reflected the industry's average antidumping margin. *Childers Deposition* at 80, attached as *Exhibit 45 Defs.'Jt.Memo.Aff.* According to PCS's Annual Report in 1987, the \$ 35 increase "served the additional purpose of making the U.S. farm sector aware of potential price increases if the preliminary duties were upheld in a final Department of Commerce decision." *PCS 1987 Annual Report*, attached as *Exhibit 43. Defs.'Jt.Memo.Aff.* Thereafter, the remaining Defendant producers, as well as several offshore producers, who were not included in the antidumping proceeding, matched the \$ 35 increase.

[\*1345] Following the announcement of the preliminary dumping margins, IMC, Kalium, and Noranda sought downward revisions in their dumping margins, while the United States petitioners, including NMP, requested an upward revision in some of the companies' margins. In addition, PCS commenced a lobbying effort, in order to enlist [\*\*25] the support of American farmers, in its effort to persuade the DOC to rescind the margins. On January 8, 1988, just short of the deadline for its announcement of a final determination, the DOC negotiated a Suspension Agreement with each of the Canadian producers. Under the terms of this Agreement, a Canadian producer could sell at less than fair value by no more than 15 percent of its previously determined dumping margin.<sup>10</sup> *Suspension of Anti-dumping Duty Investigation: Potassium Chloride From Canada*, [53 Fed.Reg. 1393, 1394](#) (January 19, 1988), attached as *Exhibit 35, Defs. 'Jt.Memo.Aff.*

[\*\*26] As an additional term of the settlement, each producer had the right to withdraw from the Agreement, and the entire Agreement was to be terminated, and the investigation resumed, if producers, who accounted for 15 percent or more of Canadian potash exports to the United States, elected to opt out. *Title 19 C.F.R. § 353.18*. Although the DOC expected that, absent some "likelihood of injurious effect on exports of potassium chloride from Canada," the Agreement would expire in January of 1993, we are advised that the Agreement remains in effect today. *Suspension of Antidumping Duty Investigation: Potassium Chloride From Canada*, [53 Fed.Reg. 1393, 1395](#) (January 19, 1988), attached as *Exhibit 35. Defs.'Jt.Memo. Aff.; Defs.'Jt.Memo. at 8.*

<sup>9</sup> In years past, the potash industry had been the subject of an antidumping action, and of prorationing legislation. For example, because of production increases, potash prices fell approximately 50 percent in the latter half of the 1960's. In August of 1969, the United States determined that dumping had occurred and, contemporaneously, the Saskatchewan government enacted a prorationing scheme in order to increase the price of potash that was to be sold in the United States. Under this scheme, not only was each producer granted a production quota, but a minimum price was established which, if violated, would threaten a cancellation of the producer's production license. See, e.g., Picketts, Schmitz & Schmitz, *Rent Seeking: The Potash Dispute Between Canada and the United States*, Amer.J.Ag.Econ. 255, 260 (May 1991), attached as *Exhibit 7. Defs.'Jt.Memo.Aff.* Nevertheless, this prorationing legislation was eventually overturned, in the Canadian Courts, for the setting of a floor price would, impermissibly, infringe upon trade. Haglund & von Bredow, *The Politics of Antidumping: The Potash "War" of 1986-1988*, in *U.S. Trade Barriers and Canadian Minerals: Copper, Potash and Uranium* (1990), at 78, attached as *Exhibit 5. Defs.'Jt. Memo.Aff.*

<sup>10</sup> In pertinent part, the Suspension Agreement provided as follows:

Each signatory producer/exporter of potassium chloride from Canada, individually, agrees that the price it will charge for each entry of potassium chloride exported to the United States from Canada for consumption in the United States will be such that the any amount by which the estimated foreign market value exceeds the United States price will not exceed 15 percent of the weighted-average amount by which the estimated foreign market value exceeded the United States price for all less-than-fair-value entries by such signatory producer/exporter that were examined during the Department's investigation.

*Suspension of Antidumping Duty Investigation: Potassium Chloride From Canada*, [53 Fed.Reg. 1393, 1394](#) (January 19, 1988), attached as *Exhibit 35, Defs.'Jt.Memo.Aff.*

On the same date that the producers entered into the Suspension Agreement, PCS announced that, on January 11, 1988, it would distribute new price lists, which would reflect an \$ 86 price for granular grade potash, which constituted an \$ 18 increase. *Telexes dated January 8, 1988 (NOR 416856, MI 59809)*, attached as *Exhibit 11, Defs.'Jt.Rep.Aff.* Within the following eleven days, the remaining Canadian producers matched the \$ 86 price, **[\*\*27]** with the exception of Kalium, which announced a price of \$ 87. See, *Plts.' Jt.Memo.* at 10 n. 15. In conjunction with its announcement of a price increase, PCS followed through on its prior promise that it would refund the \$ 35 surcharge if the duties were not, ultimately, imposed. *PCS 1987 Annual Report*, attached as *Exhibit 52, Defs. 'Jt.Memo.Aff.* The remaining Canadian producers again followed PCS's lead, and refunded, at least in part, the \$ 35 surcharge.

In their Third Amended Complaint, the Plaintiffs allege that the sharp increase in the price of potash, from April of 1987, through January of 1988, was the result of a price fixing conspiracy. The Defendants, in turn, maintain that the price increases were the inevitable product of the antidumping proceeding, the prorationing legislation, and the management change at PCS. In the Defendants' view, the interdependent nature of pricing, within the potash industry, induced the individual firms to price their product at approximately the same levels. *Id.* at 5.

In opposition to the Motions for Summary Judgment, the Plaintiffs identify a series of actions, by each of the various Defendants, that they claim were contrary **[\*\*28]** to that particular Defendant's economic self-interest -- unless an agreement to fix prices was at play. In support of the asserted price fixing conspiracy, the Plaintiffs have identified various communications, between certain of the Defendants, which the Plaintiffs characterize as both frequent and integral to the conspiracy, and they have highlighted certain **[\*1346]** purportedly retaliatory actions, that were taken by the Defendants, against ostensible price "cheaters." In addition, the Plaintiffs have offered the report of their expert witness, Gordon Rausser ("Rausser"), which examines the potash industry, and concludes that the structure of that industry is conducive to the formation of a price fixing conspiracy. Rausser also conducted a review of the Record, that was amassed in the discovery effort, and observed that certain of the Defendants' actions were inconsistent with individually rational, and economically maximizing, behavior. Lastly, Rausser has designed a statistical model, with which he has analyzed the price of potash in the United States and, according to the results of that analysis, he has concluded that the prices that were existent, during the conspiracy, exceeded the **[\*\*29]** prices that had been forecasted in the model, by an average of 35 percent.

Not surprisingly, the Defendants challenge the validity of Rausser's Report. They claim that not only are the conclusions reached by Rausser in error, but that the methods, which he employed to reach those conclusions, have failed to account for other relevant evidence. Further, the Defendants offer the reports of their own economic experts, each of whom supports their contention that the challenged price increases were the natural product, not of a conspiracy, but of a combination of events that were occurring in the potash marketplace.

The Plaintiffs have also alleged that, throughout the period of their assertedly unlawful conduct, the Defendants have attempted to cloak their conspiracy by engaging in acts of fraudulent concealment, including: (1) "secretly and conspiratorially" discussing and agreeing upon the prices to be charged to their customers; and (2) announcing price increases in a "staggered fashion." *Third Amended Complaint* at P57. In addition, the Plaintiffs contend that neither they, nor the members of the Class, had any knowledge that the Defendants were conspiring "until shortly before **[\*\*30]** the filing of the Complaint in this action," nor could they have "discovered any of the violations at any time prior to this date by the exercise of due diligence." *Id.* at P56. Based upon these asserted acts of fraudulent concealment, the Plaintiffs contend that the statute of limitations, which governs this action, should be equitably tolled. *Id.* at P59.

### III. Discussion

The core issue before us is whether the Plaintiffs have produced sufficient evidence, in support of the alleged conspiracy, to survive the Defendants' Motions for Summary Judgment. We conclude that they have not.

#### A. The Defendants' Common Motions for Summary Judgment.

1. *Standard of Review.* **HN1** In antitrust cases, as in other civil actions, a Motion for Summary Judgment should 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." [Rule 56\(c\), Federal Rules of Civil Procedure](#); [Bathke v. Casey's General Stores, 64 F.3d 340, 342 \(8th Cir. 1995\)](#) ("In complex antitrust cases, no different [\*\*31] or heightened standard for the grant of summary judgment applies."); [In re Travel Agency Com'n Antitrust Litigation, 898 F. Supp. 685, 690 \(D. Minn. 1995\)](#) (The principle underlying summary judgment "holds for antitrust claims, as it does for other civil theories."). For these purposes, a disputed fact is "material," if it must inevitably be resolved and the resolution will determine the outcome of the case, while a dispute is "genuine," if the evidence is such that a reasonable Jury could return a Verdict for the non-moving party. See, [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#); [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'")

**HN2** As [Rule 56\(e\)](#) makes clear, once the moving party presents a properly supported Motion, the burden shifts to the non-moving party to demonstrate the existence of a genuine dispute. In rebutting the showings of [\*1347] the movant, "an adverse party may not rest upon the mere allegations or denials [\*\*32] of the adverse party's pleading, but \* \* \* must set forth *specific facts* showing that there is a genuine issue for trial." [Rule 56\(e\), Federal Rules of Civil Procedure](#) [emphasis supplied]; [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra](#) at 586 ("Opponent must do more than simply show there is some metaphysical doubt as to the material facts.").

Moreover, **HN3** a party is entitled to Summary Judgment where its opponent has failed "to establish the existence of an element essential to [its] case, and on which [it] will bear the burden of proof at trial." [Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#). In such a case, no genuine issue of material fact will be found to exist because "a complete failure of proof concerning an essential element of [that party's] case necessarily renders all other facts immaterial." [Id. at 323](#). Of course, "in determining whether a material factual dispute exists, the court views the evidence through the prism of the controlling legal standard." [Nebraska v. Wyoming, 507 U.S. 584, 590, 123 L. Ed. 2d 317, 113 S. Ct. 1689 \(1993\)](#). Accordingly, the prism, through which we here appraise the [\*\*33] propriety of Summary Judgment, is the law of antitrust, as that law has evolved in the unique environs of an oligopolistic market.

In this respect, **HN4** [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 declared to be illegal." [Title 15 U.S.C. § 1](#). The essence of a [Section 1](#) claim is concerted action and, because the law requires an agreement between two or more persons, "unilateral actions of a single entity do not give rise to antitrust liability under section one of the Sherman Act." [Willman v. Heartland Hosp. East, 34 F.3d 605, 610 \(8th Cir. 1994\)](#), cert. denied, [131 L. Ed. 2d 218, U.S. , 115 S. Ct. 1361 \(1995\)](#); [Fisher v. City of Berkeley, Cal., 475 U.S. 260, 266, 89 L. Ed. 2d 206, 106 S. Ct. 1045 \(1986\)](#) ("Even when a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under [§ 1](#) in the absence of an agreement.").<sup>11</sup>

[\*\*34] Thus, "**HN5**" 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 \(1984\)](#). "The standard is whether the evidence, direct or circumstantial, 'reasonably tends to prove that the [alleged violator] and others had a conscious commitment to a common scheme

<sup>11</sup> Of course, not every agreement that restrains competition will violate the Sherman Act. It is well settled that [Section 1](#) prohibits only those agreements which unreasonably restrain competition. In identifying such offending agreements, the Supreme Court has held that certain kinds of accords are unreasonable *per se*, such as agreements among competitors to fix prices. [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 n. 49, 84 L. Ed. 1129, 60 S. Ct. 811 \(1940\)](#); [Capital Imaging v. Mohawk Valley Medical Assoc., 996 F.2d 537, 542-43 \(2d Cir. 1993\)](#) (listing the types of *per se* violations that have been recognized by the Supreme Court), cert. denied, [510 U.S. 947, 126 L. Ed. 2d 337, 114 S. Ct. 388 \(1993\)](#). Here, the Plaintiffs have alleged a horizontal price fixing conspiracy -- that is, one that involves concerted action on only one level in a product's distribution chain -- and, therefore, the only inquiry is whether the agreement existed, since the unreasonableness of such a restraint is presumed. Cf., [Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 n. 4 \(7th Cir. 1987\)](#).

designed to achieve an unlawful objective." *Pumps & Power Co. v. Southern States Industries, 787 F.2d 1252, 1256 (8th Cir. 1986)*, quoting *Monsanto Co. v. Spray-Rite Serv. Corp., supra at 764*. More recently, the Supreme Court has elaborated upon this standard, and has determined that, in order to successfully oppose a Motion for Summary Judgment, the nonmoving party "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 588*.

As the Plaintiffs have correctly observed, **HN6**[<sup>12</sup>] the precepts of **antitrust law** do not alter the principle that, "on summary judgment[,] [\*1348] the inferences to be drawn from the underlying facts [\*\*35] \* \* \* must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 587-88*, quoting *United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)*. Nevertheless, where, as here, there is no direct evidence of collusion,<sup>12</sup> "**antitrust law**" limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 588*. Specifically, "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* In such cases, the plaintiff must "present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." *Id.*, quoting *Monsanto Co. v. Spray-Rite Serv. Corp., supra at 764*.

[\*\*36] As a consequence, the plausibility of the underlying economic motive limits the range of permissible conclusions that may be drawn from ambiguous evidence. Indeed, "**HN7**[<sup>12</sup>] the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists within the meaning of *Rule 56(e)*." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 596*. In such an instance, the Record on Summary Judgment must contain further persuasive evidence if it is to support the claim for recovery. While the conspiracy, that was alleged in *Matsushita*, may have been an implausible one, the Supreme Court rejected the view that ambiguous evidence creates a Jury issue merely because the alleged conspiracy is objectively reasonable. As the Court explained: "We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy." *Id. at 597 n. 21*.

As the Supreme Court has more recently observed, in *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 468, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*, by requiring that the plaintiffs' claims make economic [\*\*37] sense, *Matsushita* did not invent a new requirement in an antitrust context, but merely articulated an established standard -- namely, "that the nonmoving party's inferences be reasonable in order to reach the jury." As a consequence, "**HN8**[<sup>12</sup>] if the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Id.*

In applying these principles, our Court of Appeals, in *Lovett v. General Motors Corp., 998 F.2d 575 (8th Cir. 1993)*, cert. denied, 510 U.S. 1113, 127 L. Ed. 2d 378, 114 S. Ct. 1058 (1994), reversed a Jury's Verdict against a defendant car manufacturer, on the plaintiff's claim that the manufacturer had conspired with some of its auto dealers to injure the plaintiff's dealership. The plaintiff had been selling cars at a price which undercut other, neighboring dealerships. After several dealers complained, the defendant limited its sales allotments to the plaintiff. In granting the defendant Judgment as a matter of law, the Court explained that "the district court failed to recognize that [plaintiff's] evidence [was] as consistent with permissible unilateral conduct on [defendant's] part as it [was] [\*\*38] with illegal conspiracy, and that *Monsanto* does not permit a jury to infer the existence of a conspiracy from ambiguous evidence." *Id. at 579*; see also, *Willman v. Heartland Hosp. East, supra at 612* (affirming grant of Summary Judgment to a hospital, and to members of its medical staff, on a physician's claim that he was denied

<sup>12</sup> The Plaintiffs have produced no direct evidence of a price fixing agreement. Otherwise stated, the plaintiffs have not pointed to a single document, or excerpt of testimony, that, were we to accept the evidence as true, would establish the alleged conspiracy. Indeed, at the Hearing on the Motions, Plaintiffs' counsel conceded that there is "no direct evidence of an agreement *per se*." *Transcript of Summary Judgment Hearing* at 137. Rather, the Plaintiffs exclusively rely upon circumstantial evidence in their proof of the alleged conspiracy. Accordingly, our task is to determine whether that circumstantial evidence, and any justifiable inferences that may be drawn therefrom, are sufficient to create genuine issues of material fact that would warrant the submission of their case to a Jury.

staff privileges, because the defendants' actions were "as consistent with the lawful purpose of promoting [\*1349] quality patient care as with the unlawful purpose of eliminating potential competitors.").

Of course, [HN9](#) participation in a price fixing conspiracy need not be, nor rarely is, shown by direct evidence, for most conspiracies are proved through inferences that are drawn from the behavior of the alleged conspirators. [\*ES Development, Inc. v. RWM Enterprises, Inc.\*, 939 F.2d 547, 553 \(8th Cir. 1991\)](#) (citations omitted) ("It is axiomatic that the typical conspiracy is rarely evidenced by explicit agreements, but must almost always be proved by inferences that may be drawn from the behavior of the alleged conspirators."), cert. denied, 502 U.S. 1097, 117 L. Ed. 2d 421, 112 S. Ct. 1176 (1992). As a consequence, the Court should not compartmentalize [\\*\\*39](#) the evidence that is proffered by an antitrust plaintiff but, rather, should analyze the plaintiff's showings as a whole so as to determine if, in its integrated entirety, the evidence supports an inference of concerted action. See, e.g., [\*In re Workers' Compensation Ins. Antitrust Lit.\*, 867 F.2d 1552, 1563 \(8th Cir. 1989\)](#) ("piece-meal analysis must be avoided and the overall conduct of the defendants must be weighed."), cert. denied, 492 U.S. 920, 106 L. Ed. 2d 593, 109 S. Ct. 3247 (1989).

Nevertheless, as our Court of Appeals has observed, "a fine line separates unlawful concerted action from legitimate business practices." [\*Lovett v. General Motors Corp.\*, supra at 988](#). Accordingly, "care must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon the defendants' freedom." [\*Petrucci's IGA v Darling-Delaware\*, 998 F.2d 1224, 1230 \(3rd Cir. 1993\)](#), cert. denied, 510 U.S. 994 (1993), quoting [\*Big Apple BMW, Inc. v. BMW of North America, Inc.\*, 974 F.2d 1358 \(3rd Cir. 1992\)](#), cert. denied, 507 U.S. 912, 122 L. Ed. 2d 659, 113 S. Ct. 1262 (1993). Indeed, in [\*Monsanto\*](#), the Supreme Court expressed concern that independent action [\\*\\*40](#) may, quite improperly, be viewed as evidence of a conspiracy. [\*Monsanto Co. v. Spray-Rite Serv. Corp.\*, supra](#). There, the plaintiff alleged that Monsanto had illegally conspired, with its other distributors, to terminate the plaintiff's distributorships. The Court observed that "to permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would \*\*\* inhibit management's exercise of its independent business judgment." [465 U.S. at 764](#).

Given the clear import of the foregoing authorities, even in the milieu of [antitrust law](#), [HN10](#) Summary Judgment is neither an acceptable means of resolving triable issues, nor is it a disfavored procedural shortcut when there are no issues which require the unique proficiencies of a Jury to weigh the evidence and to render credibility determinations. [\*Celotex Corp. v. Catrett\*, supra at 327](#); [\*Health Care Equalization Com. v. Iowa Medical Soc.\*, 851 F.2d 1020, 1031 \(8th Cir. 1988\)](#) (citing Celotex in antitrust case). We are mindful, however, [HN11](#) that only concerted action is within the proscriptions of the Sherman Act and, therefore, we have the added responsibility of [\\*\\*41](#) assuring that any underlying, lawful conduct is not, inadvertently, condemned and penalized. See also, [\*Thompson Everett, Inc. v. National Cable Advertising, L.P.\*, 57 F.3d 1317, 1322 \(4th Cir. 1995\)](#) ("Because of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for [Rule 56](#) utilization."); [\*Valley Liquors, Inc. v. Renfield Importers, Ltd.\*, 822 F.2d 656, 660 n. 4 \(7th Cir. 1987\)](#) (citation omitted) ("The ultimate determination, after trial, that an antitrust claim is unfounded may come too late to guard against the evils that occur along the way."), cert. denied, 484 U.S. 977, 98 L. Ed. 2d 486, 108 S. Ct. 488 (1987); [\*Lovett v. General Motors Corp.\*, supra at 988](#) ("The jury's finding of a conspiracy in this case shows why cases based on ambiguous evidence should not be submitted to a jury.").

As [\*Matsushita\*](#) confirms, [HN12](#) whether the underlying, circumstantial evidence is sufficient to support a reasonable inference of collusion remains a legal question for the Court's resolution. Thus, evidence which permits equally competing inferences, without "tending" to point in one direction, [\\*\\*42](#) should not be sent to [\\*1350](#) the Jury, for the Court may not invite the factfinder to speculate on the consummation of an agreement to restrain trade. Of course, if the underlying conduct is sufficient to support such an inference, then "the question of what weight should be assigned to competing permissible inferences is within the province of the fact-finder at trial." [\*Apex Oil Co. v. DiMauro\*, 822 F.2d 246, 253 \(2nd Cir. 1987\)](#), cert. denied, 484 U.S. 977 (1987).

[HN13](#) One means by which the Courts may ensure that unilateral, nonconspiratorial conduct is not unintentionally punished is to require the plaintiffs to demonstrate something more than mere paralleling or mimicking conduct. See, e.g., [\*Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.\*, 346 U.S. 537, 541, 98](#)

L. Ed. 273, 74 S. Ct. 257 (1954). Of course, if persons acted in near unison, but independently of one another and without any agreement or mutual understanding amongst them, then there is no conspiratorial showing. In effect, "individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under section 1 of the [\*\*43] Sherman Act." Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 484 (1st Cir. 1988), cert. denied, 488 U.S. 1007, 102 L. Ed. 2d 780, 109 S. Ct. 789 (1989), see also, Petrucci's IGA v. Darling-Delaware, *supra* at 1232; Reserve Supply v. Owens-Corning Fiberglas, 971 F.2d 37, 51 (7th Cir. 1992); Apex Oil Co. v. DiMauro, *supra* at 253; Richards v. Neilson Freight Lines, 810 F.2d 898, 904 (9th Cir. 1987).

History teaches, however, that in an oligopolistic market, interdependent decision making may produce cartel-like results, In re Coordinated Pretrial Proceedings, 906 F.2d 432, 444 (9th Cir. 1990), cert. denied, 500 U.S. 959 (1991), for, in an oligopoly, each firm understands that its own pricing decisions will affect the others in that market, who are likely to respond, and whose response will affect the profitability of the pricing decision. As Professor Areeda explains:

When one oligopolist raises its price, each of his rivals must decide whether to follow or not. Continuing the previous price would allow each of the others to increase his sales if the leader persists in charging a higher price. But each knows that the leader is likely to [\*\*44] retract an increase that is not followed. Accordingly, each rival asks himself whether he is better off at the lower price when charged by all or at the higher price when charged by all. If the latter, as will often be the case, the leader's price increase is likely to be followed.

VI Areeda, § 1410b at 65.

Notwithstanding this potential consequence, HN14[<sup>14</sup>] the existence of mere parallel pricing, in an oligopoly, is not, standing alone, actionable. See, e.g., Reserve Supply v. Owens-Corning Fiberglas, *supra* at 50 (quoting E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984)) ("It is well-established, however, that 'the mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws.'") As the First Circuit has observed, in Clamp-All Corp. v. Cast Iron Soil Pipe Institute, *supra* at 484, allowing oligopolists to mimic each others prices "is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for interdependent pricing[:] how does one order a [\*\*45] firm to set its prices *without regard* to the likely reactions of its competitors?" [Emphasis in original]. See also, United States v. International Harvester Co., 274 U.S. 693, 708-09, 71 L. Ed. 1302, 47 S. Ct. 748 (1927) ("The fact that competitors may see it proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.").

Therefore, HN15[<sup>15</sup>] in order to present a Jury question as to the existence of a conspiracy, there must be a parallelism in pricing that is accompanied by competent, additional evidence. But see, Coleman v. Cannon Oil Co., 849 F. Supp. 1458, 1466 (M.D.Ala. 1993) ("There must therefore be parallelism accompanied by *substantial additional evidence* to support a finding of an agreement necessary to establish a violation of § 1 of the Sherman Act. [Emphasis in original], citing Theatre [\*1351] Enterprises, Inc. v. Paramount Film Distributing Corp., *supra* at 541. Accordingly, HN16[<sup>16</sup>] it is now settled antitrust law that only when the plaintiff shows the existence of this additional evidence -- often referred to as the "plus factors" -- does the evidence tend [\*\*46] to exclude the possibility that the defendants were actually acting independently. Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1456 n. 30 (11th Cir. 1991) ("An agreement is properly inferred from conscious parallelism only when 'plus factors' exist."); Apex Oil Co. v. DiMauro, *supra* at 253; Petrucci's IGA v. Darling-Delaware, *supra* at 1244 ("courts require plus factors because otherwise the evidence is equally consistent with legal behavior"); In re Coordinated Pretrial Proceedings, *supra* at 445.<sup>13</sup>

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<sup>13</sup> Although not expressly denominated as "plus factors," our Court of Appeals has required antitrust plaintiffs to proffer evidence, that is additive to conscious parallelism, in order to avert an award of Summary Judgment. In Admiral Theatre Corp. v. Douglas

954 F. Supp. 1334, \*1351 (1996 U.S. Dist. LEXIS 14981, \*\*46

[\*\*47] By way of example, consciously paralleling conduct may allow for an inference of an agreement if it is also shown that each conspirator acted against its own self-interest, by engaging in the paralleling behavior. See, e.g., *Petruzzi's IGA v. Darling-Delaware, supra at 1242; Reserve Supply v. Owens-Corning Fiberglas, supra at 51; Apex Oil Co. v. DiMauro, supra at 253*. Likewise, a high-level of interfirm communications, when viewed in conjunction with paralleling acts, can serve to allow a Jury to reasonably infer a conspiracy. See, e.g., *Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1172 (7th Cir. 1990); Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp., 913 F. Supp. 1088, 1117 (N.D.Ill. 1995)*, vacated on other grounds, pursuant to settlement (September 18, 1995).

Nevertheless, [HN17](#) where an examination of the proffered "plus factors" leads to an equally plausible inference that merely interdependent behavior is at hand, then there is no triable issue that would preclude a grant of Summary Judgment, so long as there is no evidence which tends to exclude the possibility that the alleged conspirators acted independently. See, *Market Force Inc. v. Wauwatosa, \*\*481 Realty Co., supra at 1171; Apex Oil Co. v. DiMauro, supra at 254*. This is so, because "ambiguous evidence cannot be sent a jury [as] a court may not invite the factfinder to speculate that an agreement existed." *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp., supra at 1104*. In the final analysis, a "failure on the part of the plaintiff to produce evidence from which a jury could infer reasonably that conduct was conspiratorial, not unilateral, will lead to summary judgment for the defendant." *Richards v. Neilsen Freight Lines, supra at 902*.

## 2. Legal Analysis.

a. Overview. We begin with an explanation of the analytical approach that we have employed; not because it is novel -- for it is not -- but because of the potential for misapprehension.<sup>14</sup>

[\*\*49] [\*1352] What follows is an exhaustive and, perhaps, an uncompromisingly tedious,<sup>15</sup> appraisal of the evidentiary showings that the Plaintiffs regard as demonstrating the existence of triable issues of price fixing. In

*Theatre Co., 585 F.2d 877, 883 (8th Cir. 1978)*, the Court looked to whether the parallel conduct was "inconsistent with the self-interest of the individual actors." Indeed, in a related context, the Court concluded that a manufacturer's simple refusal to sell to dealers, who would not sell at suggested retail prices, was insufficient to support a finding that there was an illegal combination to fix retail prices. *Russell Stover Candies, Inc. v. Federal Trade Commission, 718 F.2d 256, 260 (8th Cir. 1983)*. Notably, the Court found that there were "no 'plus factors' to take the case beyond *Colgate*," a Supreme Court decision that had permitted such conduct. *Id. at 260*, citing *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*. Accordingly, we believe that, if confronted with this issue, our Court of Appeals would adopt the reasoning of those Courts, which have analyzed the sufficiency of an antitrust plaintiff's evidence, that is proffered in opposition to a Motion for Summary Judgment, on "plus factor" grounds.

<sup>14</sup> We think that the parameters of the applicable analytical regime were well-stated in *Reserve Supply v. Owens-Corning Fiberglas, 971 F.2d 37, 49 (7th Cir. 1992)*:

In [ruling on Motions for Summary Judgment on price fixing claims], the court should first examine the plaintiff's evidence of a conspiracy among the defendants. Next it should examine whether the defendants have offered evidence tending to show that the conduct complained of is as compatible with the defendants' legitimate business activities as with illegal conspiracy. If the court concludes that the foregoing analysis leaves the evidence of conspiracy ambiguous, it should then determine whether the plaintiff can point to any evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests.

See also, *Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1231-33 (3rd Cir. 1993)*, cert. denied, 510 U.S. 994 (1993); *Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1583 (11th Cir. 1988); Apex Oil Co. v. DiMauro, 822 F.2d 246, 252-54 (2nd Cir. 1987)*, cert. denied, 484 U.S. 977 (1987); but see, *In re Coordinated Pretrial Proceedings, 906 F.2d 432, 440 (9th Cir. 1990)*, cert. denied, 500 U.S. 959 (1991).

<sup>15</sup> We have conscientiously attempted to address each of the items of evidence that the parties have drawn to our attention, but we recognize that one scintilla or another will, almost certainly, escape specific comment. We merely note here that we have conducted both a microscopic and a macroscopic review of the evidence and, if a particular document, or depositional reference, has not been specifically discussed, that does not suggest that the evidence has not been closely considered in our view of the

conducting this review, we recognize that, by superficial appearance, concern could be expressed that we have invaded the proper role of the Jurors in, at least ostensibly, assessing the believability of the Plaintiffs' evidence. We have not. Rather, we have assumed our customary role as a gatekeeper of the evidence; assuring that only competent evidence is submitted for the Jury's consideration. In this sense, the function we fulfill is indistinguishable from our conventional assessment of the qualitative worth of proffered evidence.

[\*\*50] We accept, without reservation, our incapacity to adjudge, under the rubric of [Rule 56](#), the credibility of the evidence, but we no more render believability judgments in weighing the reliability of an evidentiary submission, than we do, say, in rejecting expert opinion evidence as being unworthy of a Jury's reliance, in excluding testimony as impermissible hearsay, or in barring the admission of matter that was not subject to the witness's personal knowledge. While a Court's ruling on such matters could be framed as a believability assessment, at its core, the ruling is, quintessentially, one of "screening," so as to "ensure" that the "evidence admitted is not only relevant, but reliable." [Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 125 L. Ed. 2d 469, 113 S. Ct. 2786 \(1993\)](#); and see, [Rule 802, Federal Rules of Evidence](#); <sup>16</sup> [\*\*51] [Rule 602, Federal Rules of Evidence](#), <sup>17</sup> and related Advisory Committee Notes, [Rules 602 and 802, Federal Rules of Evidence](#).

Here, the parties agree -- as, indeed, they were obliged to do by the weight of the governing law -- that [HN18](#)↑ the examination of a price fixing claim, in the unique environs of an oligopolistic market, requires more of a showing than the mere existence of the spontaneous forces which cause oligopolists to parrot the pricing decisions of a market leader. In the parlance, the price fixing claimant must present "plus factors" -- that is, reliable indicators of unlawful price fixing -- if a *genuine* issue of material fact is to be presented for a Jury's resolution. After a most painstaking [\*\*52] review, we find that the Plaintiffs have failed to offer such a positive showing, since what they have submitted for our review is, quite literally, "nonplus" -- that is, [\*1353] evidence which places us, because of its substantive ambivalence, in a quandary as to what the evidence should, with any reliability, mean.

In expressing these views, we intend no discredit to the Plaintiffs' effort to raise a genuine issue of material fact. We are advised, and we have no reason to believe otherwise, that hundreds of thousands of discovery documents have been culled by the Plaintiffs, with the result that a grouping of perhaps a hundred, or more, have been isolated, at least in the Plaintiffs' view, as favoring an inference of collusion. Given the sheer volume of this submission, as expanded by the Plaintiffs' recitation of pertinent depositional testimony, there is an instinctive, natural inclination to presume that such a daunting collection of documents must, *a fortiori*, generate triable issues of fact. Our review, however, has convincingly persuaded us otherwise.

By way of a brief analogy, quite recently, in [Wright v. Willamette Industries, Inc., 91 F.3d 1105 \(8th Cir. 1996\)](#), our Court [\*\*53] of Appeals was obliged to determine whether the plaintiffs had presented a submissible case to a Jury concerning the ill-health effects that they attributed to living next to an operation that exposed them to

evidence as a whole. See, e.g., [Big Apple BMW, Inc. v. BMW of North America, 974 F.2d 1358, 1364 \(3rd Cir. 1992\)](#), cert. denied, [507 U.S. 912, 122 L. Ed. 2d 659, 113 S. Ct. 1262 \(1993\)](#).

<sup>16</sup> The Advisory Committee's Notes, on Article VIII of the Federal Rules of Evidence, expressly recognizes the tension between excluding all hearsay evidence, and admitting that which, for one reason or another, is regarded as sufficiently reliable. In the Committee's words:

The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness.

See, also, [Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 n. 9, 125 L. Ed. 2d 469, 113 S. Ct. 2786 \(1993\)](#).

<sup>17</sup> As explained by the Advisory Committee Notes to [Rule 602, Federal Rules of Evidence](#):

" \* \* \* The rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most persuasive manifestation" of the common law insistence upon "the most reliable sources of information."

Quoting, McCormick § 10, p. 19; see also, [Daubert v. Merrell Dow Pharmaceuticals, Inc., supra at 590 n. 9](#).

formaldehyde. Although a Jury awarded damages to the plaintiffs, and notwithstanding the Trial Court's denial of the defendants' post-Trial Motions, the Court of Appeals reversed, because the claimants had failed to establish the level of exposure to formaldehyde that was reasonably known to cause adverse health consequences. In the absence of such a causative showing, the Court concluded that the Jury could do no more than speculate on the issue of causation. *Id. at 1108*. While we grant that the issues we confront here do not have the objectivity of medical science, we are aware of no reason why they should escape the "reasonable inference" standard that the Court employed in *Wright*.

**HN19** [↑] Where the empirically established principles, which govern the operation of an oligopolistic market, and which reliably confirm that, left to spontaneity, the market will be driven by a price leader, who the other participants in the market will follow, we believe that something more than [\*\*54] a suspicion of culpability should properly stave an award of Summary Judgment. While, obviously, we view the evidence presented in a light most favorable to the nonmovant -- here the Plaintiffs -- the governing law makes clear, "such inferences \* \* \* must be 'justifiable.'" *Valley Liquors, Inc. v. Renfield Importers, Ltd., supra at 659*. Accordingly, we need not view each of the evidentiary submissions as inferring complicitous wrongdoing, merely because a cramped, or inventive interpretation of that evidence, as driven by some assumption of unlawfulness, would arguably allow that result. To do so, would improperly subject the oligopolist to the artificiality of a jejune existence, merely because conduct, which is a normal and innocent expression of natural, economic forces, can be "spun" into a suggestion of complicity. Our review of the caselaw, which we have heretofore detailed, makes clear that the Courts have remained vigilant to assure that a blameless emulation of pricing policies, by participants in an oligopoly, does not incur unwarranted reprobation. This would seem all the more obvious where, as here, the oligopoly has been impacted by both pure economic forces, and by [\*\*55] the unavoidable skew that is bred through the well-intentioned, but invidiously intrusive, protectionist interests of one or more governments. Given this entanglement of fact, law and economics, the governing standard of review, and the dearth of evidence which tends to exclude the possibility that the complained of conduct was not the outcome of independent corporate will, we do not say that no price fixing conspiracy could possibly have existed, we merely conclude that the Plaintiffs have presented an insufficient showing to allow the issue to be submitted to a Jury.

With this perspective as our backdrop, we examine the Plaintiffs' evidentiary showings, as they have grouped them, in three categories of generalized proof, in order to examine whether a genuine issue of material fact has been demonstrated for a Jury's disposition. These categories -- namely, opportunity and motive; behavior that is contrary to economic self-interest; and interfirm communications -- represent the "plus factors," that the [\*1354] Plaintiffs have relied upon, in conjunction with the evidence of price parallelism, in their effort to elude an award of Summary Judgment. *Pltfs. 'Jt.Opp.Memo.* at 35-39. While we [\*\*56] will follow the Plaintiffs' lead in compartmentalizing our discussion of this evidence, we have carefully reviewed this evidence as an blended whole, together with the Defendants' explanations for their conduct, so as to ascertain whether an "inference of conspiracy is reasonable in light of the competing inference of independent action." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 588*.<sup>18</sup> Since we conclude, following a considered review of the Record before us, that an inference of a conspiracy, which could justifiably arise from this Record, would consist of unreasoned speculation, we recommend that the Defendants' Motions be granted.

[\*\*57] b. *Opportunity and Motive*. As to their first "plus factor," the Plaintiffs have asserted that, "from meetings of Canpotex<sup>19</sup> to the plethora of trade association meetings and telephone calls, the executives of defendants were in constant communication" -- ergo, the Defendants had an opportunity to conspire. *Pltfs. 'Jt.Opp.Memo.* at 36. Nevertheless, **HN20** [↑] while proof of an occasion to conspire may, as a practical matter, satisfy a necessary

<sup>18</sup> We note that, as one might expect, the Plaintiffs' "plus factors" roughly track the development of the alleged conspiracy. For example, the evidence of "motive and opportunity" generally corresponds to those months preceding April of 1987, whereas the evidence of "self-interest" and of "interfirm communication," approximates the period in which the Defendants are alleged to have conspired in fixing prices.

<sup>19</sup> Canpotex was a lawful cartel, created pursuant to Canadian law, which set prices for potash that would be sold outside of the United States. *Pltfs. 'Jt.Opp.Memo.* at 36 n. 41.

954 F. Supp. 1334, \*1354L<sup>A</sup> 1996 U.S. Dist. LEXIS 14981, \*\*57

precondition of a conspiracy, "[a] jury cannot reasonably infer the existence of a conspiracy merely from the opportunity to form one." *Utesch v. Dittmer*, 947 F.2d 321, 331 (8th Cir. 1991), cert. denied, 503 U.S. 1006, 118 L. Ed. 2d 425, 112 S. Ct. 1764 (1992), quoting *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1545 (8th Cir. 1989); see also, *Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1469 (M.D.Ala. 1993) (quoting VI Areeda, § 1417b at 97) (Evidence that the defendants "met together or telephoned each other \* \* \* 'satisfies the necessary precondition of any traditional conspiracy that the parties have the opportunity to conspire', but 'it remains the plaintiff's burden to prove that the defendant succumbed [\*\*58] to the temptation and conspired.'")

As a result, the Plaintiffs' evidence of informal communications among the alleged conspirators, standing alone, merely provides an opening for collusion, rather than unambiguous evidence from which a reasonable inference of concerted action can properly be drawn. See, *Market Force Inc. v. Wauwatosa Realty*, supra at 1172; *Petrucci's IGA v. Darling-Delaware*, supra at 1242 n. 15. To infer a conspiracy premised upon the Defendants' association in Canpotex, upon their attendance at trade association meetings, or upon their telephone communications, without any showing that those associations or communications were dedicated to concerted action, would be tantamount to condemning wholly lawful conduct, merely because the conduct could be abused by a malefactor. Since "opportunity" evidence [\*\*59] can vary in its degree of persuasiveness, at this point, we defer our examination of the substance of these communications, and of the reasonable inferences that may be legitimately drawn therefrom. Instead, at this juncture, we merely acknowledge the obvious, that routine and justifiable contacts amongst competitors, such as the conduct of meetings and the participation in the affairs of business associations is, at best, evidence of a most ambiguous sort.

With respect to motive, there can be little dispute over the Defendants' recognition that each would benefit from a uniform increase in the price of potash. Indeed, as Professor Areeda has explained, "because competitors can profit from conspiring to fix prices, they are deemed to have the motive to do so." II P. Areeda & H. Hovenkamp, *Antitrust Law* § 322g at 80 (1995) (hereafter "II Areeda"). Here, as a showing of motive, the Plaintiffs note that, on September 25, 1986, the then-president of PCS Sales, Rolf Holzkaemper ("Holzkaemper"), stated: "It is not possible [\*1355] for a single producer to affect a turn-around; however, joint action by a group of producers or governments could achieve this." *Holzkaemper Memorandum* (PC 361765), [\*\*60] attached as Tab 2, *Plts.'Jt.Opp.Aff.* In addition, the Plaintiffs have identified an undated document from PCS stating:

Cannot wait for supply/demand to pull us up. Cannot do it alone. Industry must cooperate. Key is discipline.

*Undated PCS Document* (PC 297675), attached as Tab 2, *Plts.'Jt.Opp.Aff.*

Further, the Plaintiffs have pointed to some isolated notations, from a meeting, on May 12, 1986, between certain representatives of PCS and Peat Marwick & Mitchell ("Peat Marwick"), which is an international consulting firm that had been retained by PCS.

On the basis of these notations, the Plaintiffs suggest that, during the conference of May 12, 1986, Peat Marwick proposed collusion as a strategy for returning PCS to profitability, by explaining that, "in order to increase prices there must be a reduction in supply," and by proposing "three possible solutions":

- a) Keep prices low in the short-term to force out marginal producers.
- b) That the industry arrange voluntary cutbacks or coordinated price increases.
- c) That the Government of Saskatchewan impose some form of rationing such as a special tax on producers in excess of, say 75% [\*\*61] of their capacity.

*Peat Marwick Meeting Notes* (PC 337391-94), attached as Tab 2, *Plts.'Jt.Opp.Aff.*

At best, this evidence suggests that PCS, as well as its retained consultant, recognized the need to raise prices, and to cut the supply of available product, in the interdependent potash market. Moreover, as the Defendants point out, on June 10, 1996, Peat Marwick clarified that it presented its scenarios "as the outcomes of potential policies that [might] be adopted by individual producers and/or government," and that, "under no circumstances did [it] suggest that PCS should try to 'arrange' an industry-wide capacity reduction or price increase in collusion with competitors." *Peat Marwick Letter* (PC 334476), attached as *Exhibit 16, Defs.'Jt. Rep.Aff.* Each of the notations, that

the Plaintiffs have highlighted can just as readily be construed as a recognition of the need for discipline, in an interdependent market, and we see no tendency for these notations to exclude the possibility of independent business action, here on PCS's part.

As was true with the evidence of "opportunity," [HN21](#)[] while the absence of "motive" may negate an inference of conspiracy, [\[\\*\\*62\]](#) its presence is not sufficient to infer that a conspiracy has occurred. See, [Reserve Supply v. Owens-Corning Fiberglass, supra at 51](#). "If [motive] were sufficient to show conspiracy, then parallel pricing, especially in oligopoly, would be automatically conspiratorial, but it is not." *Id.*

As well, the Plaintiffs have also focused upon discussions, between the Saskatchewan Government and two of the Defendants, which related to the antidumping investigation. Purportedly, by alluding to certain proposed agreements, this evidence is supposed to support a reasonable inference that the Defendants ultimately reached an agreement to fix prices. We disagree.

On September 29, 1986, Andrew Elliott ("Elliott"), of PCS, met with officials from the Saskatchewan Government to discuss the antidumping investigation. An interoffice Memorandum of October 7, 1986, which memorializes the discussion, states as follows:

Gosselin [a Canadian Embassy official] raised the question of whether some form of an agreement might be reached between the Ad Hoc Group [American potash producers who initiated the investigation] and Saskatchewan potash producers. I responded that this might move [\[\\*\\*63\]](#) us from the prospect of an anti-dumping investigation to an anti-trust investigation and asked what possible kind of agreement he had in mind. He mentioned assurance of "no more firesales" (the interpretation of our IRS sale last winter) and Canadians' staying out of natural markets for New Mexico (presumably a reference to Kalium's "incursion" into Texas). \* \* \* I gave Gosselin no understanding that we had an interest in pursuing such an agreement.

[\[\\*1356\]](#) *Elliott Memorandum (PC 388233-36)*, attached as *Tab 2, Pltfs.'Jt. Opp.Aff.*

Despite the Plaintiffs' characterization of this discussion as "bordering on the illegal," *Pltfs.'Jt.Opp.Memo.* at 7, we fail to see how a proposal, from a governmental official, to settle a potential trade dispute between two countries, is indicative of a conspiracy, especially when that proposal is expressly rejected.

We are similarly unimpressed with the Plaintiffs' reliance upon a Memorandum of October 26, 1986, which was authored by William Deeks ("Deeks"), who was the President of Noranda, which was directed to John Gordon ("Gordon"), who was Noranda's Vice-President, and which records that Noranda learned of the anti-dumping investigation [\[\\*\\*64\]](#) on October 21. The Memorandum reports the substance of Deeks' conversation with Hank Armstrong, who was an official with the Canadian Embassy, in Washington D.C. Deeks recounts the discussion, which included an initiative of the Canadian Government, as follows:

An overall objective would be to see whether or not it would be possible from the Canadian end to put together a proposal to the United States, which on the one hand could avoid a trade action, on the second hand would introduce some supply management to the situation, and overall would result in higher prices and would avoid a highly political trade action.

*Deeks Memorandum (NOR 955009)*, attached as *Tab 6, Pltfs.'Jt. Opp.Aff.*

As with the Elliott Memorandum, however, we do not view this evidence as supporting a suggestion that any of the Canadian producers colluded with any potash producers, American or Canadian. Indeed, contrary to the Plaintiff's suggestion, the Record is uncontested that no other producers attended this particular meeting. *Deeks Deposition* at 203, attached as *Exhibit 18, Defs.'Jt.Rep.Aff.*

Lastly, the Plaintiffs identify an alleged statement by Cliff Kelly ("Kelly"), [\[\\*\\*65\]](#) who was then the President of Kalium, to the effect: "You know, why can't we just kind of draw a line across the country and let the Canadians keep north of it and Americans stay south of it and resolve the whole thing that way." *Elliott Deposition* at 27, attached as *Tab 23. Pltfs.'Jt.Opp.Aff.* Purportedly, Kelly made this remark at a "Federal/Provincial/Industry Meeting," on February 19, 1987. A telex from an official with the Canadian Government, which was addressed to

other government officials and to the representatives of the various Canadian producers, including the Canadian Defendants, states that the purpose of the meeting was "to coordinate the defence against this antidumping action." *February 13 Telex (AK 026421)*, attached as *Tab 3, Pltfs.'Jt.Opp.Aff.*

Apparently, the Plaintiffs invite us to infer that Kelly proposed an agreement that would divide the North American potash market. Nevertheless, consistent with Elliott's interpretation, as it was related at the time of his deposition, the statement can be as logically read as expressing sarcasm, voiced out of frustration over the commencement of the antidumping proceeding. The inference, that Kelly intended **[\*\*66]** to propose an agreement to conspire, is further undermined by the fact that Elliott has no recollection of a response to Kelly's remark, and by the reality that the antidumping proceeding was not settled on terms that were even remotely similar to those suggested by Kelly. *Elliott Deposition* at 27, attached as *Tab 23, Pltfs.'Jt.Opp.Aff.*

c. *Acts Against Self-Interest.* Next, the Plaintiffs urge that there is substantial evidence which reveals that the Defendants acted, on separate occasions, contrary to their own economic self-interest. As we have observed, **HN22**<sup>1</sup> the fact that a firm's action is against its self-interest might well be suggestive of the existence of a conspiracy. See, *Admiral Theatre Corp. v. Douglas Theatre Corp.*, 585 F.2d 877, 884 (8th Cir. 1978) ("Only where the pattern of action undertaken is inconsistent with the self-interest of the individual actors, were they acting alone, may an agreement be inferred solely from such parallel action."). However, to support a reasonable inference of conspiracy, the conduct must reveal more than the mere recognition that an act is unwise -- unless it is followed by its rivals -- for it must competently disclose "individual **[\*\*67]** action [that] would be so perilous **[\*1357]** in the absence of advance agreement that no reasonable firm would make the challenged move without such agreement." *Coleman v. Cannon Oil Co.*, *supra* at 1467 (quoting *VI Areeda*, § 1434c at 215).

Accordingly, our analysis of the Plaintiff's second "plus factor" -- the acts against self-interest -- includes evidence of conduct that, despite its economic rationality, the Plaintiffs claim could not have occurred in the absence of a prior collusive agreement. As Professor Areeda has explained, "if the actual defendants could not or would not have acted as they did without advance communication and understanding, then their action necessarily proves a traditional conspiracy." *VI Areeda*, § 1425a at 144 (quoted in *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp.*, *supra* at 1119).

Whether the asserted parallel action reflects a reasonable response to a business exigency, or a collusive restraint of trade, requires a close analysis of several events which approximated the alleged inception of the conspiracy; namely, PCS's unilateral decision to raise the price of potash by \$ 35 in September of 1987; the remaining Defendants' response **[\*\*68]** to that price increase; the Defendants' entry into the Suspension Agreement; the Defendants' conduct in rebating the surcharge, and in imposing an \$ 18 increase in the price of potash; PCS's decision to supply PCA's need for potash after PCA's mine was flooded; and, the alleged transformation of the potash industry in 1987. In evaluating this evidence, which is largely comprised of the reactions of certain Defendants to exceptional, and nonrecurrent, events in the potash marketplace, we are mindful of the policy concerns which discourage any substitution of our supposed business acumen for that of the Defendants in the legitimate management of their corporate interests.

1. *The PCS September Price Increase.* The Plaintiffs claim that PCS's decision to increase its price for potash by \$ 35, within days after the DOC's announcement of the preliminary antidumping margins, is highly probative of a conspiracy. *Pltfs.'Jt.Opp.Memo.* at 9. To support this contention, the Plaintiffs rely on several arguments, none of which we find sufficient to raise a genuine issue of material fact.

At the outset, we consider Rausser's testimony that "Canadian potash producers may have been expected **[\*\*69]** to increase price in order to cover the bond requirements imposed by these margins." *Supplemental Rausser Rept.* at P 129, attached as *Tab 60, Pltfs.'Jt.Opp.Aff.* Rausser, however, believes that "the level of the price increase was generally greater than that required by the preliminary margins." *Id.* Apparently, the Plaintiffs are suggesting, albeit without supporting authority, that the size of the price increase, in and of itself, supports the inference of a conspiracy. However, as one Court has noted, "were we to permit [a conspiracy claim premised on the theory that price hikes were too high], few pricing decisions would be immune from antitrust scrutiny." *In re Coordinated Pretrial Proceedings*, *supra* at 445 (observing that the Federal Courts are unsuited to act as rate-setting commissions).

Perhaps more importantly, however, we conclude -- for reasons we later detail -- that the Defendants' explanations, for the \$ 35 increase in their price for potash, are not only plausible, but they are logically consistent with an independent exercise of business judgment.

Next, the Plaintiffs point to Childers' testimony that, rather than to select an increase which would **[\*\*70]** correspond to PCS's preliminary dumping margin, the \$ 35 increase, which reflected the industry average margin, was lower than that required by the margins. Childers, however, testified that he chose the industry-wide average not only to recover the potential duty, but also to demonstrate the impact of the duty on its potash customers in the United States. *Childers Deposition* at 87-88, attached as *Tab 17, Pltfs.'Jt.Opp.Aff.* According to Childers, and as supported by the Record before us, PCS hoped that its customers, once they became aware that the duty would cause potash prices to rise, would exert pressure, on the United States Government, to terminate the antidumping proceeding. *Id.; PCS Letter and Memorandum Addressing Lobbying Efforts (PC 33045 and PC 15542)*, attached as *Tab 47, Defs.'Jt.Memo.Aff.* In this same respect, Childers **[\*1358]** testified that, "in order for [the program enlisting support from United States farmers] to be successful we felt like there would have to be others besides us charging this surcharge and we felt like if that was going to happen it was more likely to happen if we used an industry average as opposed to a PCS average." *Childers Deposition* **[\*\*71]** at 87-88, attached as *Tab 17, Pltfs.'Jt.Opp.Aff.* We find Childers explanation to be plausible and apt in rebutting any conjectural inference that PCS had acted collusively.

Nor do we find that Childers' testimony, that PCS acted without a contingency plan, in the event that the surcharge was not followed, as cogently suggesting the presence of an agreement to collusively restrain trade. *Childers Deposition* at 91-91, attached as *Tab 17, Pltfs.'Jt.Opp.Aff.* In this respect, the Plaintiffs appear to ask that we infer, from this excerpt of Childers' testimony, that an agreement existed among the producers which obviated the need for an optional, contingency plan. Given the evidence in this Record, which corroborates the economic reality that unilateral price increases are quickly reversible, we conclude that Childers' failure to recall an "optional plan" is unavoidably, and indecipherably, ambiguous. Moreover, on August 25, 1987, Doyle authored a Memorandum, which was directed to the account managers at PCS, and which fully supports a competing inference; namely, that PCS did not know how its rivals would respond to the dumping duty. *Doyle Memorandum (PC 50352)*, attached **[\*\*72]** as *Exhibit 7, Defs.'Jt.Rep.Aff.* ("We are not sure that all our competitors intend to pass on this duty to their customers. Logic would dictate that they do so, but logic does not always prevail."). We find no unambiguous showing of collusion here.

Next, the Plaintiffs cite a Memorandum of May 7, 1987, from Childers to Gary Lane, who was also employed at PCS. In this Memorandum, Childers expressed concern that, due to the size of PCS, the antidumping investigation would place PCS at a much higher risk than its rivals. *Childers Memorandum (PC 072520-26*, attached as *Tab 2, Pltfs.'Jt. Opp.Aff.* Childers continued:

Even more disconcerting is the probability that the other Canadian producers will be slapped with a lower duty than PCS. Some of our Saskatchewan co-producers wouldn't mind a duty as long as PCS is hit harder than they are, due to the obvious market implications.

*Id.*

On this tenuous showing, the Plaintiffs encourage us to deduce that a collusive agreement served to "alleviate" Childers' concerns. We are not so persuaded, however, for Childers' decision to increase the price of PCS potash by the industry average, rather than by its own, higher **[\*\*73]** margin, does not meaningfully suggest that Childers' concerns, over PCS's competitiveness, had been effectively assuaged.

ii. *Response to PCS's Price Increase.* In addition to the size of the price increase, the Plaintiffs maintain that the "prompt response" by the other Defendants, as well as the fact that the increase was uniformly matched -- and not undercut by the other potash producers -- supports an inference of a conspiracy. We conclude, however, that an inference of conspiracy, which is based upon this showing, is unsound, particularly in view of the strong competing inference that the Defendants not only independently arrived at the \$ 35 figure but, in doing so, they exercised understandable business judgment.

As we have noted, PCS announced the \$ 35 price increase on September 4, 1987, and, by September 16, 1987, the remaining Canadian Defendants had followed suit. The Plaintiffs contend that "Kalium was aware of IMC's and Noranda's intention to increase their prices \$ 35 before they announced," and that "Noranda was aware of Kalium's intention to raise prices before they announced as well." *Pltfs.'Jt.Opp. Memo.* at 4 n. 7. As evidence for these assertions, the Plaintiffs [\*\*74] highlight a Kalium document, which is dated September 10, 1987, and which states: "IMC considering increase" and "Noranda rumored to go up also." *Kalium Document (AK 058720)*, attached as *Tab 3, Pltfs.'Jt.Opp.Aff.* The Plaintiffs also refer to a Noranda Memorandum, of September 4, 1987, which reports:

**[\*1359]**

Rumors rampant this week about imminent price increase in U.S.A. Kalium reported prepared to publish revised price list \$ 6 -\$ 10 U.S./ton higher than current level.

*Noranda Memorandum, dated September 4, 1987 (NOR 408818)*, attached as *Tab 6, Pltfs.'Jt.Opp.Aff.*

Viewed in its own light, we are unable to infer from this evidence, without engaging in sheer speculation, that the Defendants provided advance notice of each others' pricing decisions, as the inference is equally plausible that Kalium and Noranda received the referenced "rumors" from their own customers. Not only was the Kalium price increase, which was listed in the Noranda Memorandum, inconsistent with the eventual \$ 35 increase, but a Noranda document, which followed the first Memorandum by one week, stated as follows: "No definitely confirmed reports of price increases by other producers [\*\*75] though rumors abound and make for interesting discussion." *Noranda Memorandum, dated September 11, 1987 (NOR 408815)*, attached as *Exhibit 2, Defs.'Jt.Rep.Aff.*

The Plaintiffs also contend "that PCA knew before September, 1987 that the industry-wide \$ 35 price increase was forthcoming." *Plaintiffs' Memorandum in Opposition to Rio Algom/PCA Joint Motion ("Pltfs.'Rio Algom/PCA Opp.Memo.")* at 4. To support this contention, the Plaintiffs point to a telex, which was dated August 27, 1987, and which was transmitted by J.P. Welch ("Welch"), who was PCA's Western Regional Manager, to J. Ripperger ("Ripperger"), the Vice President of Marketing and Sales at PCA. *PCA Telex (XC 01637)*, attached as *Tab 5, Pltfs.'Jt.Opp. Aff.* In the telex, Welch states that he "cannot understand [PCA's] reluctance to take orders at current list price," and protests that "[PCA's] current policy is alienating our good customers, destroying morale among the salesmen and, most importantly, not moving one pound of potash." *Id.* Welch also expressed his fear that "while we are courageously supporting the industry vow of strengthening prices, we will again be left with an unsold inventory." [\*\*76] *Id.* According to the Plaintiffs, PCA's policy of not making sales at list prices "reflects PCA's foreknowledge that its competitors would be raising prices dramatically in the future." *Pltfs.'Rio Algom/PCA Opp.Memo.* at 4.

Without question, Welch's telex reveals a difference in opinion at PCA. However, on August 26, 1987 -- the day before Welch sent the telex -- Ripperger advised his sales force that, effective immediately, no new orders were to be accepted. *Ripperger Telex (XC 152614)*, attached as *Exhibit F, Rio Algom/PCA Jt.Memo., Declaration of Eric H. Queen ("Rio Algom/PCA Jt.Aff.")* Ripperger has explained that this direction was given "in order to allow PCA to clarify its situation vis-a-vis the DOC's ruling [the preceding] Friday." *Id.* Given this explanation, we conclude that a legitimate inference does not arise from PCA's decision, to withdraw sales into the United States as an immediate response to the DOC's announcement of preliminary margins, since contemporaneous documentation discloses a rational business motivation which supports that response.

Indeed, another contemporaneous Memorandum at PCA bolsters an inference that, rather than learning about [\*\*77] each others' prices from one another, the Defendants discovered the pricing decisions of their competitors by reports from their own customers. *PCA Interoffice Memorandum (XC 74090)*, attached as *Exhibit 51, Defs.'Jt.Memo.Aff.* The Memorandum, which is dated September 8, 1987, was sent from PCA's Eastern Regional Office to Ripperger, and provides as follows:

The following has been reported by customers to the Lebanon Regional Office this morning. Although we feel the information is accurately reported as the individual's best understanding of it, we would want additional time to confirm the factuality of the following: Sidney Clear, Southern States Coop, reported this morning PCS's price to them will be based on \$ 58.00 per ton coarse, FOB mine site, plus a \$ 35.00 per ton increase effective 9/7/87.

This Memorandum concludes with additional information, which pertained to the current potash pricing of one of PCA's rivals, and all of which was gleaned from third-party sources. In fact, the Memorandum reported [\*1360] that "no information to this point regarding price changes from Kalium," which suggests, when read in composite, that the potash industry routinely relied [\*\*78] upon customer reports in canvassing the pricing policies of competing interests. *Id.*

As additional, suggestive evidence that the \$ 35 increase was coordinated among the Canadian Defendants, the Plaintiffs identify an interoffice Memorandum which memorializes a meeting that occurred on August 31, 1987, between Gordon and two Saskatchewan Government officials; namely, Smith and Bob Reid, who was a Deputy Minister of Energy and Mines. In this Memorandum, Gordon related that he "reiterated [his] disapproval of [the prorationing legislation], and again suggested that via PCS the government could have prices increased." *Gordon Memorandum (NOR 406038)*, at Tab 6, *Plts.'Jt. Opp.Aff.* Notwithstanding the Plaintiffs' claims to the contrary, we find this evidence to be unsupportive of a conspiracy, since contemporaneous records reveal that PCS had decided to increase its price for potash on August 24, 1987 -- one week prior to the Noranda meeting. *Notes of Conference Call (PC 356389)*, attached as *Exhibit 4, Defs.'Jt.Rep.Aff.* Moreover, the Plaintiffs have offered no evidence to refute Smith's statement that her discussions with Gordon -- as well as her discussions and those [\*\*79] of her staff, with the other potash producers -- were held in strict confidence. *Declaration of Pat Smith* at P6, attached as *Exhibit 5, Defs.'Jt.Rep.Aff.*

As further supporting their supposition, that an industry agreement was formed to follow PCS's pricing lead, the Plaintiffs refer to an internal Memorandum, at Cominco, which is dated July 30, 1987, and which records a conversation between Reid and John Anderson, who was the President of Cominco. *Cominco Memorandum (CA 210335)*, attached as *Tab 7, Plts.'Jt.Opp.Aff.; Plts.'Com.Memo.* at 2. In response to Reid's reference to the Provincial Government's intent to introduce prorationing legislation, Anderson commented as follows:

I made the point that the price leadership being exhibited by the new management of PCS appears to be working and is accepted in the marketplace. While basic fundamentals have not changed (with one important exception -- potash producers have been so severely burned with losses that there may be much greater acceptance of price leadership and discipline in the market-place to prevent the recurrence of the previous two years). It is my feeling that the new pricing policies and apparent [\*\*80] discipline of the market-place should be given an opportunity. If they fail at some future time, standby legislation as described above could be quickly put in motion. I think that my position fell on deaf ears.

In the absence of any evidence to responsibly suggest, however, that the Saskatchewan officials were being used by the Defendants as a conduit to privately communicate their individual pricing intentions to others in the industry, the Plaintiffs' attempt to portray a conspiratorial cast to the producers' separate discussions with the Provincial Government officials, in July and August of 1987, is unavailing. Likewise, we reject the Plaintiffs' entreaty that we infer a conspiracy from Anderson's use of the phrases "price leadership" and "discipline of the market-place." Without more, these phrases merely acknowledge, we think innocuously enough, the admitted interdependence of competing interests in any oligopoly, such as the potash industry.

The Plaintiffs have also isolated an internal analysis of the dumping margins, by Cominco, as supportive of their view that Cominco's decision to match the \$ 35 increase was not reasonable unless there was a prior understanding [\*\*81] within the industry. This Memorandum, which was dated September 11, 1987, was drafted by Dale Massie, who was Cominco's Vice President of Marketing, and it directed the Accounting Manager at Cominco to begin "accruing monies from the sale of potash to cover potential dumping fees." *Cominco Memorandum (CA 057930)*, attached as *Tab 7, Plts.'Jt.Opp.Aff.* The Plaintiffs underscore that the handwritten calculations on this Memorandum, which reflect a \$ 16 accrual for granular grade potash, evince a conscious decision by Cominco to ignore its own internal analysis of the dumping margins, when it elected to match PCS's [\*1361] \$ 35 increase on September 14. *Id.* We think the Plaintiffs' reliance on these calculations is misplaced, however, for neither they, nor the remainder of the Memorandum so much as suggest that Cominco intended to raise prices by \$ 16 -- only that it sought to accrue that amount. *Id.* Of course, no conspiratorial inference is rationally prompted by a producer's failure to match a cost increase with an identical increase in price. Here, the unrebutted testimony of Cominco's management reveals that Cominco made its pricing decision without communicating with its rivals [\*\*82] in the

industry, and with the intent to achieve a competitive price level. *Deposition of David Benusa* at 230-31, attached as *Tab 16, Pltfs.'Jt.Opp.Aff.* Notably, except for this most attenuated argument, the Plaintiffs do not contend that it was unreasonable for Cominco to match PCS's price increase.

The Plaintiffs continue by arguing that IMC's and Kalium's decision to follow PCS's \$ 35 increase made no economic sense, but for an agreement to fix prices. In the Plaintiffs' view, since IMC and Kalium were assessed preliminary dumping margins which were below both PCS's and the industry average, each of the firms should have exploited their competitive advantage by undercutting the \$ 35 price increase. *Pltfs.'Jt.Opp.Memo.* at 10.

In response, the Defendants urge that the decisions by Kalium and IMC, to forego an undercutting of the \$ 35 price increase, evinces a sound exercise of business judgment on each of their respective parts. To support this urging, the Defendants note that the Saskatchewan Government enacted prorationing legislation in September of 1987, and that Kalium and IMC were each concerned that an effort to subvert its competitors' prices could trigger a punitive **[\*\*83]** application of this legislation. Indeed, in a September 10, 1987, interoffice Memorandum of Christopher Williams ("Williams"), who was the Senior Vice-President at IMC, the trepidations of management were expressed as follows: "Primary concern for IMC is the threat of production controls -- if we don't follow will the government go out of their way to hurt us?" *Williams Memorandum (ST 000001)*, attached as *Exhibit 9, Defs.'Jt.Rep.Aff.*<sup>20</sup> See also, *Deposition of Clifford Kelly* at 229, attached as *Tab J, Kalium Supplemental Memorandum, Transmittal Declaration of Lisa A. MacVittie ("Kal.Memo.Aff.")*.

**[\*\*84]** Although the legislation was never implemented, the Plaintiffs have provided no evidence that IMC or Kalium had no cause for concern. Indeed, during July and August of 1987, Saskatchewan officials met separately with the Canadian producers to inform them about the potential impact of the prorationing legislation. *Declaration of Pat Smith* at P6, attached as *Exhibit 5, Defs.'Jt.Rep.Aff.* Following one of these meetings, Richard Hedberg, who was the Executive Vice-President of IMC, advised Reid that IMC was not in favor of Government control programs. *Hedberg Letter dated August 7, 1987 (MI 61170)*, attached as *Exhibit 5, Defs.'Jt.Rep.Aff.* Moreover, the Plaintiffs' contention, that Billie Turner, who was the President of IMC, "had no understanding that increasing IMC's market share would lead to production restraints," is clearly not supported by his deposition testimony. *Plaintiffs' Reply to IMC Memorandum* at 2, citing *Deposition of Billie Turner* at 144, attached as *Tab 51, Pltfs.'Jt. Opp.Aff.* In fact, in referring to the prorationing legislation, Turner testified that, "having a long history with that province, I had no question in my mind that they were prepared **[\*\*85]** to take drastic action to protect their industry, particularly since they owned almost half of it." *Id.* at 147-48.

**[\*1362]** In addition to its comprehensible concern over the potentiality of prorationing, Kalium asserts that any inference of collusion, based on its failure to cut prices so as to generate additional revenues, is negated by the fact that it was then operating at its maximum practicable capacity. *Kalium Supplemental Memorandum* at 4. Notwithstanding the Plaintiffs' expressed disbelief, the Record before us corroborates Kalium's claim that, during the relevant period, it was operating at or near full capacity -- about 92 percent -- for the coarse and granular grades of potash, which were the varieties that accounted for the vast majority of its market in the United States. See, *Deposition of Clifford Kelly* at 229, attached as *Tab J, Kal.Memo.Dec.*; and *Declaration of John Huber* at PP12-18, attached as *Tab F, Kal.Memo.Dec.; Rausser Rept.* at P7, attached as *Tab 59, Pltfs.'Jt.Opp.Aff.* (coarse and granular grades accounted for 84% of the market during the 1983-1992 period).

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<sup>20</sup> Referring to Williams' Memorandum as a "mystery" Memorandum, the Plaintiffs imply that it would not be admissible at Trial. The Plaintiffs' objections are threefold: it is incomplete in that it ends in mid-sentence; it was produced several months after IMC's other documents were produced, and it bears a Bates number that is out of sequence with those earlier documents; and, although it is dated September 10, 1987, it refers to events that are dated September 11, 1987. *Pltfs.'IMC Opp.Memo.* at 2-3. We do not agree that these asserted anomalies would, necessarily, render the Memorandum inadmissible but, in any event, the unrebutted testimony of the Memorandum's author, Kip Williams, reveals that IMC did not attempt to undercut the \$ 35 increase because "we were concerned with the production controls." *Deposition of Christopher C. Williams* at 64, attached as *Tab 56, Pltfs.'Jt.Opp.Aff.*

For instance, compaction difficulties reduced Kalium's granular grade production [\*\*86] from 91.1 percent to 86.1 percent in 1988. *Declaration of John Huber* at P16, attached as *Tab F, Kal.Memo.Dec.* Although the Plaintiffs suggest that Kalium should have installed compactors at a rate faster than one per year, the testimony of Kalium's expert, Frederic Scherer, remains unrebutted that it would have been counter-productive for Kalium to have added compactors at a faster rate than had been accomplished. *Deposition of Frederic Scherer* at 186, attached as *Tab K, Transmittal Declaration of Frederick S. Young, Kalium Supplemental Reply Memorandum ("Kal.Rep.Dec.")*. Moreover, Kalium maintains that, because it utilized its fine and standard grades of potash in the production of the more lucrative granular variety, it lacked a compelling economic incentive to sell all of its fine and standard grades, and that, in any event, there is a direct correlation between the price of all of the potash grades in the industry. *Declaration of John Huber*, at PP20 and 23, attached as *Tab F, Kal.Memo.Dec.* Nor have the Plaintiffs presented any evidence that IMC had the capacity to increase its sales volume, as would have to be the case if it were to profit from undercutting [\*\*87] the \$ 35 price increase. Given this Record, to infer that IMC and Kalium would have obtained greater profits by underbidding the \$ 35 price increase amounts to nothing other than conjecture.

Lastly, we think it worthy of reiteration, that an advance, collusive agreement is not an inevitable rationale for price matching in an oligopoly. In this respect, we find the reasoning of the First Circuit, in *Clamp-All*, worthy of reemphasis:

A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry.

*Clamp-All Corp. v. Cast Iron Soil Pine Institute, supra at 484.*

Based upon this same reasoning, the Seventh Circuit has held that it was not irrational for two insulation manufacturers to raise their prices in a period of reduced demand. *Reserve Supply v. Owens-Corning Fiberglass, supra at 52.* As was the case in the [\*\*88] potash market, the demand for insulation, at least at the time of the Court's review in *Reserve Supply*, was inelastic. Therefore, the only new customers which would have been accessible were those who were currently being serviced by the defendants' competitors. In granting Summary Judgment for the defendants, the Court explained that the defendants' decision "to forego this option[,] [of cutting prices in an attempt to increase market share,] does not suggest that they 'acted in a way that, but for a hypothesis of joint action, would not be in [their] own self-interest.'" *Id.*, quoting *Illinois Corporate Travel Inc. v. American Airlines, Inc., 806 F.2d 722, 726 (7th Cir. 1986).*

Accordingly, after careful review, we conclude that the explanations, of the low-margin producers, for deciding to follow, and not to undercut, the \$ 35 price increase, are as economically plausible, or are more so, than the conspiracy-driven conclusion that the Plaintiffs would have us reach.

[\*1363] iii. *Entry Into Suspension Agreement.* The Plaintiffs claim, with the support of their expert, that the Defendants' participation in the Suspension Agreement creates an inference of conspiracy. [\*\*89] *Rausser Rept.* at P 22, attached as *Tab 59, Pltf's.Jt.Opp.Aff.*<sup>21</sup> As had been their urging with respect to the decision of IMC and Kalium to match the \$ 35 price increase, the Plaintiffs claim that the entry of the low-cost Defendants into the Suspension Agreement was an act of economic irrationality since, in accepting that Agreement, they failed to exploit a potential competitive advantage. We conclude, however, that the Plaintiffs' assertion is, again, a resort to unfounded supposition.

<sup>21</sup> With respect to both PCA and Noranda, which were high-cost producers, the Plaintiffs' expert testified that each acted in a manner, that was consistent with their own self-interest, by entering into the Suspension Agreement. *Deposition of Gordon Rausser* at 539 and 655, attached as *Exhibit 54, Defs.Jt. Memo.Aff.* The following testimony is illustrative: "I believe PCA was above the average [of the preliminary dumping margins]. So the response to your question would be that they would prefer [to enter the Suspension Agreement]." *Id. at 655.*

[\*\*90] In Rausser's view, the Suspension Agreement destroyed the low-cost producers' competitive advantage in having low tariffs, because the Agreement "had the effect of requiring all producers to raise their prices equally." *Id.* However, Rausser's opinion is not supported by the plain language of the Agreement, which incorporated each producer's preliminary dumping margin in the Agreement price. Indeed, in his Supplemental Report, Rausser appears to acknowledge this point but, nevertheless, he maintains that, because the DOC did not monitor the individual firms, the agreement, in practical effect, imposed a single price floor. *Supplemental Expert Report of Gordon C. Rausser* at P20, attached as *Tab 60, Pltfs.'Jt.Opp.Aff.* Nonetheless, Rausser equivocates somewhat by opining that, if the Agreement imposed different price floors, "low margin firms have been giving away a competitive advantage on a daily basis by not pricing under the price floor of the high margin firms." *Id.*

Regardless of whether the price floor effectively required a single price, we find Rausser's argument to be unavailing, for it requires a factfinder to infer irrationality from the decision of low-cost [\*\*91] producers to sacrifice market share for higher product prices. As we previously noted with respect to Kalium, even if it had desired to expand its market share, it was logically unable to do so. Moreover, there is ample evidence that, even after its entry into the Suspension Agreement, IMC was apprehensive that any attempt on its part to increase market share would trigger a price war which, in turn, could provoke the cessation of that Agreement, or the imposition of production controls, or both. See, *IMC BBT Letter - Strategic Issues/Planning* (MI 45846), dated August 9, 1989 ("Dumping remains an issue -- Market share concerns continue (production quotas)"); *IMC Strategic Issues Memorandum*, dated October 18, 1989 (MI 0928300) ("As you know, we have also been concerned about production controls if our market share moves up too far."); *IMC Strategies Memorandum* (MI 45897), dated November 29, 1989 ("Revival of dumping investigation would only take place if the price of potash drops materially[:] it is our objective, therefore, to keep the price of potash up as well as maintain our compliance with the guidelines provided under the suspension agreement."); *IMC Response* [\*\*92] to *Issues Memorandum*, dated December 7, 1989 (MI 45035) ("To achieve a larger [market] share would risk dissolution of the Suspension Agreement and pose potential dumping concerns; it could also lead to production controls."), attached as *Tab 2, IMC Reply Memorandum, Affidavit of John French* ("IMC Rep.Aff."); *IMC Price Guidelines*, dated August 23, 1990 (MI 7112) (calculations of estimate minimum U.S. price guidelines relative to the suspension agreement), attached as *Exhibit 31, Defs.'Jt.Rep.Aff.; Suspension of Antidumping Duty Investigation: Potassium Chloride From Canada, Article V.C., 53 Fed.Reg. 1393, 1394* (January 19, 1988) ("the Department reserves the right to modify its methodology in calculating United States price and foreign market value."), attached as *Exhibit 35, Defs.'Jt.Memo.Aff.* [\*1364]

Indeed, the Record discloses several occasions when IMC determined that it was unable to make a specific sale, or even to participate in a particular market, because of the Suspension Agreement. See, *IMC Memorandum*, dated April 14, 1988 (MI 60513) (observing that IMC is unable to participate in the Southeast); *IMC Memorandum*, dated September 18, 1989 (MI 7798) (stating [\*\*93] that IMC either needs "better freight rates, take a different view on dumping, or hope for a big price improvement" to attract business in the Southeast); *IMC Letter to Customer*, dated October 26, 1989 (MI 9409) (refused sale); *IMC Letter to Customer*, dated August 30, 1990 (MI 9367) (refused sale), attached as *Exhibit 31, Defs.'Jt. Rep.Aff.*

The Plaintiffs' evidence, on this aspect of the Suspension Agreement, is ambiguous for an additional reason. As is the case with any settlement, the Suspension Agreement avoided an uncertainty, and the economic risks that attended that uncertainty. Had a final determination been entered against the Canadian Defendants, each producer would have been required to make a cash deposit on all exports to the United States which, depending upon the size of the margin, had the distinct prospect of significantly affecting the company's cash flow. See, *Title 19 C.F.R. § 353.21(b); Expert Report of William H. Barringer* at PP6-8, attached as *Exhibit 59, Defs.'Jt.Memo.Aff.* Moreover, the dumping margins were preliminary, and were subject to reassessment, as is confirmed by the United States petitioners' request for an upward revision in some [\*\*94] of the companies' margins. For IMC, these risks included the possibility that a recalculation of its duties would have included additional costs which, in turn, would have had the effect of raising its dumping margin. In this respect, Turner testified that if IMC's water costs were included in their margin, "we [would] not [be] the lowest producers by a long shot." *Deposition of Billie Turner* at 154-56, attached as *Tab 2, IMC Rep.Aff.* We cannot say that it was implausible for a Canadian potash producer to hedge against these risks.

Our conclusion on this point finds further support in the view taken by the United States Department of Justice, and by the Federal Trade Commission ("FTC"), that the entry of an Agreement to terminate a dumping action is entitled to an implied immunity from the applicable antitrust laws. *U.S. Department of Justice, U.S. Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations* (April 1995) (Example M), attached as *Exhibit 61, Defs.'Jt.Memo.Aff.* Under the guidelines issued by the Justice Department and by the FTC, a scenario is addressed in which foreign producers are assessed preliminary dumping margins [\*\*95] of 10 to 40 percent. *Id.* Thereafter, the foreign producers jointly initiate discussions with the DOC that lead to the suspension of the investigation. The suspension agreement provides that each producer will sell its product in the United States at a price not less than its individual foreign market value. Before determining to suspend the investigation, the DOC provides copies of the proposed agreement to the U.S. producers, who jointly advise the DOC that they do not object to the agreement on the proposed terms. According to the Justice Department, and the FTC, the hypothetical scenario envisioned no antitrust violation. In this respect, the Guidelines explain:

While an unsupervised agreement among foreign firms to raise their U.S. sales prices ordinarily would violate the Sherman Act, the suspension agreement outlined above qualified for an implied immunity from the antitrust laws. As demonstrated here, the parties have engaged only in conduct contemplated by the Tariff Act and none of the participants have engaged in conduct beyond what is necessary to implement that statutory scheme.

Notably, the Plaintiffs have made no attempt to distinguish the present [\*\*96] case from the scenario illustrated in the guidelines and, frankly, none readily comes to mind.

In sum, we conclude that the conduct of the Defendants, in entering the Suspension Agreement, was not a collusive act, and is as readily and plausibly explained by sound business practices, as it is by the Plaintiffs' suspicions of complicity.

[\*1365] iv. *NMP/Eddy Pricing Behavior.* Although not argued in their Joint Brief, the Plaintiffs contend that, by following the prices of their Canadian rivals, NMP/Eddy "failed to maximize the price advantage it had during the conspiracy period." *Plts.'NMP/Eddy Opp.Memo.* at 3. In the Plaintiffs' view, had NMP/ Eddy acted in its own best interest, it would have exploited the Canadian producers' inability to lower their prices, under the Suspension Agreement, by increasing its U.S. sales "as much as possible." *Id.* at 4. Instead, the Plaintiffs' assert, NMP/Eddy continued to export much of its production despite receiving lower revenues from those sales. Upon close review, however, the Plaintiffs' evidence in this respect is inconsiderable, and what there is can be explained by reasonable business judgment.

Notwithstanding the Plaintiffs' theorizations, [\*\*97] the Record demonstrates that NMP/Eddy increased its share of the United States potash market, at the expense of the Canadian producers, after the January 1988 Suspension Agreement. See, *Expert Report of Louis A. Guth* at Exhibit 16 (showing NMP/Eddy's domestic market share increasing from 4.78 percent, in 1986, to 9.08 percent, in 1989, whereas the Canadian producers market share dropped from 80.15 percent to 68.11 percent, over the same period), attached as *Exhibit Q. NMP/Eddy Jt.Memo.Aff.; Deposition of Gordon Rausser* at 1033 (conceding that NMP/Eddy increased sales after the Suspension Agreement at the Canadian producers' expense in the mid-South and Midwestern United States), attached as *Exhibit 1, NMP/Eddy Reply Memorandum, Affidavit of Steven A. Marshall ("NMP/Eddy Jt.Rep.Aff.")*

Moreover, while it is true that NMP/Eddy received lower revenues from its export sales, in comparison to its sales made in the United States, the Plaintiffs' argument ignores the fact that NMP/Eddy's mines produced a disproportionate amount of the standard grade of potash. See, *Expert Report of Louis A. Guth* at Exhibit 23, attached as *Exhibit Q. NMP/Eddy Jt.Memo.Aff.; Deposition of Niven [\*\*98] Morgan* at 57 ("We didn't have \* \* \* much capability on what we produced, and we produced more standard than anything else, even though we didn't want it."), attached as *Exhibit 3, NMP/Eddy Jt.Rep.Aff.* However, as the Plaintiffs' expert has admitted, because there is little demand in the United States for the standard grade of potash, most potash exported out of the United States consists of that grade. *Deposition of Gordon Rausser* at 1009-1010, 1021, attached as *Exhibit 1, NMP/Eddy Jt.Rep.Aff.; Deposition of Niven Morgan* at 58 ("[Standard] was a product that had very little demand in the United States any longer."), attached as *Exhibit 3, NMP/Eddy Jt.Rep.Aff.* This evidence reveals that, in reality, NMP/Eddy had little alternative but to sell their inventory of standard grade potash to its export market. In addition, the evidence reveals that NMP/Eddy had not abandoned the United States market, for they were engaged in efforts to

increase their capacity to produce the more desired grades of potash. *Expert Report of Louis A. Guth* at P 33, attached as *Exhibit Q. NMP/Eddy Jt.Memo.Aff.*

The Plaintiffs next refer to a Memorandum, dated December 31, 1991, from [\*\*99] Dean McWilliams ("McWilliams"), who at that time was the Executive Vice President of NMP, to Dick Marshall ("Marshall"), who was then a new sales representative, as demonstrating that NMP/Eddy had failed to exploit the Canadian producers' inability to lower their prices. In this Memorandum, McWilliams notes that NMP's prices did not match those of its Canadian rivals, and he authorized Marshall "to meet prices, at the dealer level, which net back to Carlsbad the posted Canadian price F.O.B. mine." *NMP Memorandum (MN 003551)*, attached as *Tab 8, Plts.'Jt.Opp.Aff.* Contrary to the Plaintiffs' assertion, however, this Memorandum does not limit potash sales at these prices but, rather, simply advises Marshall that "any other competitive pricing will require [McWilliams'] approval." *Id.* We conclude that this Memorandum reveals nothing more than a limitation, that was placed on Marshall, in deviating from NMP's price list.

In light of the evidence of Record, that NMP/Eddy increased its domestic market share, at the expense of their Canadian rivals, and further, that it had no alternative [\*1366] but to export much of the potash that it produced, we conclude that the Plaintiffs' contention, [\*\*100] that NMP/Eddy acted contrary to its economic self interest by not increasing sales "as much as possible," does not raise a reasonable inference that NMP/Eddy participated in an alleged conspiracy.

v. *Refund of Surcharge and \$ 18 Increase.* After they entered into the Suspension Agreement, all of the Canadian producers rebated the \$ 35 surcharge, and increased their potash prices by \$ 18. We are asked by the Plaintiffs to conclude that this could not have occurred without a prior agreement to that effect.

As evidence of a coordinated price increase, the Plaintiffs cite a Canpotex Memorandum, that is dated January 8, 1988, and that is directed to its "agents and officers." *Canpotex Memorandum (CTX 1229)*, attached as *Tab 9, Plts.'Jt.Opp.Aff.* The Memorandum provides as follows:

FYI Canadian potash producers have reached agreement with the United States Department of Commerce and all dumping action has been suspended for a minimum of 5 years. It is rumored that the USD 35.00 per metric ton increase posted by Canadian producers in 1987 to cover possible tariff payments to the U.S. Govt will be refunded in full or part. In the meantime new price lists are being issued [\*\*101] on Monday Jan. 11 at: Standard Grade USD 80.00; Coarse Grade USD 84.00; Granular Grade USD 86.00.

By January 22, 1988, all of the Canadian Defendants, with the exception of Kalium, had issued price lists with prices that matched those announced in the Canpotex Memorandum.<sup>22</sup> The Plaintiffs infer, from the contents of this Memorandum, that all of the Defendants had previously agreed to charge these prices. However, on the same date that Canpotex issued this Memorandum, PCS announced these prices, in a telex to its customers, which advised that "price lists [would] be mailed on Monday, January 11." *Telex to Customer (NOR 416856)*, attached as *Exhibit 11, Defs.'Jt.Rep.Aff.* As a consequence, the Memorandum does not assist the Plaintiffs in proving the existence of an alleged conspiracy, since it does not tend to exclude the possibility that Canpotex learned of the price lists from a customer of PCS.

[\*\*102] Further negating an inference of conspiracy is the undisputed evidence that the Canadian producers did not uniformly increase their prices on January 11, but rather, they announced their price lists at various dates throughout the following eleven days. See, e.g., *Kalium Price List effective January 11, 1988, dated January 11, 1988 (AK 620389)*, attached as *Tab 3, Plts.'Jt.Opp.Aff.; Cominco Price List effective January 11, dated January 12 (CA 53361)*, attached as *Tab 7, Plts.'Jt.Opp.Aff.; Noranda Price List effective January 11, dated January 14 (NOR 00000021)*, attached as *Tab 6, Plts.'Jt.Opp.Aff.; IMC Price List effective January 18, undated (MI 094090)*, attached as *Tab 4, Plts.'Jt.Opp. Aff.; PCA Price List effective January 18, dated January 22 (XC 168657)*, attached

<sup>22</sup> Kalium's price list reflected prices for each grade of potash which were one dollar higher than that announced in the Canpotex Memorandum. *Kalium January 11, 1988 Price List (AK 620389)*, attached as *Tab 3, Plts.'Jt.Opp.Aff.*

as *Tab 5, Plts.'Jt.Opp.Aff.* Of course, evidence that the alleged conspirators were aware of each other's prices, before announcing their own "is nothing more than a restatement of conscious parallelism, which is not enough to show an antitrust conspiracy." *Market Force Inc. v. Wauwatosa Realty Co., supra at 1172* (evidence that real estate brokers had circulated information about each [\*\*103] others' commission policies, and that commissions tended to become uniform after this information had been circulated, was not sufficient to show a conspiracy).

The Plaintiffs have also presented evidence, which they believe demonstrates that NMP had advance notice of the potash prices prior to their announcement, by the Canadian producers, in January of 1988. As we have addressed, shortly after the entry of the Suspension Agreement, the Canadian producers raised their price for potash by \$ 18, so as to reach a total price of \$ 86 per ton on the granular grade of potash. On September 15, 1987, NMP issued price lists which contained one price that would be effective [\*1367] through December 31, 1987, and a higher price that would be effective from January 1, 1988, forward. Given these pricing decisions, the Plaintiffs have directed our attention to NMP's announced January price of \$ 92.50, which they assert was "virtually the exact price required to place the American producers at the traditional differential of approximately \$ 6 between Canadian and American prices." *Plts.'Jt.Opp. Memo.* at 10. While it is true, that the Record supports the fact that Canadian and American potash prices [\*\*104] traditionally varied by \$ 6, see, *Deposition of Niven Morgan, Jr.* at 30, attached at *Tab 38, Plts.'Jt.Opp.Aff.*, it remains implausible that, in September of 1987, when NMP issued its price list, it could have clairvoyantly known that the DOC, and the Canadian producers, would reach an agreement in the following January, let alone what the impact that settlement agreement would have upon the price of potash. Indeed, the margins were announced only several weeks before NMP announced its January potash prices, and well before any settlement negotiations had even taken place. Given this inconceivability, we are compelled to conclude that a factfinder should not be allowed to infer, on nothing more than a hunch, that NMP was privy to pricing information prior to its public announcement. See, *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp., supra at 1121* (quoting *VI Areeda* § 1425 at 146) (To infer a conspiracy from parallel behavior, the conduct "cannot arise from a 'plausible coincidence or an expectable response to a common business problem.'").

Lastly, the Record makes clear that the Defendants did not conspire to rebate the surcharge.<sup>23</sup> While PCS initially promised [\*\*105] that it would refund the surcharge in the event that the duties should not, ultimately, be imposed, the remaining producers, albeit with reluctance and under pressure from their customers, decided to follow suit, although not on uniform terms. See, e.g., *PCS Letter dated February 23, 1988* (PC 24093) ("At the time we added the \$ 35.00 to our prices we indicated to our customers that if the investigation ended without a requirement that we pay the duties we would return to our customers the surcharge amounts they had paid."), attached as *Exhibit 52, Defs.'Jt.Memo.Aff.; Kalium Letter dated January 15, 1988* (AK 101641) (credit notes to be issued "reflecting the spring price for your fall purchases with appropriate early purchase discounts and an additional credit of 1% per month to cover your cost of money", attached as *Exhibit 13, Defs.'Jt.Rep. Aff.; PCA Memorandum dated February 2, 1988* (XC 228129) (refund to be issued only where and when necessary, "as the result of a previous agreement or due to competitive pressure"), attached as *Exhibit 13, Defs.'Jt.Rep.Aff.; PCA Memorandum dated March 9, 1988* (XC 150364) ("The IMC and PCS approach to the \$ 35.00 rebate is literally [\*\*106] a dagger at our throats['] [for,] if we attempt to come out with a less lucrative program in the eyes of the market, then I am afraid we will place ourselves permanently at the end of the suppliers' line."), attached as *Exhibit 13, Defs.'Jt.Rep.Aff.; Noranda Memorandum dated November 10, 1987* (NOR 475571) ("We will consider making retroactive price adjustments after conclusion of the dumping case is final if this is necessary to maintain a competitive pricing policy; but it is not our policy that this will be initiated or automatic on Noranda's part even if the outcome of the dumping case is positive."), attached as *Exhibit 13, Defs.'Jt.Rep.Aff.* Accordingly, even if there was a conspiratorial agreement amongst the Defendants to fix prices, the agreement did not include any decision to refund the \$ 35 surcharge, and the Plaintiffs' claim on that ground must fail.

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<sup>23</sup>In fairness, at the Hearing on this Motion, Plaintiffs' counsel disavowed any claim of conspiracy that was predicated upon the Defendants' decision to rebate the surcharge. See, *Transcript of Summary Judgment Hearing* at 107 ("They didn't conspire to give back the 35, but they conspired to raise it 35 bucks but some of them gave it back, you know, kicking and screaming.") Nevertheless, the Plaintiffs' Memorandum pointedly implies that the occurrence of the rebates suggested a prior agreement, as follows: "The circumstances surrounding the Suspension Agreement and the attendant price rollback are also indicative of a conspiracy." *Plts.'Jt.Opp.Memo.* at 11.

[\*\*107] vi. *PCS's Decision to Supply PCA with Potash.* Next, the Plaintiffs argue that PCS's decision, to supply PCA with potash [\*1368] for resale during the period, in 1987, in which PCA's mine was flooded, makes no economic sense. In support of this argument, the Plaintiffs assert that, without an independent source of potash, PCA would not have been able to service the supply needs of its customers. In the Plaintiffs' view, since other potash producers were operating with substantial excess capacity, these producers would have been able to supply PCA's customers and, thereby, to acquire PCA's market share. *Rausser Rept.* at P20, attached as *Tab 59, Pltfs.'Jt.Opp.Aff.* Accordingly, the Plaintiffs maintain that, rather than co-opting PCA's customers, PCS chose to supply PCA with potash, at "substantially less profit to PCS than PCS could have made simply by supplying some or all of PCA's customers itself." *Pltfs.'Jt. Opp.Memo.* at 39.

The most that we can say about this transaction, between PCS and PCA, is that it has an enigmatic basis. For one, PCS agreed to enter into its supply agreement with PCA in February of 1987, which was not only prior to Childers' arrival at PCS, but also [\*\*108] several months before the date of the alleged conspiracy. More importantly, however, contemporaneous PCS documents disclose PCS's concern that PCA would be supplied by one of its rivals, if PCS did not agree to do so. On February 3, 1987, PCS internally reported that, "if PCA is seriously considering reopening the mine, they will probably want to maintain their marketing organization by purchasing product from other producers." *PCS Interoffice Memorandum, dated February 3, 1987 (PC 3311),* attached as *Exhibit 15, Defs.'Jt.Rep.Aff.*

Thereafter, on February 5, 1987, an interoffice PCS Memorandum, which was directed to Holzkaemper, who then served as the president of PCS, stated that "we stand the risk that competitors will bid at very attractive prices for specific portions of the business and their cherry-picking may allow them to offer more attractive prices than PCS Sales." *PCS Interoffice Memorandum, dated February 5, 1987 (PC 74926),* attached as *Exhibit 15, Defs.'Jt.Rep.Aff.* This same concern was reiterated during a meeting of PCS's Board of Directors, on March 4, 1988. As reported in the notes of that meeting: "If [PCA] had not been able to purchase product from [\*\*109] PCS Sales it would have purchased the product elsewhere as there was sufficient excess capacity available to meet PCA demand either from within the Canadian potash industry or offshore or a combination." *PCS Meeting Notes (PC 69787),* attached as *Exhibit 15, Defs.'Jt.Rep.Aff.* These meeting minutes also reveal that PCS earned a profit from its sales to PCA. *Id.* ("The contract with PCA returns a profit to PCS Sales.") Given these circumstances, and in view of the absence, in this Record, of any showing that PCS could, in fact, have done better by soliciting PCA's customers, we conclude that an inference of a conspiracy, on the basis of this transaction, would invoke impermissible speculation.

vii. *December of 1989 Price Decrease.* The Plaintiffs propose that PCS sharply reduced its potash prices, in December of 1989, in order to retaliate against "those who broke ranks." *Pltfs.'Jt.Opp.Memo.* at 24. In fact, on December 18, 1989, PCS did institute what it termed a "Market Correction Program," which reduced the price of potash by \$ 18. In a letter of the same date, Carlos Smith ("Smith"), who was the Director of U.S. Sales at PCS, advised that the price reduction would [\*110] be available for only five days. See, *PCS Smith Letter (AK 102128),* attached as *Tab 3, Pltfs.'Jt.Opp.Aff.*

In contrast to the conclusion that the Plaintiffs would have us reach, contemporaneous documents, as well as deposition testimony, show that the price reduction program was designed, at least in part, to stabilize the market price for potash. First, the Smith letter concludes with the following statement of purpose: "We believe this program will be beneficial to our customers by helping to stabilize the market so we all may be in a position to profit from what promises to be a good spring 1990." *Id.* In addition, Smith echoed his belief, during the course of his deposition, that the program was "to try to level pricing." *Deposition of Carlos Smith* at 133-38, attached as *Tab 47, Pltfs.'Jt.Opp.Aff.* The following excerpt, which was cited in the Plaintiffs' Memorandum, is illustrative:

**[\*1369]**

Q: Well, was [the] market correction program meant to level just PCS's prices?

A: Industry.

Q: It was meant to level the industry prices, PCS, IMC, Noranda and the rest of them correct?

A: Yes.

Q: I don't mean to leave anybody out. Okay. And did it work?

A: [\*\*111] It leveled them.  
 \* \* \*

Q: When you say level it, was it an attempt to stabilize prices?

A: Yes.

Q: And when you say stabilize the market, you're talking about stabilize the price of all PCS and its competitors?

A: Yes sir.

Moreover, a PCS Memorandum of April 11, 1990, from Smith, Gary Snyder ("Snyder"), who was PCS's Account Manager, and Jerry Jackson ("Jackson"), who was PCS's Director of National Accounts and Field Sales, to all of PCS's district and account managers, discloses that PCS sought to stabilize the market prices in order to obtain its full list price. *PCS Memorandum (PC 023104)* ("Looking back to the Market Correction Program and its purpose is just a reminder that our primary objective then and now is to obtain full list price."), attached as *Tab 2, Plts.'Jt.Opp.Aff.; Deposition of Jerry Jackson* at 150, attached as *Tab 32, Plts.'Jt.Opp.Aff.*

**HN23** [+] Standing alone, however, an attempt by one member of an oligopoly to exercise price leadership, by reducing its price, is not unlawful. As the Supreme Court recently observed, in *Brooke Group v. Brown & Williamson Tobacco, 509 U.S. 209, 223-24, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*, it would be an unsound expression of antitrust policy to discourage a price leader, in an oligopolistic market, from reducing its price. The Court explained:

Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut: The antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition. Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.

*Id.*

As a result, evidence that PCS lowered its price, in a unilateral effort to stabilize the price of potash, does not, by itself, support a reasonable inference of conspiracy. Indeed, as Rausser has testified, retaliatory behavior by one supplier against a rival is not, necessarily, collusive behavior. *Deposition of Gordon Rausser* at 739, attached [\*\*113] as *Exhibit 54, Defs.'Jt.Memo.Aff.* Moreover, while it is not possible to ascertain what constituted a "supracompetitive price," the Defendants assert, and the Plaintiffs do not controvert that, "at the time of the filing of the complaints, U.S. potash prices were lower than at any point since the price war that prevailed in the mid-1980s, before the initiation of the antidumping proceeding." *Defs.'Jt.Memo.* at 11.

Nevertheless, the Plaintiffs proffer evidence which they claim demonstrates that the Market Correction Program was aimed at producers who cheated in the marketplace by making "sales at lower prices \* \* \* after a December 1 'cutoff date.'" *Plts.'Jt.Opp. Memo.* at 24. To support this claim, the Plaintiffs offer a handwritten note of John Huber ("Huber"), who was the President of Kalium, which contains the following language:

- 1) Program was a market correction. Weren't trying to teach other people -- only got tired of people who kept chipping away.
- 2) Program was reasonable one. Checked with people.
- 3) People started cheating. Ind. Farm Bureau -- own program. Hudson by Amax and MCC -- 25 barges. [Kaiser] Estech -- Isreali vessels.
- 4) We wanted [\*\*114] to get their attention.

Program to be short, very specific. [\*1370]

5) IMC extended to 29th.

6) Didn't want shipments after Dec. 1.

7) Will do everything we can to promote profitability. If gains continue, another program.

8) There running at 46% of capacity.

- 9) Have idle capacity more than IMC's [ILLEGIBLE WORD].
- 10) Dumping -- lowered cost -- 30 percent.
- Equity to Debt -- 10 to 1.

*Huber Note (AK 026115)*, attached as *Tab 3, Plts.'Jt.Opp.Aff.; Deposition of John Huber* at 132-33 (read document into the record), attached as *Tab 31 Plts.'Jt.Opp.Aff.*

We believe that this document creates no dominant inference in either proving, or disproving, the existence of a conspiracy. First, Huber testified that he received this information from a customer. *Deposition of John Huber* at 134, attached as *Tab 31, Plts.'Jt.Opp. Aff.* Indeed, as may be expected, the price reduction spawned much discussion in the market. See, *IMC Managers Report (MI 31528)* ("PCS prices have dominated activity last week."); *PCS Memorandum dated December 18, 1989 (PS 214568)* (informing Smith of Kalium's, IMC's, and Cominco's likely reactions to price cut, gleaned **[\*\*115]** from conversation with customer), attached as *Exhibit 31, Defs.'Jt.Rep. Aff.*

Second, it is not disputed that PCS sought to be the price leader in the industry, nor, as *Brook* has plainly established, is it unlawful for PCS to seek to stabilize the market, even if the effect would be to "force firms to maintain supracompetitive prices."<sup>24</sup> *Brook Group v. Brown & Williamson Tobacco, supra at 224*. Third, it remains uncertain what conduct was referenced by the terms "cheating" and "chipping away." Although this language may allude to conduct which deviated from an unlawful conspiracy, it is equally reasonable to read the terms as referring to a general price deterioration, or to prices that were lower than those that were allowed under the Suspension Agreement. Moreover, it cannot be intelligibly ascertained who had been "cheating." See, e.g., *Cominco Memorandum dated October 16, 1992 (CA 012468)* ("Resellers will be trying to chip away at the above prices -- hopefully, the major producers will not allow this to happen."), attached as *Tab 7, Plts.'Jt.Rep.Aff.*

**[\*\*116]** Lastly, the inference suggested by the Plaintiffs is further undermined by a contemporaneous IMC strategic plan document. *PCS Strategic Plan (MI 45907)*, attached as *Exhibit 31, Defs.'Jt. Rep.Aff.* Dated December 27, 1989, the document addresses IMC's assessment of PCS's market behavior, in the following terms:

We consider PCS's recent (December) market behavior to be a short-term aberration to their desired goals.

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[IMC's] position will be to support PCS pricing efforts as long as their efforts are realistic. We will lead if PCS's approach is not in [IMC's] best interest.

**[\*1371]** On its face, this document reveals that IMC did not view the price reduction as a means by which PCS would retaliate against co-conspirators so as to reestablish an agreed-upon price. Given these starkly competing

<sup>24</sup> Thus, evidence that PCS viewed the Market Correction Program as the "2 X 4 approach" does not assist the Plaintiffs in establishing that the Program was intended to retaliate against those firms which departed from the alleged conspiracy. *PCS Handwritten Strategy Memorandum, undated (PC 292882-83)*, attached as *Tab 2, Plts.'Jt.Opp.Aff.* Rather, this document merely shows that the Program was implemented in furtherance of PCS's goal of being the price leader. The reference to the "2 X 4" approach is listed with "Raised Prices \$ 35" and "Gave Rebates - Left Price up \$ 18" under the heading "Re-examine Our Strategy -- Should We Be Bold Enough to Take Drastic Action Again?" *Id.* Notably, the Memorandum goes on to report that "prices continue to deteriorate." *Id.*

Likewise, we cannot draw a reasonable inference of conspiracy from a Noranda Memorandum that records a conversation between the author, who appears to be a Noranda employee, and an employee at PCS, which occurred at the Saskatchewan Mining Association, in February of 1990. *Noranda Memorandum (NOR 167913)*, attached as *Tab 6, Plts.'Jt.Opp.Aff.* Referring to this conversation, the Memorandum states:

Casual conversation at the SMA meeting with a fairly senior PCS guy got quite pointed about the "market correction plan" and he was happy to indicate that they could do it again and to lower price levels because they were more efficient than the rest of us and didn't have to worry about the DOC at levels that would cause the other producers to "dump."

In our view, this Memorandum is consistent with PCS's intent to use the Program as a means to stabilize market prices.

inferences, we conclude that premising a conspiracy upon the language contained in the Kalium document would allow impermissible surmise to supplant responsible factfinding.

viii. *Transformation of Industry During 1987.* In addition to "uncharacteristically parallel pricing behavior," the Plaintiffs advert to other developments in the potash industry, in early [\*\*117] 1987, which, they claim, are probative of a conspiracy. These developments include a new emphasis upon list prices, the elimination of discounts, and industry-wide cutbacks.

As a preliminary observation, we cannot draw an inference of conspiracy from the Plaintiffs' assertion that "uncharacteristically parallel pricing" commenced in 1987. *Pltfs.'Jt.Opp.Memo.* at 11. As the Plaintiffs themselves have acknowledged, prices in an oligopoly tend to be uniform and, in fact, they have been uniform throughout the history of the potash industry. Although several attempted price hikes, in 1986, were later rescinded after industry participants failed to follow along, the mere fact that Canadian producers "raised prices and the increase struck," after the arrival of Childers and Doyle at PCS in the spring of 1987, proves nothing more than interdependence in an oligopolistic marketplace. *Pltfs.Jt.Opp.Memo.* at 1. While the amount of the increase, in September of 1987, was exceptional, by not providing the amount of the price increase in the Spring of 1987, the Plaintiffs ask that we infer a price fixing conspiracy based on the mere fact that prices increased. As we have repeatedly observed, [\*\*118] however, such business behavior is insufficient to establish an agreement to fix prices.

The Plaintiffs' next claim that, "by May of 1987, coincident with the arrival of Childers and Doyle at PCS, there emerged a new found industry-wide emphasis on list prices for potash." *Pltfs.' Jt.Opp.Memo.* at 12. To support this assertion, the Plaintiffs cite a passage from an article, that was published in a trade publication, in which Doyle, who was the President of PCS Sales, is quoted as stating:

"When I first came on board in the Spring of 1987, the first word I put out to our sales force was that the price list was our price, stick to that price and no bending. Anybody who bends was out of here," Doyle says.

"Tough Decisions Return Balance to the Bottom Line," *Custom Applicator*, Feb. 1989, attached as, *Exhibit 24*, *Defs.'Jt.Memo.Aff.*

However, the article continues by quoting Childers' explanation of a legitimate business reason for an emphasis upon price lists:

"Our philosophy is that our customers are better off as long as they have a steady system where they can depend on one price and one price list," [Childers] says. "If we say the price is \$ [\*\*119] 122, then that's what it is going to be. Our customer needs to have confidence in us and our price list."

*Id.*

The fact that PCS's emphasis on list prices was predicated on a legitimate business purpose renders the probative weight of that practice, in proving the existence of a conspiracy, to be equivocal, at best.

The inference that the Canadian Defendants colluded, in part, by emphasizing price lists, is also subverted by the absence of evidence that the strategy was pursued by the other producers. Indeed, the only other evidence, that is proffered by the Plaintiffs, is a March of 1987 internal Memorandum from IMC, which lists, in part, the following objectives:

Reduce the amount of the discount and the number of discounted buyers. Be more selective in who we sell placing less product in the hands of the re-seller. Restrict the number of re-sellers pulling out of IMC warehouses. *Put pricing back in the hands of the producer.* Eliminate large swings in price which permit the re-seller to buy large quantities of product prior to a planned price increase, permitting him to undersell and delay the price from moving up.

[\*1372] *IMC Objectives Memorandum (MI [\*\*120] 013536)*, attached as *Tab 4, Pltfs.' Jt.Opp.Aff.* [Emphasis Supplied in Plaintiffs' Brief].

Contrary to the Plaintiffs' pinched reading, we construe the highlighted language as more naturally meaning that IMC "put pricing back in the hands of the producer," not through the use of price lists, but by a reluctance to sell to "re-sellers." Moreover, an IMC interoffice Memorandum of December 3, 1991, supports the opposite inference -- that is, an overall disillusionment with price lists. In that Memorandum, Steve Hoffman ("Hoffman"), who was the Senior Vice President of Sales at IMC, observed: "Since the mid 1980's, domestic potash pricing has evolved from sacrosanct price lists to a total disregard for their credibility." *Hoffman Memorandum (MI 48458)*, attached as *Exhibit 31, Defs.'Jt.Rep.Aff.* Thus, while the evidence suggests that PCS publicized its intention to not deviate from list prices, there is no evidence that the Defendants reached any understanding, by which each agreed to adhere to list prices so long as their competitors did. Indeed, the evidence favors the opposite inference.

Further, we conclude that the Plaintiffs' assertion that, in the Spring of 1987, [\*\*121] the Defendants "coordinated the elimination of long-standing discount practices," likewise suffers from a dearth of evidentiary support. *Plts.'Jt.Opp.Memo.* at 12. For this proposition, the Plaintiffs reference a PCA interoffice Memorandum of July 8, 1987, from James Brown, who was employed in the Eastern Regional Office of PCA, to the Eastern District Managers. *Brown Memorandum (XC 000498)*, attached as *Tab 5, Plts.'Jt.Opp.Aff.* In this Memorandum, Brown advises that PCA's senior management had made clear that discounts, which had been given for prompt payment, would only be given for payment that was received within the stated time period. Referring to this policy, Brown states: "It is our intent and obviously the industry's practice henceforth to exercise this procedure firmly and it is up to each of us to make sure our customers clearly understand this procedure." In our view, Brown's Memorandum reveals nothing more than a recognition of the pricing policies of PCA's competitors and, therefore, this evidence is ambivalent.

Equally nonprobative of any agreement, among the Defendants, to abolish long-standing discount practices, is the Plaintiffs' reliance upon a Noranda [\*\*122] Memorandum of June 5, 1987. This Memorandum reports that, with the exception of "summerfill incentive discounts," PCS will no longer permit discounts, "however general consensus that there may be some form of a National Discount." The Memorandum also reports that neither IMC nor Cominco had specified national discounts, although they "may surface later in some form." *Noranda Memorandum (NOR 118422)*, attached as *Tab 6, Plts.'Jt.Opp. Aff.* While the document suggests that PCS, under the new management of Childers and Doyle, had unilaterally reduced the number of available discounts, it does not reasonably support an inference that the Defendants illegally coordinated the elimination of any well-established discount practice.

As a further aspect of what the Plaintiffs have regarded as a transformation in the potash industry, they assert that the "spring of 1987 brought industry-wide production cut-backs." *Plts.'Jt. Opp.Memo.* at 13. To support this suggestion, the Plaintiffs have referenced a Memorandum from George Jones to John Gordon, both of whom were Vice-Presidents at Noranda, which discusses the background market conditions which led to Noranda's financial problems. [\*\*123] *Noranda Memorandum (NOR 438284-87)*, attached as *Tab 6, Plts.'Jt. Opp.Aff.* The Plaintiffs have quoted the following passage:

The losses by producers and the planned cutbacks by Cominco, Saskatoon, IMC, the 50 percent operating rate of PCS, curtailed operations at Kalium and the potential closure at [Noranda] would all combine to indicate the possibility for price stability.

However, any inference, that may have otherwise arisen from this document, is substantively eviscerated by the fact that the document should, correctly, be dated "November 17, 1986," and not "November 17, 1987," as the Plaintiffs' had understood. *Noranda Memorandum (NOR 438284-87)*, attached as *Tab 6, Plts.'Jt.Opp.Aff.* Accordingly, the document verifies that the Canadian producers, [\*1373] aware of the oversupply problems in the industry, had begun to limit production well in advance of the date that the Plaintiffs have alleged as being the start of the purported conspiracy.

To be sure, as the Plaintiffs have asserted, production "shutdowns continued in later years." *Plts.'Jt.Opp.Memo.* at 14. As but one example, the Plaintiffs direct us to a Cominco Report, of potash operations, in [\*\*124] June of 1989. In relevant part, the Report advises:

The entire industry is taking extended summer shutdowns to get inventories to an acceptable level, and we must do the same. We have scheduled a 6-week shutdown this summer. Politically, we cannot be seen to be taking less stringent measures to stabilize prices and inventories than our Saskatchewan competitors.

*Cominco Memorandum (CA 265270)*, attached as *Tab 7, Pltfs.'Jt. Op.Aff.*

In our view, rather than support an inference of unlawful complicity, the quoted segment reveals Cominco's intent to follow the market. In any event, the decision to reduce production is precisely the type of conduct that routinely is influenced by independent self-interest. In addition to the proper business interests of reducing supply, the production shutdowns had the added effect of staying governmental intervention in the marketplace, as the same Report recounts: "The government has not proceeded with establishment of the production review board or regulations having stated they are satisfied with how the industry is maintaining discipline." *Id.*

In bolstering their claim, that the Defendants unlawfully agreed to cutback **[\*\*125]** production, the Plaintiffs quote the following passage from a 1993 Report, that was disseminated by the Mineral Policy Sector of Energy Mines and Resources Canada:

Over the last four years, operating rates in the Canadian potash industry declined to average 60% of total installed capacity. Since 1987, Canadian producers have been managing production in an attempt to stabilize world markets and prices; potash supply capability has been exceeding world demand for the last decade and is projected to continue to exceed it until the end of this decade.

*Energy Mines and Resources Canada Report (CTX 1526)*, attached as *Tab 9, Pltfs.'Jt.Opp.Aff.*

Nonetheless, "HN24"<sup>1</sup> the fact that many, if not all, firms in an industry react similarly to a particular practice does not evidence an industry-wide agreement when there is a legitimate business purpose for each firm's behavior." *Richards v. Neilsen Freight Lines, supra at 904*. We conclude, therefore, that because the oversupply of potash was a legitimate business concern, each of the Defendants had a proper economic motive in reducing their production. Thus, the Plaintiffs' evidence is of dubious weight since it denotes individual **[\*\*126]** motivation as much as it evidences conspiratorial conduct.

Lastly, the Plaintiffs point to two internal Noranda Memoranda to support their contention that the "Spring of 1987 brought new recognition of industry unity." *Pltfs.'Jt.Opp.Memo.* at 20. On June 27, 1987, a Noranda internal weekly Report observed:

Buyer sentiment towards the potential firmness in the potash market is mixed. The potash market has been a buyers market for so long that these buyers are resisting the discipline the producers *collectively* are attempting to enforce.

*Noranda Report (NOR 407425)*, attached as *Tab 6, Pltfs.'Jt.Opp.Aff.* [Emphasis in Plaintiffs' Brief].

A subsequent internal weekly Report, that is dated July 24, 1987, expresses a similar view:

The mood of the Southwestern Fertilizer Conference in Dallas was cautiously optimistic, mainly by reason of the generally *uniform resolve of fertilizer producers* to take whatever pricing and supply action is necessary to be profitable during the next fertilizer year.

*Noranda Report (NOR 408836)*, attached as *Tab 6, Pltfs.'Jt.Opp.Aff.* [Emphasis in Plaintiffs' Brief].

Once again, we find this **[\*\*127]** evidence to be indeterminate. In our view, the documents show nothing more than some recognition, on Noranda's **[\*1374]** part, that the price increases were enduring.

Indeed, a similar recognition is reflected in contemporaneous issues of a weekly trade publication of the fertilizer industry, whose edition of June 15, 1987, reported as follows: "The resolve on PCS's and IMC's parts to hold out for higher product dollars is firm." "Market Watch, North America, Potash," *Green Markets*, June 15, 1987 at 2, attached as *Exhibit 21, Defs.'Jt.Rep.Aff.* In an issue of July 27, 1987, the same publication advised: "Potash producers have convinced most buyers that they are firmly committed to current posted prices, at least for the next couple of months." "Market Watch, North America, Potash," *Green Markets*, June 15, 1987 at 2, attached as *Exhibit 21, Defs.'Jt.Rep.Aff.* Given the acknowledged interdependence of the firms within the potash industry, and the

unrebutted testimony of the Noranda employees, that the information contained in the internal reports was derived from potash customers, we conclude that the mere use of the terms "collectively," and "uniform," to describe the events that [\*\*128] were occurring in the marketplace, does not competently allow a reasonable inference of conspiracy. See, *Deposition of David James Sandison* at 77-78, *Deposition of Julie Rawska-Cook* at 134, attached as *Exhibit 21, Defs'.Jt.Rep.Aff.*

In the final analysis, we are compelled to conclude that the Plaintiffs have failed to proffer evidence which constructively distinguishes conduct, that could not or would not have occurred without advance communication or understanding, and that which is an ordinary incident of the marketplace. We do not suggest that this evidence is somehow irrelevant, however, ss the Second Circuit has observed, in *Apex Oil Co. v. DiMauro, supra at 254-55*, as follows:

**HN25** [↑] A court deciding whether to grant summary judgment should not view each piece of evidence in a vacuum. Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place.

Accordingly, in determining those inferences that may be reasonably drawn from the Plaintiffs' showings, we have viewed, and will continue to consider, the Plaintiffs' evidence in the context of the Record as a [\*\*129] whole.

d. *Interfirm Communications.* The third component of the evidence, which the Plaintiffs claim supports a reasonable inference of a conspiracy, consists of the communications between the various Defendants. According to the Plaintiffs, there existed a high level of interfirm communications which, when considered in conjunction with the Defendants' record of coinciding conduct, warrants an inference of conspiracy. For these purposes, we will follow the organization that the Plaintiffs have employed, and will group this evidence in the following categories: the cutoffs; the exchange of production information; the price discussions; the apologies; and the threats. Upon our close review, we conclude that these communications do not reliably confirm the Plaintiffs' allegations of conspiracy.

i. *The Cutoffs.* The Plaintiffs assert that, "among the most noteworthy communications," are those that relate to "cutoff dates." *Plts.' Jt.Opp.Memo.* at 16. The Record demonstrates that the Defendants have frequently announced future potash prices, and the dates when those prices were to take effect. According to the Plaintiffs, "the Defendants would follow up on price increase announcements [\*\*130] with personal communications to make sure all competitors would adhere to the new price on the effective date and refrain from selling at the old price after the 'cutoff date.'" <sup>25</sup> *Id.* Upon [\*1375] close review, however, this grouping of communications generally relates to one producer -- PCS -- complaining about a certain business practice of another producer -- Kalium.

[\*\*131] In response to this contention, the Defendants have cited the Seventh Circuit's decision, in *Valley Liquors, Inc. v. Renfield Importers, Ltd., supra at 661*, and have asserted that the proof of complaints by competitors is an inadequate foundation to support a conspiracy claim. In contrast to this case, however, *Valley Liquors*, as well as

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<sup>25</sup> Robert Turner ("Turner"), who was the Vice-President of Sales at Kalium, described cutoffs, as they related to price changes, in the following terms:

There are generally four price periods in the fertilizer year. \* \* \* One would be summer fill program, then you have the fall use period, then you have a winter fill program and a spring use period. Generally the prices in the fill programs are lower than prices in the use periods. So if we put our a price list for the summer fill program that is due to cut off on September 15, by means of the price list we say that product that is ordered and shipped after September 15 will go at a higher price. Our distribution system occasionally gets swamped and is unable to deliver all of the orders by September 15. So to make certain that our customers are protected on their price, if they have accepted orders in by the cutoff date, prior to the cutoff date, we sometimes have to ship beyond the cutoff date.

*Deposition of Robert Turner* at 25-26, attached as *Tab 52, Plts.' Jt.Opp.Aff.*; see also, *Deposition of Clifford Kelly* at 242-43 (stating reasons why list prices usually increased during the growing season), attached as *Exhibit C, Kal.Rep.Aff.*

Monsanto Co. v. Spray-Rite Service Corp., supra, which is the case that was principally relied upon in *Valley Liquors*, involved allegations of an unlawful vertical agreement.<sup>26</sup> In *Monsanto*, the Supreme Court held that HN26[  
↑] a conspiracy cannot be established merely by proof that a manufacturer terminated a distributor in response to dealer complaints. According to the Court, complaints about price cutters "are natural -- and from the manufacturer's perspective, unavoidable -- reactions by distributors to the activities of their rivals." Id. at 763.

[\*\*132] Despite the fact that *Monsanto* and *Valley Liquor* involved vertical agreements, rather than the type of horizontal conspiracy alleged here, we conclude that the analysis of these Courts is generally instructive. In rejecting the notion that a Jury could infer the existence of a price-fixing agreement from the complaints of other distributors, the *Monsanto* Court made clear that, so long as the manufacturer made an independent business decision not to do business with a distributor, the fact that the manufacturer was aware of the other distributors' complaints was of no moment. Complaints alone, the Court observed, do not "tend to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." Id. at 764. In so concluding, the Court, in *Monsanto*, recognized that complaints between members of different market layers are often "unavoidable," and may even assure a more efficient distribution system. *Id.* While complaints between competitors at the same market level may not always have the same potential to improve the market, we do not believe that evidence of such complaints, standing alone, satisfies the Plaintiffs' burden [\*\*133] in establishing a conspiracy. Since the focus of our inquiry is directed at whether two or more of the Defendants unlawfully agreed to fix prices, we find no responsible basis, nor any persuasive authority, upon which to conclude that such complaints should be accepted, without more, as indicia of a conspiracy, in order to discourage, or to remove such conduct, from the horizontal marketplace. We, therefore, turn to the complaints, and the responses they received.

On November 5, 1990, Turner, who was the Vice President of Sales at Kalium, met with Doyle and Smith, both of PCS. According to Turner's notations from that meeting: "They wanted to talk about our post-increase shipments[;]  
causes problems with effective date of increases." <sup>27</sup> *Deposition of Robert Turner* at 107, attached as Tab 52, *Plts.'Jt.Opp.Aff.* Of note, Turner's daybook entry reveals that he had advised Doyle and Smith that he was meeting them out of courtesy, that he did not feel that meeting with competitors really solved anything, and that he "would not discuss any pricing related items with them." Id. at 109; *Turner Daybook Entry* (AK 005698), attached as Tab 3, *Plts.'Jt.Opp.Aff.* Regarding [\*\*134] the post-cutoff discussion, [\*1376] Turner "just saw it as a continuation of [Doyle's] line of bitching about that." *Deposition of Robert Turner* at 110-11, attached as Tab 52, *Plts.'Jt.Opp.Aff.* Indeed, Doyle has testified that shipping product at fill season prices, after a use season price increase, was "a constant practice at Kalium." *Deposition of William Doyle* at 297, attached as Tab J, *Kal.Rep.Aff.* Thereafter, in August of 1991, Doyle again expressed his "displeasure" to Turner, that "Kalium continued to ship beyond a cutoff date." *Deposition of Robert Turner* at 36, attached as Tab 52, *Plts.'Jt.Opp.Aff.*; *Summary of Competitor Communications* at 14-15, attached as Tab 1, *Plts.'Jt.Opp.Aff.* Although Doyle did not ask Kalium to stop the practice, he stated that PCS's information and studies "showed that Kalium's market share increased in the months following a cutoff date." *Id.* Significantly, Turner testified that he responded as follows:

I repeated what I had told him on the prior occasion \* \* \* that our distribution system at times became overwhelmed and we could -- couldn't make the cutoffs as we would like to do but that was our system and that [\*\*135] we would work to protect the business that we had and if we had to extend, we would. We would run our business.

*Deposition of Robert Turner* at 37, attached as Tab 52, *Plts.'Jt. Opp.Aff.*

<sup>26</sup> In contradistinction to horizontal agreements, or agreements between competitors at the same level in market structure, a vertical agreement exists between firms at different levels of the market structure, such as between manufacturers and distributors.

<sup>27</sup> While not cited in the Plaintiffs' Memoranda, the Record indicates that, in July of 1989, Doyle telephoned Turner to express his displeasure at Kalium's practice of shipping product, after a price cutoff, at pre-cutoff prices. *Deposition of Robert Turner* at 107, attached as *Plts.'Jt.Opp.Aff.*; *Summary of Competitor Communications* at 12, attached as Tab 1, *Plts.'Jt.Opp.Aff.* We have also considered the import of this communication in the analysis that proceeds in the text of this Report.

Undoubtedly, if one first were to assume the existence of a conspiracy, PCS's complaints and inquiries, concerning Kalium's cutoff shipments, would appear to be consistent with communications between conspirators. However, as *Matsushita* explains, the Plaintiffs are required to supply evidence which tends to establish the conspiracy, and the Plaintiffs may not discharge their burden by simply assuming that a conspiracy was at play, and then force-fitting every scintilla of evidence into that assumption. Here, the cutoff evidence does not dispose toward the establishment of a conspiracy, because the evidence does not tend to exclude the equally probable inference of independent action and, indeed, we find the evidence to be more supportive of independent action. Not only does the contemporaneous record disclose Turner informing Doyle of Kalium's competitive intentions, but there is also no evidence that Doyle requested Turner to stop the post-cutoff shipments at pre-cutoff prices. [\*\*136] *Deposition of Robert Turner* at 26 ("I can't recall that he demanded that we stop doing that."), attached as *Tab 52, Pltfs.'Jt.Opp.Aff.* More importantly, the Plaintiffs make no attempt to contradict the evidence that Kalium did not change its conduct in response to PCS's protests. *Deposition of William Doyle* at 326, attached as *Tab J, Kal.Rep.Aff.; Deposition of Robert Turner* at 272-73, attached as *Tab E, Kal.Rep. Aff.*<sup>28</sup>

[\*\*137] The Plaintiffs next assert that Turner recognized the "importance of adhering to the previously announced price rises." *Pltfs.'Jt.Opp.Memo.* at 17. To support this assertion, the Plaintiffs reference a December 16, 1991 entry in Turner's daybook which reads, as follows:

Bill Doyle called. Wanted to advise they were not going along with the Gromark [\*1377] program. Said Gromark had advised that we were. He said he was advised that IMC and Cominco were declining as well. I told him that we had agreed to be competitive at Gromark. We also fully intended to get the product out by 1/31 and to read my letter to the trade. I reminded him that the Gromark program was in response to reseller deliveries after cutoff and was directed to protect themselves from that.

*Deposition of Robert Turner* at 136, attached as *Tab 52, Pltfs.'Jt. Opp.Aff.; Turner Daybook Entry (AK 006067)*, attached as *Tab 3, Pltfs.'Jt.Opp.Aff.*

In our view, this entry more plausibly supports an inference of independent action than of concerted effort.

The "letter to the trade," to which Turner adverted, was a cover letter that Kalium had attached to its price list of December 2, 1991, and that [\*\*138] had been transmitted to its customers. In that letter, Kalium informed its customers that it "intended to complete all winter fill requirements on or before January 31, 1992." *Kalium Letter to Customers (AK 101545)*, attached as *Exhibit 23, Defs.'Jt.Rep.Aff.* Thus, Turner conveyed no information to Doyle that had not already been made public. What is perhaps more significant, however, is that, rather than "recognize the importance of adhering to a price increase," Turner not only informed Doyle that Kalium would be competitive,

<sup>28</sup> The enforcement of cutoffs, the Plaintiffs assert, also prevented potash resellers from accumulating potash inventories, prior to a price increase, for resale after the increase went into effect. In this respect, the Plaintiffs proffer a PCS internal Memorandum of March 9, 1989, which, at first blush, appears to support their view:

We must get control back in the hands of the producers. \* \* \* We must control inventories, to not beef-up at any specific locations, at the request of the operator/customer or sales manager in anticipation of a block sale. It is important that we get the word out on block sales. \* \* \* We need to set a policy or at least send some indicator as to our thinking.

*PCS Memorandum (PC 024187)*, attached as *Tab 2, Pltfs.'Jt.Opp.Aff.*

This evidence is indeterminate, however, for it shows nothing more than PCS's frustration over the conduct of potash wholesalers which impeded PCS's ability to sell product after a price increase. Further, the fact that Turner expressed a similar concern to Gillette, on January 15, 1992, is not probative of a conspiracy. See, *Deposition of Robert Turner* at 142 ("I also told him I was concerned about reseller activity after 1/31 at old prices."), attached as *Pltfs.'Jt.Opp.Aff.* Absent some showing that the content of these communications supports a reasonable inference of a conspiracy, a discussion between rivals, of a common marketing concern, cannot singularly suffice to exclude the real possibility that the competitors were acting, individually, in their own, respective, self interests.

but confirmed that Kalium had satisfied Gromark's request, and had sold its potash at its lower, fill-season price. *Deposition of Robert Turner* at 262-63, attached as *Tab E, Kal.Rep.Aff.*<sup>29</sup>

[\*\*139] ii. *The Exchange of Production Information.* In support of a conspiratorial inference, the Plaintiffs next contend that the Defendants "regularly exchanged detailed information about each other's future production." *Pltfs.'Jt.Opp.Memo.* at 18. When examined closely, however, the Plaintiffs' evidence reflects no more than innocent conduct.

The first piece of evidence, that is offered to support the Plaintiffs' assertion, is a Memorandum of September 15, 1992, which was authored by C.S. MacKay ("MacKay"), who was the officer at Kalium in charge of production, and which was directed to John Huber ("Huber"), who became the President of Kalium in 1991. *Kalium Memorandum (AK 008221)*, attached as *Tab 3, Pltfs.'Jt.Opp. Aff.* This Memorandum recounts a meeting, on September 9, 1992, of the International Fertilizer Association ("IFA") Potash Working Party. Along with MacKay, representatives from PCS, IMC, the Canadian government, and four non-Canadian producers were in attendance. The Memorandum reveals that various producers, including IMC and PCS, disclosed production information. When viewed in context, however, the producers disclosed their production plans for 1992 and, [\*\*140] because the parties did not report the amount of potash that each had already produced in 1992, the disclosures did not reveal how much more potash each intended to produce. Even if the producers had provided [\*1378] this information, it is not clear what use this information had on the alleged fixing of prices. Given the fact that more non-Defendants provided production information than did the Defendants, and that the information which IMC and PCS provided was solely limited to their 1992 production figures, we conclude that this Memorandum is insufficient to favor an inference of a conspiracy.

The Plaintiffs next point to a Kalium Memorandum of January 8, 1993, in which MacKay reports a Saskatchewan Mining Association ("SMA") "State of the Nation" meeting. *Kalium Memorandum (AK 108967)*, attached as *Tab 3, Pltfs.'Jt.Opp.Aff.* At these meetings, "each company reviews specific items such as safety, union problems or employee problems and it also includes future plans for shutdowns." *Deposition of John Huber* at 61, attached as *Tab 31, Pltfs.'Jt.Opp.Aff.* However, with respect to the information concerning future shutdowns, Huber testified that the producers disclosed only what [\*\*141] each had publicly disclosed, *id.* at 62, and, according to Huber, the applicable union contracts required the producers to provide their employees with advance notice of mine shutdowns. *Id.* at 57. Any inference of conspiracy, that could be based upon the Defendants' participation at SMA meetings, is further mollified by the fact that the producers disclosed this information prior to the commencement of the alleged conspiracy.<sup>30</sup>

<sup>29</sup> Likewise, evidence that, on December 19, 1991, Turner told Bo Thompson ("Thompson"), who was a representative of Potocan, which is a non-Defendant potash producer, that Kalium intended to have all of its deliveries completed by 1/31, is non-probatative. Not only is Potocan not a Defendant in this action, but Kalium's intent to have deliveries completed by 1/31 had previously been expressed in a letter to its customers. *Deposition of Robert Turner* at 138, attached as *Tab 52, Pltfs.'Jt.Opp.Aff.* Further, we find Turner's statement to Steve Gillette, who was the Manager of National Accounts at PCS, that Kalium intended to "make our cutoff date \* \* \* with only a few mechanical exceptions," and that Kalium did not intend to "deviate from my letter to customers on the price list," to be equally non-probatative. *Id.* at 142.

Lastly, while the vast majority of the Plaintiffs' "cut-off" evidence involves PCS and Kalium, PCA's Ripperger recalled one instance when Doyle asked him if PCA intended to implement a price increase that PCA had announced, and "that [PCA] not make sales at the old price after the effective date of the announced price increase." *Deposition of John Ripperger* at 216, attached as *Tab 43, Pltfs.'Jt.Opp.Aff.* Although Ripperger could not recall either the date of the conversation, or his specific response, he believed PCA "did what we wanted to do as far as running our business." *Id.* at 218. The Plaintiffs have pointed to no evidence to the contrary. Although we do not condone such conduct, absent evidence that either Kalium or PCA modified their behavior, we conclude that Doyle's remarks are inadequate, by themselves, to support the inference of a collusive agreement.

<sup>30</sup> As additional evidence that the Defendants had disclosed sensitive material regarding their production capacity, the Plaintiffs cite a Kalium Memorandum in which MacKay recounts the events at a dinner meeting of the Saskatchewan Potash Producers Association. According to the Memorandum, MacKay attended the meeting to talk with representatives of the Canadian

[\*\*142] Although not cited in the Plaintiffs' briefs, the final piece of evidence that they offer, to demonstrate regular exchanges of sensitive information, is a January 20, 1993 entry from Turner's daybook. The entry reveals that William Ayers ("Ayers"), who was the Director of International Sales and Marketing at PCA, told Turner that "their production was at desired levels but extreme cold was causing salt to precipitate and was impacting production." *Deposition of Robert Turner* at 225, attached as Tab 52, *Plts.'Jt.Opp.Aff.* Not only did Ayers fail to indicate any future production information, but this kind of communication between firms, concerning general production information, would seem to be a natural expression of legitimate business interests, which simply does not support an inference of a conspiracy to fix prices.

iii. *Price Discussions.* In this category of evidence, the Plaintiffs have assembled those price communications which they have not otherwise identified as pertaining to cutoffs, to threats, or to apologies. The bulk of these communications involve instances in which a representative of one of the Defendants attempted to verify an assertion, by a customer, [\*\*143] that he had purchased potash, in a completed transaction, from another producer and at a particular price.

The Plaintiffs contend that the exchange of pricing information supplies significant evidence of a conspiracy. We note, however, that the cases upon which the Plaintiffs rely involved systematic and routine exchanges of pricing information. Thus, in *Morton Salt Co. v. United States*, 235 F.2d 573, 575 (10th Cir. 1956), the presence of a "completely free exchange of pricing information," between the alleged conspirators, was not disputed. In that case, "pricing information, keys and scales were sent to one another and any changes which were of interest to the other salt producers were communicated immediately." *Id.* Likewise, in *Rosefield v. Falcon Jet Corp.*, 701 F. Supp. 1053, 1057 (D.N.J. 1988), the defendants' sales representatives "engaged in a regular exchange of price and other information." The exchanges routinely occurred during monthly telephone conversations, and included the product's base price at the "next available delivery." *Id.*

In contrast to the cases cited by the Plaintiffs, not only does the verification evidence [\*1379] here relate to completed transactions, [\*\*144] but the evidence demonstrates that the contacts were neither coordinated nor systematic. See, *Summary of Competitor Communications*, attached as Tab 1, *Plts.'Jt.Opp.Aff.* Notwithstanding the Plaintiffs' bald assertion that the Defendants "discussed prices at every opportunity," the Record reveals no more than several dozen instances, during the period between April of 1987, through March of 1995, in which one Defendant requested another to verify the sale price of a past transaction. *Plts.'Jt.Opp.Memo.* at 37. Further, the vast majority of the contacts involved PCS.

As to PCS, the evidence reveals that it either initiated or received verification contacts, which ranged from less than a dozen per year with IMC, to no more than one or two during the entire period with Noranda. *Summary of Competitor Communications*, attached as Tab 1, *Plts.'Jt.Opp.Aff.* Moreover, contrary to the Plaintiffs' assertion, the evidence suggests that the Defendants were not always candid with each other and, at times, they refused to disclose the requested information. See, *Deposition of Gary Snyder* at 129 (responses "probably not" truthful), attached as Tab 48, *Plts.'Jt.Opp.Aff.*; *Deposition* [\*\*145] of Jerry Jackson at 220 (noting that Turner at Kalium told him that he was "not comfortable" verifying a certain price), attached as Tab 32, *Plts.'Jt.Opp.Aff.*

Of course, "[HN27](#)"<sup>31</sup> the dissemination of price information is not itself a *per se* violation of the Sherman Act." *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975); accord, *Rosebrough Monument Co. v. Memorial Park Cemetery*, 666 F.2d 1130, 1137 n. 4 (8th Cir. 1981); see also, VI Areeda, § 1422b at 134 ("[A] firm asking a rival for its price on a particular item or transaction and announcing an intention to match it may simply be articulating the obvious; [and a] traditional agreement cannot be inferred.")<sup>31</sup>

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Government. *Kalium Memorandum* (AK 616130), attached as Tab 3, *Plts.'Jt. Opp.Aff.* Notwithstanding the Plaintiffs' claim, that the Defendants exchanged information "which would have been closely guarded secrets between true competitors," *Plts.'IMC Memo.* at 7, the date of the Memorandum was February 18, 1986, which predates the alleged conspiracy by over a year and, therefore, related to a period of time that the Plaintiffs cite as one of intense competition within the potash industry.

<sup>31</sup> Although not cited by the Plaintiffs, independent research has drawn our attention to *United States v. Container Corp.*, 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969), which, upon a first reading, gave us pause. There, under circumstances which

Because the mere exchange of price information, without more, is not unlawful, the Plaintiffs must demonstrate that the price verifications were motivated by an anticompetitive intent and, indeed, caused injury to competition. *Rosebrough Monument Co. v. Memorial Park Cemetery, supra at 1138.*

[\*\*146] Here, by contrast, the evidence does not reasonably support the inference that the disclosure of past transaction prices was undertaken with the purpose and effect of facilitating a greater coordination and stabilization [\*1380] of prices. In the two instances, that were cited by the Plaintiff, as involving a response by a Defendant to a specific price confirmation discussion, the Defendant actually lowered its price. *Deposition of Charles S. Hoffman* at 133, attached as *Tab 16, Pltfs.'Jt.Opp.Aff.*, cited in *Summary of Competitor Communications* at 7, attached as *Tab 1, Pltfs.'Jt.Opp.Aff.* As to intent, the unrebutted evidence supports an inference that the Defendants made, and answered inquiries regarding past transactions, in order to ascertain the accuracy of their customers' assertions. See, *Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 527 (9th Cir. 1987)* ("An exchange of price information which constitutes reasonable business behavior is not an illegal agreement."). We find nothing inherently unusual, or sinister, in a sporadic request being made to a business competitor, in order to determine if a customer's report, of a competitive sales price, was [\*\*147] truthful.

Having concluded that the Plaintiffs' price verification evidence does not tend to exclude the possibility that the Defendants were acting independently, we turn to those price discussions which, the Plaintiffs assert, did not involve a price confirmation.

1. *The NMP/Eddy Memoranda.* In support of their assertion, that the Defendants developed a network "to exchange advance information about price increases," the Plaintiffs cite an internal NMP/Eddy Potash Memorandum dated October 27, 1988. *Pltfs.'Jt.Opp.Memo.* at 19; *NMP/Eddy Memorandum (MN 001511)*, attached as *Tab 8, Pltfs.Jt.Opp.Aff.* The Memorandum states that, with respect to a recently scheduled Kalium price increase, "PCS and IMC have indicated they do not expect to change current prices before December 1." *Id.* The Plaintiffs infer that Pat Tubbs ("Tubbs"), who authored the Memorandum, and who was an NMP salesperson, had obtained the information from conspiratorial discussions with representatives of PCS and IMC. We conclude, however, that this inference is speculative because the Memorandum does not disclose the means by which Tubbs secured the information. Indeed, the Memorandum plainly reveals, [\*\*148] on its face, that Tubbs had obtained the Kalium price list -- a portion of which was affixed to the document -- from a customer. *Id.* Moreover, Dean McWilliams, who was the only witness who testified about the Memorandum, stated that the source of the information, that was contained in the document, was a customer. *Deposition of Dean McWilliams* at 84, attached as *Exhibit 24, Defs.'Jt.Rep.Aff.*

bear a similarity to those before us, the Supreme Court concluded that the conduct of price verifications, within a concentrated industry, could give rise to liability, under *Section 1* of the Sherman Act, even in the absence of an illegal agreement. In a concurring opinion, Justice Fortas took pains to assure that the decision would not be read as holding that the exchange of price information, even in an oligopoly, should be treated as a *per se* violation of the Sherman Act. *Id. at 339.*

Consistent with the Plaintiffs' approach, the Defendants also have not addressed the ruling of the Court in *Container Corp.*, but have tacitly addressed that ruling by addressing a prior decision of the Court that *Container Corp.* left intact. See, *Cement Manufacturers Protective Association v. United States, 268 U.S. 588, 69 L. Ed. 1104, 45 S. Ct. 586 (1925)* (recognizing the validity of exchanging pricing information so as to curtail arguably fraudulent client practices). Further, the Defendants have pointedly relied upon the Supreme Court's subsequent holdings, in *United States v. United States Gypsum Co., 438 U.S. 422, 441 n. 16, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*, and *United States v. Citizens & Southern National Bank, 422 U.S. 86, 113, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975)*, which implicitly adopted Justice Fortas' concurrence as the governing law.

We are satisfied that, even if the price verification activities of the Defendants were as systemic and pervasive as those suggested in *Container Corp.*, that decision has no continuing viability. Whatever vestiges of *Container Corp.* remained after the Court's subsequent decisions, in *Citizens and Gypsum*, would surely be eradicated by the Court's pronouncements in *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, and in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. Where, as here, sporadic price verifications have occurred, but were generated by the legitimate business purpose of assuring that a customer was not misleading a producer, as to the market value of potash, the circumstance of the price verification is ambiguous evidence of price fixing. Accordingly, the cases which we cite in the text of this Opinion are, in our view, reflective of the prevailing weight of authority.

For the same reason, we find the remaining documents, that are cited in the Plaintiffs' Memorandum in Opposition to NMP/Eddy's Supplemental Memorandum, to be hopelessly ambiguous. For example, the Plaintiffs have referred to an internal Memorandum of January 30, 1992, in which Marshall observes that: "The primary Potash producers are making strong statements in regard to the February 1st price increase which is stated to be \$ 7.00 according to the published list prices." Not only is Marshall's reference to "strong statements" unclear, there is nothing in the Record to support an inference that Marshall learned of these "statements" from his rivals. *NMP/Eddy Memorandum (MN 003549)*, attached as *Tab 8, Plts.Jt.Opp.Aff.* The Plaintiffs' attempt to brace this asserted inference, [\*\*149] by citing a Memorandum of February 1, 1992, which was authored by McWilliams, and which stated that NMP/Eddy "will support prices effective February 1, 1992 as published in December," is equally unavailing. *NMP/Eddy Memorandum (MN 003549)*, attached as *Tab 8, Plts.Jt.Opp.Aff.* In fact, McWilliams testified that his intent was to report that NMP/Eddy was "going to make every effort to hold our price schedule." *Deposition of Dean McWilliams* at 116, attached as *Exhibit 5, NMP/Eddy Jt.Rep.Aff.*<sup>32</sup>

[\*\*150] [\*1381] 2. *Jackson (PCS) -- Benusa (Cominco)*. Next, the Plaintiffs identify a meeting at which David Benusa ("Benusa"), who was a Regional Sales Manager at Cominco, asked Jackson to confirm a discounted price, that PCS had used in a sale to Crop Production Services ("CPS"), a subsidiary of Cominco. *Deposition of Jerry Jackson* at 63, attached as *Tab 32, Plts.'Jt.Opp.Aff.* According to Jackson, on behalf of Cominco's accounting department, Benusa wanted to know why CPS received a \$ 6 discount. *Id.* at 68. Jackson testified that he informed Benusa that the discount constituted a "competitive national discount," which PCS had maintained with CPS prior to CPS's acquisition by Cominco. *Id.* at 65. According to the Plaintiffs, "it defies all logic to believe this clandestine meeting was simply an effort to get information that the accounting people could have gotten from a simple call." *Plts. 'Com.Memo.* at 4-5. Of course, whether the information requested by Benusa could be simply obtained from another source is as conjectural as the Plaintiffs' inference that Jackson and Benusa met for a conspiratorial purpose when there is an equally valid business reason to explain their [\*\*151] encounter; namely, whether a subsidiary of Cominco was being properly charged for potash and whether that charge reflected a new price reverberation in the marketplace to which Cominco, and the other potash producers, might have to competitively respond. More importantly, there is no showing that Benusa sought any alteration in the discount given, or otherwise acted upon the information that Jackson disclosed.

3. *Hoffman/Wittje (IMC) -- Benusa(Cominco)*. The Plaintiffs have also isolated an expense report of Steve Hoffman ("Hoffman"), who was the Senior Vice President of Sales at IMC, which records that he, Herman Wittje, who was also of IMC, and Benusa, played golf on July 8, 1992. *Hoffman Expense Report (MI 103147)*, attached as *Tab 4, Plts.'Jt.Opp.Aff.* The report advises that the purpose of the outing was to discuss IMC's potash exchange with Cominco and Canpotex. *Id.* According to Hoffman, IMC and Cominco had a detailed potash exchange that involved multiple warehouse locations. *Deposition of Steve Hoffman* at 194-97, attached as *Tab 29, Plts.'Jt.Opp.Aff.* Once a year, representatives from each company would determine valid locations for the exchange, and [\*\*152] would agree on what had to be accomplished with any outstanding balances. Hoffman testified that the outing was planned for this purpose, and he denied that there was any discussion of potash pricing in the United States. *Id.* at 197-98.

In support of a purported conspiratorial purpose behind the golf outing, the Plaintiffs have directed us to an internal Cominco Memorandum, which was also dated July 8, 1992, in which Benusa states: "Our competitors have agreed to deduct \$ 2.00 from their current warehouse and rail delivered list." *Plts. 'Com.Memo.* at 7, quoting *Cominco Memorandum (CA 012296)*, attached as *Tab 7, Plts.'Jt.Opp.Aff.*<sup>33</sup> Notwithstanding Hoffman's testimony, the

<sup>32</sup> The Plaintiffs citation to an additional Memorandum, which was authored by Marshall, and dated December 3, 1992, is equally non-probative. The Memorandum, which has price lists from IMC and PCS appended to it, stated: "PCS is not increasing prices until Feb. 1, 1993." *NMP/Eddy Memorandum (001525)*, attached as *Tab 8, Plts.Jt.Opp.Aff.* Once again, however, the manner in which Marshall obtained the information contained in the Memorandum is entirely unclear and, by every appearance, PCS's stated intent -- not to raise its prices until February 1 -- was intimated on the face of its price list.

<sup>33</sup> Unfortunately, we are unable to locate this document. Nevertheless, portions of the document's contents have been quoted in the Plaintiffs' Cominco Opposition Memorandum, during Hoffman's Deposition, and during the Summary Judgment Hearing. We

Plaintiffs infer, from the timing of the golf game, and of Benusa's Memorandum, that the information recited in Benusa's Memorandum was derived from conversations that were conducted on the golf course. However, absent any evidence as to who Benusa was referring to as the "competitors" or whether the price deduction was published before the golf outing, the inferences, that the Plaintiffs would have us draw, from the coincidence of the dates involved, cannot rise above pure conjecture.

[\*\*153] 4. *Zalac (Noranda) -- Conforti (IMC)*. In an internal Noranda Memorandum of November 29, 1989, Mike Zalac reports that he was "advised by Bill Conforti, IMC today that PCS published following prices." *Noranda Memorandum (NOR 140117)*, attached as *Tab 6, Pltfs.'Jt.Opp.Aff.* The Memorandum concludes by stating that "IMC will be publishing same prices." *Id.* Although Conforti disclosed IMC's intent to match PCS's published prices, the unrebutted testimony of David Westlake ("Westlake"), [\*1382] from Noranda, confirms that the information, which pertained to IMC's pricing intentions, had previously been distributed in the marketplace. *Deposition of David Westlake at 198-99*, attached as *Tab 5, Noranda's Supplemental Reply Memorandum, Affidavit of Michael Kelly ("Nor.Rep.Aff.")*. Westlake testified that, prior to his receipt of the Memorandum, he had learned of IMC's plan to match PCS's price in a conversation that he had with a customer. *Id.* at 206-09; *Westlake Diary (NOR 481182)*, attached as *Tab 5, Nor.Rep.Aff.* This evidence offsets any intimation that Conforti had provided Zalac with pricing information as a part of some alleged conspiracy. Further undermining [\*\*154] any conspiratorial inference is the fact that Zalac's responsibilities, at Noranda, did not include sales or pricing but, rather, involved transportation matters. *Deposition of David Westlake at 45*, attached as *Tab 5, Nor.Rep.Aff.*

5. *Turner/Huber (Kaliuum) -- Ripperger (PCA)*. The Plaintiffs next underscore Ripperger's testimony that Turner once remarked, during a telephone conversation which took place in the 1990's that, "by going directly to customers," PCA was "messing up the market" in the Minnesota/Wisconsin region. *Deposition of John Ripperger at 226*, attached as *Tab 43, Pltfs.'Jt.Opp.Aff.* Turner has admitted that he was frustrated by the fact that a PCA salesman was "aggressively cutting the price," and that he asked Ripperger if he knew what his salesman was doing. *Deposition of Robert Turner at 51*, attached as *Tab 52, Pltfs.'Jt.Opp.Aff.*

Despite Turner's frustration as to a particular pricing policy at PCA, we find this evidence to be equally consistent with independent conduct. Notably, there is no evidence that Turner, or Huber, who was the president of Kaliuum, had asked PCA to discontinue any particular sales practice. *Deposition of John Ripperger* [\*\*155] at 227, attached as *Tab 43, Pltfs.'Jt.Opp.Aff.* While Ripperger responded that he would "check and get back" to Turner, the Record reveals that "he never did, and the prices in Wisconsin continued to fall." *Deposition of Robert Turner at 53*, attached as *Tab 52, Pltfs.'Jt.Opp.Aff.* Corroboratively, Turner has testified that Ripperger did not provide any information about PCA's sales activities. *Id.* at 282, attached as *Tab E, Kal.Rep.Aff.* We are not impressed that any inference, founded upon this exchange, could be other than vague innuendo.

iv. *Apologies Between Rivals*. As a further aspect of its proffered evidence of interfirm communications, the Plaintiffs contend that "the Defendants politely apologized to each other for price competition." *Pltfs.'Jt.Opp.Memo.* at 20. Notwithstanding this characterization, we find that the proffered evidence is too slender to bear a reasonable inference of complicity.

On January 15, 1992, Steve Gillette, who was PCS's Manager of National Accounts, informed Turner that a particular bid, to a customer in the Pacific Northwest, had been a mistake. According to Gillette, Turner had "said something to the effect of what the [\*\*156] heck happened on this Agra Northwest bid." *Deposition of Steve Gillette at 151*, attached as *Tab 25, Pltfs.'Jt.Opp.Aff.* Gillette explained that "people had been away for the holidays," and that a "misquotation had been made that was below common trading in the market." *Id.* Gillette testified to his concern that Sam Clark ("Clark"), who Turner supervised, had "come unglued." *Id.* at 152. Turner informed Gillette that "even though costly, [Kaliuum] had protected [its] business at that location." *Deposition of Robert Turner at 142*, attached as *Tab 52, Pltfs.'Jt.Opp.Aff.*

In December of 1992, Gillette encountered Clark at a Far West Fertilizer Conference. According to Gillette, Clark still appeared "miffed about what had happened in that respective bid." *Deposition of Steve Gillette* at 117, attached as *Tab 25, Pltfs.'Jt.Opp. Aff.* Gillette reiterated that a mistake had been made in the price quotation, and he further acknowledged that PCS had subsequently changed its organizational structure. *Id.* at 118. "The other thing that I did say to him, that I was going to pursue the market competitively every day and I had no intent of having a special price [\*\*157] for bid business or two-tiered pricing in that geography." *Id.* Gillette recalls Turner advising that the bid price was particularly disruptive in the marketplace, [\*1383] but that Kalium did what they had to do, which was to match the price quotation. *Id.* at 119.

We believe that this single transaction, by itself, creates no permissible inference. The Record demonstrates that Gillette sought to assuage certain representatives of Kalium, who were upset at having to match a price that was "below the perceived market price." *Id.* at 119. Given the competing inferences and, particularly, the uncontested evidence that the objectionable price was a mistake, we find that Gillette's remarks do not tend to preclude the possibility of independent action and, in this instance, the end result was increased, rather than diminished, competition.

v. *Threats.* Lastly, the Plaintiffs assert that, when prices eroded in 1989, the "price communications became accusatory." *Pltfs.'Jt.Opp.Memo.* at 21. Since the bulk of this evidence does not involve instances in which one Defendant demanded another Defendant to behave in a certain manner, or risk peril, we conclude that, contrary to the Plaintiffs' [\*\*158] characterization, this evidence more properly amounts to a collection of complaints. As we have already indicated, the mere fact that one Defendant has complained to another is ambiguous, since each of the specific complaints would appear to have an equally plausible, non-conspiratorial explanation. We turn to this evidence, following the Plaintiffs order of presentation.

1. *Childers (PCS) -- Proops and Sullivan (Kalium).* In July of 1988, Childers visited Jay Proops ("Proops"), who, along with Joe Sullivan ("Sullivan"), had acquired Kalium from PPG in November of 1987. According to Proops, Childers told him that PCS was losing its market share, and that several other producers, including Kalium, were gaining market share. *Deposition of Jay Proops* at 17, attached as *Tab 41, Pltfs.'Jt.Opp.Memo.* Childers further advised Proops that he had documentation to show that Kalium was "undercutting PCS's prices in the marketplace," and that such pricing "was one of the causes of the problem." *Id.* at 18. At the end of the meeting, Childers handed Proops a PCS Memorandum of June 16, 1988, which was authored by Jackson and directed to Doyle, and which was entitled: "Competitive Activity [\*\*159] Spring 1988: IMC, Kalium and Cominco." In relevant part, the Memorandum reads:

Kalium's history throughout the spring season has been non-supportive. The information provided will show Kalium has consistently been \$ 6.00--\$ 8.00/ton below PCS pricing through the spring season. \* \* \* Freight has been a game Kalium has played throughout the spring season serving to reduce delivered market pricing. \* \* \* Kalium's attitude in the marketplace has shown aggression and a lack of willingness to support Canadian list pricing. Even though Kalium has acted with less finesse than IMC and has clearly been a negative, their impact on the general market has not been as destructive as IMC.

*PCS Spring Competitive Analysis - Redacted (AK 057713A-B)*, attached as *Tab 3, Pltfs.'Jt.Opp.Aff.*<sup>34</sup>

<sup>34</sup> Proops' testimony reveals that the document he received from Childers did not include the analysis of IMC and Cominco, which had been included in the original Memorandum. *Deposition of Jay Proops* at 46-47, attached as *Tab 41, Pltfs.'Jt.Opp.Memo.* We note that the original version, in addition to separate analyses of Cominco and IMC, also included the following summary:

PCS's May market share performance is a direct result of low priced selling from our chief competitors, IMC and Kalium. Market developments took several forms ranging from broker based activity to freight manipulation. The fact remains that IMC and Kalium have not come close to supporting the list price.

*PCS Spring Competitive Analysis -- Non-Redacted (PC 074283-85)*, attached as *Tab 2, Pltfs.'Jt.Opp.Memo.*

Thereafter, Proops undertook a study in order to determine whether the specific prices, that were reflected in that document, were correct. *Deposition of Jay Proops* at 37, attached as *Tab 41, Plts.'Jt.Opp.Memo.* While the Plaintiffs assert that Proops commenced this investigation so as to reassure himself that Kalium "had not been competing," *Plts.'Jt. Opp.Memo.* at 22, [\*\*160] Proops has testified to the contrary. When asked what he was "looking to find out," Proops stated that it was his understanding that Kalium's [\*1384] position in the marketplace was "to sell a premium product at a premium price." *Deposition of Jay Proops* at 34, attached as *Tab 41, Plts.'Jt.Opp.Memo.* If the pricing allegations were true, "it would have been different from my understanding of our own policy." *Id.* at 32.

[\*\*161] While we are troubled by Childers' conduct, we again note that the focus of the antitrust laws is concerted action. Here, the evidence shows that Proops was "upset" with Childers' visit, and that he had expressed his concern to Sullivan. *Id.* at 30; *Deposition of Joe Sullivan*, attached as *Tab 50, Plts.'Jt.Opp.Aff.* This concern is reinforced by the fact that Proops notified Kalium's legal counsel shortly after that meeting. In addition, Proops testified that he did not show the referenced document to anyone, other than Kalium's attorney and Sullivan, and that he did not discuss the results of the study with anyone other than Sullivan. See, *Declaration of Jay Proops* at '1 3, attached as *Tab M. Kal.Memo.Aff.* Further, the Record does not demonstrate that Childers asked Proops to modify Kalium's behavior, let alone that Proops agreed to change Kalium's pricing policies, or even that he told Childers what Kalium's practice was with respect to its pricing policies. *Deposition of Jay Proops* at 18-22 and 29, attached as *Tab 41, Plts.'Jt.Opp.Memo.*

When viewed in totality, we find that Childers' visit, although perhaps injudicious, was insufficient, as a matter [\*\*162] of law, to raise a genuine issue of fact. First, the content of this informal complaint does not suggest that Childers accused Kalium of deviating from agreed upon conduct but, rather, merely voices PCS's concern that Kalium's aggressive pricing policies had taken a portion of PCS's market share. Second, the Plaintiffs have identified nothing in the Record that even remotely suggests that Childers' visit had any effect on Kalium's pricing decisions. See, *Declaration of Jay Proops* at P 3, attached as *Tab M, Kal.Memo.Aff.*; *Deposition of Joe Sullivan* at 172-73, attached as *Tab G, Kal.Rep. Aff.* Indeed, at least in PCS's view, Kalium continued to aggressively pursue a larger market share. In a PCS Memorandum of November 18, 1988,<sup>35</sup> in which Jackson [\*1385] follows up on the

<sup>35</sup> The November 18, 1988 follow-up Memorandum is significant in that it not only supports Kalium's claim, that its pricing did not change after Childers' visit, but it also suggests aggressive competition on the part of IMC, Cominco, and Noranda. In this regard, the Memorandum states:

IMC has set the standard for market share since the beginning of the 1988 calendar year. \* \* \* Market share strides have resulted once again from freight manipulation, below market pricing and low prices selling through third parties (brokers). Third party selling has produced the greatest market share gains for IMC.

\* \* \*

Cominco has missed very few opportunities to sell aggressively. \* \* \* Although menacing, market aggression by Cominco was much less frequent and certainly not as wide spread as IMC and Kalium.

\* \* \*

Noranda through Terra showed absolutely no support for market pricing. As the fall market weakened Terra managed to remain \$ 2.00 to \$ 4.00/S.T. below competitive levels.

\* \* \*

PCS' chief competitors, IMC and Kalium, simply took advantage of PCS market discipline. \* \* \* The lack of competitor discipline has had a snow-balling effect on market share. IMC and Kalium have noticeable market share increases as a result of the lack of support for market pricing.

*PCS Competitive Market Analysis (PC 171624)*, attached as *Exhibit 30. Defs.'Jt.Rep.Aff.*

On December 13, 1988, Jackson summarized PCS's year from a market share perspective. The analysis was included in a Memorandum directed to Doyle, which concluded with the following language:

Memorandum of June, that Childers gave to Proops, Jackson states: "While PCS supported strong June/July pricing and strict guidelines for national accounts, Kalium priced product aggressively, forward - sold material, and appeared liberal with national discounts." *PCS Competitive Market Analysis (PC 171624)*, attached as *Exhibit 30*, *Defs.'Jt.Rep.Aff.* Thus, there is no causative relationship from which a [\*\*163] reasonable inference of conspiracy may reliably be drawn. The Plaintiffs apparently ask us to infer, from Childers' comments, that he would not have approached Proops in the absence of a prior understanding. Given Proops' testimony, that he did not solicit the analysis, that he communicated no agreement, that he immediately contacted Kalium's counsel, and that Kalium's post-visit persistence in aggressively pricing its product, this inference is less compelling than the competing inference that Childers acted, independently, on the chance that he might receive a favorable response, which he did not.

[\*\*164] Thereafter, on August 16, 1990, Childers made an attempt to discuss pricing with Sullivan. His attempt has been memorialized in a Memorandum that Sullivan drafted. See, *Sullivan Memorandum (AK 058790)*, attached as *Tab 3, pltfs.'Jt.Opp.Aff.* The Memorandum reads, in part, as follows:

Childers than turned to a second issue, stating that his pricing leadership was not working despite major efforts. He immediately said that he would like to discuss this issue with me, taking advantage of my long experience in industry leadership. He indicated he had been by to see me two years ago, but that was during the time that I was in the hospital \* \* \*. I told him that, as much as I respected him, that we could not talk about pricing at all because even the appearance of this might be misconstrued by the Department of Justice, or other governmental bodies. I further pointed out that Jay [Proops] and I had decided, right from the start, never to engage in this kind of discussion. Childers responded that he wouldn't even suggest anything illegal in such a discussion. I responded that, even if it were totally innocent, several years down the line it might appear illegal. I again [\*\*165] reiterated that I was not trying to be difficult or unfair, but we will just not discuss pricing at all. Childers than backed off and said he would not discuss it with us given our views.

Immediately after the conversation, the Record reflects that Sullivan consulted with Kalium's legal counsel and "alerted Kelly not to discuss anything remotely concerning price with Childers, feeling that this was a very dangerous situation." *Id.* What is most significant about this conversation, however, is that an attempt to discuss pricing was explicitly, and abjectly, rebuffed by Sullivan; thus an inference of concerted action is not justifiably supported. Viewed in conjunction with Childers' visit in June of 1988, Sullivan's conversation with Childers suggests that, at most, Childers sought an understanding with Kalium that it would be in each producer's best interests if prices were set and maintained. However, even if that had been Childers' intent, the Plaintiffs have identified no evidence, in the Record before us, that even remotely suggests Childers reached any "unity of purpose or a common design and understanding." *American Tobacco Co. v. United States, 328 U.S. 781, 810, I\*\*166 90 L.Ed. 1575, 66 S.Ct. 1125 (1946).*

When assessing the market share situation, it is clear that PCS losses this year result from competitor's low market selling, freight manipulation and terms in special situations. PCS has been very disciplined and has refused to sell under the above circumstances. Our chief competitors IMC, Kalium and Cominco have taken the "whatever it takes to get the business" selling approach.

*PCS 1988 Business Loss Analysis (PC 171619)*, attached as *Exhibit 31. Defs.'Jt.Rep.Aff.*

In our view, the market analyses performed by PCS not only fail to support the Plaintiffs' alleged conspiracy, but they strengthen the Defendants' contention that their pricing activities were not concerted.

Lastly, the portrayal of Cominco's aggressive selling undermines the Plaintiffs' assertion that Cominco participated as a "teamplayer" in the conspiracy. *Pltfs.'Com.Memo.* at 7. To support this assertion, the Plaintiffs have pointed to the following statements in the PCS June Competitive Analysis Memorandum: "Very little of the information we have points to problems generated by Cominco. In a few instances Cominco was found to be below the market but their general behavior pointed to responsible selling." *PCS Spring Competitive Analysis -- Non-Redacted (PC 074283-85)*, attached as *Tab 2. Pltfs.'Jt.Opp.Aff.* Even without the follow-up market analyses, however, we conclude that PCS's use of the term "responsible selling" is nothing more than its unilateral characterization of price-following behavior.

2. *Doyle (PCS)/Williams (IMC) -- Ripperger (PCA)*. During his deposition, Ripperger recalled being approached by representatives of three potash producers -- Doyle from PCS, Williams from IMC, and an individual from Dead Sea Works -- concerning PCA's sale of Russian Potash. *Deposition of John Ripperger* at 204-11, attached as *Tab 43, Pltfs.'Jt.Opp.Aff.* These communications occurred during a meeting of the Fertilizer Institute ("TFI") in 1987, or in 1988. Each of these individuals informed Ripperger that PCA's pricing activity, in Florida, was "undermining the prevailing level of prices for [\*1386] potash," or was otherwise "having a negative impact on the market." *Id.* at 204 and 209. In view of Ripperger's testimony, that he perceived his communications with Doyle and Williams as annoyances, rather than threats, and that, despite these conversations, PCA continued to sell Russian potash at whatever price it felt was necessary, we find this evidence non-suggestive of any alleged conspiracy. *Id.* at 209-210 (annoyance); *Id.* at 253 (no change in behavior), attached as *Tab A. Rio Algom/PCA Rep.Aff.*

3. *Doyle (PCS) -- Huber (Kalium)*. [\*\*167] During a meeting, in 1991, of the Phosphate and Potash Institute ("PPI"), Doyle complained that Kalium's market share had increased and PCS's had declined over a period of time. *Deposition of John Huber* at 250, attached as *Tab 31, Pltfs.'Jt.Opp.Aff.* In response, Huber advised that Kalium was enjoying increased intercompany sales, and good industrial sales. *Id.* at 251. This evidence proves nothing.

Doyle then expressed unhappiness about PCS's drop in market share with Occidental Chemical, which was a customer of both Kalium and PCS. Doyle told Huber that "he wasn't going to kick us [i.e., PCS] out," and indeed, PCS matched Kalium's lower price to maintain business. *Deposition of William Doyle* at 275-76, attached as *Tab 22, Pltfs.'Jt.Opp.Aff.* In turn, Huber testified that he considered Doyle's comments as "trash talk," and that Doyle was unhappy and frustrated that Kalium's market share had risen. *Deposition of John Huber* at 254, attached as *Tab 31, Pltfs.'Jt.Opp.Aff.* Moreover, since Kalium had previously signed a long-term contract with Occidental, Doyle's complaints could not, as a matter of logic, have had any effect upon Kalium's pricing. Further delimiting [\*\*168] any reasonably plausible inference of a conspiracy is the fact that, once Doyle began commenting on Kalium's aggressive pricing with respect to a specific customer, Huber told Doyle the meeting was over, and he promptly left. *Id.* at 251.

4. *Doyle (PCS) -- Turner (Kalium)*. On January 12, 1993, Doyle telephoned Turner to verify reports of Kalium offering "terms" in certain locations. *Deposition of Robert Turner* at 152, attached as *Pltfs.'Jt.Opp.Aff.* According to Turner's notations of the conversation, Doyle "admonished me that [PCS] did not and would not give terms." *Id.* In reply, Turner advised that Kalium had met a competitive situation, but would not disclose the identity of the customer. *Id.* With respect to terms, Turner replied that Kalium would "protect [its] business." *Id.* In light of Turner's responses, we find that, rather than demonstrate concerted action, this exchange fully supports an inference of independent action.

5. *Snyder (PCS) -- Ayers (PCA)*. A PCA Memorandum of February 4, 1993, records a conversation between William Ayers ("Ayers"), who was PCA's Director of International Sales and Marketing, and Gary Snyder ("Snyder"), who was [\*\*169] PCS's Account Manager. *PCA Memorandum (XC 120955)*, attached as *Tab 5, Pltfs.'Jt.Opp.Aff.* During that conversation, Snyder asked Ayers why he had offered a certain price to a specific customer which, in Snyder's view, was well below the market in that area. The Memorandum notes that Ayers replied that it was none of Snyder's business. In turn, Snyder told Ayers that PCS "will take it (prices) down and bury you (PCA) if that's what you want." *Id.* According to the Memorandum, Ayers recognized that Snyder was intoxicated, and he suggested to Snyder that his comments were inappropriate. *Id.*

At the outset, we note that this appears to be the only instance in this Record where one Defendant "threatened" another. Nevertheless, we do not believe that this conversation supports a reasonable inference of concerted action. Ayers testified that he did not perceive Snyder's remark as a threat but, instead, he sensed that Snyder was inebriated and "just mad they lost that business." *Deposition of William Ayers* at 83, attached as *Exhibit 26, Defs.'Rep.Aff.* Significantly, the evidence before us is undisputed, that the PCA employee rebuffed the complaint, and reported the incident [\*\*170] to his supervisor. While we do not view threats, even if "idle," to reflect an exemplary business practice, we must examine the threat, in context, before we can reasonably infer a conspiracy from its existence. We find no legitimate basis to infer, on this Record, that a solitary threat, [\*1387] which was effectively rebuffed, reliably supports an inference of conspiracy.

6. *Jackson (PCS) -- Ripperger (PCA)*. On February 18, 1993, Jackson asked Ripperger if PCA was selling at a certain price, and if PCA was following "the announced price increases." *PCA Memorandum* (XC 120954), attached as *Tab 5, Plts.'Jt.Opp.Aff.* In response, Ripperger refused to comment, and stated that it was not in their best interests to discuss the matter. Ripperger also stated that PCA was "competitive with prices we find in our various markets." *Id.* We find no basis upon which to conclude that this evidence supports an alleged conspiracy.

7. *Zimmerman (Cominco) -- Ripperger (PCA)*. On February 22, 1993, Ben Zimmerman, who was a District Manager at Cominco, telephoned Ayers, at PCA, to determine whether PCA was selling potash at a certain price in a particular market. *PCA Memorandum* (XC 120959), [\*\*171] attached as *Tab 5, Plts.'Jt.Opp.Aff.* Ayers refused to comment, to which Zimmerman replied that he thought he would attempt to determine what was happening from the marketplace. We find this evidence wholly non-probatative of any allegedly illegal conduct.

8. *Cominco Unwillingness to Trade Potash With PCA*. The Plaintiffs next reference a Cominco internal Memorandum of February 22, 1993, as further evidence of a "threat." Although this Memorandum confirms a willingness, on the part of Cominco, to initiate a potash exchange with PCA, the Plaintiffs highlight that portion of the document which states that, "due to their weak approach to pricing, I am not prepared to offer them other locations at this time." *Cominco Internal Memorandum* (CA 009838), attached as *Tab 7, Plts.'Jt.Opp. Aff.* The Plaintiffs urge that Cominco's refusal to engage in additional trades with PCA is evidence of retaliation, or punishment. *Plts.'Jt.Opp.Memo.* at 23-24. In our view, the Memorandum is ambiguous, for it is wholly unclear what the author intended by referring to PCA's "weak approach to pricing." While such language could imply a conspiratorial effort to coerce PCA to raise its prices, [\*\*172] it could equally mean that Cominco was not interested in permitting PCA to sell Cominco-derived potash at below market prices -- an undeniably cogent business reason for Cominco, independently, to reject any contemplated potash exchange.

e. *Internal Memoranda Evidence*. While not labeled a plus factor, the Plaintiffs identify several internal Memoranda, which were obtained from the various Defendants, and which, the Plaintiffs claim, support a conspiratorial inference. Upon closer examination, however, we find that the Memoranda reflect nothing more than mere interdependence.

i. *Cominco*. The Plaintiffs cite several occasions on which a Cominco employee expressed the importance of "supporting" a particular price increase. For example, on February 17, 1992, Benusa recommended that Cominco publish a new price list, that would be effective on February 15. The Plaintiffs' maintain that the statement that, "we have support from the coop system and I believe other majors are prepared to support this pricing structure," reveals a conspiratorial inference. *Cominco Memorandum* (CA 010350), attached as *Tab 7, Plts.'Jt.Opp.Aff.* We are not so persuaded. There is no evidence that [\*\*173] Cominco communicated with any other Defendant concerning the February 15 price increase. Indeed, Benusa testified that the information, which pertained to the other potash producers, was obtained from a customer. *Deposition of David Benusa* at 78, attached as *Tab 16, Plts.'Jt.Opp.Aff.* Likewise, we find the Plaintiffs' evidence that Cominco decided, on several occasions, to "support" a particular price increase, reflects nothing more than its recognition that a price-following policy was, at least as of that date, in its best interest. See, *Cominco E-mail, dated September 5, 1991* (CA 309789) ("need to make sure we are making every effort to support this price increase"); *Cominco E-mail, dated October 16, 1992* (CA 012468) ("we have to support these levels without deviating"); *Cominco Memorandum, dated January 25, 1994* (CA 004068) ("Our dealer network advised us that Kalium has announced a \$ 8.00 per ton price increase on potash effective 2/14/94[;] \* \* \* it appears that we will support this increase but will wait a couple of days before we [\*\*1388] announce."), attached as *Tab 7, Plts.'Jt.Opp.Aff.*

In addition, the Plaintiffs assert that Cominco's central role in the [\*\*174] alleged conspiracy is demonstrated by Benusa's statements, in an internal Memorandum of January 29, 1990, that Cominco "intend[s] to be a stabilizing rather a disruptive force," and that to "approach the market in any other way would be economically and politically unwise." *Plts.'Com.Memo.* at 6-7; *Cominco Memorandum* (CA 013758), attached as *Tab 7, Plts.'Jt.Opp.Aff.* [Emphasis added in the Plaintiffs' briefing]. By emphasizing the term "politically" in their written arguments, the Plaintiffs appear to claim that Benusa used that term to reference Cominco's conduct in relation to the alleged co-conspirators. When the Memorandum is read in context, however, the term "politically" takes on its literal meaning, and most probably refers to Governmental actors. For example, the Memorandum advises:

Given our current supply situation and our relationship with other buyers in the market place (i.e. CF) we should not \* \* \* accept returns that may put us in violation of the suspension agreement. \* \* \* I can assure you that we have no intention of violating the spirit of the agreement.

*Id.*

Moreover, the Plaintiffs suggestion of a conspiratorial meaning [\*\*175] is further undercut by the fact that, positioned between the quoted statements concerning Cominco's stated intent to be "stabilizing," Benusa wrote: "We will be a player in the market based on service, quality and price to the extent that we can." *Id.* A fair reading of this statement, in conjunction with the entirety of the Memorandum's contents, logically implies the absence of an illegal agreement -- not the presence of one.

ii. *PCA.* As suggestive evidence of PCA's participation in the alleged conspiracy, the Plaintiffs have isolated a statement, which was recited in a PCA internal Memorandum of October 25, 1989, and which relates that a particular pricing program "may have some effect on moving product and stabilizing market." *PCA Memorandum* (XC 119822), attached as *Tab 5, Pltfs.'Jt.Opp.Aff.* The program is specific to a particular "pricing problem at Baltimore since late May." *Id.* Despite the Plaintiffs' urging to the opposite effect, we draw no conspiratorial inference from this Memorandum. The reference to "stabilizing" is ambiguous, at best, since the term is plainly susceptible to multiple meanings. Here, the Memorandum appears to make clear that PCA intended [\*\*176] to lower its prices, in order to sell more potash. We are unwilling to subscribe a conspiratorial inference to such a legitimate exercise of independent business judgment.

The Plaintiffs also rely upon a portion of a Monthly Report in November of 1992, which Robert Connocie, who was the President of PCA, sent to PCA's parent, Rio Algom, as evidencing that PCA acted contrary to its economic self-interest. The quoted portion states:

In our effort to stabilize prices and maximize 1993 profit PCA has deliberately turned down business. As a result November volumes were minimal; December will be better but still below average.

*PCA Monthly Report* (XC 201661), attached as *Tab 5, Pltfs.'Jt.Opp. Aff.*

The Plaintiffs contend that PCA's decision not to maximize sales reflects economic irrationality. The Plaintiffs' reliance on this document is misplaced, however, as it demonstrates, on its very face, that PCA's intent was to "maximize 1993 profit."

iii. *Noranda.* In similar fashion, the Plaintiffs' contend that language in an internal Noranda Memorandum of June 27, 1987, which recommends that Noranda "support PCS's leadership role and announce to their [price] [\*\*177] levels," is suggestive of a conspiracy. *Noranda Memorandum* (NOR 407467), attached as *Tab 6, Pltfs.'Jt. Opp.Aff.* We disagree. In our view, the Memorandum reveals no more than independent price-following behavior. The author informs that she had advocated following PCS's published prices, as opposed to other producer's prices, because she believed that those producers would later revise their price lists. *Id.* Accordingly, we find ample evidence of interdependence to [\*1389] offset the Plaintiffs' implication of illegally concerted conduct.

f. *Summary.* In assessing the individualized components of the Plaintiffs' proffered evidence of price fixing, we have not lost sight of the greater picture for, in truth, the whole can be greater than the sum of its individual parts. Here, however, we have the totality of the Plaintiffs' evidentiary showings, but that composite view can claim no synergistic enhancement "from a number of acts none of which" tend to exclude the real possibility of independent action. *Cal. Computer Products v. Intern. Business Machines*, 613 F.2d 727, 746 (9th Cir. 1979); see also, *American Floral Serv. v. Florists' Transworld Del.*, 633 F. Supp. 201, 215 [\*\*178] n. 23 (N.D.Ill. 1986) ("It requires no sophistication in mathematical theory to recognize that zero plus zero plus zero still equals zero[;]\* \* \* if no incident has probative value, all incidents taken together have no probative value."). While, perhaps, unduly simplistic, we believe it to be cryptically straightforward that, notwithstanding our thorough vetting of this Record for a showing which would comport with the rudiments of "Simon-says," we have found nothing more than "Follow-the-Leader."

Nor does the Plaintiffs' case obtain added substance from the expert opinion evidence of Rausser -- not because he is without the requisite background in economic theory, but because his opinions can be no more reliable than the factual underpinnings upon which they have been predicated. With modest exception, the mere passage of an untrustworthy evidentiary showing, through the mechanism of an expert's Report, will be wholly unavailing in curing the foundational deficiencies. See, [Rule 703, Federal Rules of Evidence](#). In voicing his opinions, Dr. Rausser has necessarily accepted, as reasonable, the ambiguous showings that *Matsushita* regards as nonprobative. We may not do likewise.

[\*\*179] We understand the Plaintiffs' earnest belief that the conduct of the Defendants is, in their view, wholly consistent with their allegations of illegal price fixing. Unfortunately, while those allegations might properly elude a Motion to Dismiss, at this stage of the proceedings, the Plaintiffs may no longer rest on their allegations, for the Court must look, as we have, to the evidence before it in a light -- prismatically focused by the doctrine of *Matsushita* -- most favorable to them. See, [Behrens v. Pelletier, 133 L. Ed. 2d 773, U.S. , 116 S. Ct. 834, 840 \(1996\)](#). Here, the result of that deliberative review commends an award of Summary Judgment to the Defendants.

#### B. *The Separate Summary Judgment Motions of Individual Defendants.*

While our Recommendation, if adopted, would have the effect of summarily concluding the Plaintiffs' claims, in the interests of completeness, we briefly address the Motions of Rio Algom and PPG for the entry of Summary Judgment on independent grounds.<sup>36</sup>

[\*\*180] As we have noted, Rio Algom's involvement in the alleged conspiracy arose from its ownership of PCA. As a result, in order to hold Rio Algom liable, the Plaintiffs must either pierce the corporate veil between Rio Algom and PCA, or demonstrate that Rio Algom participated "as an actor," in the alleged conspiracy. [H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1549 \(8th Cir. 1989\)](#).

In support of their assertion, that Rio Algom is "legally responsible for the antitrust violations by PCA," the Plaintiffs [\*1390] highlight the language, in an internal PCA business strategy document, which is dated in August of 1990, and which states that "Rio Algom's March 30, 1990 strategy paper outlines several issues which form guidelines for PCA strategy." *Plts.'Rio Algom/PCA Opp.Memo.* at 5; *PCA Memorandum* (XC 03958), attached as *Tab 5, Plts.'Jt.Opp.Aff.* The Plaintiffs underscore that PCA supplied Rio Algom with monthly summaries of its operations, see, e.g., *August 1990 Report (RIO 4124)*, attached as *Tab 5, Plts.'Jt.Opp.Aff.*, and that Rio Algom representatives had participated in the merger negotiations between Kalium and PCA. *Deposition of Robert Connochie* [\*\*181] at 170, attached as *Tab 18, Plts.'Jt.Opp.Aff.* As additional evidence to find Rio Algom liable, the Plaintiffs identify an internal PCA organizational chart which lists PCA as a "division" of Rio Algom. *April, 1990 PCA Organizational Chart* (XC 035579), attached as *Tab 5, Plts.'Jt.Opp.Aff.*

Nevertheless, [HN28](#) in order to hold Rio Algom liable "as an actor," the Plaintiffs must demonstrate that Rio Algom "performed acts sufficient to create liability, or actively influenced [PCA] in its violations." [H.J., Inc. v. International Tel. & Tel. Corp., supra](#). In contrast, the plaintiffs' evidence does not indicate that Rio Algom influenced any purportedly conspiratorial conduct. Indeed, the guidelines referred to in the cited strategy document concerned the environment, new investment, professional development, and the volatility of earnings from mining investments. *PCA Memorandum* (XC 03958-61), attached as *Tab 5, Plts.'Jt.Opp.Aff.* As in *H.J.*, which involved a

<sup>36</sup> While the majority of the Plaintiffs' claims are timely, those claims, which arise more than four years before this action was commenced, require proof of fraudulent concealment if they are to remain viable. See, *Title 15 U.S.C. § 15b* ("any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action was accrued."). As the District Court has previously explained, "the doctrine of fraudulent concealment requires plaintiffs to show (1) defendants concealed the conduct complained of and (2) despite the exercise of due diligence, plaintiffs failed to discover the facts that form the basis of their claim." [In re Potash Antitrust Litigation, 159 F.R.D. 682, 698-99 \(D. Minn. 1995\)](#). Nevertheless, since we have found that an inference of conspiracy is not reasonable, there cannot be a concealment of that which does not exist. Accordingly, we do not reach the Defendants' Statute of Limitations defense.

claim of below-cost, predatory pricing, "there [has been] no proof that [the Parent corporation] was involved in the decisions upon which liability is based." [H.J., Inc. v. International Tel. & Tel. Corp., \[\\*182\] supra](#).

The Plaintiffs' claim, for piercing Rio Algom's corporate veil, is equally without merit. First, evidence that Rio Algom received monthly summaries from PCA, and that it participated in a merger discussion between PCA and Kalium, reveals nothing more than a normal parent-subsidiary relationship and, therefore, such conduct cannot, legitimately, constitute a basis for making Rio Algom responsible for PCA's independent, corporate actions. See, e.g., [Lowell Staats Mining Co. v. Pioneer Uravan, Inc., 878 F.2d 1259, 1264 \(10th Cir. 1989\)](#). Moreover, under these circumstances, [HN29](#)<sup>↑</sup> a corporation's inaccurate description, of its relationship with a related corporation, cannot justify piercing the corporate veil. See, e.g., [Fletcher v. Atex, Inc., 68 F.3d 1451, 1460 \(2d Cir. 1995\)](#) (statements describing subsidiary as a division and as a business unit not evidence that the two companies operated as a "single corporate entity"). In sum, the Plaintiffs have failed to demonstrate "the substantial reasons' necessary to disregard the presumption that a subsidiary is a legally separate entity from its parent." [H.J., Inc. v. International Tel. & Tel. Corp., supra](#), quoting [Contractors, \[\\*183\] Laborers, Teamsters & Engin. v. Hroch, 757 F.2d 184, 190 \(8th Cir. 1985\)](#) (substantial reasons to justify veil piercing involve undercapitalization, failure to follow corporate formalities, intermingling of finances, promotion of fraud or illegality, and sham existence to shield liability); see also, [Cooper v. Lakewood Engineering and Mfg. Co., 874 F. Supp. 947, 955-56 \(D. Minn. 1994\)](#) (similar factors cited under Minnesota law), aff'd, [45 F.3d 243 \(8th Cir. 1995\)](#). Accordingly, we find no basis to hold Rio Algom accountable, even if PCA had engaged in price complicity, as the plaintiffs have alleged.

With respect to PPG, the defense of nonliability is premised upon its claim that it withdrew from the purported conspiracy when it sold Kalium, in November of 1987. Since the Plaintiffs did not file this action within four years of that date, PPG maintains that the Plaintiffs' claims are barred on Statute of Limitations grounds. We find this argument to have merit.

[HN30](#)<sup>↑</sup> A conspiracy "is presumed to exist until there has been an affirmative showing that it has terminated, and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn." [\[\\*184\] United States v. Edwards, 994 F.2d 417, 421 \(8th Cir. 1993\)](#), cert. denied, 510 U.S. 1048 (1994), quoting [United States v. Lewis, 759 F.2d 1316, 1343 \(8th Cir. 1985\)](#), cert. denied 474 U.S. 994 (1985). Accordingly, [\[\\*1391\]](#) "the statute of limitations does not begin to run on a co-conspirator until the final act in furtherance of the conspiracy has occurred or until a co-conspirator withdraws from the conspiracy." [United States v. Reed, 980 F.2d 1568, 1584 \(11th Cir. 1993\)](#), cert. denied, 509 U.S. 932 (1993).

In [United States v. United States Gypsum Co., 438 U.S. 422, 464, 57 L. Ed. 2d 854, 98 S. Ct. 2864 \(1978\)](#), the Supreme Court stated: [HN31](#)<sup>↑</sup> 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." While the mere cessation of activities may not be sufficient to activate the period of limitations, a conspirator "need not take action to stop, obstruct or interfere with the conspiracy in order to withdraw from it." [United States v. Lowell, 649 F.2d 950, 957 \(3rd Cir. 1981\)](#); see also, [United States v. Granados, 962 F.2d 767, 773 \(8th Cir. 1992\)](#) (citation omitted) (To withdraw from a conspiracy, a conspirator "must take affirmative action, either making a clean breast to the authorities or communicating his withdrawal in a manner reasonably calculated to reach co-conspirators.").

Based upon the Record before us, we conclude that, by selling its interest in Kalium, PPG not only severed its connection with the potash industry, but it did so in a manner that was reasonably expected to adequately notify all of the alleged co-conspirators. The record reveals that the sale of Kalium, by PPG, was widely publicized in trade and financial publications, including *Green Markets* and the *Wall Street Journal*. Indeed, the unrebutted testimony of the salespersons, and of the executives, from all of the alleged co-conspirators, confirms their knowledge that PPG had sold Kalium. See, *Portions of Deposition Testimony*, attached as *Exhibit 8, PPG's Memorandum in Support of Motion for Summary Judgment, Affidavit of Kathryn M. Walker ("PPG Memo.Aff.")*.

The Plaintiffs assertions to the contrary are not persuasive. First, the Plaintiffs argue that this Court's prior recommendation, that denied PPG's [\[\\*186\]](#) Motion to Dismiss, under [Rule 12\(b\)\(6\), Federal Rules of Civil](#)

Procedure, controls our ruling on PPG's present Motion. Of course, the argument is frivolous, at best, for it hopelessly ignores the core distinctions between the respective dispositive Motions. As the Supreme Court recently reiterated, [HN32](#) [Motions to Dismiss are directed to the sufficiency of the allegations in the Complaint, whereas, on Motions for Summary Judgment, the Court looks to the evidence before it. *Behrens v. Pelletier, supra at 840*. Moreover, the case upon which the Plaintiffs' rely, for the proposition that a sale of a business does not effect a withdrawal -- *United States v. Sax, 39 F.3d 1380 (7th Cir. 1994)* -- is distinguishable. Admittedly, the defendant in *Sax* sold his drug distribution business, but the evidence disclosed that the payment for that business was contingent upon future drug sales, and further, that he continued to receive proceeds from those drug sales. *Id. at 1387*. In contrast, it is uncontested that PPG never sold potash, or received any financial benefit from the sale of potash, after the date that Kalium was sold. See, *Affidavit of Aziz Giga* at PP 4-5, attached to [\[\\*\\*187\] PPG Memo](#). Indeed, this case is more in line with our Court of Appeals decision in *Krause v. Perryman*, 827 F.3d 346 (8th Cir. 1987). There, the Court concluded that, by producing unrebutted evidence that he had "sold all his stock and resigned as president of [the conspiring enterprise]," the defendant in a civil RICO case was entitled to Summary Judgment on the ground that he had effectively withdrawn from the conspiracy. *Id. at 351*. Therefore, we can find no basis, on the Record before us, to impute Kalium's involvement in the alleged conspiracy to PPG.

For these reasons, we recommend that Rio Algom's and PPG's Motions for Summary Judgment be granted, even if the Court should reject the Recommendation that Summary Judgment be granted in favor of all of the Defendants.

WHEREFORE, It is --

RECOMMENDED:

1. That the Motion of PCA and Rio Algom for Summary Judgment [Docket No. 512] be granted.
- [\[\\*1392\]](#) 2. That Kalium's Motion for Summary Judgment [Docket No. 516] be granted.
3. That Noranda's Motion for Summary Judgment [Docket No. 519] be granted.
4. That Cominco's Motion for Summary Judgment [Docket No. 522] be granted.
5. That the Joint Motion of the Defendants for [\[\\*\\*188\]](#) Summary Judgment [Docket No. 525] be granted.
6. That IMC's Motion for Summary Judgment [Docket No. 527] be granted.
7. That PPG's Motion for Summary Judgment [Docket No. 530] be granted.
8. That the Motion of New Mexico Potash and Eddy Potash for Summary Judgment [Docket No. 534] be granted.

Raymond L. Erickson

UNITED STATES MAGISTRATE JUDGE

## NOTICE

Pursuant to [Rule 6\(a\), Federal Rules of Civil Procedure](#), D. Minn. LR1.1(f), and D. Minn. LR72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties **by no later than September 30, 1996**, a writing which specifically identifies those portions of the Report to which objections are made and the bases of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

If the consideration of the objections requires a review of a transcript of a Hearing, then the party making the objections shall timely order and file a complete transcript of that Hearing **by no later than September 30, 1996**, unless all interested parties stipulate that the District [\[\\*\\*189\]](#) Court is not required by Title [28 U.S.C. § 636](#) to review the transcript in order to resolve all of the objections made.

## APPENDIX A

## LIST OF IDENTITIES

(Dates indicate beginning of tenure at position, if known.)

<b>PCS/PCS Sales (PCS Sales Subsidiary)</b>	
Rolf Holzkaemper	President, PCS
Charles Childers	President, CEO, PCS, March, 1987
William Doyle	President, PCS Sales, March, 1987
Carlos Smith	Director of U.S. Sales, PCS Sales
Steve Gillette	National Accounts Manager, PCS Sales
Gary Snyder	Account Manager, PCS Sales
Jerry Jackson	Dir. of Natl. Accounts / Field Sales, PCS Sales
Kalium	
Joseph Sullivan	Purchased Kalium in 1987, Chairman of Vigoro
Jay Proops	Purchased Kalium in 1987, Vice-Chair of Vigoro
Clifford Kelly	President, 1988
John Huber	President, 1991
Robert Turner	Vice President of Sales
C.S. MacKay	Officer Responsible for Production
Sam Clark	Sales Representative
IMC	
Billie Turner	President, CEO
Christopher Williams	Senior Vice President, Wholesale Marketing
Steve Hoffman	Senior Vice President, Sales
Richard Hedberg	Executive Vice President
Herman Wittje	Vice President, Marketing
NORANDA	
William Deeks	President, CEO
John Gordon	Executive Vice President
George Jones	Executive Vice President
David Westlake	Unidentified
Mike Zalac	Responsible for Transportation Matters

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<b>PCA</b>	
Robert Connochie	President
William Ayers	Director of International Sales and Marketing
John Ripperger	Vice President Marketing and Sales
J.P. Welch	Western Regional Manager
James Brown	Eastern Regional Office
	Cominco
John Anderson	President, CEO,
Dale Massie	Vice President, Marketing
David Benusa	Vice President, Regional Sales Manager
Ben Zimmerman	District Manager
	New Mexico Potash/Eddy
Dean McWilliams	Exec. Vice President, 1988; President, 1992
Dick Marshall	Sales Representative, 1991

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**PCA**

Pat Tubbs

Sales Representative

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End of Document

## **Stewart Glass & Mirror v. U.S.A. Glas**

United States District Court for the Eastern District of Texas, Beaumont Division

September 16, 1996, Decided ; September 16, 1996, Opinion Filed

Case No. 1:95-CV-813

**Reporter**

940 F. Supp. 1026 \*; 1996 U.S. Dist. LEXIS 13940 \*\*

STEWART GLASS & MIRROR, INC., ET AL., Plaintiffs, v. U.S.A. GLAS, INC., ET AL., Defendants.

**Disposition:** [\*\*1] Defendants' motions to dismiss with respect to Plaintiffs' third, fifth, and seventh causes of action GRANTED and remaining causes of action DENIED. Plaintiffs' third, fifth, and seventh causes of action DISMISSED.

### **Core Terms**

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insurance company, monopolization, glass, Defendants', antitrust, conspiracy, shops, competitors, prices, boycott, cause of action, repair, preferred provider, Sherman Act, insureds, market power, anti trust law, repair and replacement, underwritten, contracts, tortious interference, motion to dismiss, customers, restraint of trade, probability, concerted, consumers, harming, rates, flat

### **LexisNexis® Headnotes**

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

#### **HN1** [down arrow] **Motions to Dismiss, Failure to State Claim**

[Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) provides that a party may move a court to dismiss an action for failure to state a claim upon which relief can be granted. On motion under [Rule 12\(b\)\(6\)](#), the court must decide whether the facts alleged, if true, would entitle the plaintiff to some legal remedy. Dismissal is proper only if there is either (1) the lack of a cognizable legal theory or (2) the absence of sufficient facts alleged under a cognizable legal theory. Unless a [Rule 12\(b\)\(6\)](#) motion is converted to a summary judgment motion, the court cannot consider material outside the complaint. The court must accept as true all material allegations in the complaint as well as any reasonable inferences to be drawn from them. The well-pleaded facts must be reviewed in the light most favorable to the plaintiff. A plaintiff, however, must allege specific facts, not conclusory allegations. Conclusory allegations and unwarranted deductions of fact are not admitted as true. A pleading, however, need not specify in exact detail every possible theory of recovery -- it must only give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

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

#### **HN2** [down arrow] **Motions to Dismiss, Failure to State Claim**

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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 motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.

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

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

### **HN3** Motions to Dismiss, Failure to State Claim

*Rule 12(b)(6) of the Federal Rules of Civil Procedure* must be read in conjunction with *Rule 8(a) of the Federal Rules of Civil Procedure*, which sets forth the requirements for pleading a claim in federal court and calls for a short and plain statement of the claim showing that the pleader is entitled to relief. The Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim. *Rule 8 of the Federal Rules of Civil Procedure* fosters that policy by sweeping aside the hypertechnical pleading rules that once defeated many an unwary but meritorious claimant. A plaintiff's complaint ordinarily need only be a short and plain statement that gives the defendant notice of what the claim is and the grounds upon which it rests. *Rule 8* indicates that a complaint need only set out a generalized statement of facts from which defendant will be able to frame a responsive pleading.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

### **HN4** Sherman Act, Scope

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > Claims

### **HN5** Sherman Act, Claims

The elements required to state a [15 U.S.C.S. § 1](#) claim are: (1) the existence of a conspiracy (2) affecting interstate commerce (3) that imposes an unreasonable restraint of trade. To satisfy the first element, pleadings must contain charges of the defendants' conspiracy and factual allegations that would support such a claim. To satisfy the second element, an interstate impact need not be intentional but, rather, may be indirect or fortuitous. An illegal restraint of trade that has a market wide effect on the output or price of goods or services is sufficient to affect interstate commerce. With respect to the third element, although most restraints are analyzed pursuant to a rule of reason, some trade agreements are so egregiously anti-competitive that they are conclusively presumed illegal without further examination.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

### **HN6** Sherman Act, Scope

A preferred provider contract between a buyer and a seller generally does not, without more, appear to violate the antitrust laws at all. Only if such an agreement contains restrictions on one party's activities other than those involved in the immediate purchase and sale does the possibility of a Sherman Act violation arise.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

#### [HN7](#) Sherman Act, Scope

A preferred provider agreement may violate the antitrust laws if such an agreement contains restrictions on one party's activities other than those involved in the immediate purchase and sale. A preferred provider agreement may illegally restrain trade if the parties to the agreement engage in some concerted action or the purchaser abuses its buying power. An illegal type of concerted action could be a boycott by insurance companies in which they conspire with repair shops to refuse to deal with other competing repair shops.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

#### [HN8](#) Sherman Act, Scope

A boycott is a restraint of trade within the meaning of [§ 1](#) of the Sherman Act. Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. Boycott violations 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.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Damages

#### [HN9](#) Clayton Act, Claims

The Clayton Act authorizes treble-damage suits for any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. [15 U.S.C.S. § 15](#). Private plaintiffs must establish standing to recover damages for antitrust violations. Standing is a threshold issue determinable from the allegations of the complaint. Antitrust injury is an essential element of standing without which a plaintiff cannot recover.

Antitrust & Trade Law > Clayton Act > Claims

#### [HN10](#) Clayton Act, Claims

Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. In pleading an antitrust claim for damages under § 4 of the Clayton Act, therefore, a plaintiff must allege, either directly or inferentially, that he has suffered an anticompetitive injury as a result of the defendants' antitrust violation. The plaintiff must allege that the defendant's antitrust violation was the cause-in-fact of the plaintiff's injury or that but for the violation, the injury would not have occurred.

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

#### [HN11](#) Motions to Dismiss, Failure to State Claim

In the context of a motion to dismiss for failure to state a claim, the court must determine whether any factual theory alleged, if true, would entitle a plaintiff to some legal remedy.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > Damages

#### [HN12](#) [ ] Sherman Act, Claims

The antitrust injury doctrine prevents losses that stem from competition from supporting suits by private plaintiffs. In particular, the antitrust injury doctrine does not allow competitors to recover damages for any conspiracy to charge higher than competitive prices because competitors stand to gain from any conspiracy to raise the market price.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

#### [HN13](#) [ ] Sherman Act, Claims

Under [15 U.S.C.S. § 2](#), it is illegal to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce. To state a claim for monopolization, a plaintiff must allege: (i) a relevant product and geographic market; (ii) the possession of monopoly power in such market; and (iii) the willful acquisition or maintenance of that power.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

#### [HN14](#) [ ] Sherman Act, Claims

To state a claim for attempted monopolization, a plaintiff must allege: (i) a relevant product and geographic market; (ii) a specific intent to monopolize that market; (iii) exclusionary or predatory conduct in furtherance of the attempted monopolization; and (iv) a dangerous probability that, absent judicial intervention, the attempt will be successful.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

#### [HN15](#) [ ] Sherman Act, Claims

To state a claim for conspiracy to monopolize, a plaintiff must allege: (i) the existence of a combination or conspiracy; (ii) an overt act in furtherance of the combination or conspiracy; (iii) substantial amount of interstate commerce effected; and (iv) specific intent to monopolize.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

#### [HN16](#) [ ] Sherman Act, Claims

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The elements of monopolization, attempted monopolization, and conspiracy to monopolize vary, but they all share a common requirement that a defendant must have either monopoly power or the dangerous probability of acquiring it.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

### **HN17** [blue download icon] **Scope, Monopolization Offenses**

Monopoly power is the power to control price or exclude competition. In an attempted monopolization case, a defendant must have some legally significant share of the market before he approaches the level of dangerous probability of success condemned by the attempt provision of [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

### **HN18** [blue download icon] **Sherman Act, Claims**

When two or more persons agree to monopolize, they have committed the offense of joint monopolization provided that they have jointly acquired monopoly power. Joint monopolization claims do not require that the Plaintiffs allege that each Defendant has at least 50 percent market share.

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

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

### **HN19** [blue download icon] **Commercial Interference, Contracts**

Texas law protects existing and prospective contracts from interference.

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

### **HN20** [blue download icon] **Intentional Interference, Elements**

The elements for a cause of action for tortious interference with an existing contract are: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) such act was a proximate cause of damage; and (4) actual damage or loss occurred.

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

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

### **HN21** [blue download icon] **Intentional Interference, Elements**

The elements of tortious interference with prospective contract or business relationships are: (1) a reasonable probability that the parties would have entered into a contractual relationship; (2) an intentional and malicious act by

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the defendant that prevented the relationship from occurring, with the purpose of harming the plaintiff; (3) the defendant lacked privilege or justification to do the act; and (4) actual harm or damage resulted from the defendant's interference.

Torts > ... > Contracts > Intentional Interference > Defenses

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

#### **HN22** [] **Intentional Interference, Defenses**

Under the defense of legal justification or excuse, one is privileged to interfere with another's contract (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.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Evidence > Burdens of Proof > General Overview

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

#### **HN23** [] **Defenses, Demurrs & Objections, Affirmative Defenses**

A party is privileged to cause a third party to terminate business relations with the party's competitor to obtain future benefits by offering the third party better contract terms than its competitors. The privilege of legal justification or excuse in the interference of contractual relations is an affirmative defense upon which the defendant has the burden of proof.

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

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

#### **HN24** [] **Motions to Dismiss, Failure to State Claim**

To survive a motion to dismiss a claim for tortious interference with existing and prospective contracts, under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#), Plaintiffs are not required to allege that Defendants interfered with specific contracts.

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

#### **HN25** [] **Industry Practices, Insurance Company Operations**

Article 5.07-1 of the Texas Insurance Code regulates the conduct of insurance companies, not glass repair or replacement companies.

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

**HN26** [blue document icon] **Industry Practices, Insurance Company Operations**

See [Tex. Ins. Code Ann. art. 5.07-1\(a\)](#) (Texas).

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

**HN27** [blue document icon] **Industry Practices, Insurance Company Operations**

[Tex. Ins. Code Ann. art. 5.07-1](#) does not grant a private right of action.

**Counsel:** For STEWART GLASS & MIRROR INC, plaintiff: Jack Nolan Price, Law Office Of Jack N Price, Austin, TX Travis. J Thad Heartfield, Jr, Heartfield & McGinnis, Beaumont, TX. David Cohen, Law Office of David Cohen, Austin, TX.

For TEXAS MOBIL AUTO GLASS INC, plaintiff: Jack Nolan Price, (See above). J Thad Heartfield, Jr, (See above). David Cohen, (See above).

For RLJ INC dba A-1 Glass Co, plaintiff: Jack Nolan Price, (See above). J Thad Heartfield, Jr, (See above). David Cohen (See above).

For FREDDY'S AUTO GLASS & MIRROR INC, plaintiff: Jack Nolan Price, (See above). J Thad Heartfield, Jr, (See above). David Cohen, (See above).

For NEDERLAND GLASS CO INC, plaintiff: Jack Nolan Price, (See above). J Thad Heartfield, Jr, (See above). David Cohen, (See above).

For LONE STAR GLASS INC, plaintiff: Jack Nolan Price, (See above). J Thad Heartfield, Jr, (See above). David Cohen, (See above).

For AUTO GLASS SPECIALISTS INC, plaintiff: Jack Nolan Price, **[\*\*2]** (See above). J Thad Heartfield, Jr, (See above). David Cohen, (See above).

For ALLIED SAN JACINTO GLASS CO, plaintiff: Jack Nolan Price, (See above). J Thad Heartfield, Jr, (See above). David Cohen, (See above).

For U S AUTO GLASS DISCOUNT CENTERS INC, defendant: J Michael Baldwin, David G Patent, Baker & Botts, Houston, TX Harris. Robert K Niewijk, Joel G Chefitz, Katten Muchin & Zavis, Chicago, IL.

For SAFELITE GLASS CORP, defendant: David W Ledyard, Strong Pipkin Nelson & Bissell, Beaumont, TX Jefferson.

For HARMON GLASS COMPANY INC, defendant: Walter Joshua Crawford, Jr, Wells, Peyton, Beard, Greenberg, Hunt & Crawford, Beaumont, TX. Christopher K Larus, John A Cotter, Larkin Hoffman Daly & Lindgren Ltd, Bloomington, MN.

For WINDSHIELDS AMERICA INC, defendant: David J Beck, Lonny J Hoffman, L Nicole Batey, Beck Redden & Secrest, Houston, TX Harris. Thomas A Doyle, Donald J Hayden, Baker & McKenzie, Chicago, IL.

For USA GLAS INC, defendant: J Michael Baldwin, David G Patent, Baker & Botts, Houston, TX Harris. Robert K Niewijk, Joel G Chefitz, Katten Muchin & Zavis, Chicago, IL.

**Judges:** RICHARD A. SCHELL, UNITED STATES DISTRICT JUDGE

**Opinion by:** RICHARD A. SCHELL

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**Opinion**

**[\*\*3] [\*1029] MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT**

Before the court are Defendants' motions to dismiss Plaintiffs' Second Amended Complaint. Plaintiffs filed a collective response. Thereafter, two Defendants filed replies, and Plaintiffs again filed a response. Upon consideration of the motions, responses, replies, and memoranda of law, this court is of the opinion that Defendants' motions to dismiss should be granted in part and denied in part.

**I. BACKGROUND**

Plaintiffs have sued Defendants for violations of Sections 1 and 2 of the Sherman Act, tortious interference with existing and prospective contracts, and violation of the Texas Insurance Code, Art. 5.07-1. Plaintiffs and Defendants are competitors in the business of repair and replacement of auto glass, and residential and commercial flat glass. Plaintiffs are eight Texas corporations (hereinafter referred to collectively as "Plaintiffs"). Defendants are four foreign corporations doing business in Texas: U.S.A. Glas, Inc. ("U.S.A. Glas"), Safelite Glass Corp. ("Safelite"), Harmon Glass Company, Inc. ("Harmon"), and Windshields America, Inc. **[\*\*4]** ("Windshields America").

**[\*1030]** In their Second Amended Complaint, Plaintiffs allege that Defendants conspired with various insurance companies to dominate and control the business of replacement and repair of auto glass and flat glass underwritten by insurance companies in Texas. Pls.' Second Am. Compl. P 7. Plaintiffs allege that Defendants cooperated with one another on many aspects of their business. For the sake of brevity, the court will mention only a few examples. First, Defendants allegedly agreed among themselves to divide and allocate customers and territories. *Id.* PP 8, 9(a)-(b). Second, Defendants allegedly exchanged information on many aspects of business operations such as claims, pricing, and costs. *Id.* PP 9(c)-(f). Third, Plaintiffs claim that Defendants cooperated in marketing through utilizing computerized-rotating telephone systems and sharing customer service representatives. *Id.* PP 9(g)-(l). And fourth, Defendants allegedly agreed to refer business to non-Defendant glass shops only on certain conditions. *Id.* P 10.

Plaintiffs further allege that Defendants control (1) over fifty percent of the auto glass repair and replacement business underwritten by **[\*\*5]** insurance companies in Texas and (2) over fifty percent of the residential and commercial flat glass repair and replacement business underwritten by insurance companies in Texas. *Id.* P 11. Plaintiffs allege that this conspiracy by Defendants and unnamed insurance companies has reduced competition and injured Plaintiffs in the form of lost profits. *Id.* PP 12, 22. Plaintiffs define the relevant market as the business of repair and replacement of (1) auto glass underwritten by insurance companies in Texas and (2) residential and commercial flat glass underwritten by insurance companies in Texas. *Id.* P 13.

Plaintiffs allege seven causes of action. In their first cause of action, Plaintiffs allege that Defendants violated Section 1 of the Sherman Act by entering into agreements that unreasonably restrained trade. *Id.* P 14. In their second cause of action, Plaintiffs allege that Defendants violated Section 2 of the Sherman Act by monopolizing, attempting to monopolize, and conspiring to monopolize the glass repair and replacement market through willfully acquired monopoly power. *Id.* P 15. In their third cause of action, Plaintiffs allege that Defendants divided and allocated **[\*\*6]** customers in violation of Section 1 of the Sherman Act. *Id.* P 16. In their fourth cause of action, Plaintiffs allege that Defendants unlawfully boycotted Plaintiffs by denying them referrals from insurance companies. *Id.* P 17. In their fifth cause of action, Plaintiffs allege that Defendants fixed prices. *Id.* P 18. In their sixth cause of action, Plaintiffs allege that Defendants tortiously interfered with Plaintiffs' existing and prospective contracts. *Id.* P 19. In their seventh cause of action, Plaintiffs allege that Defendants violated Article 5.07-1 of the Texas Insurance Code, which prohibits an insurer from limiting its coverage under a policy covering damage to a motor vehicle by limiting the beneficiary of the policy from selecting a person or shop to repair damage to the motor vehicle covered under the policy. *Id.* P 20.

**II. APPLICABLE STANDARDS FOR RULE 12(b)(6)**

**HN1** [↑] [Rule 12\(b\)\(6\)](#) provides that a party may move a court to dismiss an action for "failure to state a claim upon which relief can be granted." On motion under [Rule 12\(b\)\(6\)](#), the court must decide whether the facts alleged, if true, would entitle the plaintiff to some legal remedy. [Conley v. Gibson, I<sup>\\*\\*71</sup> 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#). Dismissal is proper only if there is either (1) "the lack of a cognizable legal theory" or (2) "the absence of sufficient facts alleged under a cognizable legal theory." [Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 \(9th Cir. 1990\)](#). Unless a [Rule 12\(b\)\(6\)](#) motion is converted to a summary judgment motion, the court cannot consider material outside the complaint. See [Powe v. Chicago, 664 F.2d 639, 642 \(7th Cir. 1981\)](#). The court must accept as true all material allegations in the complaint as well as any reasonable inferences to be drawn from them. [Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 \(5th Cir. 1982\)](#), cert. denied, 459 U.S. 1105, 74 L. Ed. 2d 953, 103 S. Ct. 729 (1983). The well-pleaded facts must be reviewed in the light most favorable to the plaintiff. [Piotrowski v. City of Houston, 51 F.3d 512, 514 I<sup>\\*1031</sup> \(5th Cir. 1995\)](#). A plaintiff, however, must allege specific facts, not conclusory allegations. [Elliott v. Foufas, 867 F.2d 877, 881 \(5th Cir. 1989\)](#). Conclusory allegations and unwarranted deductions of fact are not admitted as true. [Guidry v. Bank of I<sup>\\*81</sup> LaPlace, 954 F.2d 278, 281 \(5th Cir. 1992\)](#). A pleading, however, "need not specify in exact detail every possible theory of recovery--it must only 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" [Thrift v. Hubbard, 44 F.3d 348, 356 \(5th Cir. 1995\)](#) (quoting [Conley, 355 U.S. at 47](#)). **HN2** [↑] "[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, 355 U.S. at 45-46](#); [Kaiser Aluminum, 677 F.2d at 1050](#). "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." [Id. at 1050](#) (quoting 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (1969)).

**HN3** [↑] "[[Rule 12\(b\)\(6\)](#)] must be read in conjunction with [Rule 8\(a\)](#), which sets forth the requirements for pleading a claim in federal court and calls for 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" WRIGHT & MILLER, *supra*, § 1356; see also [Thrift, 44 F.3d at 356 n.13](#). "The Federal Rules of Civil Procedure erect [<sup>\*\*9</sup>] a powerful presumption against rejecting pleadings for failure to state a claim." [Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 386 \(5th Cir. 1985\)](#). [Rule 8](#) fosters that policy by sweeping aside the hypertechnical pleading rules that once defeated many an unwary but meritorious claimant." *Id.* "A plaintiff's complaint ordinarily need only be a short and plain statement that gives the defendant notice of what the claim is and the grounds upon which it rests." [Colle v. Brazos County, 981 F.2d 237, 243 \(5th Cir. 1993\)](#). [Rule 8](#) indicates that a complaint need only set out a generalized statement of facts from which defendant will be able to frame a responsive pleading." WRIGHT & MILLER, *supra*, § 1357.

### III. DISCUSSION

The issue for determination is whether Plaintiffs have alleged sufficient facts for their antitrust and state law theories of recovery. Defendants collectively make a number of arguments that Plaintiffs have failed to state a claim upon which relief can be granted. First, Defendants argue that Plaintiffs lack standing to bring this antitrust action because their complaint fails to allege that they suffered "antitrust injury" from Defendants' acts. Second, [<sup>\*\*10</sup>] Defendants argue that Plaintiffs have not alleged facts showing that any Defendant possesses or has a dangerous probability of acquiring market power. Third, with respect to Plaintiffs' tortious interference claims, Defendants argue (1) that Plaintiffs have not alleged any specific contracts into which they were likely to have entered and (2) that the "interference" of which Plaintiffs complain is merely the privileged business-generation of their competitors. Fourth, with respect to Plaintiffs' claim under the Texas Insurance Code, Defendants argue (1) that the Code applies only to insurers rather than competing glass providers such as Defendants and (2) that the Code does not allow for a private right of action.

#### A. [Section 1](#) of the Sherman Act

##### 1. [Section 1](#) Conspiracy Standards Relating to Preferred Provider Agreements

[Section 1](#) of the Sherman Act provides that **HN4** [↑] "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. HN5](#) [↑] "The elements required to state a [Section 1](#) claim are: (1) the existence of a conspiracy (2) affecting [\*\*11] interstate commerce (3) that imposes an unreasonable restraint of trade." [Ancar v. Sara Plasma, Inc., 964 F.2d 465, 469 \(5th Cir. 1992\)](#). "To satisfy the first element, pleadings must contain charges of the defendants' conspiracy and factual allegations that would support such a claim." *Id.* To satisfy the second element, an "interstate impact need not be intentional but, rather, may be indirect or fortuitous." *Id.* An illegal restraint of trade that has a [\*1032] market wide effect on the output or price of goods or services is sufficient to affect interstate commerce. See [Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 331-32, 114 L. Ed. 2d 366, 111 S. Ct. 1842 \(1991\)](#). With respect to the third element, "although most restraints are analyzed pursuant to a 'rule of reason,' some trade agreements are so egregiously anti-competitive that they are conclusively presumed illegal without further examination." [Ancar, 964 F.2d at 470](#). Accordingly, the nature of the alleged agreements between and among the Defendants will determine whether to apply rule of reason or *per se* scrutiny.

Defendants characterize the agreements between themselves and insurance companies as preferred provider [\*\*12] agreements. Mem. in Supp. of Windshields America's Mot. to Dismiss at 2-4. Defendants correctly state that many preferred provider agreements have withstood antitrust scrutiny. A leading case is [Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F.2d 1195 \(7th Cir. 1981\)](#), cert. denied, 455 U.S. 1020, 72 L. Ed. 2d 138, 102 S. Ct. 1717 (1982). In this case, Quality Auto Body ("Quality") brought a [Section 1](#) action against two insurance companies that provided coverage for auto repair work. [Id. at 1197](#). Quality alleged that the insurance companies violated [Section 1](#) "by processing damage claims in a manner which fixes the price Quality can charge for automobile repairs and by boycotting Quality if it fails to adhere to the defendants' price." *Id.* Under the policies issued by the insurance companies, insureds who needed automobile repair could select their own body shop or go to a shop selected by the insurance companies. [Id. at 1197-98](#). Regardless of the insured's choice, the insurance companies would pay only the amount that they determined to be reasonable for the repairs. This determination was based on market surveys of the prevailing competitive rates. *Id.* [\*\*13] If an insured used a shop that charged higher than the predetermined competitive rates, the insured would have to pay the difference from his or her own pocket. *Id.*

Quality was one of the few shops that refused to lower its repair rates to the "competitive rates" as determined by the insurance companies. [Quality Auto Body, 660 F.2d at 1198](#). In its [Section 1](#) action against the insurance companies, Quality argued that the insurance companies fixed prices by refusing to pay more than what they determined to be the prevailing competitive rates. [Id. at 1199](#). Quality also argued that the defendants' practices amounted to a boycott in violation of [Section 1](#). *Id.* The Seventh Circuit explained Quality's boycott contention:

Quality contends that the defendants maintain lists of body repair shops which agree to charge the rates established by the defendants and direct insureds to these preferred shops for automobile repairs. According to Quality, these vertical agreements not only reinforce defendants' price structure but also effectively withhold business from shops which do not participate in defendants' pricing program. Quality claims that defendants' action amounts [\*\*14] to a boycott of non-conforming shops . . . .

[Id. at 1199.](#)

The district court had granted summary judgment in favor of the defendant insurers. [Quality Auto Body, 660 F.2d at 1197](#). For purposes of the cross-motions for summary judgment, the district court assumed that the defendants had entered into preferred provider agreements with automobile repair shops regarding the price of repair. [Id. at 1199](#). "But after analyzing these agreements under the rule of reason, the [district] court determined, as a matter of law, that such provider agreements do not, in and of themselves, violate the Sherman Act." *Id.* "The [district] court [also] found no factual basis to support a holding that defendants engaged in an illegal boycott of plaintiff's business." *Id.*

The Seventh Circuit affirmed the district court's decision. The Seventh Circuit scrutinized the agreements under the rule-of-reason analysis noting that "no court which has examined the antitrust implications of insurance provider agreements has used a *per se* approach." [Quality Auto Body, 660 F.2d at 1203](#). The court observed: "The vertical agreements, to the extent they exist here, are between buyers [\*\*15] (the insurance companies) [\*1033] with apparently extensive market power and sellers (the body shops) with what, in comparison, seems slight market power." *Id.* The court assumed that the defendants had entered into preferred provider agreements with automobile

940 F. Supp. 1026, \*1033L 1996 U.S. Dist. LEXIS 13940, \*\*15

repair shops. Under the terms of these agreements, if a shop performs work at the "competitive rates" as determined by the insurance companies, the shop would be "placed on a 'preferred' list and receive a steady stream of referrals from claim adjusters." *Id.*

The court determined that under certain circumstances these preferred provider agreements were legal under Section 1. The court held:

**HN6** [↑] A contract of this nature between a buyer (the insurance company) and a seller (the body shop) generally does not, without more, appear to violate the antitrust laws at all. Only if such an agreement contains restrictions on one party's activities *other than those involved in the immediate purchase and sale* does the possibility of a Sherman Act violation arise.

Quality Auto Body, 660 F.2d at 1203 (italics in original). The court's rationale was that preferred provider agreements have pro-competitive effects that inure [\*\*16] to the benefit of consumers:

In refusing to pay a price higher than what they regard as the competitive rate, defendants [insurance companies] have not imposed any restriction on the repair shops beyond the immediate sales transaction. Defendants are simply taking steps to insure the best terms available in the marketplace and firmly indicating their position on price to the seller (the body shops). As the Third Circuit explained in Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80 (3d Cir.), cert. denied, 414 U.S. 1093, 38 L. Ed. 2d 550, 94 S. Ct. 724 . . . "this pressure encourages [suppliers] to keep their costs down; and, for its own competitive advantage, [enables the insurer to pass] . . . along the savings thus realized to consumers. To be sure, [the insurer's] initiative makes life harder for commercial competitors. . . . The antitrust laws, however, protect competition, not competitors; and stiff competition is encouraged, not condemned." *Id. at 84*. Thus, the mere existence of informal (or formal) provider agreements in the instant case, far from establishing a Sherman Act violation, seems merely to show aggressive and competitive [\*\*17] dealing by the insurance companies.  
\*\*\*

These defendants [insurance companies] have an undeniable impact on the price structure of the auto repair market. But much as this impact may contribute to the discomfiture of the body shops, it probably rebounds to the benefit of competition and consumers. In the absence of proof of some concerted action or an abuse of defendants' buying power, the provider agreements do not illegally restrain trade.

Quality Auto Body, 660 F.2d at 1203-204.

The Seventh Circuit also affirmed the district court's decision to grant summary judgment in favor of the insurance companies on the issue of boycotts. "Quality contended that defendants' claims practices prevented plaintiff's shop from effectively competing with other repair shops which are willing to perform work at the prevailing competitive rate and therefore amount to a boycott of plaintiff's business." *Id. at 1206*. The court found no evidence amounting to a concerted refusal to deal. *Id.* The court stated: "The uncontested facts establish that neither Allstate nor State Farm has ever refused to deal with Quality. On the contrary, a large portion of Quality's business [\*\*18] is generated by defendants' policyholders and claimants." *Id.*

Courts also have determined that preferred provider agreements in the medical care industry are legal under the antitrust laws and may have pro-competitive effects. See, e.g., Royal Drug Co. v. Group Life and Health Ins. Co., 737 F.2d 1433, 1438-39 (5th Cir. 1984) (pharmacy agreement), cert. denied, 469 U.S. 1160, 83 L. Ed. 2d 925, 105 S. Ct. 912 (1985); Barry v. Blue Cross of California, 805 F.2d 866, 871 (9th Cir. 1986) (physician agreement); Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922, 933 (1st Cir. 1984) (physician agreement), cert. denied, 471 U.S. 1029, 85 L. Ed. 2d 322, 105 S. Ct. 2040, 105 S. Ct. 2049 (1985); Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc., 675 F.2d 502, 506 (2d Cir. 1982) (pharmacy agreement); Sausalito Pharmacy, Inc. v. Blue Shield of California, 544 F. Supp. 230, 237 (N.D. Cal. 1981) (pharmacy agreement), aff'd, 677 F.2d 47 (9th Cir.), [\*1034] cert. denied, 459 U.S. 1016, 74 L. Ed. 2d 510, 103 S. Ct. 376 (1982).

**HN7** [↑] A preferred provider agreement, however, may violate the antitrust laws if "such an agreement [\*\*19] contains restrictions on one party's activities other than those involved in the immediate purchase and sale." Quality

Auto Body, 660 F.2d at 1203 (italics omitted). A preferred provider agreement may illegally restrain trade if the parties to the agreement engage in some concerted action or the purchaser abuses its buying power. Id. at 1204. An illegal type of concerted action could be a boycott by the insurance companies in which they conspire with repair shops to refuse to deal with other competing repair shops. See id. at 1206.

## 2. Sufficiency of Facts Alleged for Section 1 Violation

In their Second Amended Complaint, Plaintiffs allege that Defendants entered into agreements with insurance companies "to dominate and control the business of replacement and repair of auto glass and flat glass underwritten by the insurance companies in the State of Texas." Pls.' Second Am. Compl. PP 2(e), 7. Plaintiffs also allege that Defendants worked together to sell glass replacement services to insurance companies. Id. P 9(i). Plaintiffs further allege that, in combination and conspiracy, Defendants denied Plaintiffs access to glass repair and replacement business except on particular **[\*\*20]** terms dictated by Defendants. Id. PP 10, 17.

The court determines that Plaintiffs allege sufficient facts under Section 1 of the Sherman Act to survive a Rule 12(b)(6) motion. Plaintiffs allege that Defendants and insurance companies entered into agreements. With respect to the affecting-interstate-commerce element, Plaintiffs allege that Defendants' agreements have affected competition on a market wide basis in Texas. Pls.' Second Am. Compl. P 12. Plaintiffs also allege that Defendants' agreements impose an unreasonable restraint of trade. Preferred provider agreements between various Defendants and insurance companies may be legal if those agreements are limited to the immediate sales transaction. Quality Auto Body, 660 F.2d at 1203. Plaintiffs, however, allege that Defendants entered into agreements with insurance companies to boycott Plaintiffs. Pls.' Second Am. Compl. PP 2(e), 7, 10, 17. Although Plaintiffs do not explain in detail the precise nature of Defendants' agreements among themselves and with insurance companies, a complaint ordinarily needs to be only a short and plain statement that gives the defendant notice of what the claim is and the grounds upon which **[\*\*21]** it rests. See FED. R. CIV. P. 8(a); Colle, 981 F.2d at 243.

**HN8** [↑] A boycott is a restraint of trade within the meaning of Section 1 of the Sherman Act. F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 422, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990). "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category." Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959). Boycott violations "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." 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) (internal quotations and citations omitted). Plaintiffs sufficiently allege that Defendants, in conspiracy with insurance companies, have entered into agreements to boycott or refuse to deal with Plaintiffs. Pls.' Second Am. Compl. PP 2(e), 7, 10, 17.

Defendant U.S.A. Glas argues that "nothing in the **[\*\*22]** antitrust laws requires a defendant to give to a third party the business it has won, rather than performing the work itself." Mem. in Supp. of U.S.A. Glas's Mot. to Dismiss at 10. Defendants may legally win and keep business that they legitimately earn for themselves through price and quality competition **[\*1035]** or through legitimate preferred provider agreements. But Defendants may not win business through agreements with the insurance companies to misinform a potential glass customer about his or her options for glass repair. These types of agreements may be unreasonable restraints of trade under Section 1 because they would operate to the detriment of consumers. Competition would be harmed if consumers were routed to particular glass repair companies based on factors other than competitive pricing or quality in the marketplace. If such agreements to boycott exist, they may fall into the forbidden category under *per se* scrutiny. See Superior Court Trial Lawyers Ass'n, 493 U.S. at 433; Royal Drug Co., 737 F.2d at 1436.

## 3. Antitrust Injury

Defendants argue that Plaintiffs lack standing to bring this antitrust action because the complaint fails to allege that Plaintiffs suffered **[\*\*23]** "antitrust injury" from Defendants' acts. **HNg** [↑] The Clayton Act authorizes treble-damage suits for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust

laws." [15 U.S.C. § 15](#). Private plaintiffs must establish standing to recover damages for antitrust violations. [Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 993 \(5th Cir. 1983\)](#), cert. denied, 465 U.S. 1100, 80 L. Ed. 2d 126, 104 S. Ct. 1594 (1984). Standing is a threshold issue determinable from the allegations of the complaint. [Transource Int'l, Inc. v. Trinity Indus., Inc., 725 F.2d 274, 280 \(5th Cir. 1984\)](#). Antitrust injury is an essential element of standing without which a plaintiff cannot recover. [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110 n.5, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#).

**HN10** [↑] Antitrust injury is "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 \(1977\)](#). "In pleading an antitrust claim for damages under section 4 of the Clayton Act, therefore, a plaintiff [\*\*24] must allege, either directly or inferentially, that he has suffered an anticompetitive injury as a result of the defendants' antitrust violation." [Mahone v. Addicks Utility Dist., 836 F.2d 921, 939 \(5th Cir. 1988\)](#). The plaintiff must allege that the defendant's antitrust violation was the cause-in-fact of the plaintiff's injury or that "but for" the violation, the injury would not have occurred. [O.K. Sand & Gravel, Inc. v. Martin Marietta Technologies, Inc., 36 F.3d 565, 573 \(7th Cir. 1994\)](#).

Plaintiffs sufficiently allege that they have suffered "antitrust injury." Plaintiffs allege that Defendants' conspiracy has reduced competition in the marketplace. Pls.' Second Am. Compl. P 12. Plaintiffs further allege that they have suffered injury in the form of lost profits as a result of Defendants' restraints of trade. *Id.* P 22. As alleged, Plaintiffs' injury is of the "type the antitrust laws were intended to prevent." [Brunswick Corp., 429 U.S. at 489](#). Antitrust laws were intended to prohibit firms from restraining trade by harming other competitors, which in turn harms consumers by restricting competition, increasing prices, and decreasing output. [Anago, Inc. v. Tecnol I\\*\\*251 Medical Prods. Inc., 976 F.2d 248, 249 \(5th Cir. 1992\)](#), cert. dismissed, 510 U.S. 985, 126 L. Ed. 2d 441, 114 S. Ct. 491 (1993); see also PHILLIP AREEDA & DONALD F. TURNER, [\*\*ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION\*\*](#) PP 103-104 (1978). Plaintiffs also allege that their lost profits were caused by Defendants' unlawful agreements. See [Great W. Directories v. Southwestern Bell Tel. Co., 63 F.3d 1378, 1387-88 \(5th Cir. 1995\)](#) (holding that loss of profits caused by exclusionary conduct by a competitor is sufficient for antitrust injury), superseded in part on other grounds, [74 F.3d 613](#), petition for cert. filed, 135 L. Ed. 2d 1120, 117 S. Ct. 26, 64 U.S.L.W. 3839 (U.S. June 7, 1996) (No. 95-1974).

**HN11** [↑] In the context of a motion to dismiss for failure to state a claim, the court must determine whether any factual theory alleged, if true, would entitle a plaintiff to some legal remedy. [Conley, 355 U.S. at 45-46](#). While Plaintiffs' complaint is short on the details of the alleged boycott, the court is aware that no discovery has [\*1036] occurred in this case. After discovery in this case, Plaintiffs will have an opportunity to amend their complaint detailing the alleged agreements and any pernicious effect on [\*\*26] competition. At this stage in the proceedings, however, Plaintiffs have alleged sufficient facts under [Section 1](#) for conspiracy to boycott the Plaintiffs.

#### 4. [Section 1](#) Price Fixing Claim

Defendants argue that Plaintiffs do not have the requisite antitrust injury to bring a [Section 1](#) price fixing claim because any conspiracy by Defendants to raise prices would help Plaintiffs rather than injure them. Mem. in Supp. of U.S.A. Glas's Mot. to Dismiss at 5. Plaintiffs respond: "That Defendants have agreed to charge higher prices certainly harms the public; That they have also agreed to exclude Plaintiffs from the market place harms both Plaintiffs and the public." Pls.' Resp. to Defs.' Reply Briefs in Supp. of their Mots. to Dismiss at 4. **HN12** [↑] The antitrust injury doctrine "prevents losses that stem from competition from supporting suits by private plaintiffs." [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#). In particular, the antitrust injury doctrine does not allow competitors to "recover damages for any conspiracy . . . to charge higher than competitive prices" because competitors "stand to gain from any conspiracy to raise [\*\*27] the market price." *Id. at 337* (quoting [Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 582-83, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#)); see also [Rockbit Indus. v. Baker Hughes, Inc., 802 F. Supp. 1544, 1548-49 \(S.D. Tex. 1991\)](#) (holding that a competitor lacked standing even if it was the target of the price fixing conspiracy). Because Plaintiffs stand to gain from any conspiracy to raise prices, they do not have the requisite "antitrust injury" necessary to maintain a [Section 1](#) claim for a conspiracy to fix prices at higher levels.

Even if the court were to infer that Plaintiffs' complaint alleged that Defendants were conspiring to fix prices at lower levels, Plaintiffs again would not suffer the requisite antitrust injury. The Supreme Court has stated: "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury." [Atlantic Richfield Co., 495 U.S. at 340](#). Plaintiffs have not made any allegations that Defendants set prices at predatory levels.

##### 5. [Section 1](#) Market Division and Allocation Claim

As with their [\\*\\*28](#) price fixing claim, Plaintiffs do not have the requisite antitrust injury to maintain a [Section 1](#) claim for market division and allocation. Division and allocation agreements between competitors minimize competition because each competitor has agreed not to compete in the other's market. See [Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50, 112 L. Ed. 2d 349, 111 S. Ct. 401 \(1990\)](#). Plaintiffs allege that Defendants "unlawfully divided and allocated customers in the relevant market and submarkets in the State of Texas." Pls.' Second Am. Compl. P 16. "[Competitors] cannot recover for a conspiracy to impose nonprice restraints [e.g., division and allocation] that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive." [Matsushita Elec. Indus., 475 U.S. at 583](#) (emphasis in original). Agreements on price and agreements to divide or allocate markets have the same effect on price, output, and competitors. See [Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406, 1415 \(7th Cir. 1995\)](#), cert. denied, 134 L. Ed. 2d 233, [I\\*\\*29](#) 116 S. Ct. 1288 (1996). If, as alleged, Defendants divided and allocated the markets, such action would benefit Plaintiffs. Plaintiffs would face less competition in markets in which Defendants attempted to reduce competition among themselves through division and allocation.

#### B. [Section 2](#) of the Sherman Act

##### 1. [Section 2](#) Standards for Monopolization, Attempted Monopolization, and Conspiracy to Monopolize

[HN13](#)<sup>↑</sup> Under [Section 2](#), it is illegal to "monopolize, or attempt to monopolize, or [\[\\*1037\]](#) combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." [15 U.S.C. § 2](#). "To state a claim for monopolization, a plaintiff must allege: (i) a relevant product and geographic market; (ii) the possession of monopoly power in such market; and (iii) the willful acquisition or maintenance of that power." [Rockbit Indus., 802 F. Supp. at 1550](#) (citing [United States v. Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#); [C.E. Serv., Inc. v. Control Data Corp., 759 F.2d 1241, 1244](#) (5th Cir.), cert. denied, 474 U.S. 1037, 88 L. Ed. 2d 583, 106 S. Ct. 604 (1985)). [HN14](#)<sup>↑</sup> "To state a claim for attempted monopolization, a plaintiff must [\[\\*30\]](#) allege: (i) a relevant product and geographic market; (ii) a specific intent to monopolize that market; (iii) exclusionary or predatory conduct in furtherance of the attempted monopolization; and (iv) a dangerous probability that, absent judicial intervention, the attempt will be successful." [Rockbit Indus., 802 F. Supp. at 1552-53](#) (citing [Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 490](#) (5th Cir. 1984)). [HN15](#)<sup>↑</sup> To state a claim for conspiracy to monopolize, a plaintiff must allege: (i) the existence of a combination or conspiracy; (ii) an overt act in furtherance of the combination or conspiracy; (iii) substantial amount of interstate commerce effected; and (iv) specific intent to monopolize. [North Mississippi Communications, Inc. v. Jones, 792 F.2d 1330, 1335](#) (5th Cir. 1986) (citing [United States v. Yellow Cab Co., 332 U.S. 218, 91 L. Ed. 2010, 67 S. Ct. 1560 \(1947\)](#)).

In its motion to dismiss, Defendant U.S.A. Glas argues that Plaintiffs have not alleged facts showing that any Defendant possesses or has a dangerous probability of acquiring market power. Mem. in Supp. of U.S.A. Glas's Mot. to Dismiss at 6-7. [HN16](#)<sup>↑</sup> The elements of monopolization, attempted monopolization, [\[\\*31\]](#) and conspiracy to monopolize vary, but they all share a common requirement that a defendant must have either monopoly power or the dangerous probability of acquiring it. See [Rockbit Indus., 802 F. Supp. at 1550](#) (monopolization); [Id. at 1553](#) (attempted monopolization); [Futurevision Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp., 789 F. Supp. 760, 777](#) (S.D. Miss 1992) (conspiracy to monopolize), aff'd, 986 F.2d 1418 (5th Cir. 1993). [HN17](#)<sup>↑</sup> "Monopoly power is the power to control price or exclude competition." [United States v. American Airlines, Inc., 743 F.2d 1114, 1117](#) (5th Cir. 1984), cert. dismissed, 474 U.S. 1001, 88 L. Ed. 2d 370, 106 S. Ct. 420

(1985) (internal quotation marks omitted). In an attempted monopolization case, "[a] defendant must have some legally significant share of the market before he approaches the level of dangerous probability of success condemned by the attempt provision of section two." [\*Rockbit Indus.\*, 802 F. Supp. at 1553](#).

To support its theory that Plaintiffs have not sufficiently alleged market power, Defendant U.S.A. Glas argues that Plaintiffs do not allege that each Defendant has at least a fifty-percent market share. Mem. in Supp. of U.S.A. Glas's [\*\*32] Mot. to Dismiss at 8 (citing [\*Rockbit Indus.\*, 802 F. Supp. at 1551](#) ("It is the law in this circuit that a defendant must have a market share of at least fifty percent before he can be guilty of monopolization.")). Defendant U.S.A. Glas's argument would be correct if Plaintiffs were alleging that only one Defendant was violating [Section 2](#). Plaintiffs, however, allege that Defendants have engaged in a joint monopolization.

The plain language of [Section 2](#) makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." [15 U.S.C. § 2](#) (emphasis added); see also [\*Spectrum Sports, Inc. v. McQuillan\*, 506 U.S. 447, 113 S. Ct. 884, 889, 122 L. Ed. 2d 247 \(1993\)](#) ("[Section 2](#) addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize."). [HN18](#) [↑] When two or more persons agree to monopolize, they have committed the offense of joint monopolization provided that they have jointly acquired monopoly power. See [\*American Airlines\*, 743 F.2d at 1118](#). Joint monopolization claims do not require that the Plaintiffs allege [\*\*33] that each Defendant has at least fifty-percent market share. The cases that U.S.A. Glas cites for the proposition that Plaintiffs must allege that each Defendant has at least fifty percent of the market are limited to actions in which it was alleged that a single defendant monopolized [\*1038] the market. See, e.g., [\*Rockbit Indus.\*, 802 F. Supp. at 1550-51](#); [\*Domed Stadium Hotel\*, 732 F.2d at 489-90](#). Accordingly, Plaintiffs need only allege that Defendants have jointly acquired market power. To allege this market power, however, Plaintiffs must alleged that Defendants have a market share in the aggregate of at least fifty percent. See [\*Domed Stadium Hotel\*, 732 F.2d at 489](#). While *Domed Stadium Hotel* involved only a single defendant, the fifty-percent market share requirement should apply equally to the joint monopolization context because percentage of market share remains a sound proxy for market power.

## 2. Sufficiency of Facts Alleged for [Section 2](#) Violation

Plaintiffs sufficiently allege that Defendants possess market power or a dangerous probability of acquiring market power. Pls.' Second Am. Compl. P 15. Plaintiffs further allege that "the defendant networks control over [\*\*34] fifty percent (50%) of the auto glass repair and replacement underwritten by insurance companies in the State of Texas and over 50% of the residential and commercial flat glass repair and replacement underwritten by insurance companies in the State of Texas." *Id.* P 11. Plaintiffs' complaint also contains many factual allegations that Defendants are jointly exercising market power through substantial cooperation on pricing and other business operations. See, e.g., *id.* PP 9(a)-(r). The court does not address the other elements of monopolization, attempted monopolization, and conspiracy to monopolize because Defendants limited their arguments to the element of monopoly power.

## C. Tortious Interference Claims

Defendants argue (1) that Plaintiffs have not alleged any specific contracts into which they were likely to have entered and (2) that the "interference" of which Plaintiffs complain is merely the privileged business-generation of their competitors. Mem. in Supp. of U.S.A. Glas Mot. to Dismiss at 10-11. Plaintiffs respond: "The complaint here clearly meets [\*FED. R. CIV. P. 8\(a\)\*](#)'s requirements for alleging tortious interference with existing and prospective contracts." [\*\*35] Pls.' Resp. to Defs.' Mots. to Dismiss at 9-10.

[HN19](#) [↑] "Texas law protects existing and prospective contracts from interference." [\*Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.\*, 793 S.W.2d 660, 665 \(Tex. 1990\)](#). [HN20](#) [↑] The elements for a cause of action for tortious interference with an existing contract are: (1) the existence of a contract subject to interference, (2) a willful and intentional act of interference, (3) such act was a proximate cause of damage, and (4) actual damage or loss occurred. *Id. at 664*. [HN21](#) [↑] The elements of tortious interference with prospective contract or business relationships are:

(1) [A] reasonable probability that the parties would have entered into a contractual relationship, (2) an intentional and malicious act by the defendant that prevented the relationship from occurring, with the purpose of harming the plaintiff, (3) the defendant lacked privilege or justification to do the act, and (4) actual harm or damage resulted from the defendant's interference.

[Exxon Corp. v. Allsup, 808 S.W.2d 648, 659](#) (Tex. App.--Corpus Christi 1991, writ denied).

**HN22** [↑] "Under the defense of legal justification or excuse, one is privileged to interfere with another's [\*\*36] contract (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." [Sterner v. Marathon Oil Co., 767 S.W.2d 686, 691 \(Tex. 1989\)](#). **HN23** [↑] A party is privileged to cause a third party to terminate business relations with the party's competitor to obtain future benefits by offering the third party better contract terms than its competitors. [Caller-Times Publishing Co. v. Triad Communications, Inc., 855 S.W.2d 18, 23 \(Tex. App.--Corpus Christi 1993, no writ\)](#); [Times Herald Printing Co. v. A.H. Belo Corp., 820 S.W.2d 206, 215 \(Tex. App.--Houston \[14th Dist.\] 1991, no writ\)](#). "The privilege of legal justification or excuse in the interference of contractual relations is an affirmative defense upon which the defendant has the burden of proof." [Juliette Fowler Homes, 793 S.W.2d at 664 n.7](#) (quoting [Sterner, 767 S.W.2d at 690](#)).

[\*1039] Plaintiffs sufficiently allege that Defendants tortiously interfered with existing and prospective contracts. In their sixth cause of action, Plaintiffs allege:

Based on the facts stated above and additional evidence to be gathered through discovery [\*\*37] and presented at trial, the Defendants, acting individually and in concert, combination, and conspiracy, have tortiously interfered with the Plaintiffs' existing and prospective relationships with customers having need of repair and replacement of auto glass and flat glass underwritten by insurance companies and with the insurance companies who underwrite such insurance coverage in the State of Texas. There was more than a reasonable probability that the Plaintiffs would have entered into a business or contractual relationship with many insureds who were steered to network glass shops. The Defendants acted maliciously by intentionally interfering with and preventing the relationships from occurring, or continuing, for the purpose of harming the Plaintiffs, without privilege or justification. Actual harm and damage to the plaintiffs in the form of loss of business occurred as a result.

Pls.' Second Am. Compl. P 19.

**HN24** [↑] To survive a motion to dismiss under [Rule 12\(b\)\(6\)](#), Plaintiffs are not required to allege that Defendants interfered with specific contracts. See [Colle, 981 F.2d at 243](#). Plaintiffs' complaint provides a short and plain statement that gives Defendants notice of [\*\*38] what their tortious interference claims are and the general factual grounds upon which they rest. Plaintiffs allege that Defendants' illegal agreements to boycott Plaintiffs have interfered with existing and prospective contracts with customers. While Defendants are privileged to win business from Plaintiffs on the basis of quality or prices, Defendants are not permitted to interfere with Plaintiffs' business on the basis of alleged illegal agreements.

#### D. [Texas Insurance Code, Art. 5.07-1, Claim](#)

In their seventh cause of action, Plaintiffs allege violations of the [Texas Insurance Code, Art. 5.07-1](#):

Based on the facts stated above and additional evidence to be gathered through discovery and presented at trial, the Defendants, acting individually and in concert, combination, and conspiracy, have limited the beneficiaries of policies issued by various insurance companies from selecting Plaintiffs-glass shops and those similarly situated to repair glass damage to their motor vehicles, homes, and business covered under their policies, in violation of the [Texas Insurance Code, Art. 5.07-1](#).

Pls.' Second Am. Compl. P 20. Defendants argue (1) that the Texas Insurance [\*\*39] Code applies only to insurers rather than competing glass providers such as Defendants and (2) that the Texas Insurance Code does not allow for a private right of action. Plaintiffs respond:

Plaintiffs can prove that the Defendants, by their collusive conduct, aiding and abetted insurance companies to limit the beneficiaries of policies from selecting Plaintiffs' glass repair facilities -- in violation of Art. 5.07-1(a) -- they are entitled to bring such conduct to the jury's attention. Proof of such conduct would not only support Plaintiffs' tortious interference claim, by establishing that Defendants' conduct was neither justified nor privileged, but might also support Plaintiffs' entitlement to punitive damages. Surely, Defendants' [sic] should not be excused from answering charges that they aided and abetted another party to violate the law.

Pls.' Resp. to Defs.' Mots. to Dismiss at 10. While Plaintiffs argue that this allegation would have some evidentiary purpose in this action, the court must focus on whether Plaintiffs can bring this cause of action against Defendants under the Texas Insurance Code.

The court determines that Plaintiffs do not have a right **[\*\*40]** of action under Article 5.07-1 of the Texas Insurance Code. [HN25](#) This provision regulates the conduct of insurance companies, not glass repair or replacement companies. Article 5.07-1 provides that [HN26](#) "an insurer may not, directly or indirectly, limit its coverage under a policy covering damage to a motor vehicle . . . by limiting the beneficiary of the policy from selecting a person or **[\*1040]** shop to repair damage to the motor vehicle covered under the policy." [TEX. INS. CODE ANN. art. 5.07-1\(a\)](#) (Vernon 1981 & Supp. 1996) (emphasis added). Additionally, Plaintiffs do not have standing to bring a cause of action under Article 5.07-1 because [HN27](#) the provision does not grant a private right of action.

#### IV. CONCLUSION

Therefore, the court ORDERS that Defendants' motions to dismiss are hereby GRANTED with respect to Plaintiffs' third, fifth, and seventh causes of action and DENIED as to the remaining causes of action. Accordingly, the court DISMISSES Plaintiffs' third, fifth, and seventh causes of action.

SIGNED this the 16th day of September 1996.

RICHARD A. SCHELL

UNITED STATES DISTRICT JUDGE

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## California CNG v. Southern Cal. Gas Co.

United States Court of Appeals for the Ninth Circuit

August 8, 1996, Argued, Submitted, Pasadena, California ; September 19, 1996, Filed

No. 95-55806

### **Reporter**

1996 U.S. App. LEXIS 35321 \*; 1996-2 Trade Cas. (CCH) P71,565; 97 Daily Journal DAR 1103

CALIFORNIA CNG, INC., a California corporation; CALIFORNIA CNG, a California general partnership; PRIME OF CALIFORNIA, INC., a California corporation, Plaintiffs-Appellants, v. SOUTHERN CALIFORNIA GAS COMPANY, a California corporation; HENDERSON ENGINEERING COMPANY, an Illinois corporation, Defendants-Appellees.

**Subsequent History:** [\*1] As Amended January 30, 1997.

**Prior History:** Appeal from the United States District Court for the Central District of California. D.C. No. CV-95-00281-JSL. J. Spencer Letts, District Judge, Presiding.

Original Opinion Previously Reported at: [1996 U.S. App. LEXIS 24675](#).

**Disposition:** AFFIRMED in part, REVERSED in part, and REMANDED.

## **Core Terms**

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stations, fueling, natural gas, articulated, ratepayer, tariff, state policy, customers, immunity, guidelines, programs, funds, compressed, antitrust, rates, costs, nonutility, subsidization, state-action, refueling, compete, Involvement, approving, authorize, unfairly, spend, anti-competitive, infrastructure, competitors, supervision

## **LexisNexis® Headnotes**

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

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

Civil Procedure > Appeals > Standards of Review > General Overview

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

Where a complaint is dismissed for failure to state a claim, the allegations of the complaint are taken as true, and construed in the light most favorable to the complainant, for purposes of appeal.

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

## **HN2** Standards of Review, De Novo Review

A district court's dismissal for failure to state a claim is reviewed de novo. A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle her to relief.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > State & Territorial Governments > Claims By & Against

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

## **HN3** Antitrust & Trade Law, Exemptions & Immunities

There is a two-prong test for determining when the state-action doctrine immunizes a defendant's conduct from the antitrust laws: 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. State-action immunity is disfavored, much as are repeals by implication. The first prong of the test applies to the conduct of private parties that are regulated by state agencies.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > General Overview

## **HN4** Natural Gas Industry, Distribution & Sale

California's legislature has clearly articulated and affirmatively expressed a policy of encouraging substantial market penetration of compressed natural gas fueled vehicles and of encouraging natural-gas utilities to pursue research, development, and demonstration activities in furtherance of that legislative goal. [Cal. Pub. Util. Code § 740.2](#).

Energy & Utilities Law > Natural Gas Industry > General Overview

## **HN5** Energy & Utilities Law, Natural Gas Industry

The legislature's clearly articulated policy is to have the California Public Utilities Commission (CPUC) balance the need for utility participation in the development of the natural-gas-vehicle-infrastructure market and the need for that market to develop into a competitive one.

Energy & Utilities Law > Natural Gas Industry > General Overview

Transportation Law > Private Vehicles > Safety Standards > Emission Control

## **HN6** Energy & Utilities Law, Natural Gas Industry

The California Public Utilities Commission adopted the following guideline for its use in the approval of new and continuing low-emission-vehicle programs: The utility will be required to demonstrate that each element of its low-emission-vehicle program is not unfairly competitive with non-utility enterprises, and to discontinue the offending program element if, and when, it interferes with the development of a competitive market.

Governments > State & Territorial Governments > Claims By & Against

## **[HN7](#) [↑] State & Territorial Governments, Claims By & Against**

Tariff provisions usually take effect unless the agency takes affirmative steps to suspend or disapprove them. Agency inaction is not sufficient to justify immunity. It fails to meet the requirement that there be a clear state purpose to displace antitrust oversight of the particular activity. Inaction normally does not reflect any agency desire to approve.

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Henry C. Thumann, O'Melveny & Myers, Los Angeles, California, for defendant-appellee Southern California Gas Company.

**Judges:** Before: Betty B. Fletcher and A. Wallace Tashima, Circuit Judges, and Jane A. Restani, \* Judge, United States Court of International Trade. Opinion by Judge Fletcher.

**Opinion by:** FLETCHER

## **Opinion**

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### **OPINION**

FLETCHER, Circuit Judge:

California CNG, Inc. and Prime of California, Inc., two California corporations (hereinafter collectively referred to as "Cal CNG"), appeal from the district court's dismissal of their complaint alleging various violations of the Sherman Act, [15 U.S.C. §§ 1-7](#), by Southern California Gas ("SoCalGas"), a California utility company, and by Henderson [\*2] Engineering, an Illinois corporation. The district court determined that SoCalGas was immune from suit under the "state action" doctrine. We have jurisdiction over this appeal pursuant to [28 U.S.C. § 1291](#), and we affirm in part and reverse in part.

### **FACTUAL BACKGROUND**

Because the district court [HN1](#) [↑] dismissed Cal CNG's complaint for failure to state a claim, the allegations of the complaint are taken as true, and construed in the light most favorable to Cal CNG, for purposes of this appeal. [\*National Wildlife Federation v. Espy\*, 45 F.3d 1337, 1340 \(9th Cir. 1995\)](#). The following recitation of the "facts" therefore draws entirely on the complaint.

Cal CNG is involved in the natural-gas-vehicle (NGV) industry. NGVs are internal-combustion-powered vehicles that operate on compressed natural gas, producing a much lower level of emissions than traditional gasoline-fueled vehicles. Concerns about air quality and dependence on foreign oil supplies have heightened interest in NGVs,

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\* Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

especially in California. Operators of substantial fleets of vehicles in California have begun using NGVs in their fleets. Fuel for NGVs is dispensed at fueling stations which take natural gas from existing [\*3] pipelines, compress the gas into storage tanks, and dispense the compressed gas into NGV tanks.

The California Public Utilities Commission (CPUC) in January 1992 approved an application by SoCalGas to spend nearly \$ 11 million on a two-year NGV development program, the costs to be recoverable from the utility's ratepayers. That program proposed the installation of fueling stations to serve SoCalGas and customer NGVs. Many of these stations were to be built at the sites of commercial fleet operators.

Cal CNG, in mid-1992, together with Prime of California, a corporation with over 30 years experience in building liquid-fuel fueling stations, entered the NGV fueling-station business. Plans called for the company (1) to sell fueling stations and their component parts, including compression equipment; (2) to install and maintain fueling stations on customer property; and (3) to own and operate (or lease) its own fueling stations. Cal CNG entered into negotiations with Henderson, the exclusive U.S. licensee of the Pignone compressor, an Italian-manufactured compressor considered by Cal CNG to be the most technologically superior model available. Cal CNG and Henderson reached a verbal distribution [\*4] agreement in November 1992, reduced to writing and executed in May 1993, in which Cal CNG obtained the exclusive right to sell Pignone compressors in southern California for an initial term of one year. The agreement set minimum quotas for Cal CNG's sales, and failure to meet the quotas would allow Henderson to terminate the agreement; the quota for the first year was one compressor. Cal CNG then began discussions with southern California's significant vehicle-fleet operators, all of which expressed interest in buying a fueling station from Cal CNG; the company alleges that it would have sold fueling stations to at least some of those operators but for SoCalGas' actions.

Those actions, Cal CNG alleges, amounted to a campaign to drive Cal CNG from the market. SoCalGas allegedly approached fleet operators who had expressed interest to Cal CNG and offered them the possession, installation, and maintenance of a complete fueling station, including compressor, for "free, or virtually free". As a consequence, Cal CNG says, several of the operators with which it had held discussions declined to purchase fueling stations from Cal CNG and obtained them from SoCalGas instead. Cal CNG also accuses [\*5] SoCalGas of other conduct designed to disparage the business and services of Cal CNG, to harass Cal CNG, to dissuade potential customers and investors from further dealings with Cal CNG, and effectively to overpower and destroy Cal CNG in the NGV and NGV fueling-infrastructure markets; Cal CNG, however, does not detail such other conduct. Cal CNG further alleges that when it brought SoCalGas' actions to the attention of legislators and regulators, SoCalGas engaged in further improper conduct, including "direct threats of reprisal to Cal CNG if it did not 'stay away' from So Cal Gas's 'customers'", disparagement of Cal CNG's equipment and services, and interference with the relationship between Cal CNG and Henderson. As to this last course of conduct, SoCalGas allegedly used economic leverage over Henderson, which was involved in other projects with SoCalGas, to get Henderson to pressure Cal CNG not to compete with SoCalGas and, eventually, to terminate the distribution agreement in May 1994 without justification. All of this conduct, Cal CNG alleges, kept it from selling fueling stations and forced it out of the NGV-infrastructure market.

#### **PROCEDURAL HISTORY**

Cal CNG filed a complaint [\*6] in January 1995 alleging claims against SoCalGas for monopolization and attempted monopolization and against SoCalGas and Henderson for combination and conspiracy to monopolize and to restrain trade, all in violation of sections 1 and 2 of the Sherman Act.<sup>1</sup> [\*7] SoCalGas and Henderson moved to dismiss the complaint for failure to state a claim, and the court granted the motions. The district court held that SoCalGas' provision to customers of ratepayer-subsidized NGV fueling stations was immune from federal antitrust attack under the "state action" doctrine, that any other conduct by SoCalGas had no "independent

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<sup>1</sup> The complaint also included nine state-law claims for restraint of trade, intentional or negligent conspiracy to interfere with prospective economic advantage, unfair business practices, intentional or negligent interference with prospective economic advantage, breach of contract, promise without intent to perform, and negligent misrepresentation.

competitive impact" that would allow Cal CNG to state a cognizable federal antitrust claim, and that Henderson could not have conspired or combined with SoCalGas to violate the federal antitrust laws because SoCalGas's actions were immunized from federal antitrust scrutiny.<sup>2</sup> Cal CNG has timely appealed.

## STANDARD OF REVIEW

**HN2** A district court's dismissal for failure to state a claim is reviewed de novo. *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

## DISCUSSION

### I. "State Action" Immunity

**HN3** The Supreme Court has announced a two-prong test for determining when the state-action doctrine immunizes a defendant's conduct from the antitrust laws: "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." *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) (citations and internal quotation marks omitted). The Court has held that "state-action immunity is [\*8] disfavored, much as are repeals by implication". *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 636, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992) (citing *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)).

The Ninth Circuit has articulated the application of the first prong of the test to the conduct of private parties that are regulated by state agencies. *Columbia Steel Casting Co. v. Portland General Electric Co.*, 60 F.3d 1390 (9th Cir. 1995) (Slip op. 16261, Amended Opinion filed December 27, 1996).

#### A. State Policy

##### 1. Legislature

**HN4** California's legislature has clearly articulated and affirmatively expressed a policy of encouraging "substantial market penetration of . . . compressed natural gas fueled vehicles" and of encouraging natural-gas utilities "to pursue research, development, and demonstration activities in furtherance of that legislative goal". *Cal. Pub. Util. Code § 740.2*. As to the specific question of NGV infrastructure, including NGV fueling stations, California's clearest legislative articulation of policy appears in *Section 745.5* of the state's Public Utilities Code.<sup>3</sup> In adopting that section, the legislature made the following findings:

- [\*9] \* that the increased use of natural gas as a transportation fuel is desirable;
- \* that "[a] high quality, reliable, and cost competitive natural gas vehicle . . . public fueling infrastructure must be built to sustain a market for natural gas vehicles";
- \* that "utility participation in the construction and operation of compressed natural gas public refueling stations is needed to promote competition with oil companies and others selling compressed natural gas as a vehicle fuel and to help develop a market for natural gas vehicles"; and

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<sup>2</sup> The district court dismissed Cal CNG's state-law claims without prejudice, and Cal CNG is apparently pursuing those claims in state court.

<sup>3</sup> *Section 745.5* is repealed by its own terms, *§ 745.5(f)*, on 1 January 1997 unless the legislature acts to extend it.

\* that "there are long-term benefits to natural gas utility ratepayers from the sale of natural gas for use as a transportation fuel, and that it should be the policy of the Public Utilities Commission to support utility natural gas vehicle conversion, maintenance, and fueling demonstration programs".

1991 Cal. Stat. Ch. 1204, [§§ 1\(a\), \(c\), \(d\), \(e\)](#).

[\*10] The text of the law itself empowered the CPUC to "authorize natural gas utilities to construct and maintain compressed natural gas refueling stations to be owned and operated by the utility, or to be transferred to nonutility operators" and, where appropriate, to "authorize natural gas utilities to recover through rates, either by expensing or capitalizing, or both, the reasonable costs associated with" such fueling-station projects. [Cal. Pub. Util. Code § 745.5\(a\), \(d\). Section 745.5\(e\)](#), however, places two limits on the CPUC's power to authorize utilities to engage in fueling-station projects at ratepayer expense. First, the commission cannot allow a utility to pass the costs of fueling stations on to ratepayers unless it finds that the programs "are substantially in the ratepayers' long-term interests". More importantly for purposes of this case, the legislature provided that "the decision of the commission shall also ensure that natural gas utilities do not unfairly compete with nonutility enterprises."

We note that [§ 745.5](#) appears to articulate a state policy that exhibits considerable tension between two apparently conflicting goals. On the one hand, the legislature wished [\*11] to "ensure that natural gas utilities do not unfairly compete with" nonutilities in building, maintaining, and operating NGV fueling stations. On the other hand, the legislature allowed utilities, with CPUC approval, to recover the costs of such fueling-station activities through rates charged to utility customers, a resource obviously unavailable to potential nonutility competitors in the NGV-infrastructure market. A number of policies that reconcile these conflicting goals suggest themselves,<sup>4</sup> but what is undeniable is that the legislature intended for the CPUC to perform that reconciliation. [Section 745.5](#) speaks entirely in terms of what the commission may authorize and under what conditions. Specifically, [§ 745.5\(d\)](#) allows the *commission* to authorize recovery of costs through rates, and [§ 745.5\(e\)](#) directs the *commission*, in deciding whether to authorize NGV projects and ratepayer funding for them, to ensure that utilities do not compete unfairly with nonutilities. Thus, it appears that [HNS↑](#) the legislature's clearly articulated policy is to have the CPUC balance the need for utility participation in the development of the NGV-infrastructure market and the need for that market [\*12] to develop into a competitive one.<sup>5</sup> Therefore, we must look to the CPUC's position to determine whether SoCalGas's conduct is part of a "clearly articulated and affirmatively expressed . . . state policy".

### [\*13] 2. CPUC<sup>6</sup>

#### a. 1991-92 Approvals of Utility NGV Programs

The first significant CPUC decision to focus on the role of utilities in the NGV market is a July 1991 decision approving an application by Pacific Gas & Electric Company (PG&E) to establish an NGV program. *Re Pacific Gas and Elec. Co.*, [40 C.P.U.C.2d 722 \(Cal.P.U.C. 1991\)](#) (hereinafter "PG&E"), modified on denial of reh'g, [41 C.P.U.C.2d 428 \(Cal.P.U.C. 1991\)](#). The PG&E decision is relevant to this case not merely because of the similarity of subject matter but because the commission expressly adopted the policy positions expressed in this opinion

<sup>4</sup> For example, ratepayer subsidization might be available for the *construction* of NGV fueling stations but the CPUC could require that revenues from the operation or transfer of the stations be used to "repay" the ratepayers. Or, ratepayer subsidization might be allowed only so long as no nonutility enterprises participated in the NGV-infrastructure market.

<sup>5</sup> This policy is also embodied in § 740.3 of the Public Utilities Code, subsection (a) of which directs the commission to "evaluate and implement policies to promote the development of equipment and infrastructure needed to facilitate the use of . . . natural gas to fuel low-emission vehicles". The legislature specifically directed the commission to implement policies on "the rate-basing of . . . compressor stations for natural gas fueled vehicles", § 740.3(a)(1), and required that "the commission's policies . . . ensure that utilities do not unfairly compete with nonutility enterprises", § 740.3(c).

<sup>6</sup> We have previously approved the taking of judicial notice under [Federal Rule of Evidence 201\(b\)](#) of published decisions of the CPUC in determining issues of state-action immunity. [Nugget Hydroelectric, L.P. v. Pacific Gas and Elec. Co.](#), [981 F.2d 429, 435 \(9th Cir. 1992\)](#), cert. denied, [508 U.S. 908, 124 L. Ed. 2d 247, 113 S. Ct. 2336 \(1993\)](#).

when, less than six months later, it approved SoCalGas' application to establish [\*14] an NGV program. *Re Southern California Gas Co., 43 C.P.U.C.2d 104, 110 (Cal.P.U.C. 1992)* ("We intend that the policy issues decided in [PG&E] apply to SoCalGas.").

As an initial matter, the commission found that "because of consumer indifference, the low cost of gasoline, the lack of oil company participation, and the lack of financial incentives, the chance of a natural gas fueled vehicle industry surviving and growing without some form of initial public assistance is practically nil." [40 C.P.U.C.2d at 734](#). The commission approved utility involvement in the NGV market as just the kind of assistance necessary for the industry to survive and grow:

In funding the utility for a two-year period we are trying to promote the development of the equipment and infrastructure needed to facilitate the use of natural gas as a vehicle fuel. Utilities play a critical role in the development of this market; but the role, though critical, should be temporary. However, we are not prepared to set a timetable for the extrication of the utilities from the market because it is not clear how long their presence will be needed to provide the bridge to a profitable competitive market for [\*15] retail CNG.

[Id. at 742](#). As the commission put it in a later order on the subject, "the utilities are called upon to 'jump start' the retail market by providing refueling stations and offering conversion incentives". *Re Utility Involvement in the Market for Low-Emission Vehicles*, Interim Order 91-10-029 (Cal.P.U.C. Oct. 23, 1991), 1991 WL 496693 at \*8. Therefore, the commission approved the utilities' proposals to spend millions of dollars on NGV programs - programs that included the construction of NGV fueling stations - and to charge the costs to ratepayers. *PG&E, 40 C.P.U.C.2d at 745* (authorizing PG&E to spend \$ 12,485,000); *Re Southern California Gas, 43 C.P.U.C.2d at 113* (authorizing SoCalGas to spend \$ 10,818,000); *Re San Diego Gas & Electric Co., 40 C.P.U.C.2d 713 (Cal. P.U.C. 1991)* (authorizing SDG&E to spend \$ 6,761,000), modified on denial of reh'g, 41 C.P.U.C.2d 428 (Cal.P.U.C. 1991).

In making its decision, the commission expressly considered the possible effects of utility participation in the NGV market on competition:

The record is clear, and we find, that PG&E's NGV program is not anticompetitive. There are no competitors now, [\*16] and potential competitors, if there are any, are waiting for PG&E to show them the way through the investment of PG&E's and ratepayers' funds. . . . The short answer to [those] who fear competition from PG&E, is that there is no competition. PG&E is in this market by default. No one wants to compete.

[40 C.P.U.C.2d at 742](#). Thus, the CPUC reconciled the legislature's two goals of utility participation and fair competition in the NGV-infrastructure market by clearly articulating a policy of allowing ratepayer-funded utility participation in the market because no nonutility enterprises with whom the utilities might unfairly compete were in that market.

The commission, however, expressed its intent to monitor closely the impact of utility participation in the market on the growth of competition:

As competition in the NGV market emerges and evolves, the Commission will be in a position to adjust the PG&E program, as necessary, in response. PG&E will be subject to ongoing reasonableness reviews. In addition, PG&E's entire NGV program will be subject to review should PG&E apply to continue the program beyond its two-year term. PG&E has also agreed to submit periodic reports [\*17] to the Commission. The Commission will have ample opportunity to review the competitive situation and make mid-course corrections as necessary.

*Id.* Thus, the CPUC clearly articulated its continuing responsibility for balancing the legislative goals of utility participation in the NGV market and fair competition in that market.

#### b. 1993 Guidelines

After approving PG&E's application, the CPUC on its own initiative opened an investigation and rulemaking proceeding concerning utility involvement in the market for low-emission vehicles, including NGVs. *Re Utility*

*Involvement in the Market for Low-emission Vehicles*, Interim Order 91-10-029 (Cal.P.U.C. Oct. 23, 1991), 1991 WL 496693.

In initiating the proceeding, the CPUC reiterated its view of the role of utilities in the development of an NGV infrastructure: "Initially, the utilities must play a role in ensuring that natural gas is transported to the pumps [and] that there are natural gas refueling stations conveniently located to serve the public . . ." *Id.* at \*5. One purpose of the proceeding was to develop policies on "how long a utility presence will be needed to provide the bridge to a profitable competitive [\*18] market for retail CNG". *Id.* at \*7. The proceeding also provided "an opportunity to define more specifically what NGV activities, if any, are appropriate for long-term funding, and what measures the Commission should use to assess possible anti-competitive effects of the utilities' activities". *Id.* at \*5.

Phase I of the investigation and rulemaking concluded with the adoption of policy guidelines by the CPUC in July 1993. *Re Utility Involvement in the Market for Low-emission Vehicles*, 145 P.U.R.4th 243 (Cal.P.U.C. 1993). While acknowledging that "investor owned gas . . . utilities have an appropriate and prominent place in seeking to introduce the technology of vehicles . . . fueled by compressed natural gas and the development of a service and refueling infrastructure", the commission reiterated that "the activities of such entities are not to be undertaken to the exclusion of other non-utility entrants, and it is the responsibility of the Commission to see that utility presence is compatible with the emergence of competition in all sectors of this industry". *Id.* at 248. **HN6**[] The CPUC therefore adopted the following guideline for its use in the "approval of new and continuing [\*19] [low-emission-vehicle] programs": "The utility will be required to demonstrate that each element of its [low-emission-vehicle] program is not unfairly competitive with nonutility enterprises, and to discontinue the offending program element if, and when, it interferes with the development of a competitive market." *Id.* at 252-53.

In the guidelines, the CPUC departed significantly from the position that it had taken in its earlier decisions on how to implement the legislative directive to prevent unfair utility competition in the NGV market. No longer was the CPUC willing to say, as it had in *PG&E*, that utility involvement in the market would have no anti-competitive effect because no competition existed in the market; indeed, it instead made a factual finding that "the preclusion of unfair competition governs markets where there currently is no competition as well as those where there currently is". *Id.* at 255. Furthermore, in adopting the guideline on competition, the commission stated, "The terms of this guideline supports [sic] and is [sic] obviously subordinate to both state and federal statutes dealing with anti-competitive behavior." *Id.* at 252. Thus, [\*20] in July 1993, the commission articulated a new state policy on the balancing of the legislative goals of utility participation and fair competition: even if the NGV-infrastructure market contained no nonutility competitors, the utilities must compete fairly, which meant, at least, conforming to state and federal competition laws.

Upon issuing the guidelines, the CPUC announced that the utility NGV programs it had previously approved had to be brought into conformity with the guidelines. *Id.* at 246. It also ordered the utilities to submit new applications for six-year NGV programs. *Id.* at 256.

#### c. 1995 Partial Approvals

In November 1995, several months after the district court's dismissal of Cal CNG's complaint, the CPUC concluded Phase II of its investigation and rulemaking and issued an order partially approving the applications that the utilities, including SoCalGas, had submitted in response to the issuance of the 1993 guidelines at the completion of Phase I.

<sup>7</sup> *Re Utility Involvement in the Market for Low-Emission Vehicles*, 165 P.U.R.4th 503 (Cal.P.U.C. 1995). SoCalGas's application had included a proposal to use ratepayer funds to construct at least 67 additional [\*21] NGV fueling stations for the use of its customers. *Id.* at 545. The CPUC did not approve that portion of SoCalGas's application, finding that the risk that the ratepayers would never recover any of the funds used for such construction was too great. *Id.* at 545-47. Because the CPUC rejected this portion of SoCalGas's application, it did not fully

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<sup>7</sup> While the CPUC's November 1995 decision may not directly govern the question of state-action immunity for any of the SoCalGas activity at issue in this appeal, since Cal CNG filed its complaint in January 1995, the ruling is nonetheless useful in assessing California's policy on utility participation in the NGV-infrastructure market in the period leading up to the decision.

address the unfair-competition concerns that other parties had raised in the proceeding. The commission did state, however, that "there are many companies that are interested in competing in the market for the construction and operation of refueling stations at customer or other private sites" and that "any future utility refueling station program must be designed to avoid giving the utility any market advantage, based on its monopoly status". *Id. at 547*. That meant, the commission concluded, that "construction, operation, and commodity charges must be fully compensatory". *Id.* In other words, no ratepayer funds could be used to subsidize the utility's costs of fueling stations or the price it charged purchasers of such stations. The legislative goals had been rebalanced again, and state policy had changed as a consequence: the [\*22] need for fair competition in the NGV-infrastructure market now completely prevented utilities from using ratepayer funds to construct and maintain NGV fueling stations.

### *3. Application to Cal CNG's Claims against SoCalGas*

Based on the foregoing analysis, it is clear that from July 1991 to July 1993 the CPUC had clearly articulated and affirmatively expressed a state policy that utility activities in the NGV-infrastructure market were desirable and did not pose any dangers to competition because the market contained no competitors. In January 1992, the CPUC approved SoCalGas's application to spend over \$ 10 million of ratepayer funds [\*23] on NGV programs, *including* the "install[ation of] up to 51 refueling stations to serve SoCalGas and customer NGVs". *43 C.P.U.C.2d at 111*. Thus, any activity by SoCalGas in this period to use ratepayer funds to provide NGV fueling stations to customers below-cost, or even for free, was part of a clearly articulated and affirmatively expressed state policy.

In addition, it is equally clear that after November 1995, the CPUC clearly articulated a policy forbidding utilities to use ratepayer funds to compete with nonutilities in the provision of NGV fueling stations. Thus, any SoCalGas actions after November 1995 to provide customers with ratepayer-subsidized NGV fueling stations would not enjoy "state action" immunity from antitrust liability.

For the period between July 1993 and November 1995 - the period in which most of the SoCalGas actions alleged in the complaint seem to have taken place,<sup>8</sup> the CPUC's articulation of state policy did not directly address NGV fueling stations but held more generally that utilities' NGV programs must not be unfairly competitive with nonutility enterprises and must not interfere with the development of a competitive market. *145 P.U.R.4th at J\*241 252-53*. The CPUC further stated that its guidelines on utility participation in NGV markets were "subordinate to both state and federal statutes dealing with anticompetitive behavior". *Id. at 252*. It also directed the utilities to bring their existing NGV programs into conformity with the new guidelines. *Id. at 246*. Given the guidelines' unequivocal statement that utility activities in NGV markets must not be anticompetitive, the lack of any express commission discussion of fueling stations demonstrates the absence of the "clearly articulated and affirmatively expressed" state policy that *Midcal* requires to shield ratepayer subsidization of such stations from federal antitrust scrutiny. Therefore, any SoCalGas actions in providing subsidized NGV fueling stations to customers after July 1993 do not enjoy "state action" immunity from antitrust liability.<sup>9</sup>

### **[\*25] 4. SoCalGas' 1994 Tariff**

#### *a. 1994 Tariff Filing*

SoCalGas argues that the structure of its November 1994 rate schedule for natural gas for NGVs constitutes a clear articulation of state policy allowing ratepayer subsidization of utility-built NGV fueling stations. The rate schedule provides that SoCalGas will charge 28.490 cents per therm for uncompressed natural gas to be used at a customer-funded fueling station, where compression "will be performed by the customer using customer's equipment at the customer's designated premises", but will charge 63.683 cents per therm for compressed natural

<sup>8</sup>The complaint does not specifically allege the dates on which the challenged SoCalGas conduct occurred, but it appears that the conduct alleged must have taken place between May 1993 and January 1995.

<sup>9</sup>Neither party has raised the question of whether the "state action" immunity for SoCalGas's activities extends beyond July 1993 for some "reasonable period" required for the utility to bring its NGV programs into conformity with the guidelines. We therefore need not reach that question on this appeal.

gas dispensed at a utility-funded fueling station, where compression will be performed by the utility. SoCalGas argues in its brief that "while the [higher] compressed rate supports recovery of part of the capital and operating costs associated with the provision of the fueling station, it purposefully does not provide for full recovery and accordingly results in operator subsidization". Therefore, SoCalGas argues, CPUC approval of the tariff "reflects a conscious state decision to subsidize NGV infrastructure development".

The parties dispute whether the district court's judicial [\*26] notice of the November 1994 rate schedule under Federal Rule of Evidence 201(b) was proper, but we need not resolve the dispute, because even if notice is taken the rate schedule does not establish that SoCalGas is entitled to state-action immunity for three reasons.

First, there is no indication on the face of the rate schedule that the compressed-gas tariff, though higher than the uncompressed-gas tariff, is not high enough to provide for full recovery of costs. Therefore, the rate schedule alone does not demonstrate that the CPUC was aware that SoCalGas's tariff structure would result in subsidization such that any commission approval would be a clear articulation of state policy.

Second, while SoCalGas argues that the CPUC expressly considered "the structure and substance of SOCAL's NGV tariff", the only support it provides for that argument is citation to the commission's January 1992 approval of SoCalGas's application to use ratepayer funds for its NGV programs. Even if the CPUC did approve the structure and substance of SoCalGas's tariff in 1992, that approval is irrelevant to whether state-action immunity shields the utility from antitrust scrutiny after July 1993, since [\*27] at that point the CPUC adopted a new state policy on utility participation in the NGV-infrastructure market and expressly ordered that all existing utility NGV programs be brought into conformity with that new policy. In the absence of any evidence that the CPUC actually considered the structure and substance of SoCalGas's tariff after July 1993, the continued existence of the tariff structure approved earlier is insufficient to show a clearly articulated state policy in the later period.

Finally, there is no indication that the November 1994 tariff represents any articulation of policy by the CPUC, because it is not clear whether the CPUC actually considered and approved the tariff. According to the SoCalGas cover letter filing the November 1994 adjustments to its rate schedule, the tariffs were adjustments to those first approved by the CPUC as effective on 1 August 1992. The letter states that under the approved rate schedules, the utility is to "redetermine" its rates in the month following the close of each calendar quarter. Whenever the "redetermined" rates vary more than 5% from the then-existing rates, "SoCalGas is to propose the appropriate rate changes and submit them to [\*28] the Commission three working days before the end of that month" and then "these newly determined rates are to become effective on and after the first day of the month following their submission". (Emphasis added.) Thus, it appears from the rate schedules themselves that the November 1994 tariff changes simply became effective upon their filing by SoCalGas and the passage of time. There is no indication whatsoever that the CPUC actually examined and approved the tariff structure and these rates in light of its 1993 guidelines such that the tariff could be said to be a clear articulation of state policy. See Phillip Areeda and Donald Turner, Antitrust Law Par. 213f (1978) ("In one recurrent situation, a regulated firm is obliged by state law to file with a state regulatory agency a tariff stating its rates and practices. HNT Tariff provisions usually take effect unless the agency takes affirmative steps to suspend or disapprove them. . . . Agency inaction is not sufficient to justify immunity . . . It fails to meet the requirement . . . that there be a clear state purpose to displace antitrust oversight of this particular activity. Inaction normally does not reflect any agency [\*29] desire to approve."); cf. Ticor, 504 U.S. at 638 (holding as to "actual supervision" prong of *Midcal* state-action test that "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-fixing or ratesetting scheme").

On this record, then, SoCalGas has failed to establish that the existence of its November 1994 rate schedules demonstrates a clearly articulated state policy to shield ratepayer subsidization of NGV fueling stations from antitrust scrutiny. The CPUC's 1991 approval of PG&E's NGV program provided that PG&E's tariffs would be reviewed annually, 40 C.P.U.C.2d at 744; while the 1992 approval of SoCalGas's NGV program does not contain the same provision, the fact that the commission expressly incorporated the policy decisions from the *PG&E* decision in its approval of SoCalGas's program suggests that annual review may have been contemplated for that

utility's tariffs as well. Thus, SoCalGas may be able to show sufficient CPUC oversight of its rate structure [\*30] to meet the first prong of the *Midcal* test, but it has not done so on this record.

#### b. 1995 CPUC Decision

SoCalGas suggests that the discussion of rates in the November 1995 CPUC decision supports its argument that its 1994 rate schedules show that its ratepayer-subsidized NGV fueling stations were part of a clearly articulated state policy.

The CPUC indeed points out that SoCalGas's "rate schedules were not designed to cover the total costs of the service" and compares the rates to PG&E's, which "do not recover any portion of [the utility's] capital outlay, maintenance, or fuel taxes in supplying natural gas as a vehicle fuel". [165 P.U.R.4th at 552](#). The commission then restates the grounds for its approval of this rate structure in PG&E in 1991, including its interpretation of relevant statutory provisions. [Id. at 556](#). However, the commission then notes that it "cannot rest upon this interpretation of the relevant statutes to support the continued offering of subsidized service" because the statutes "must be interpreted in light of [the] guidelines" adopted in 1993. *Id.* Specifically, the commission points out that ratepayer subsidization in the rates "is [\*31] unfair competition because of the utilities' ability to rely on captive, regulated customers to provide the subsidy, rather than depend on retained earnings, as would any competitor". *Id.* The commission then notes that "there are other firms that are interested in competing within and against the compressed natural gas market". *Id.*

While the 1995 decision appears to be the first time that the commission expressly stated that SoCalGas's rate structure for NGV fueling stations was not in compliance with its 1993 guidelines because it allowed the utility to unfairly compete, the 1993 guidelines themselves required the utility to bring its NGV programs into conformity with the guidelines. If SoCalGas failed to do so, then the mere fact that the CPUC did not address that failure until 1995 does not constitute an articulated state policy approving the nonconforming conduct. While the commission in its 1995 decision did not order immediate revisions in the utilities' rates but instead directed the utilities "to file tariffs that will allow for gradual transition from the current rate levels to rates that reflect the direct and fully allocated long-run marginal cost of the service [\*32] being provided", [id. at 557](#), this alone does not constitute ratification of SoCalGas' rate structure during the July 1993 to November 1995 period because it is not a clear articulation or affirmative expression of state policy to grant immunity to all pre-November 1995 conduct.

#### 5. Conclusion

SoCalGas has, on the record before us, shown a clearly articulated state policy to allow utilities to use ratepayer funds to participate in the NGV-infrastructure market only in the period between July 1991 and July 1993. We therefore reverse the district court's dismissal to the extent that it applies to claims for conduct by SoCalGas after July 1993.

#### B. Actual Supervision

To qualify for state-action immunity, SoCalGas must show not only a clearly articulated state policy but also the active supervision of that policy by the state. For the period before July 1993, SoCalGas has sufficiently demonstrated such supervision. In January 1992, the CPUC approved a detailed application from SoCalGas to spend over \$ 10 million in ratepayer funds on NGV programs over two years. [43 C.P.U.C.2d at 113](#). The application had been modified by a settlement agreement between SoCalGas and the Division [\*33] of Ratepayer Advocates, and the commission modified it further. [Id. at 105, 109](#). Although that approval was *ex parte*, public hearings had been held on the identical policy issues raised by PG&E's similar application. [40 C.P.U.C.2d at 724](#). In addition, an ALJ had considered briefs from several parties on the proposed application and settlement agreement. Most importantly, SoCalGas's application proposed "to install up to 51 refueling stations to serve SoCalGas and customer NGVs", [43 C.P.U.C.2d at 111](#), and the commission's approval of the application authorized SoCalGas to charge the costs of its proposed projects to its ratepayers, [id. at 113](#). Thus, the CPUC expressly approved the conduct challenged by Cal CNG - the use of ratepayer funds by SoCalGas to provide NGV

fueling stations to customers at a price below the cost of the stations - between January 1992 and July 1993. We therefore affirm the district court's dismissal to the extent that it applies to claims for actions by SoCalGas before July 1993.

## *II. Other SoCalGas Conduct*

Cal CNG challenges the district court's ruling that, in the absence of an antitrust claim for the provision to customers of ratepayer-subsidized [\*34] NGV fueling stations, none of the other SoCalGas conduct alleged by Cal CNG - business disparagement, harassment, dissuasion of potential customers and investors, threatening reprisals against Cal CNG, and interference with Cal CNG's relationship with Henderson - had sufficient independent competitive impact to state a federal antitrust claim. Because the district court erred in dismissing Cal CNG's claims based on the ratepayer-subsidized NGV fueling stations, we reverse this subsidiary ruling as to the post-July 1993 period.

## *III. Henderson<sup>10</sup>*

The district court dismissed Cal CNG's claims against Henderson on the ground that Henderson could not have conspired or combined with SoCalGas to violate the antitrust laws because SoCalGas's conduct was immunized by the state-action doctrine. Again, because we reverse the district court's ruling on state-action immunity, we also reverse the dismissal of the [\*35] claims against Henderson as well.

## **CONCLUSION**

Because California clearly articulated a state policy to shield utility participation in the NGV-infrastructure market from competition only until July 1993, and actively supervised SoCalGas's participation in that market during that period, the district court's dismissal on state-action immunity grounds is reversed to the extent it applies to actions taken by SoCalGas after July 1993.

AFFIRMED in part, REVERSED in part, and REMANDED. Each party shall bear its own costs.

## **ORDER**

The opinion filed September 19, 1996, Slip op. 12459 is modified as follows:

At Slip op. 12468-69, commencing three lines from bottom of 12468, delete, "regulated by state agencies: "Private conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct." [Columbia Steel Casting Co. v. Portland General Electric Co., 60 F.3d 1390, 1396 \(9th Cir. 1995\)](#)."

Replace with: "regulated by state agencies. [Columbia Steel Casting Co. v. Portland General Electric Co., 60 F.3d 1390 \(9th Cir. 1995\)](#) (Slip op. 16261, Amended Opinion filed December 27, 1996)." [\*36]

The mandate shall issue forthwith.

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<sup>10</sup> Henderson has not appeared in this appeal and filed no responsive brief to Cal CNG's opening brief.



## **White v. Central Vt. Pub. Serv. Corp.**

United States District Court for the District of Vermont

September 20, 1996, Decided ; September 20, 1996, FILED

Docket No. 2:94-cv-386

### **Reporter**

958 F. Supp. 174 \*; 1996 U.S. Dist. LEXIS 20719 \*\*

BRADFORD E. WHITE, MICHEL J. MESSIER and JOHN A. WASIK, Plaintiffs, v. CENTRAL VERMONT PUBLIC SERVICE CORPORATION, FREDERIC H. BERTRAND, ROBERT P. BLISS, JR., ELIZABETH COLEMAN, LUTHER F. HACKETT, FRANCES HUTNER, F. RAY KEYSER, JR., MARY ALICE MCKENZIE, GORDON P. MILLS, PRESTON LEETE SMITH, ROBERT D. STOUT, THOMAS C. WEBB, and FRED W. YEADON, JR., Defendants.

**Disposition:** [\*\*1] Defendants' Motion to Dismiss the Complaint (paper 9) GRANTED. All other motions pending as of the date of this opinion DENIED as MOOT.

## **Core Terms**

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retroactively, Clayton Act, threshold, savings, repeal, interlocking directorate, shareholder, saving clause, intent of congress, antitrust, conflicting interest, motion to dismiss, state claims, possessed, fuel, supplemental jurisdiction, Plaintiffs', pendent, Counts, impair, cases

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > General Overview

### **HN1** [] Antitrust & Trade Law, Clayton Act

Section 8 of the Clayton Act, [15 U.S.C.S. § 19\(a\)\(1\)](#), as amended effective November 16, 1990, provides in relevant part that no person shall, at the same time, serve as a director or officer in any two corporations that are (A) engaged in whole or in part in commerce; and (B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws; if each of the corporations has capital, surplus, and undivided profits aggregating more than \$ 10,000,000 as adjusted.

Governments > Legislation > Interpretation

Governments > Federal Government > US Congress

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

## [\*\*HN2\*\*](#) [down] Legislation, Interpretation

The analysis a court must undertake to determine whether Congress intended a statute to apply to events that took place before its enactment is as follows. When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, the traditional presumption is that it does not govern absent clear congressional intent favoring such a result.

Governments > Legislation > Effect & Operation > Retrospective Operation

Governments > Legislation > Effect & Operation > General Overview

## [\*\*HN3\*\*](#) [down] Effect & Operation, Retrospective Operation

A statute does not have retroactive effect merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. The question is rather whether the statute would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Governments > Courts > Authority to Adjudicate

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Governments > Legislation > Effect & Operation > General Overview

## [\*\*HN4\*\*](#) [down] Jurisdictional Sources, Statutory Sources

The United States Supreme Court regularly applies intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

## [\*\*HN5\*\*](#) [down] Legislation, Effect & Operation

There is an "apparent tension" between two rules of statutory construction which could apply in cases where the issue of retroactivity is raised: one, that a court is to apply the law in effect at the time it renders its decision; and two, that retroactivity is not favored in the law. However, where the congressional intent is clear, it governs.

958 F. Supp. 174, \*174A 1996 U.S. Dist. LEXIS 20719, \*\*1

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > General Overview

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

## **HN6** Legislation, Expiration, Repeal & Suspension

[1 U.S.C.S. § 109 \(1985\)](#) provides, in relevant part that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Governments > Legislation > Effect & Operation > General Overview

Mergers & Acquisitions Law > Antitrust > Interlocking Directorates

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Interpretation

## **HN7** Legislation, Effect & Operation

If the very purpose of Congress is to take away jurisdiction, the statute does not survive under [1 U.S.C.S. § 109](#), and [§ 109](#) does not save a statute solely jurisdictional in its scope.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

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

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

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

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

## **HN8** Justiciability, Case & Controversy Requirements

A district court has supplemental jurisdiction over claims that are so related to a claim over which it has original jurisdiction that it forms part of the same case or controversy. [28 U.S.C.S. § 1337\(a\) \(1993\)](#).

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

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

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

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

## **HN9** [blue download icon] Subject Matter Jurisdiction, Jurisdiction Over Actions

When a court has dismissed all claims over which it has original jurisdiction, it may, but is not required to, decline to exercise supplemental jurisdiction over any remaining claims. [28 U.S.C.S. § 1337\(c\)\(3\)](#). [Section 1337\(c\)](#) specifies four circumstances under which supplemental jurisdiction may be declined, one of which is when the court has dismissed all claims over which it has original jurisdiction.

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

Governments > Courts > Authority to Adjudicate

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

## **HN10** [blue download icon] Subject Matter Jurisdiction, Supplemental Jurisdiction

If the dismissal of an antitrust count is based on lack of jurisdiction over the subject matter of the suit, the court lacks the power to adjudicate any supplemental claims appended to it, and the remaining claims must be dismissed.

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**Judges:** William K. Sessions, III, United States District Court Judge

**Opinion by:** William K. Sessions, III

## **Opinion**

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[\*175] OPINION AND [\*\*3] ORDER

Plaintiffs, shareholders and customers of Central Vermont Public Service Corporation ("CVPS"), an electric utility, bring suit against CVPS and members of its board of directors for violation of federal **antitrust law** and for breach of fiduciary duty. All Defendants have moved to dismiss the Complaint **[\*176]** for failure to state a claim upon which relief can be granted. For the reasons stated below, Defendants' motion to dismiss is GRANTED.

#### *Background*

According to the Complaint, for several years CVPS has faced competitive pressure from alternative suppliers of fuel, while at the same time environmentalists and regulators were forcing CVPS itself to reduce demand for electric water and space heating by promoting fuel-switching.<sup>1</sup> CVPS did not invest in these alternative fuel services such as propane and oil, but chose instead to attempt, unsuccessfully, to improve its poor performance by speculating in riskier energy-related ventures. Verified Complaint, PP 11-14.

**[\*\*4]** Plaintiffs allege that Defendant F. Ray Keyser, Jr., Chairman of the Board of CVPS, and his family own and have acquired businesses ("the OSI companies") which distribute oil and propane products in the CVPS service area in direct competition with CVPS. *Id.*, PP 15-18. Keyser's asserted conflict of interest has influenced CVPS's judgment not to enter these alternative fuel markets and not to disclose the conflict of interest to shareholders. *Id.*, PP 16-22. The other members of the board of directors have neither urged investment in propane or fossil fuels nor addressed the issue of Keyser's conflict of interest. *Id.*, PP 23-26.

CVPS and its Board, by ignoring the conflict of interest, have allowed CVPS to have

the worst of both worlds. It has lost revenues to other energy sources through its own 'fuel switching' efforts while currently earning the enmity of environmentalists and regulators and consuming valuable financial and human resources because of the realization of the economic consequences of switching customers to alternative fuels without a corresponding presence in that market.

*Id.*, P 32.

On November 10, 1994, Plaintiff Bradford E. White wrote **[\*\*5]** to CVPS requesting a copy of its shareholder list. CVPS denied White's request on November 15, 1994.

Plaintiffs filed their lawsuit on December 30, 1994, asserting that, as representatives of a class of similarly situated consumers, they had been injured by Keyser's conflict of interest, in violation of federal law prohibiting interlocking directorates between competing companies, Clayton Act § 8, [15 U.S.C. § 19 \(1973\)](#). As shareholders of CVPS, they brought corporate causes of action against Keyser and other members of the CVPS board of directors for breach of fiduciary duty. Finally, White sought to enforce CVPS's obligation under Vermont law to provide a shareholder list upon proper request.

#### *Discussion*

Defendants have argued three points in their motion to dismiss. First, they argue that Count I, which alleges a violation of the Clayton Act's interlocking directorate prohibition, should be dismissed for failure to state a claim upon which relief can be granted. Second, they argue that Counts II and III, which assert shareholder derivative claims of breach of fiduciary duty, should be dismissed for failure to satisfy the pleading requirements of [Fed. R. Civ. P. 23.1](#). Third, **[\*\*6]** they argue that Count IV, which seeks a list of CVPS shareholders, should be dismissed for failure to comply with the statutory prerequisites for obtaining a shareholder list set forth at [Vt. Stat. Ann. tit. 11A, § 16.02 \(1993\)](#).

<sup>1</sup> Fuel-switching programs offer financial assistance to retail customers of electricity for water and space heating to switch to alternative sources of fuel, if such a switch would be cost-effective. Least-Cost Investments, Energy Efficiency, Conservation and Management of Demand for Energy, Docket No. 5270- CV-1, 122 Pub. Util. Rep. 4th 153, 1991 WL 501827 (Vt. Pub. Serv. Bd. Mar. 19, 1991).

## I. Motion to Dismiss Antitrust Claim.

Defendants have asserted three grounds in support of their claim that Plaintiffs' Clayton Act count should be dismissed: one, that Plaintiffs do not satisfy the statutory "jurisdictional threshold" for bringing a case under § 8 of the Clayton Act; two, that Plaintiffs [\*177] lack standing to bring a § 8 claim; and three, that they are immune from this antitrust attack under the state action doctrine and under the *Noerr-Pennington* doctrine. The Court finds that Plaintiffs have not satisfied the jurisdictional threshold for bringing an interlocking directorate complaint under § 8 of the Clayton Act, [15 U.S.C. § 19](#), and therefore does not reach Defendants' second and third arguments.

### A. Clayton Act § 8 "Jurisdictional Threshold"

**HN1**[] Section 8 of the Clayton Act, as amended effective November 16, 1990, provides in relevant part:

No person shall, at the same time, serve as a director or officer in any two corporations [\*\*7] . . . that are --  
 (A) engaged in whole or in part in commerce; and  
 (B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws; if each of the corporations has capital, surplus, and undivided profits aggregating more than \$ 10,000,000 as adjusted . . .  
 .<sup>2</sup>

#### [15 U.S.C. § 19\(a\)\(1\)](#).

Plaintiffs do not dispute that they cannot state a claim under the statute as it currently exists or as it existed at the time they filed their complaint, because they cannot show the requisite minimum amounts. Plaintiffs [\*\*8] contend, however, that the relevant statute is the one which existed at the time of Defendant Keyser's wrongful conduct, asserted to be from 1981 to 1990. Prior to the 1990 [amendment](#), [15 U.S.C. § 19](#) prohibited interlocking directorates if either company had \$ 1,000,000 in capital, surplus and undivided profits.

The issue therefore is whether the 1990 amendment should apply to conduct which occurred prior to its enactment in a case which was not filed until after the effective date of the amendment. At the outset, it is far from clear whether Defendants have actually challenged the court's subject matter jurisdiction pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#), or challenged the adequacy of the pleadings pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). See [Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.](#), 341 U.S. 246, 249, 95 L. Ed. 912, 71 S. Ct. 692 (1951). Under either analysis the outcome, dismissal of the Count, must be the same, however. The only distinction in this case between dismissal for lack of subject matter jurisdiction or for failure to state a claim is in whether the Court has discretion under [28 U.S.C. § 1367](#) to retain jurisdiction over the pendent state claims set forth [\*\*9] in Counts II through IV.

The United States Supreme Court in the recent case of [Landgraf v. USI Film Prod.](#), 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), described **HN2**[] the analysis a court must undertake to determine whether Congress intended a statute to apply to events which took place before its enactment:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

[Landgraf](#), 114 S. Ct. at 1505. See also [Kaiser Aluminum & Chemical Corp. v. Bonjorno](#), 494 U.S. [\*\*10] 827, 835, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990) (starting point for interpretation of statute is 'language of the statute itself').

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<sup>2</sup> [15 U.S.C. § 19\(a\)\(5\)](#) provides for an annual adjustment of the \$ 10,000,000 threshold based on an amount equal to the percentage increase or decrease in the gross national product. As of the date this complaint was filed, the adjusted jurisdictional threshold was \$ 12,092,000. Revised Jurisdictional Thresholds for Section 8 of the Clayton Act, [59 Fed. Reg. 751 \(1994\)](#).

Absent a [\*178] clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.') (quoting [Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 \(1980\)](#)).

The plain language of the 1990 amendment does not state whether it is to be applied to causes of action which arose prior to the statute's effective date. The next step is to determine whether the statute has retroactive effect. [Landgraf, 114 S. Ct. at 1505](#).

#### 1. Retroactive effect.

As the Supreme Court noted, [HN3](#) [↑] a statute does not have retroactive effect merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. [Landgraf, 114 S. Ct. at 1499](#) (citation omitted). The question is rather whether the statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." [Id. at 1505](#). The 1990 amendment places no such [\*\*11] burdens on either party.

The statute does not impair rights possessed by Defendant Keyser during the 1981-1990 period complained of. On the contrary, obviously it legalizes what was assertedly illegal conduct at the time.

Although Plaintiffs possessed a right to seek redress for an illegal interlocking directorate such as they describe in their complaint during this period, they did not then act. The statute does not impair rights possessed by Plaintiffs *when they acted*, in December, 1994, by filing a lawsuit. At the time they took that action, they did not possess a right to sue under [15 U.S.C. § 19](#) unless they could show that both corporations possessed capital, surplus and undivided profits aggregating more than \$ 10,000,000. See by contrast [In re Prudential Sec. Inc. Ltd. Partnerships Litig., 930 F. Supp. 68 \(S.D.N.Y. 1996\)](#) (statute withdrawing jurisdiction over civil RICO claims would not apply to pending case because it would impair plaintiffs' ability to recover damages for possible violation of federal law).

The statute does not increase either party's liability for past conduct; it eliminates Defendant Keyser's liability. Nor does the statute impose new duties [\*\*12] with respect to transactions already completed. In short, the statute does not operate retroactively with regard to this case.

Since the statute does not operate retroactively, it is not necessary to ascertain Congressional intention as to the scope of the statute. Nevertheless, the legislative history of the 1990 amendment to [15 U.S.C. § 19](#) does suggest that Congress intended to alter the district courts' jurisdiction over interlocking directorate suits.

#### 2. Congressional intent.

The House Report, noting that the "jurisdictional test" in section 8 remained unchanged since its enactment in 1914, stated that the purpose of The Interlocking Directorate Act of 1990 was to amend section 8 of the Clayton Act by "increasing the jurisdictional threshold from \$ 1 million to \$ 10 million." "While the fundamental purpose behind the enactment of section 8 remains an important one, the Committee has concluded that the original statute's jurisdictional threshold does not adequately reflect the size or nature of the modern corporation in the current economy." The Subcommittee on Economic and Commercial Law recognized "that the existing ban on directorial interlocks was tied to a jurisdictional [\*\*13] trigger of \$ 1 million that was over 75 years old and expressed in 1914 dollars." H.R. Rep. No. 101-483, 101st Cong., 2nd Sess. 1-5 (1990).

The Senate Report similarly noted that a purpose of the act was to "raise[] the jurisdictional threshold, . . . to reflect our modern economy and inflation." It stated specifically:

Because of the substantial increase in price levels since 1914, this [\$1 million] dollar threshold is obviously far lower than the size of corporations Congress originally sought to cover. . . . By increasing the threshold, it is the intention of the committee to maintain the original congressional intent of applying the sections only to corporations [\*179] which are engaged in some significant degree of commerce.

S. Rep. No. 101-286, 101st Cong., 2nd Sess. 2, 5 (1990).

The language of the legislative history demonstrates that Congress intended to alter a jurisdictional trigger or threshold in order to restore the original Congressional intent of regulating only those corporations engaged in a significant degree of commerce, rather than to prevent all conflicts of interest or anticompetitive conduct. See also [Protectoseal Co. v. Barancik, 23 F.3d \[\\*\\*14\] 1184, 1187 \(7th Cir. 1994\)](#).

**HN4** The United States Supreme Court pointed out that it "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." [Landgraf, 114 S. Ct. at 1501](#). See also [Bruner v. United States, 343 U.S. 112, 96 L. Ed. 786, 72 S. Ct. 581 \(1952\)](#); [Hallowell v. Commons, 239 U.S. 506, 60 L. Ed. 409, 36 S. Ct. 202 \(1916\)](#).

As Justice Scalia discussed in his concurring opinion in *Landgraf*, the key concern of a jurisdictional provision is with the ability to exercise judicial power over a case, not with the conduct or events giving rise to the claim. A new jurisdictional rule may or may not leave a litigant with an alternate forum for his claim, but

the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power--so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after [\*\*15] the statute takes effect is applying it prospectively.

[Id., at 1525](#) (Scalia, J., concurring).

The Supreme Court recognized **HN5** an "apparent tension" between two rules of statutory construction which could apply in cases where the issue of retroactivity is raised: one, "that 'a court is to apply the law in effect at the time it renders its decision;" and two, that "retroactivity is not favored in the law." [Landgraf, 114 S. Ct. at 1496 \(1994\)](#) (quoting [Bradley v. Richmond Sch. Bd., 416 U.S. 696, 711, 40 L. Ed. 2d 476, 94 S. Ct. 2006 \(1974\)](#) and [Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 \(1988\)](#)). However, as the Court noted, "where the congressional intent is clear, it governs." [Landgraf, 114 S. Ct. at 1496](#). There is no need to resort to canons of statutory construction in this case, because congressional intent is clear.

### 3. Savings Clause, [1 U.S.C. § 109](#).

Plaintiffs urge this Court to find that the general savings clause, **HN6** [1 U.S.C. § 109 \(1985\)](#) applies to save their cause of action under the pre-1990 version of [15 U.S.C. § 19](#). The savings clause provides, in relevant part:

The repeal of any statute shall [\*\*16] not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

In [Warden v. Marrero, 417 U.S. 653, 660, 41 L. Ed. 2d 383, 94 S. Ct. 2532 \(1974\)](#), the United States Supreme Court explained that the savings clause was enacted to abolish the common law presumption that repeal of a criminal statute resulted in the abatement of all prosecutions which had not reached final disposition. Historically the Court has held that the clause covered criminal statutes. [Id. at 661](#) (citing [United States v. Reisinger, 128 U.S. 398, 32 L. Ed. 480, 9 S. Ct. 99 \(1888\)](#)). But the Court and several lower courts have also applied the savings clause in civil cases. See [De La Rama S.S. Co. v. United States, 344 U.S. 386, 97 L. Ed. 422, 73 S. Ct. 381 \(1953\)](#) (savings clause permitted insured to recover from government for loss of ship insured under the War Risk Insurance Act, notwithstanding its repeal); [\*\*17] [Hertz v. Woodman, 218 U.S. 205, 54 L. Ed. 1001, 30 S. Ct. 621 \(1910\)](#) (savings clause extends to liability or obligation to pay a tax imposed under a repealed [\*180] statute); [Commonwealth of Mass., Dept. of Pub. Welfare v. Secretary of Agric., 984 F.2d 514](#) (1st Cir.) (savings clause permitted Food and Nutrition Service to impose sanctions against Commonwealth for exceeding allowable margin of error for distributing food stamps, despite repeal of quality control program), cert. denied, 510 U.S. 822, 126 L. Ed. 2d 49, 114 S. Ct. 81 (1993); [Keener v. Washington Metro. Area Transit Auth., 255 U.S. App. D.C. 148, 800 F.2d 1173 \(D.C. Cir. 1986\)](#) (under savings statute, repeal of workers' compensation act did not result in forfeiture of remedies

available at time of repeal for injuries incurred prior to repeal), *cert. denied*, 480 U.S. 918, 94 L. Ed. 2d 690, 107 S. Ct. 1375 (1987).

**HN7** If the "very purpose of Congress [was] to take away jurisdiction, of course it [would] not survive," and [§ 109](#) does not save a statute solely jurisdictional in its scope. [De La Rama, 344 U.S. at 390](#). Section 8 of the Clayton Act is not solely a jurisdictional statute, however; it sets forth [\[\\*\\*18\]](#) the elements of a violation of the prohibition against interlocking directorates.

The question in this case then is whether the amendment to Section 8 of the Clayton Act has the effect of releasing or extinguishing a liability incurred under the statute, neither party having suggested that a penalty or forfeiture is involved here. A close look at the cases holding that the savings statute has preserved civil liabilities incurred under a repealed or amended statute reveals that "liability incurred" is narrowly interpreted.

The United States Supreme Court in [Hertz v. Woodman, 218 U.S. at 217-221](#), discussed the meaning of "liability incurred" in the general savings statute in the context of an inheritance tax case. Woodman's executors sought to recover an inheritance tax paid under protest. The statute in effect at Woodman's death provided that an inheritance tax was "due and payable" within one year of the death of a testator. After Woodman's death, but before the tax was collected or his legacies were distributed, the statute was repealed. The Court held that because the right of succession was absolute upon Woodman's death, and no other fact or event was essential to the imposition [\[\\*\\*19\]](#) of liability, liability for the tax had been imposed at that time. Because death occurred prior to the repeal, the savings provision operated to preserve the tax liability. [Id. at 224](#).

*Hertz v. Woodman* was an action to recover a "liability" already imposed and collected, as opposed to an action to adjudicate whether liability existed, as is presented in the instant case.

The cases that have held that the savings statute preserved a civil cause of action have, almost without exception, involved actions to enforce collection or recovery of a liability already incurred by operation of contract or law, as opposed to actions seeking adjudication of whether liability existed at all. See [De La Rama, 344 U.S. at 388](#) (government agreed that it had incurred liability to shipping company under the War Risk Insurance Act prior to its repeal, and question was where could liability be enforced); [Keener, 800 F.2d at 1175, 1179](#) (suit for recovery of workers' compensation benefits); [Lovetro v. United States, 602 F. Supp. 574 \(S.D.N.Y. 1984\)](#) (suit for wrongfully withheld wages and double-wage penalty).

However, in [Professional & Business Men's Life Ins. Co. v. Bankers Life Co., \[\\*\\*20\] 163 F. Supp. 274, 295 \(D. Mont. 1958\)](#), a district court observed in dictum that [§ 109](#) would save an antitrust cause of action under section 7 of the Sherman Act, "to give effect to the will and intention of Congress." As discussed above, Congress's intention in amending section 8 of the Clayton Act was expressly to return to the practice of regulating conflicts of interest only in those corporations engaged in a significant degree of commerce. Reading [§ 109](#) to save the pre-amendment version of [15 U.S.C. § 19](#) would run counter to "the will and intention of Congress," unlike the situation presented in *Professional & Business Men's Life*.

Accordingly, this Court holds that [1 U.S.C. § 109](#) does not preserve Plaintiffs' right to sue under the pre-amendment version of [15 U.S.C. § 19](#), because liability had not been incurred under the pre-amendment version, and because the will and intention of Congress [\[\\*181\]](#) was to eliminate the jurisdiction of the district courts to hear such cases.

Because the 1990 amendment in fact does not operate retroactively according to the *Landgraf* test; because Congress's stated intention was to limit jurisdiction over interlocking directorate claims; and [\[\\*\\*21\]](#) because the savings statute, [1 U.S.C. § 109](#), does not apply under these circumstances; the 1990 amendment applies to this 1994-filed case. Defendants' motion to dismiss the antitrust count is Granted for failure to satisfy the jurisdictional threshold established by the 1990 amendment to section 8 of the Clayton Act, [15 U.S.C. § 19](#).

## II. Supplemental Jurisdiction over Shareholder Claims

The remaining counts of Plaintiffs' complaint assert state law claims, for which there is no independent basis for federal jurisdiction. [HN8](#)<sup>8</sup> A district court has supplemental jurisdiction over claims that are so related to a claim over which it has original jurisdiction that it forms part of the same case or controversy. [28 U.S.C. § 1367\(a\) \(1993\)](#).

The federal claim having been dismissed, the next issue is whether it continues to be appropriate to exercise supplemental jurisdiction over the remaining counts of Plaintiffs' complaint. [HN9](#)<sup>9</sup> When a court has dismissed all claims over which it has original jurisdiction, it may, but is not required to, decline to exercise supplemental jurisdiction over any remaining claims. [28 U.S.C. § 1367\(c\)\(3\)](#).

[28 U.S.C. § 1367\(c\)](#) specifies four circumstances under [\[\\*\\*22\]](#) which supplemental jurisdiction may be declined, one of which is when the court "has dismissed all claims over which it has original jurisdiction." [28 U.S.C. § 1367\(c\)\(3\)](#). Prior to the enactment of [§ 1367](#) in 1990, the exercise of judicial discretion to hear a pendent state claim was guided by [United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 \(1966\)](#), in which the Court stated:

It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . . . Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

[Section 1367\(c\)](#) rejected the language in *Gibbs* which seems to require dismissal of state claims if the federal claim is dismissed before trial by providing that even in those circumstances the decision to retain or relinquish jurisdiction is within the court's discretion. [\[\\*\\*23\]](#) See McLaughlin, *The Federal Supplementary Jurisdiction Statute--A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 980 (1992). See also [Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 98 L. Ed. 2d 720, 108 S. Ct. 614 \(1988\)](#). But see [Salim v. Proulx, 93 F.3d 86](#), No. 95-7899, 1996 WL 476896, at \*6 (2d Cir. Aug. 23, 1996).

Because the dismissal of the federal claim has occurred "at the threshold" of the case, and before the parties have engaged in discovery on the pendent claims, this Court exercises its discretion under [28 U.S.C. § 1367\(c\)\(3\)](#) to dismiss the pendent state claims in Counts II through IV. *Salim*, 1996 WL 476896, at \*1.<sup>3</sup>

[HN10](#)<sup>10</sup> If the dismissal of the antitrust count is based on lack of jurisdiction over the subject matter of the suit, this Court of course lacks the power to adjudicate any supplemental claims appended to it, and the [\[\\*\\*24\]](#) remaining claims must be dismissed. [Envirotech Corp. v. Bethlehem Steel Corp., 729 F.2d 70, 73 \(2d Cir. 1984\)](#). [Crane Co. v. American Standard, Inc., 603 F.2d 244, 254 \(2d Cir. 1979\)](#).

## CONCLUSION

Defendants' Motion to Dismiss the Complaint (paper 9) is hereby GRANTED. All other motions pending as of the date of this opinion are hereby DENIED as MOOT.

Dated at Burlington, Vermont this 20<sup>th</sup> day of September, 1996.

William K. Sessions, III

United States District Court Judge

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<sup>3</sup> Should the Plaintiffs choose to refile their claims in state court, of course [28 U.S.C. § 1367\(d\)](#) will operate to toll the period of limitations.



## Baker's Carpet Gallery v. Mohawk Indus.

United States District Court for the Northern District of Georgia, Rome Division

September 23, 1996, Decided ; September 23, 1996, FILED

CIVIL ACTION FILE NO. 4:94-CV-0101-HLM

### **Reporter**

942 F. Supp. 1464 \*; 1996 U.S. Dist. LEXIS 15008 \*\*; 1996-2 Trade Cas. (CCH) P71,612

Baker's Carpet Gallery, Inc., Plaintiff, v. Mohawk Industries, Inc., Defendant.

**Disposition:** [\*\*1] Defendant's Motion for Summary Judgment [39] with respect to claims arising from alleged antitrust violations that occurred prior to July 30, 1993 GRANTED IN PART, and Defendant's Motion with respect to claims arising from alleged antitrust violations that occurred after July 30, 1993 DENIED IN PART. Plaintiff's Motion for Leave to File a Very Short Response With Brief in Support [63] GRANTED.

## **Core Terms**

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termination, prices, dealer, manufacturer, resale price, continuity, summary judgment, employees, transshipping, conspiracy, antitrust, carpet, telephone, adhere, successor liability, Sherman Act, allegations, Deposition, ambiguous, policies, products, circumstantial evidence, conversations, adduced, courts, alleged conspiracy, memorandum, antitrust violation, predetermined, general rule

## **LexisNexis® Headnotes**

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

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

### **HN1[] Summary Judgment, Entitlement as Matter of Law**

When deciding a motion for summary judgment, the court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion.

Mergers & Acquisitions Law > General Business Considerations > General Overview

Torts > Vicarious Liability > Corporations > Predecessor & Successor Corporations

Mergers & Acquisitions Law > Liabilities & Rights of Successors > General Overview

Mergers & Acquisitions Law > Liabilities & Rights of Successors > Mere Continuation

### **HN2[] Mergers & Acquisitions Law, General Business Considerations**

942 F. Supp. 1464, \*1464A 996 U.S. Dist. LEXIS 15008, \*\*1

A corporation that purchases or otherwise acquires the assets of a second corporation does not assume the debts and liabilities of the second corporation. The doctrine of successor liability recognizes four traditional exceptions to this general rule, allowing a court to impose liability upon the successor corporation. One such exception applies when the successor corporation is a "mere continuation" or reincarnation of the selling corporation.

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

### **HN3** **Summary Judgment, Supporting Materials**

When evaluating a motion for summary judgment, the court may consider only that evidence that would be admissible at trial. Testimony as to an out-of-court statement by a nonparty witness is inadmissible hearsay, and therefore cannot be considered by the court when assessing the suitability of summary judgment.

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

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

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

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

### **HN4** **Conspiracy, Elements**

In order to admit evidence under the co-conspirator exception, the Eleventh Circuit requires a plaintiff to adduce sufficient evidence, independent of the co-conspirator statement itself, to establish both the conspiracy and the declarant's participation in the conspiracy.

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

### **HN5** **Summary Judgment, Opposing Materials**

As a general rule, the party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. The moving party's burden is discharged by showing, that is, pointing out to the trial court, that there is an absence of evidence to support the nonmoving party's case. In assessing whether the movant has met this burden, the trial court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Once the moving party has adequately supported its motion, the nonmovant has the burden of showing summary judgment is improper by coming forward with specific facts that demonstrate the existence of a genuine issue for trial.

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

942 F. Supp. 1464, \*1464A 996 U.S. Dist. LEXIS 15008, \*\*1

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Labor & Employment Law > Wrongful Termination > General Overview

## **HN6** Price Fixing & Restraints of Trade, Vertical Restraints

The Eleventh Circuit has formulated a specialized test to assess, at the summary judgment stage, a dealer's claims of wrongful termination by a manufacturer acting pursuant to an illegal resale price maintenance agreement. The test provides that, in order to survive a defendant's properly supported motion for summary judgment, the plaintiff must adduce facts that tend to show (1) a conspiracy to set prices existed, and (2) the plaintiff was terminated pursuant to that conspiracy. To satisfy the first part of the test, the plaintiff must (A) point to evidence which tends to exclude the possibility that the manufacturer was operating independently in making his determination to terminate the distributor; and (B) satisfy the court that the conspiracy which he alleges is, objectively, an economically reasonable one. Sub-part A is satisfied if the plaintiff shows (i) the manufacturer sought an agreement from the dealer to adhere to resale prices; and (ii) the dealer communicated in some way its acquiescence in that agreement.

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

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

Evidence > Inferences & Presumptions > Inferences

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

Civil Procedure > Judgments > Summary Judgment > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

## **HN7** Summary Judgment, Opposing Materials

The general summary judgment standard has been modified slightly for antitrust violations involving resale price maintenance agreements. Consequently, antitrust plaintiffs face a heavy standard when opposing a properly supported motion for summary judgment, because courts are limited in the range of permissible inferences that can be made from ambiguous evidence. Evidence is ambiguous if it is equally consistent with a finding of permissible competition as it is with a finding of illegal conspiracy. Without additional direct or circumstantial evidence, ambiguous evidence alone cannot support an inference of conspiracy. As a result, a conclusory statement by the plaintiff that a conspiracy existed, without more, does not support even an inference of conspiracy and cannot survive a motion for summary judgment.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Inferences & Presumptions > Inferences

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

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

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

## **HN8** Summary Judgment, Evidentiary Considerations

942 F. Supp. 1464, \*1464A 1996 U.S. Dist. LEXIS 15008, \*\*1

Despite the higher summary judgment standard for antitrust violations involving resale price maintenance agreements, the general rule that reasonable inferences from the evidence must be taken in favor of the nonmoving party is not changed. The plaintiff's evidence need not be such that only an inference of conspiracy may be derived from it. It must, however, go beyond equivocal complaints and tend to exclude the inference of independent action. Once reasonable inferences are taken in favor of the nonmoving party, the stringent standard of proof in vertical restraint cases must be satisfied. Thus, allegations by the plaintiff that are not merely conclusory, but rather can serve as direct evidence if believed, are enough to defeat a summary judgment motion.

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

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

### **HN9** **Price Fixing & Restraints of Trade, Vertical Restraints**

The test for assessing whether plaintiff's evidence of an agreement to restrain trade in a dealer termination case provides that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be 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 > Vertical Restraints > General Overview

### **HN10** **Price Fixing & Restraints of Trade, Vertical Restraints**

In a vertical restraint case, plaintiff has the burden of showing that the alleged conspiracy is, objectively, a reasonable one.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

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

### **HN11** **Price Fixing & Restraints of Trade, Vertical Restraints**

A manufacturer may announce in advance the terms under which it will sell its products, and may refuse to deal with those customers who do not comply with the terms. However, when the manufacturer's actions go beyond mere announcements of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, the resulting agreement is a per se violation of the Sherman Act. [15 U.S.C.S. § 1](#). Included in "other means" are threats of termination and other coercive actions taken after a dealer fails to conform to a manufacturer's predetermined prices.

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

942 F. Supp. 1464, \*1464 1996 U.S. Dist. LEXIS 15008, \*\*1

## [\*\*HN12\*\*](#) [blue download icon] Price Fixing & Restraints of Trade, Vertical Restraints

In the context of a summary judgment motion on a dealer's claims of wrongful termination by a manufacturer acting pursuant to an illegal resale price maintenance agreement, evidence is ambiguous if, notwithstanding its source, it is equally consistent with a finding of permissible competition as it is with a finding of illegal conspiracy.

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

Contracts Law > Contract Formation > General Overview

## [\*\*HN13\*\*](#) [blue download icon] Price Fixing & Restraints of Trade, Vertical Restraints

To discharge the requirement of showing that the plaintiff in some way communicated its acquiescence in the manufacturer's proposed agreement to adhere to predetermined resale price requirement, the evidence must reveal a meeting of the minds in an unlawful arrangement which includes more than a showing that the distributor conformed to the resale price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

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

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

## [\*\*HN14\*\*](#) [blue download icon] Price Fixing & Restraints of Trade, Vertical Restraints

If the alleged price-fixing conspiracy is economically irrational and practically infeasible, then summary judgment should be granted. This requirement does not introduce a special burden on plaintiffs facing summary judgment in antitrust cases, but rather permits summary judgment if the inferences arising from the plaintiff's evidence are so unreasonable as to be "economically senseless."

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > Scope > General Overview

## [\*\*HN15\*\*](#) [blue download icon] Sherman Act, Claims

A manufacturer may refuse to sell its goods to anyone, even if the refusal is based on a dealer's failure to adhere to suggested resale prices. A manufacturer's refusal to deal, however, is illegal under the Sherman Act if performed pursuant to a price-fixing conspiracy between the manufacturer and its dealer. In order to establish a violation of the Sherman Act in this context, plaintiff must present direct or circumstantial evidence that supports a reasonable inference that a causal connection exists between the termination and the alleged conspiracy.

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

## **HN16** Price Fixing & Restraints of Trade, Vertical Restraints

When the manufacturer disputes the dealer's testimony at summary judgment in a case alleging a vertical restraint, the choice between two reasonable interpretations of the testimony properly is left for the jury.

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

## **HN17** Price Fixing & Restraints of Trade, Vertical Restraints

Even if the court concludes that defendant participated in an illegal resale price maintenance agreement, plaintiff still must demonstrate that plaintiff has suffered antitrust injury. The Eleventh Circuit has held that a plaintiff can suffer antitrust injury simply by losing its dealership and consequently losing sales and profits.

**Counsel:** For BAKER'S CARPET GALLERY, INC., plaintiff: Tony Glen Powers, Rogers & Hardin, Atlanta, GA.

For MOHAWK INDUSTRIES, INC., defendant: Robert D. McCallum, Jr., Randall Lee Allen, Beth Kirby Toberman, Alston & Bird, Atlanta, GA.

For MOHAWK INDUSTRIES, INC., counter-claimant: Randall Lee Allen, Beth Kirby Toberman, Alston & Bird, Atlanta, GA.

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For MOHAWK INDUSTRIES, INC., counter-claimant: Robert D. McCallum, Jr., Randall Lee Allen, Beth Kirby Toberman, Alston & Bird, Atlanta, GA.

For BAKER'S CARPET GALLERY, INC., counter-defendant: Tony Glen Powers, Rogers & Hardin, Atlanta, GA.

**Judges:** Harold L. Murphy, UNITED STATES DISTRICT JUDGE

**Opinion by:** Harold L. Murphy

## **Opinion**

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### **[\*1467] ORDER**

**[\*\*2]** This is an antitrust case in which Plaintiff claims that Defendant unlawfully perpetuated and enforced a resale price maintenance agreement in violation of the Sherman Act. Plaintiff also alleges that Defendant illegally terminated Plaintiff's exclusive distribution rights after Plaintiff failed to abide by the pricing agreement. The case is before the Court on Defendant's Motion for Summary Judgment [39] and Plaintiff's Motion for Leave to File a Very Short Response with Brief in Support [63].<sup>1</sup>

### **I. Background**

Keeping in mind that, **HN1** when deciding a motion for summary judgment, the Court "must view the evidence and all factual inferences in the light most favorable to the party opposing the motion," the Court provides a general statement of facts. See *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993). This statement

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<sup>1</sup> The Court grants Plaintiff's Motion for Leave to File a Very Short Response with Brief in Support.

does not represent actual findings of fact and is **[\*\*3]** presented simply to place the Court's legal analysis **[\*1468]** within the context of a specific case or controversy.

Plaintiff is a closely-held Georgia corporation that sold carpets at its store, Baker's Carpet Gallery, in Tunnel Hill, Georgia. Plaintiff's owners, Terry and Mary Baker, formed Plaintiff upon obtaining assurances that Plaintiff could enter into an agreement ("exclusivity agreement") with Fieldcrest Cannon, Inc., ("Fieldcrest") to serve as the sole authorized dealer for Karastan-brand carpets in the Dalton, Georgia, marketplace. See Deposition of John Eggleston ("Eggleston Dep.") at 32-33.

Fieldcrest's Carpet and Rug Division ("Karastan division") manufactured and distributed Karastan carpets. Fieldcrest entered into the exclusivity agreement <sup>2</sup> with Plaintiff, naming Plaintiff as the sole authorized dealer of Karastan carpets in the Dalton market. Affidavit of Terry Baker ("Baker Aff.") P 3. Fieldcrest continued this relationship with Plaintiff until July 30, 1993.

**[\*\*4]** Defendant Mohawk Industries, Inc., purchased the principal assets of the Karastan division from Fieldcrest on July 30, 1993. See Deposition of William Storey on September 26, 1994 ("Storey Dep. 1") at 62-63. Defendant continued the exclusivity agreement with Plaintiff until Defendant terminated the exclusivity agreement on September 1, 1993. See *id.* at 62-63, 72-73; Deposition of William Qualls ("Qualls Dep.") Ex. 11.

#### A. Business Operations of Fieldcrest Cannon, Inc.

From Plaintiff's formation until July 30, 1993, the Karastan division operated as a distinct business unit within Fieldcrest. Storey Dep. 1 at 62-63. During this time period, Fieldcrest maintained an exclusive distribution system for Karastan carpets, allowing only authorized dealers such as Plaintiff to sell these carpets to the public. Deposition of William Storey on March 30, 1995 ("Storey Dep. 2") at 44. Fieldcrest believed its exclusive dealership system fostered an image of top-of-the-line quality and superior consumer recognition for the Karastan brand. *Id.*

Fieldcrest also instituted a policy prohibiting "transshipping," or "selling to dealers who are not authorized Karastan dealers." Qualls **[\*\*5]** Dep. Ex. 6. On January 18, 1991, Fieldcrest sent a letter to its authorized Karastan dealers, including Plaintiff, warning that "should a Karastan dealer sell any Karastan product to a non-Karastan dealer, our business with that Karastan dealer will be terminated. This policy will be applied consistently to all dealers, and we urge you to view this announcement seriously." *Id.*

Since at least 1991, Fieldcrest published manufacturer's suggested retail prices and suggested promotional prices for Karastan products. Deposition of Dennis Thiets ("Thiets Dep.") at 16-17, 36-39. The promotional prices reflected a 40 percent discount off the suggested retail prices. *Id.* In 1992, Fieldcrest announced a "deep discounting" policy, forbidding authorized dealers from selling Karastan products at prices lower than 10 percent below the suggested promotional prices. Qualls Dep. Exh. 7. Fieldcrest warned Karastan dealers that a violation of the deep discounting policy would result in termination of the dealer's exclusivity agreement. *Id.*

#### B. Formation of an Alleged Resale Price Maintenance Agreement Between Plaintiff and Fieldcrest in 1991

In November or December 1991, Philip Haney, **[\*\*6]** Fieldcrest's national vice president for sales for the Karastan division, investigated a transaction executed by Plaintiff that allegedly violated Fieldcrest's transshipping prohibition. Deposition of Philip Haney ("Haney Dep.") at 196-201. Fieldcrest dispatched two Karastan division representatives to Plaintiff's store, where they presented Plaintiff's co-owner, Terry Baker, with a letter terminating the exclusivity agreement. Deposition of Terry Baker ("Baker Dep.") at 153-155. Subsequently, Baker telephoned Haney and

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<sup>2</sup>The parties never reduced the terms of the exclusivity agreement to a single writing. See Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment on its Counterclaim at 6.

adamantly denied that the transaction in question constituted transshipping, and Haney agreed to review the transaction records [**\*1469**] and reconsider the decision to terminate the exclusivity agreement. *Id.* at 155-78.

Some time later, Haney telephoned Baker and informed him that the transaction "certainly [did not raise] a transshipping issue, but I do have a problem with the price." <sup>3</sup> Baker Dep. at 173. Haney "suggested that [Baker] needed to do something about [Plaintiff's] pricing. . . [and] suggested that [Plaintiff] get [its] prices up." *Id.* at 173-74. In the meantime, Haney said, the decision whether to terminate Plaintiff's exclusivity agreement [**\*\*7**] would remain "on hold." *Id.* at 174.

Later in the week, Haney telephoned Baker and told him that Haney "would like for [Baker] to raise [Plaintiff's] prices in general." *Id.* at 175. Baker responded that raising prices "was going to cost [Plaintiff] a lot of business. And [Haney] said, 'Well, the way it had to be was that from now on . . . [Plaintiff] was not to price anything on the phone at less than 10 percent below [**\*\*8**] the promotional price.'" *Id.* Additionally, Haney "asked again that [Baker] raise [Plaintiff's] in-store prices." *Id.*

Before ending the telephone conversation, Haney "made it very clear to [Baker] that if [Plaintiff] sold one piece of Karastan carpet on the phone at below 10 percent less than the promotional price, [Plaintiff] would be cut off." Baker Dep. at 176-77. Baker promised that he would "live up" to this demand. *Id.*

John Eggleston, Fieldcrest's regional vice president for the Karastan division, has confirmed the existence of a pricing agreement between Plaintiff and Fieldcrest. Eggleston Dep. at 74. Eggleston has testified that Plaintiff's prices "had to stay within the guide -- after reinstatement or after [Plaintiff] had been approved to retain the line, . . . there were certain rules that had to be followed and those rules were that [Plaintiff] had to maintain the suggested retail pricing." *Id.*

Following Baker's conversations with Haney, Plaintiff conformed to Fieldcrest's pricing requirements for telephone sales. *Id.* at 177, 192-96. Baker printed new price sheets to reflect separate prices for telephone sales, and Baker instructed Plaintiff's [**\*\*9**] salespeople to adhere to the new prices. Baker Dep. at 113-14, 121-24; Deposition of Dennis Hammontree at 18-21. On several occasions, Fieldcrest employees monitored Plaintiff's prices by telephoning Plaintiff's store and requesting a price quotation. Deposition of Greg Watkins at 42-44. After Plaintiff implemented the new pricing policy, Plaintiff's sales volume fell by as much as \$ 750,000. Baker Dep. at 179.

### C. Allegations of Transshipping and Pricing Violations in 1993

On April 5, 1993, Plaintiff sold 90 square yards of Karastan carpet for \$ 1,260 to Robert Kenemer, a resident of Dalton, Georgia. Deposition of Robert Kenemer at 11-18. As a result of this transaction ("Kenemer transaction"), a Karastan dealer in Kansas City, Missouri, alleged that Plaintiff transshipped a Karastan carpet, in violation of the exclusivity agreement. Thiets Dep. at 184-85. The Kansas City dealer, and consequently Fieldcrest's Karastan division executives, believed Plaintiff had sold the carpet over the telephone and then shipped the carpet to the unauthorized dealer. See Thiets Dep. at 192-93 & Ex. 33; Haney Dep. Ex. 34.

On July 13, 1993, Dennis Thiets, Fieldcrest's midwest regional vice [**\*\*10**] president for the Karastan division, prepared a memorandum that recited the dealer's allegations and concluded, "In addition to the transshipments, I think it is very special that they are selling the product at \$ 14 per square yard and our promotional price is \$ 19.95 carpet only." Thiets Dep. Ex. 33. Thiets forwarded [**\*1470**] his memorandum to Philip Haney, who now served as

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<sup>3</sup> Defendant disputes Baker's deposition testimony as to the time, form, and content of this conversation. Haney's deposition testimony states that Haney traveled to Plaintiff's store to speak with Baker personally about the alleged transshipping incident. Haney Dep. at 204-05, 215-16. Contrary to Baker's deposition testimony, Haney states that Baker, on his own initiative, said that Plaintiff, in order to avoid transactions that would constitute transshipping, would no longer quote prices below Fieldcrest's promotional retail price when making telephone sales. *Id.* at 207-08.

Fieldcrest's regional vice president for the Karastan division,<sup>4</sup> and William Storey, Fieldcrest's director of marketing for the Karastan division. *Id.*

On or about July 13, 1993, Haney prepared a memorandum to his files concerning the Kenemer transaction. Haney Dep. Ex. 34. The memorandum states that a "second" problem arising from the Kenemer transaction is that "selling the merchandise at [\$ 14 per square yard] is very [\*\*11] much a violation of our deep discounting policy." *Id.* Haney did not share this memorandum with any of the Karastan division employees, but he discussed the Kenemer transaction with Storey.<sup>5</sup>

#### **D. Defendant's Purchase of the Karastan Division and Alleged Perpetuation of the Resale Price Maintenance Agreement**

On July 30, 1993, Defendant purchased the assets of the Karastan division from Fieldcrest. Defendant did not integrate the Karastan division into its overall operations. Storey Dep. 1 at 61-63, 72-73. Instead, the Karastan division continued to operate as a distinct business unit, with Defendant managing the Karastan operation "as a separate function from a sales and marketing aspect." *Id.* Defendant did not make any significant changes to the Karastan division's sales and marketing [\*\*12] operations. *Id.* Most of Fieldcrest's Karastan division executives simply relocated to identical positions under Defendant's employment. *Id.* at 70. Defendant did not alter any of the Karastan division's policies with its authorized dealers, including the policies that governed pricing and transshipping. *Id.* at 85-88. Until Defendant published a revised set of policies in December 1993, the guidelines established by Fieldcrest in 1991 and 1992 remained the authoritative source of Defendant's policies for authorized Karastan dealers. *Id.* at 89-90.

#### **E. Defendant's Termination of the Exclusivity Agreement With Plaintiff**

On September 1, 1993, Storey--who then was an employee of Defendant--sent Plaintiff a letter terminating the exclusivity agreement. Qualls Dep. Ex. 11. The letter states that the decision to terminate the exclusivity agreement is based on Plaintiff's April 1993 violation of Defendant's transshipping policy. *Id.* After receiving Storey's letter, Baker telephoned Storey on several occasions and attempted to convince Storey that the Kenemer transaction did not violate Defendant's transshipping policy. Baker Dep. at 222-226. Baker also mailed Storey [\*\*13] a copy of the invoice, a receipt, and a letter detailing Plaintiff's version of the Kenemer transaction. Storey Dep. Ex. 80. During one telephone conversation, Storey told Baker that "if [Plaintiff] had sold it at the price it should have been sold, then it wouldn't have been a problem." Baker Dep. at 235. Baker subsequently spoke to Haney--then an employee of Defendant--regarding the termination letter, and Haney told Baker that Plaintiff's "price was below the level that it should have been." *Id.* at 238. Defendant did not reconsider its termination of the exclusivity agreement.

#### **F. Procedural History**

In early 1994, Plaintiff ceased operations. On May 12, 1994, Plaintiff filed suit in this Court alleging that Defendant violated the Sherman Act. On November 21, 1994, Plaintiff filed an amended complaint, adding Fieldcrest as a defendant. Plaintiff settled its claim with Fieldcrest, and the Court entered an order dismissing the claim on December 15, 1995.

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<sup>4</sup> At the time of the 1991 transshipping allegation, Philip Haney was national vice president for sales for the Karastan division, and he served as the supervisor of Plaintiff's Karastan account. See page 4 *infra*.

<sup>5</sup> Defendant strongly contests the content, as well as the significance, of the conversation between Storey and Haney, which took place prior to Plaintiff's notification that the exclusivity agreement had been terminated.

## II. Defendant's Liability Under Successor Liability Theories for the Actions of Fieldcrest Prior to Defendant's Purchase of the Karastan Division

Plaintiff argues that Defendant is liable, under a theory of **[\*\*14]** successor liability, for antitrust violations committed by the employees of the Karastan division during Defendant's ownership, as well as during Fieldcrest's ownership, of the division. The alleged resale **[\*1471]** price maintenance agreement giving rise to this case was created by Plaintiff and Fieldcrest in 1991. Defendant's involvement arose only after Defendant purchased the assets of the Karastan division from Fieldcrest in 1993. Nonetheless, Plaintiff contends that, after Defendant purchased the Karastan division, Defendant maintained the division's corporate structure to such a substantial degree that Defendant necessarily assumed liability for any antitrust violations the division may have committed under Fieldcrest's ownership. Defendant counters that the general rules of successor liability foreclose Defendant's liability for any antitrust violations that occurred prior to its purchase of the Karastan division on July 30, 1993.

As a general rule, [\*\*HN2\*\*](#)<sup>↑</sup> "a corporation that purchases or otherwise acquires the assets of a second corporation does not assume the debts and liabilities of the second corporation." *Bud Antle, Inc. v. Eastern Foods, Inc.*, [758 F.2d 1451, 1456 \(11th Cir. 1985\)](#). **[\*\*15]** The doctrine of successor liability recognizes four traditional exceptions to this general rule, allowing a court to impose liability upon the successor corporation. *Id.* One such exception applies when the successor corporation is a "mere continuation" or reincarnation of the selling corporation.<sup>6</sup> *Id.* Plaintiff does not argue that Defendant fits within the "mere continuation" exception,<sup>7</sup> but instead relies on a broadened test of successorship, "substantial continuity," that has evolved from the "mere continuation" exception. See [\*United States v. Mexico Feed & Seed Co., Inc.\*, 980 F.2d 478, 487 \(8th Cir. 1992\)](#).

**[\*\*16]** The "substantial continuity" exception originated from a line of Supreme Court labor relations cases, starting with [\*Golden State Bottling Co. v. NLRB\*, 414 U.S. 168, 38 L. Ed. 2d 388, 94 S. Ct. 414 \(1973\)](#). See [\*Mexico Feed & Seed\*, 980 F.2d at 487-88](#). Since *Golden State Bottling*, the exception has been applied in the context of products liability and federal environmental regulation, where "the public policy vindicated by recovery from the implicated assets is paramount to that supported by traditional rules delimiting successor liability." See [\*Mexico Feed & Seed\*, 980 F.2d at 487-88](#) (CERCLA); [\*Cyr v. B. Offen & Co., Inc.\*, 501 F.2d 1145 \(1st Cir. 1974\)](#) (products liability). Although the test for the "substantial continuity" exception varies in different jurisdictions, the test typically considers:

whether the purchaser retained the same facilities, same employees, same name, same production facilities in the same location, same supervisory personnel; and produced the same product; maintained a continuity in assets; continued the same general business operation; and held itself out to the public as a continuation of the previous enterprise.

*Mexico Feed* **[\*\*17]** & [\*Seed\*, 980 F.2d at 488 n.10](#).<sup>8</sup>

<sup>6</sup> Plaintiff has not alleged that any of the three remaining exceptions are applicable, including (1) express or implied agreement to assume liability for the alleged resale price maintenance agreement; (2) the existence of a "de facto" merger between Defendant and Fieldcrest; and (3) fraud in the transaction so that Fieldcrest can avoid liability for its conduct. See [\*Bud Antle, Inc. v. Eastern Foods, Inc.\*, 758 F.2d 1451, 1456 \(11th Cir. 1985\)](#).

<sup>7</sup> "The key element of a '[mere] continuation' is a common identity of the officers, directors, and stockholders in the selling and purchasing corporations." [\*Bud Antle\*, 758 F.2d at 1459](#). Employment of the selling business entity's officers by the successor corporation is not enough--there must be a transfer of stock. [\*Id. at 1458-59\*](#). Plaintiff has adduced no evidence revealing a transfer of stock from Fieldcrest to Defendant, and therefore cannot invoke the "mere continuation" exception to support its claim.

<sup>8</sup> In citing this form of the test, the Court does not suggest that the form is superior to others adopted in other jurisdictions.

To the Court's knowledge, no court has applied the "substantial continuity" exception to assign liability to a successor corporation in the context of an antitrust claim.<sup>9</sup> The Eleventh Circuit, while adopting the "substantial continuity" exception in the context of labor law, see *Road Sprinkler Fitters Local Union No. 669 v. Independent Sprinkler Corp.*, 10 F.3d 1563, 1567 (11th Cir.), cert. denied, 513 U.S. 868, 130 L. Ed. 2d 122, 115 S. Ct. 189 (1994), is silent on the prospect of employing the exception in an antitrust action.

[\*\*18] Courts adopting the "substantial continuity" exception have identified four policies that justify its use. First, and most important, is the need to prevent a responsible party from evading a federal statute's remedial purpose simply through the creative structuring of subsequent transactions. See, e.g., *Mexico Feed & Seed*, 980 F.2d at 488 (CERCLA); *Cyr*, 501 F.2d at 1153-54 (products liability). The second policy reflects the national interest in uniform enforcement of federal statutes, "commanding that . . . successor liability be governed by a uniform federal rule of decision rather than by the laws of the individual states." See *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1283 (E.D. Pa. 1994) (CERCLA). Third is the need to realize the stated intent of Congress or the regulatory agency charged with implementing remedial statutes. See *id. at 1285* (citing a memorandum issued by the Environmental Protection Agency that expressly adopted the position that a successor corporation is liable for the acts of a predecessor under the "substantial continuity" exception).

The fourth and final policy justification behind the "substantial continuity" exception [\*\*19] is highlighted in a Third Circuit opinion in which the court refused to adopt the exception in the context of strict products liability.<sup>10</sup> In *Polius v. Clark Equipment Co.*, 802 F.2d 75 (3d Cir. 1986), the court found the exception to be "an unsound exception to the general rule" that an asset purchaser does not acquire the seller's liabilities. *802 F.2d at 75*. The court expressed concern that the exception "brushes aside the bedrock requirement" of a causal relationship between a defendant's acts and a plaintiff's injury, thus imposing liability "on entities which in fact had no connection with the acts causing injury." *Id. at 81*. A district court, following *Polius*, found the "substantial continuity" exception more appropriate in environmental cases involving CERCLA, where liability is imposed even in the absence of a causal link between the defendant and the harm. See *Atlantic Richfield*, 847 F. Supp. at 1285-87 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (finding causation requirement to be incompatible with the basic structure of CERCLA's definition of responsible parties)). Following the reasoning of the Third Circuit courts, [\*\*20] the Court concludes that the fourth policy favoring use of the "substantial continuity" exception is the absence of a causation requirement to establish liability under the statute in question.

Applying these four policies to the facts of this case, the Court declines to adopt the "substantial continuity" exception as a necessary means of achieving the policies and objectives of **antitrust law**.

First, adoption of the "substantial continuity" exception is not necessary to prevent either Fieldcrest or Defendant from evading the remedial purposes of the Sherman Act. Defendant is undoubtedly liable for any violation of antitrust laws committed by Karastan employees after its purchase of the Karastan division. [\*\*21] *15 U.S.C.A. § 1 et seq. (1973)*. Likewise, the sale of the Karastan division did nothing to alter Fieldcrest's liability for antitrust violations that occurred before Fieldcrest sold the division. See, e.g., *United States v. Gold*, 743 F.2d 800, 822 (11th Cir. 1984) (corporation is liable for acts or omissions of its agents, performed in the scope of the agents' employment), cert. denied, 469 U.S. 1217, 84 L. Ed. 2d 341, 105 S. Ct. 1196 (1985). Arguably, a selling company could evade antitrust liability by selling the company's entire assets and subsequently dissolving. However, such a scenario already is addressed by the "de facto merger" exception to successor liability, which is applied when "the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible." [\*1473] *Bud Antle*, 758 F.2d at 1458. A debate whether the "de facto merger" exception

<sup>9</sup> As discussed below, the court in *In Re Master Key Antitrust* applied the "continuity of enterprise" test, which some courts have described as identical to the "substantial continuity" exception. See *Anderson v. City of Minnetonka*, 1993 U.S. Dist. LEXIS 4846, 1993 WL 95361, at \*7 (D. Minn. January 27, 1993).

<sup>10</sup> Several courts presented with the opportunity to adopt the "substantial continuity" exception have declined to do so. See, e.g., *Florom v. Elliott Mfg.*, 867 F.2d 570, 579 (10th Cir. 1989); *Hoover v. Recreation Equipment Corp.*, 792 F. Supp. 1484, 1495 (N.D. Ohio 1991) (both products liability cases).

adequately prevents evasion of antitrust laws is academic at any rate, because in this case the selling corporation continues to exist; indeed, Plaintiff successfully litigated an antitrust claim against Fieldcrest, resulting in a settlement of \$ 162,500. For these [\*\*22] reasons, Plaintiff has "not shown that application of the traditional mere continuation exception, [as opposed to the "substantial continuity" exception], would frustrate [the statute's] remedial purposes in this case." See *Sylvester Bros. Development Co. v. Burlington Northern R.R.*, 772 F. Supp. 443, 449 (D. Minn. 1990).

Second, the "substantial continuity" exception is not required to achieve uniform enforcement of the Sherman Act. "Most jurisdictions" recognize the four traditional exceptions to the general rule on limited successor liability, with only a handful of courts adopting the broader "substantial continuity" exception in contexts that do not include **antitrust law**. See *Bud Antle*, 758 F.2d at 1456; *Mexico Feed & Seed*, 980 F.2d at 487. The courts that have addressed successor liability in an antitrust context have relied only on the four traditional exceptions. See, e.g., *State v. Louis Trauth Dairy, Inc.*, 1996 U.S. Dist. LEXIS 9176, 1996 WL 343440, at \*5-6 (S.D. Ohio April 25, 1996) (granting summary judgment to successor corporation); *In Re Catfish Antitrust Litigation*, 908 F. Supp. 400, 412 (N.D. Miss. 1995).

Plaintiff cites *In Re Master Key Antitrust Litigation*, [\*\*23] 1977-1 Trade Cas. (CCH) P61,456 (D. Conn. Sept. 28, 1976), as an example of a court adopting the "substantial continuity" exception in an antitrust case. The Court reads *In Re Master Key* differently. Although the *In Re Master Key* court states that it applies a "continuity of enterprise" test--used by several courts as a synonym for the "substantial continuity" exception--the factors considered by the court suggest that it applied the same traditional exceptions as the courts in *Louis Trauth Dairy* and *In Re Catfish*. *Id.* Specifically, the court noted that the shareholders of the selling company acquired stock in the buying company, thus fulfilling the primary requirement of the "mere continuation" exception--from which the "substantial continuity" exception arises. See *Bud Antle*, 758 F.2d at 1458-59. To the extent that *In Re Master Key* suggests the adoption of a broader test than the "mere continuation" exception, the Court declines to follow the suggestion.

Third, the antitrust statutes and regulations do not reveal an intent to broaden traditional forms of successor liability. See *15 U.S.C.A. §§ 7, 12* (1973) (defining "person" held liable under the Sherman [\*\*24] Act to include a "corporation" but providing no further guidance). Plaintiff has not pointed to, nor has the Court been able to uncover, any regulation or statement by Congress or the Federal Trade Commission that evinces an intent to adopt a broader theory of successor liability. Cf. *Atlantic Richfield*, 847 F. Supp. at 1285 (citing EPA memorandum that advocates adoption of exception identical to "substantial continuity" exception). The Court therefore concludes that adoption of the "substantial continuity" exception is not necessary to comply with the objectives and intent underlying the Sherman Act.

Fourth, unlike CERCLA, the Sherman Act retains traditional causation as an element of a defendant's liability. *Foremost-McKesson, Inc. v. Instrumentation Laboratory, Inc.*, 527 F.2d 417, 418 (5th Cir. 1976) ("The necessity for proof of causation in a private antitrust action is . . . clear."). Comparatively, "Congress specifically rejected including a causation requirement in [CERCLA's definition of responsible parties]." *Atlantic Richfield*, 847 F. Supp. at 1285. This legislative purpose led the Third Circuit to apply the "substantial continuity" exception to CERCLA actions, [\*\*25] while rejecting its use in products liability actions, where a causal link is "fundamental" to recovery. *Id.*

**Antitrust law** is more akin to products liability law in retaining a causation requirement. The Court agrees that the tendency of the "substantial continuity" exception is to "brush aside" the "bedrock" requirement of causation, rendering inappropriate the application of the exception to antitrust cases. See *Polius*, 802 F.2d at 81.

[\*1474] Accordingly, the Court declines to adopt the "substantial continuity" exception, and instead recognizes only the four traditional exceptions within the context of this antitrust case. Because Plaintiff has not alleged that Defendant's purchase of the Karastan division falls within any of the traditional exceptions, the Court grants Defendant's Motion for Summary Judgment with respect to antitrust violations alleged to have occurred prior to July 30, 1993.

### III. Summary Judgment

#### A. Admissibility of Testimony by Terry Baker as to Statements by Defendant's and Fieldcrest's Employees

**HN3** When evaluating a motion for summary judgment, the Court may consider only that evidence that would be admissible at trial. *Sires v. Luke*, 544 F. Supp. 1155, 1160 [\*261] (S.D. Ga. 1982) (citing *Samuels v. Doctors Hosp., Inc.*, 588 F.2d 485, 486 & n.2 (5th Cir. 1979)). Testimony as to an out-of-court statement by a nonparty witness is inadmissible hearsay, and therefore cannot be considered by the Court when assessing the suitability of summary judgment. *Id.*

The primary evidence adduced by Plaintiff in opposing Defendant's Motion for Summary Judgment involves out-of-court statements by the employees of Defendant and Fieldcrest. Specifically, Plaintiff relies on:

- (1) testimony by Plaintiff's co-owner, Terry Baker, detailing statements made in 1991 by Fieldcrest employees Philip Haney, John Eggleston, and William Qualls, concerning the 1991 transshipping allegations and the resale price maintenance agreement Plaintiff alleges arose from the incident;
- (2) memoranda prepared on or about July 14, 1993, by Fieldcrest employees Dennis Thiets and Philip Haney, concerning the 1993 transshipping allegations;
- (3) conversations between Fieldcrest employees Dennis Thiets, Philip Haney, and William Storey, in which the 1993 transshipping allegations are reviewed; and
- (4) testimony by Terry Baker detailing statements [\*27] made in 1993 by Defendant's employees Philip Haney and William Storey, concerning the 1993 transshipping allegations and the termination of Plaintiff's exclusivity agreement.

Defendant objects to the admissibility of this evidence, arguing that Plaintiff has not adduced sufficient independent evidence to allow the out-of-court statements to be admitted within the co-conspirator exception to the hearsay rule. *Fed. R. Evid. 104*, *801(d)(2)(E)*. Defendant's objection fails for four reasons.

First, statements made by Karastan division executives after Defendant purchased the Karastan division on July 30, 1993, are admissible as admissions by a party opponent. *Fed. R. Evid. 801(d)(2)(D)*. Defendant employed Philip Haney and William Storey at the time they made their statements to Baker, and the statements concerned a matter within the scope of their employment. Therefore, the statements are not hearsay under the Federal Rules of Evidence. *Id.*

Second, the statements by Fieldcrest employees Haney, Qualls, and Eggleston, involving the 1991 transshipping allegations, directly relate to Plaintiff's claim that these employees imposed and enforced a resale price maintenance agreement. As [\*28] such, the statements are admissible as possessing independent legal significance, because they reveal the offer and acceptance necessary to establish the existence of the pricing agreement. See *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir.) ("A contract is a verbal act . . . [and] has legal reality independent of the truth of any statement contained in it."), cert. denied, 513 U.S. 820, 130 L. Ed. 2d 35, 115 S. Ct. 82 (1994); *Hydrite Chemical Co. v. Calumet Lubricants Co.*, 47 F.3d 887, 892 (7th Cir. 1995) ("It is direct evidence, not hearsay, when a party to a dispute over a contract testifies to the offer or the acceptance made by the other contracting party."). The statements also establish the alleged use of threats of termination by Fieldcrest employees in order to secure Plaintiff's adherence to the resale price maintenance agreement. The statements thus [\*1475] possess independent legal significance to show the existence of such threats.

Alternatively, Baker's testimony concerning the 1991 statements by Haney, Qualls, and Eggleston is admissible to demonstrate the effect these statements had on the listener. See *United States v. Cruz*, 805 F.2d 1464, [\*291] 1477 (11th Cir. 1986), cert. denied, 481 U.S. 1006, 95 L. Ed. 2d 204, 107 S. Ct. 1631 (1987). "Excluded from the hearsay rule is verbal or nonverbal 'conduct when it is offered as a basis for inferring something other than the matter asserted.'" *Id.* (emphasis in original) (quoting *Lubbock Feed Lots v. Iowa Beef Processors, Inc.*, 630 F.2d

250 (5th Cir. 1980)). Plaintiff intends to support its antitrust claim by showing that, after hearing the 1991 statements of Haney, Qualls, and Eggleston, Plaintiff understood that it had to raise its prices to avoid termination of the exclusivity agreement. Indeed, Plaintiff supports this claim with price sheets, printed by Plaintiff soon after these conversations took place, that reflect a new category of higher prices. For these reasons, Plaintiff may testify as to the statements to show the effect of the statements on Plaintiff's decision to raise its prices.

Third, Plaintiff seeks to introduce memoranda prepared by Philip Haney and Dennis Thiets while they were employed by Fieldcrest. Because the memoranda were prepared during the course of and in furtherance of the common objectives of the alleged resale price maintenance agreement, [\*\*30] the memoranda are admissible as statements made by a co-conspirator. Fed. R. Evid. 801(d)(2)(E). HN4<sup>11</sup> In order to admit evidence under the co-conspirator exception, the Eleventh Circuit requires Plaintiff to adduce sufficient evidence, "independent of the co-conspirator statement itself," to establish both the conspiracy and the declarant's participation in the conspiracy. United States v. James, 590 F.2d 575, 581 (5th Cir.), cert. denied, 442 U.S. 917, 61 L. Ed. 2d 283, 99 S. Ct. 2836 (1979). The Court concludes that the statements made by the employees of Fieldcrest and Defendant, which already are admissible as discussed above, fulfill the "more likely than not" standard of proof required to establish Haney and Thiets's participation in a price-fixing conspiracy. See Bourjaily v. United States, 483 U.S. 171, 175, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987). The memoranda, therefore, are admissible.

Fourth, Plaintiff seeks to introduce evidence concerning conversations between Fieldcrest employees Haney, Thiets, and William Storey that took place at approximately the same time as the preparation of the Thiets and Haney memoranda. Testimony as to the existence of these conversations [\*\*31] is admissible because the evidence is not introduced to establish the truth of the assertions made in the conversations. Rather, the evidence simply shows the conversations actually took place, and thus lead to an inference that the speakers had the opportunity to exchange information regarding Plaintiff's alleged failure to comply with the resale price maintenance agreement. As a result, the evidence is not hearsay.

Accordingly, the Court concludes that Baker's testimony as to the out-of-court statements described above is admissible without offending the rule against hearsay evidence. In addition, the memoranda prepared by Philip Haney and Dennis Thiets, as well as evidence showing the existence of conversations between Haney, Thiets, and William Storey concerning these memoranda, also are admissible.

## B. Summary Judgment Standard for an Antitrust Claim Involving a Dealer Terminated Pursuant to an Illegal Price-Fixing Scheme

HN5<sup>11</sup> As a general rule, the party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970); Helicopter [\*\*32] Support Systems v. Hughes Helicopter, 818 F.2d 1530, 1534 (11th Cir. 1987). The moving party's burden is discharged by "showing"--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In assessing [\*1476] whether the movant has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 469 (11th Cir. 1993). Once the moving party has adequately supported its motion, the nonmovant has the burden of showing summary judgment is improper by coming forward with specific facts that demonstrate the existence of a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1579 (11th Cir. 1988).<sup>11</sup>

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<sup>11</sup> Notwithstanding the clarity of these general rules, Plaintiff and Defendant have done an admirable job of pinpointing a tendency toward inconsistency in courts' assessment of summary judgment motions in antitrust cases:

[\*\*33] [HN6](#)<sup>↑</sup>

The Eleventh Circuit has formulated a specialized test to assess, at the summary judgment stage, a dealer's claims of wrongful termination by a manufacturer acting pursuant to an illegal resale price maintenance agreement. [Helicopter, 818 F.2d at 1534](#) (creating the "Helicopter test"); see, e.g., [DeLong Equipment Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1508-09 \(11th Cir. 1989\)](#) ("DeLong II") (applying the Helicopter test), cert. denied, 494 U.S. 1081, 108 L. Ed. 2d 943, 110 S. Ct. 1813 (1990). The Helicopter test provides that, in order to survive a defendant's properly supported motion for summary judgment, the plaintiff must adduce facts that tend to show (1) a conspiracy to set prices existed, and (2) the plaintiff was terminated pursuant to that conspiracy. See [DeLong II, 887 F.2d at 1508](#). To satisfy the first part of the Helicopter test, the plaintiff must (A) point to "evidence which tends to exclude the possibility that the manufacturer was operating independently in making his determination to terminate the distributor"; and (B) "satisfy the court that the conspiracy which he alleges is, objectively, an economically reasonable [\*\*34] one." [Helicopter, 818 F.2d at 1534](#). Sub-part A is satisfied if the plaintiff shows (i) the manufacturer sought an agreement from the dealer to adhere to resale prices; and (ii) the dealer communicated in some way its acquiescence in that agreement. [Id. at 1533](#).

In addition to creating the specialized Helicopter test, [HN7](#)<sup>↑</sup> courts have modified slightly the general summary judgment standard for antitrust violations involving resale price maintenance agreements. [Helicopter, 818 F.2d at 1532](#) (citing [Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#)). Consequently, antitrust plaintiffs face a heavy standard when opposing a properly supported motion for summary judgment, because courts are limited in the "range of permissible inferences" that can be made from "ambiguous" evidence. [DeLong II, 887 F.2d at 1508](#). Evidence is ambiguous if it is equally consistent with a finding of permissible competition as it is with a finding of illegal conspiracy. [Helicopter, 818 F.2d at 1533](#). Without additional direct or circumstantial evidence, ambiguous evidence alone cannot support an inference of conspiracy. *Id.* As a result, a conclusory [\*\*35] statement by the plaintiff that a conspiracy existed, without more, does not support "even an inference of conspiracy" and cannot survive a motion for summary judgment. [Dunnivant, 851 F.2d at 1579](#).

[HN8](#)<sup>↑</sup> Despite this heightened standard, *Monsanto* and its progeny "cannot be read to change the general rule that reasonable inferences from the evidence must be taken in favor of the nonmoving party." [Helicopter, 818 F.2d at 1535](#). The plaintiff's evidence "need not be such that *only* an inference of conspiracy may be derived from it. It must, however, go beyond equivocal complaints and *tend* to exclude the inference of independent action." [Id. at 1534 n.4](#). Once reasonable inferences are taken in favor of the nonmoving party, the "stringent [\*\*1477] standard of proof" in vertical restraint cases must be satisfied. [Id. at 1535](#). Thus, allegations by the plaintiff that are not merely conclusory, but rather can serve as direct evidence if believed, are enough to defeat a summary judgment motion. See [id. at 1534 n.4](#).

### C. Application of the Helicopter Test

Defendant contends that Plaintiff's evidence does not satisfy the Helicopter test; rather, the evidence has been [\*\*36] distorted in Plaintiff's "makeshift blender in the hopes that it can be pureed into something this Court can swallow." Defendant's Reply Brief in Support of its Motion for Summary Judgment at 2. After carefully chewing on Defendant's argument for some time, the Court disagrees, finding sufficient morsels of evidence to allow the Court to digest the facts in such a way as to satiate the Helicopter test.

"The Supreme Court . . . has articulated specific rules which make summary judgment more readily available in cases alleging violations of [section 1](#) of the Sherman Act." [DeLong Equipment Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1505 \(11th Cir. 1989\)](#), cert. denied, 494 U.S. 1081, 108 L. Ed. 2d 943, 110 S. Ct. 1813 (1990).

"Summary judgment should be used cautiously in antitrust cases." [Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1584 \(11th Cir. 1989\)](#).

## 1. Plaintiff's Showing that a Conspiracy to Set Prices Existed

Plaintiff's first step in meeting the *Helicopter* test is to show that a conspiracy to violate the Sherman Act existed. *Helicopter Support Systems v. Hughes Helicopter*, 818 F.2d 1530, 1533-34 (11th Cir. 1987). In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984), the Court set forth HN9<sup>1</sup> a test for assessing Plaintiff's evidence of an agreement to restrain trade in a dealer termination case:

There must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment [\*\*37] to a common scheme designed to achieve an unlawful objective.

[465 U.S. at 768](#). In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), the Court added a second requirement, assigning HN10<sup>1</sup> Plaintiff the burden of showing that the alleged conspiracy is, objectively, a reasonable one. [475 U.S. at 588](#).

As directed by the *Helicopter* test, the Court will consider the *Monsanto* and *Matsushita* requirements in turn. Following this analysis, the Court will assess whether the evidence supports an inference that Defendant perpetuated the alleged conspiracy after it purchased the Karastan division from Fieldcrest on July 30, 1993.

### A. Evidence which Tends to Exclude the Possibility That Defendant Was Operating Independently

Under the *Helicopter* test, evidence tends to exclude the possibility that the manufacturer was acting independently if it shows (i) the manufacturer sought an agreement from its dealer to adhere to a resale price, and (ii) the dealer in some way communicated its acquiescence in the proposed agreement. *Helicopter*, 818 F.2d at 1533.

#### (i) Evidence that Defendant Illegally Sought an [\*\*38] Agreement From Plaintiff to Adhere to a Resale Price

HN11<sup>1</sup> A manufacturer may announce in advance the terms under which it will sell its products, and may refuse to deal with those customers who do not comply with the terms. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919). However, when the manufacturer's actions "go beyond mere announcements of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices," the resulting agreement is a *per se* violation of *Section 1* of the Sherman Act. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960); 15 U.S.C.A. § 1 (1973). Included in "other means" are threats of termination and other coercive actions taken after a dealer fails to conform to a manufacturer's predetermined prices. See, e.g., *Monsanto*, 465 U.S. at 765-767.

Several circuit court cases illustrate this principle. In *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984), the court distinguished illegal coercion from permissible suggestion and persuasion. *749 F.2d at 1213*. Coercion is impermissible when it reflects "actual or threatened [\*\*39] affirmative action, [\*1478] beyond suggestion or persuasion, taken by a defendant in order to induce a plaintiff to follow the defendants' prices." *Id.* More specifically, threats of terminating a franchisee in order to induce compliance with predetermined retail prices constitute illegal coercion. *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 53 (2d Cir. 1980); see also *Carlson Machine Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253, 1261 (5th Cir. 1982) (threatening to make a "meaningful event depend on compliance or non-compliance" with a pricing agreement is coercion).

Plaintiff has adduced direct and circumstantial evidence of threatening behavior by Karastan division employees that reveals an intent to seek an agreement to maintain the resale prices for Karastan products. As owner of the Karastan division in 1991, Fieldcrest published manufacturer's suggested retail and promotional prices for Karastan products. Under the *Colgate* rule, this conduct alone is not improper. However, Philip Haney, Fieldcrest's national vice president for sales for the Karastan division, expressly warned Plaintiff's owner, Terry Baker, that "the way it had to be was that from now on . . . [Plaintiff] [\*\*40] was not to price anything on the phone at less than 10 percent

below the promotional price." Baker Dep. at 174. Haney then "made it very clear to [Baker] that if [Plaintiff] sold one piece of Karastan carpet on the phone at below 10 percent less than the promotional price, [Plaintiff] would be cut off." *Id. at 176-77*. This evidence of coercion is even more compelling in light of the fact that Haney's warning came immediately after Fieldcrest's agents accused Plaintiff of violating its pricing policies and delivered a letter terminating Plaintiff's exclusivity agreement. At the time of Haney's threats, Plaintiff's termination was "on hold" and under reconsideration by Fieldcrest.

This direct evidence, offered through the testimony of Terry Baker, is corroborated by the testimony of John Eggleston, regional vice president of the Karastan division, and William Qualls, manager of the Karastan territory in which Plaintiff was located. Both Eggleston and Qualls admitted that they were dispatched to deliver to Plaintiff a letter terminating the exclusivity agreement. Eggleston stated that, following this episode, he understood that Plaintiff must not sell Karastan products below [\*\*41] the predetermined prices. Finally, Plaintiff subsequently published a revised price list and instructed its salespeople to adhere to the new prices, and Fieldcrest's employees even monitored Plaintiff's price quotations on the telephone.

Plaintiff's evidence comprises more than merely conclusory complaints that Fieldcrest's employees sought an illegal pricing agreement. Indeed, Plaintiff has adduced direct evidence that Fieldcrest employees threatened to terminate Plaintiff's contractual right to sell Karastan products if Plaintiff did not agree to sell Karastan products at a predetermined price level. Plaintiff also has adduced circumstantial evidence, such as revised price sheets and price monitoring by Fieldcrest's employees, that supports the inference that Fieldcrest sought the agreement through such threats. As such, Fieldcrest's conduct is identical to the threatening behavior declared illegal by the *Yentsch* and *Bender* courts.

Defendant argues that Plaintiff's evidence is offered solely through the testimony of Terry Baker, while Defendant's own evidence contradicts Baker's testimony. Defendant contends that Plaintiff's evidence therefore falls within the definition [\*\*42] of "ambiguous" evidence and cannot, by itself, defeat Defendant's Motion for Summary Judgment. See Defendant's Memorandum of Law in Support of Summary Judgment at 20-21. The Court disagrees. [HN12](#)[] Evidence is ambiguous if, notwithstanding its source, it is equally consistent with a finding of permissible competition as it is with a finding of illegal conspiracy. *Helicopter*, 818 F.2d at 1533. Evidence is not ambiguous solely because it is offered through the testimony of Plaintiff's owner, nor is evidence ambiguous simply because Defendant's own testimony contradicts it. "The court must look beyond the defendant's bald denial of concerted action and analyze the substance of [the plaintiff's] evidence in order to determine if summary judgment is appropriate." *DeLong Equipment Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1515 (11th Cir. 1989) ("DeLong II"), cert. denied, 494 U.S. 1081, 110 S. Ct. 1813, [\*1479] 108 L. Ed. 2d 943 (1990). Looking at the substance of Plaintiff's evidence, the Court believes that Baker's testimony, when considered alongside testimony by Fieldcrest's employees and other circumstantial evidence, tends to show that Fieldcrest sought, through illegally [\*\*43] coercive means, to establish an agreement with Plaintiff to maintain resale prices for Karastan products.

## (ii) Evidence That Plaintiff Acquiesced in an Agreement With Defendant to Adhere to a Resale Price

Under *Helicopter*, the second step for a plaintiff to exclude the possibility that the manufacturer acted independently is to show that the plaintiff in some way communicated its acquiescence in the manufacturer's proposed agreement to adhere to predetermined resale prices. *Helicopter*, 818 F.2d at 1533-34. [HN13](#)[] To discharge this requirement, the evidence must reveal

a "meeting of the minds in an unlawful arrangement . . . [which] includes more than a showing that the distributor conformed to the resale price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer

*Monsanto*, 465 U.S. at 764, 764 n.9.

Plaintiff's evidence shows that Terry Baker told Philip Haney that Plaintiff would "live up" to Haney's demands that Plaintiff adhere to the pricing agreement. Moreover, Haney's telephone statements to Baker reveal that Haney sought this kind of assurance [\*\*44] from Plaintiff. The Court believes that a reasonable inference from this

evidence is that Haney sought Plaintiff's acquiescence in a pricing agreement, and that Baker communicated Plaintiff's acquiescence to Haney.

The Court therefore concludes that Plaintiff has presented evidence that tends to exclude the possibility that Fieldcrest and Plaintiff acted independently. The Court now turns to the second part of Plaintiff's required showing of the existence of an conspiracy: whether the alleged conspiracy is, objectively, an economically reasonable one.

### **B. Whether the Alleged Conspiracy Is Economically Reasonable**

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), the Court held that [HN14](#) if the alleged price-fixing conspiracy is "economically irrational and practically infeasible, then summary judgment should be granted." *Helicopter*, 818 F.2d at 1534 (applying the *Matsushita* test). This requirement does not "introduce a special burden on plaintiffs facing summary judgment in antitrust cases," but rather permits summary judgment if the inferences arising from the plaintiff's evidence are so unreasonable [\[\\*\\*45\]](#) as to be "economically senseless." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992).

In *Helicopter*, a manufacturer terminated a dealer based on the dealer's noncompliance with a resale price maintenance agreement. Applying the *Matsushita* test, the court found the agreement was "a perfectly feasible and sensible undertaking. By exerting control over the resale prices of its distributors, [the manufacturer and its dealers] would hope to reap monopoly profits arising from a collusively inflated market price." [818 F.2d at 1534](#). Plaintiff's evidence reveals facts nearly identical to those considered by the *Helicopter* court. Defendant terminated the exclusivity agreement with Plaintiff allegedly because Plaintiff failed to adhere to predetermined resale prices. Following the reasoning of the *Helicopter* court, the Court concludes that the conspiracy alleged by Plaintiff is economically rational and practically feasible.

As discussed above, Plaintiff's evidence also allows a reasonable inference that Fieldcrest sought and established an illegal conspiracy with Plaintiff to fix prices for Karastan products. [\[\\*\\*46\]](#) Plaintiff thus has satisfied all the subparts of the first prong of the *Helicopter* test.

### **3. Whether Plaintiff's Evidence Supports an Inference that Defendant Adopted and Perpetuated an Alleged Conspiracy to Fix Prices**

The Court observes that Plaintiff has adduced sufficient evidence to create a genuine dispute [\[\\*1480\]](#) whether Defendant adopted and perpetuated the price-fixing conspiracy with Plaintiff after Defendant purchased the Karastan division on July 30, 1993. After Defendant purchased the Karastan division from Fieldcrest, the division continued to operate as a distinct business unit. Defendant did not make any significant changes to the division's sales and marketing operations, and it retained the same executive personnel. More importantly, Defendant did not alter any of the Karastan division's policies with its authorized dealers, including the pricing policies. Defendant simply adopted the guidelines published by Fieldcrest in 1991 and 1992 as the source of Defendant's policies for dealers such as Plaintiff. Additionally, Karastan's executives continued to enforce the pricing agreement after the Defendant purchased the division. Therefore, the Court concludes that Plaintiff's [\[\\*\\*47\]](#) evidence is sufficient to withstand summary judgment regarding an agreement between Plaintiff and Defendant to maintain a predetermined resale price for Karastan products.

### **2. Plaintiff's showing that Defendant Terminated the Exclusivity Agreement Pursuant to the Alleged Conspiracy to Fix Prices**

The second prong of the *Helicopter* test requires Plaintiff to adduce evidence showing Plaintiff was terminated pursuant to the alleged conspiracy. See *DeLong Equipment Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1508 (11th Cir. 1989) ("*DeLong II*"), cert. denied, 494 U.S. 1081, 108 L. Ed. 2d 943, 110 S. Ct. 1813 (1990). The

*Colgate* doctrine arises once again in this context, because [HN15](#) [↑] a manufacturer may refuse to sell its goods to anyone, even if the refusal is based on a dealer's failure to adhere to suggested resale prices. [United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#). A manufacturer's refusal to deal, however, is illegal under the Sherman Act if performed pursuant to a price-fixing conspiracy between the manufacturer and its dealer. [Monsanto Co. v. Spray-Rite Service Co., 465 U.S. 752, 768, 79 L. Ed. 2d 775, \[\\*48\] 104 S. Ct. 1464 \(1984\)](#). In order to establish a violation of the Sherman Act in this context, Plaintiff must present direct or circumstantial evidence that supports a reasonable inference that a causal connection exists between the termination and the alleged conspiracy. [465 U.S. 752 at 759.](#)

In *Monsanto*, the Court affirmed a jury verdict based on largely circumstantial evidence establishing a causal connection between the termination of a herbicide dealership and an illegal price-fixing conspiracy. [Id. at 759.](#) The Court relied on testimony that, at a meeting between agents of the manufacturer and the dealer, the first topic raised by the manufacturer's agent was the prices charged by the dealer for the herbicide. [Id. at 765.](#) In addition, the Court cited testimony that, prior to the termination, the manufacturer never discussed with the dealer the criteria that served as the alleged basis for the termination. *Id.* Finally, the Court referred to testimony by the dealer's president that the manufacturer's officers made explicit threats to terminate the dealership unless the dealership raised its prices. [Id. at 765.](#)

The Eleventh Circuit considered a similar set of facts [\[\\*49\]](#) in [DeLong II, 887 F.2d at 1514-15](#). Relying almost exclusively on circumstantial evidence, the court found that genuine issues of material fact existed regarding the cause of the dealer's termination. *Id.* The court observed that, to counter the dealer's circumstantial evidence, the manufacturer may argue that a valid business reason served as the motivation behind terminating the dealer. *Id.* However, the dealer may respond to such arguments by showing the manufacturer's justifications are merely pretextual: "While such evidence standing alone would not be sufficient to show joint action in violation of the antitrust laws, 'evidence of pretext, if believed by a jury, would disprove the likelihood of independent action on the part of [the defendant].'" [Id. at 1514](#) (quoting [Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 474 \(3d Cir. 1985\)](#)).

The evidence in this case presents a striking similarity to that considered by the *Monsanto* and *DeLong* courts. First, immediately after terminating the exclusivity agreement, William Storey, Defendant's director [\[\\*1481\]](#) of marketing for the Karastan division, told Plaintiff's owner, Terry Baker, that "if [Plaintiff] had [\[\\*50\]](#) sold it at the price it should have been, then it wouldn't have been a problem." Baker Dep. at 235. In addition, Philip Haney, Defendant's regional vice president for the Karastan division, told Baker that Plaintiff's "price was below the level it should have been." Finally, two memoranda expressly refer to Plaintiff's failure to adhere to the predetermined resale price. Storey received one of these memoranda, and discussed the transaction in question with the author of the other, before terminating the exclusivity agreement with Plaintiff.

Defendant endeavors to minimize the significance of this evidence by alleging that a valid business reason motivated its decision to terminate the exclusivity agreement. Specifically, Defendant argues that Plaintiff violated Defendant's prohibition against transshipping. Plaintiff's evidence, however, suggests that Defendant's stated reason for terminating the exclusivity agreement is merely pretextual. In October 1993, only one month after Defendant terminated the exclusivity agreement with Plaintiff, Defendant did not terminate another dealer that transshipped carpet to a non-authorized dealer. Storey Dep. 2 at 211-19, Ex. 68, 69. Moreover, the [\[\\*51\]](#) two memoranda discussing Plaintiff's transshipping violation also mention the resale price violation.

Defendant attempts to discredit Plaintiff's evidence by pointing to deposition testimony by William Storey, suggesting that Plaintiff misinterpreted Storey's telephone statement to Baker: "Storey maintains that he told Baker that but for Plaintiff's pricing, dealers would not have been interested in purchasing carpets from [Plaintiff] which in turn would have prevented a transshipping violation." Defendant's Memorandum in Support of its Motion for Summary Judgment at 20-21. Defendant contends that Storey's testimony renders Plaintiff's evidence ambiguous and insufficient to withstand summary judgment.

Defendant once again has misapprehended the definition of "ambiguous" evidence. See [\*Helicopter. 818 F.2d at 1533\*](#) (ambiguous evidence is equally consistent with a finding of illegal conspiracy as a finding of permissible competition). Testimony that is opposed by conflicting testimony from the adverse party is not automatically rendered ambiguous. The *Monsanto* Court stated that, [HN16](#) when the manufacturer disputes the dealer's testimony, "the choice between two reasonable interpretations [\*\*52] of the testimony properly [is] left for the jury." [\*465 U.S. at 767 n.12\*](#). The Court must look "beyond the defendant's bald denial of concerted action and analyze the substance of [the plaintiff's] evidence." [\*DeLong II, 887 F.2d at 1515\*](#).

Finally, Defendant argues that, before deciding to terminate the exclusivity agreement, Storey never discussed the resale price violation with any other employee. Unfortunately for Defendant, the *DeLong II* court dismissed an identical argument as "unpersuasive," because "conspiracies are rarely evidenced by explicit agreements, and must almost always be proven by inferences that may be fairly drawn from the behavior of the alleged conspirators." [\*887 F.2d at 1515\*](#).

The Court thus concludes that Plaintiff has adduced sufficient direct and circumstantial evidence to support an inference that Defendant terminated Plaintiff's exclusivity agreement because of an illegal conspiracy to fix prices, and not because of a violation of the transshipping policy. As a result, Plaintiff's evidence satisfies the second prong of the *Helicopter* test.

#### D. Plaintiff's Evidence of Antitrust Injury

[HN17](#) Even if the Court concludes that Defendant participated [\*\*53] in an illegal resale price maintenance agreement, Plaintiff still must demonstrate that Plaintiff has suffered antitrust injury. [\*Atlantic Richfield Co. v. United States Petroleum Co., 495 U.S. 328, 342, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)\*](#) (holding that even in cases that involve conduct that is illegal *per se*, plaintiff must allege and prove antitrust injury). The Eleventh Circuit has held that a plaintiff can suffer antitrust injury simply by losing its dealership and consequently losing sales and profits. [\*DeLong Equipment Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186, 1199 \("DeLong III"\)\*](#), cert. denied, 510 U.S. 1012, 126 L. Ed. 2d 569, 114 S. Ct. 604 (1993). In *DeLong III*, the defendant manufactured a particular brand of "media" that possessed certain competitive advantages over other market alternatives. *Id.* The court found that the plaintiff, upon being terminated as a supplier of the defendant's media, did not suffer "damage simply from its own failure to compete in the open market for identical media made by other manufacturers." *Id.* Rather, the plaintiff "was not allowed to participate in the competitive market for [the [\*\*54] defendant's] media because it refused to go along with the [defendant's] price-fixing scheme." *Id.* Consequently, the plaintiff suffered antitrust injury. *Id.*

The Fifth Circuit also has held that wrongful termination of a dealership can constitute antitrust injury. [\*Pierce v. Ramsey Winch, 753 F.2d 416, 435 \(1985\)\*](#). "The *sina qua non* of the injury caused by a refusal to deal [is the] inability to obtain the product. From this failure to obtain the product would flow subsidiary consequences: loss of sales or market share because of the failure to sell or utilize this product." *Id.* A jury question on the issue of damages, therefore, can be established "simply by showing that, following termination, plaintiff, because he lacked the terminating manufacturer's product, suffered a decline in gross sales." [\*Id. at 435-36\*](#).

Plaintiff has introduced evidence that the termination of its dealership caused the closing of its business and resulted in lost profits. Second Amended Report of Bruce Seaman at 5-8, Ex. E, F, G. Furthermore, Defendant's Motion for Summary Judgment ignores the possibility that Plaintiff could have suffered antitrust injury, based solely on the [\*\*55] existence of a resale price maintenance agreement, during the period in which Defendant allegedly perpetuated this agreement. Thus, Plaintiff has created a jury question sufficient to survive summary judgment on the issue of antitrust injury.

#### V. Conclusion

942 F. Supp. 1464, \*1482L 1996 U.S. Dist. LEXIS 15008, \*\*55

ACCORDINGLY, the Court **GRANTS IN PART** Defendant's Motion for Summary Judgment [39] with respect to claims arising from alleged antitrust violations that occurred prior to July 30, 1993, and **DENIES IN PART** Defendant's Motion with respect to claims arising from alleged antitrust violations that occurred after July 30, 1993. The Court also **GRANTS** Plaintiff's Motion for Leave to File a Very Short Response With Brief in Support [63].

IT IS SO ORDERED, this is 23<sup>rd</sup> day of September, 1996.

Harold L. Murphy

UNITED STATES DISTRICT JUDGE

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## **Borschow Hosp. & Medical Supplies v. Cesar Castillo Inc.**

United States Court of Appeals for the First Circuit

September 23, 1996, Decided

No. 96-1113

**Reporter**

96 F.3d 10 \*; 1996 U.S. App. LEXIS 24831 \*\*; 1996-2 Trade Cas. (CCH) P71,587

BORSCHOW HOSPITAL AND MEDICAL SUPPLIES, INC., Plaintiff - Appellant, v. CESAR CASTILLO INC., ET AL., Defendants - Appellees.

**Subsequent History:** [\*\*1] As Corrected October 11, 1996.

**Prior History:** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Salvador E. Casellas, U.S. District Judge.

**Disposition:** AFFIRMED.

## **Core Terms**

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distributorship, distributor, non-exclusive, summary judgment, parties, distribution agreement, extrinsic evidence, outline, tie, tied product, products, district court, contracts, parol, integration clause, tying arrangement, tying product, unambiguous, intent of a party, civil code, Sherman Act, contractual, antitrust, nonmoving, promise, syringe, terms

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

### **HN1** **Appellate Review, Standards of Review**

An appellate court must review the factual record in the light most favorable to the nonmoving party at summary judgment.

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

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

Civil Procedure > Judgments > Summary Judgment > General Overview

96 F.3d 10, \*10L996 U.S. App. LEXIS 24831, \*\*1

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

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

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

## **HN2** [blue download icon] **Standards of Review, De Novo Review**

An appellate court reviews a district court's grant of summary judgment de novo. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

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

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

## **HN3** [blue download icon] **Summary Judgment, Entitlement as Matter of Law**

To succeed on a motion for summary judgment, the moving party must show that there is an absence of evidence to support the nonmoving party's position.

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

## **HN4** [blue download icon] **Entitlement as Matter of Law, Appropriateness**

Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial. There must be sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. The court views the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

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

Torts > Business Torts > Bad Faith Breach of Contract > General Overview

## [\*\*HN5\*\*](#) [down] Commercial Interference, Contracts

*P.R. Laws Ann. tit. 10, § 278* provides that, 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.

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

Torts > Business Torts > Bad Faith Breach of Contract > General Overview

## [\*\*HN6\*\*](#) [down] Commercial Interference, Contracts

Although non-exclusive distributors are entitled to protection under *P.R. Laws Ann. tit. 10, § 278* (Law 75), it is equally true that Law 75 does not operate to convert non-exclusive distribution contracts into exclusive distribution contracts. The established relationship between dealer and principal is bounded by the distribution agreement, and therefore Law 75 only protects against detriments to contractually acquired rights.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Contracts Law > Contract Interpretation > General Overview

## [\*\*HN7\*\*](#) [down] Federal & State Interrelationships, Erie Doctrine

As a civil law jurisdiction, Puerto Rico eschews common law principles of contract interpretation in favor of its own civil code derived from Spanish law.

Contracts Law > Contract Interpretation > General Overview

## [\*\*HN8\*\*](#) [down] Contracts Law, Contract Interpretation

P.R. Civ. Code art. 1233, *P.R. Laws Ann. tit. 31, § 3471*, determines the manner in which courts should interpret contracts under dispute as to the meaning of their terms.

Contracts Law > Contract Interpretation > General Overview

## [\*\*HN9\*\*](#) [down] Contracts Law, Contract Interpretation

See P.R. Civ. Code art. 1233, *P.R. Laws Ann. tit. 31, § 3471*.

Contracts Law > Contract Interpretation > General Overview

## [\*\*HN10\*\*](#) [down] Contracts Law, Contract Interpretation

Under Puerto Rican law, an agreement is clear when it can be understood in one sense alone, without leaving any room for doubt, controversies or difference of interpretation.

Contracts Law > Contract Interpretation > General Overview

### [\*\*HN11\*\*](#) [blue document icon] Contracts Law, Contract Interpretation

P.R. Civ. Code art. 1233, *P.R. Laws Ann. tit. 31, § 3471*, has been interpreted to be strict in its mandate that courts should enforce the literal sense of a written contract, unless the words are somehow contrary to the intent of the parties.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

### [\*\*HN12\*\*](#) [blue document icon] Contract Interpretation, Parol Evidence

When an agreement leaves no doubt as to the intention of the parties, a court should not look beyond the literal terms of the contract.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

### [\*\*HN13\*\*](#) [blue document icon] Contract Interpretation, Parol Evidence

See P.R. Laws Ann. tit. 32, App. IV, R. 69(B).

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

### [\*\*HN14\*\*](#) [blue document icon] Contract Interpretation, Parol Evidence

P.R. Laws Ann. tit. 32, App. IV, R. 69(B) and P.R. Civ. Code art. 1233, *P.R. Laws Ann. tit. 31, § 3471*, require courts to ignore parol evidence when the agreement is clear and unambiguous.

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

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

### [\*\*HN15\*\*](#) [blue document icon] Contract Conditions & Provisions, Integration Clauses

P.R. Laws Ann. tit. 32, App. IV, R. 69(B) and P.R. Civ. Code art. 1233, *P.R. Laws Ann. tit. 31, § 3471*, bar consideration of extrinsic evidence to vary the express, clear, and unambiguous terms of a contract.

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

**HN16** [blue document icon] Legislation, Effect & Operation

The strict mandate of the P.R. Civ. Code art. 1233, *P.R. Laws Ann. tit. 31, § 3471*, obliges courts to abide by the literal meaning of the terms of the contract when they leave no doubt as to the intention of the contracting parties.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

**HN17** [blue document icon] Contract Interpretation, Parol Evidence

Extrinsic evidence of the parties' intent is inadmissible in the face of a clear and unambiguous contract term under Puerto Rico Law.

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 > Clayton Act

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

**HN18** [blue document icon] Sherman Act, Scope

Section 1 of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#), prohibits a seller from tying the sale of one product to the purchase of a second product if the seller thereby avoids competition on the merits of the tied product. There are essentially four elements to a per se tying claim: (1) the tying and the tied products are actually two distinct products; (2) there is an agreement or condition, express or implied, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product.

Antitrust & Trade Law > Sherman Act > General Overview

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

**HN19** [blue document icon] Antitrust & Trade Law, Sherman Act

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 § 1 of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#), is violated.

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

**HN20** [blue document icon] Price Fixing & Restraints of Trade, Tying Arrangements

Where a tying product has not been withheld, there is no tie. There is no tie for any antitrust purpose unless the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one.

**Counsel:** Fernando L. Gallardo, with whom Harry E. Woods, Geoffrey M. Woods, Woods & Woods and Carlos R. Iguina-Charriz were on brief for appellant.

Donald R. Ware, with whom Richard M. Brunell and Foley, Hoag & Eliot were on brief for appellee Becton Dickinson and Company.

Edilberto Berrios-Perez and Luis Fernandez-Ramirez for appellees Cesar Castillo, Inc., Umeco, Inc., Jose Luis Castillo, Ivonne Belaval de Castillo, Cesar Castillo, Jr., Aracelis Ortiz de Castillo and Maria Isabel Gonzalez.

**Judges:** Before Selya, Circuit Judge, Torres \* and Saris, \*\* District Judges.

**Opinion by:** SARIS

## Opinion

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[\*11] **SARIS, *District Judge*.** Plaintiff-Appellant Borschow Hospital & Medical Supplies, Inc. is a distributor of a line of medical and surgical products supplied by Defendant-Appellee, Becton Dickinson and Company, in Puerto Rico. Borschow claims that Becton Dickinson violated the Puerto Rico Dealers Act, 10 L.P.R.A. [\*2] § 278, also commonly known as "Law 75," by granting additional distributorships in violation of its allegedly exclusive Distributorship Agreement.<sup>1</sup> Although the Distributorship [\*12] Agreement contained a clear non-exclusivity provision and integration clause, Borschow contends that the district court erred under Puerto Rico's parol evidence rule when it excluded an unsigned written memorandum sent prior to the signing of the agreement as evidence that the parties actually intended the distributorship to be exclusive.

[\*\*3] Borschow also claims that Becton Dickinson engaged in an unlawful tying arrangement in violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), by threatening to discontinue a supply of a line of its products (the tying products) unless Borschow also carried its syringe line (the tied product) and dropped that of a competitor.

The district court granted summary judgment for Becton Dickinson on both claims. We affirm.

### I. STATEMENT OF THE CASE

#### A. Facts

**HN1** [↑] Reviewing the factual record in the light most favorable to the nonmoving party, as we must at summary judgment, see [Mesnick v. General Elec. Co.](#), 950 F.2d 816, 822 (1st Cir. 1991), cert. denied, 504 U.S. 985, 119 L. Ed. 2d 586, 112 S. Ct. 2965 (1992), we treat the following facts as controlling, noting, however, that Bectin Dickinson disputes many aspects of this account.

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\* Of the District of Rhode Island, sitting by designation.

\*\* Of the District of Massachusetts, sitting by designation.

<sup>1</sup> The additional distributorships were granted to Defendants-Appellees Cesar Castillo, Inc. and UMECO, Inc., which filed a separate brief. At oral argument, Becton Dickinson argued for the Appellees as a group. Where we refer to Becton Dickinson in the course of this opinion, we mean our statements to apply to Appellees as a group except where otherwise indicated. Similarly, to avoid confusion where referring to the testimony of Jonathan Borschow, Borschow's president, we will refer to him as Mr. Borschow and to the company simply as Borschow.

A major supplier of medical products in Puerto Rico, Borschow contracted with Parke Davis & Company ("Parke Davis") on May 1, 1985 to distribute a line of medical and surgical products manufactured by its subsidiary, Deseret Medical, Inc. (the "Deseret Line"). In mid-1986, Becton Dickinson acquired Deseret and assumed Parke Davis' obligations under the distribution agreement [\*\*4] as an assignee. This dispute turns in large part on the content of that agreement.

The distribution agreement executed by Borschow and Parke Davis ["Distribution Agreement"], includes two provisions of interest here. First, it provides that "Company [i.e., Parke Davis] hereby appoints Distributor [i.e., Borschow] and the Distributor hereby accepts appointment, as the Company's *nonexclusive* independent distributor of the Products for Regular Business in the Territory [i.e., Puerto Rico] during the term of this Agreement." Distribution Agreement, § 2.1.2 (emphasis added). Second, the contract included the following integration clause:

Integration: The terms and provisions contained in this Agreement, including all Schedules attached hereto and Company's Standard Terms and Conditions of Sale in effect, from time to time, constitute the entire agreement and is the final expression of intent between the Parties relating to the subject matter hereof and supersede, all previous communications, representations, agreements, and understandings, either oral or written, between the Parties with respect to the subject matter thereof. No agreement or understanding varying [\*\*5] or extending this Agreement will be binding upon either Party hereto unless in writing, wherein this Agreement is specifically referred to, and signed by duly authorized officers or representatives of the respective Parties.

*Id.* § 9.10. Borschow's president, Jonathan Borschow, initially refused to sign any contract that included a non-exclusivity provision. However, in negotiations prior to execution of the Distribution Agreement, Robert Vallance, Deseret's Regional Director for Canada/Latin America, assured Mr. Borschow that his distributorship would be exclusive. Vallance promised him that he would receive a letter from Parke Davis promising exclusivity. When that letter was not forthcoming, Mr. Borschow telephoned Vallance and inquired about the delay. Vallance told Mr. Borschow that the people in "Morris Plains," the corporate headquarters of Warner Lambert, Parke Davis' parent company, were considering the matter.

After that conversation, Mr. Borschow received a draft of the Distribution Agreement, which included the non-exclusivity term. He [\*13] again objected to Vallance but was told that the "contract cannot, it will not be changed. The people in Morris Plains will [\*\*6] not countenance it." However, Vallance reassured Mr. Borschow that he would send a document that would outline the "true" basis for their business relationship, including a promise that Borschow's distributorship would be exclusive.

Within a matter of days, Mr. Borschow received a two-page undated and unsigned outline. The outline specifies that one of the supplier's obligations is to "sell exclusively to the DISTRIBUTOR and refrain from selling to other DISTRIBUTORS or clients in the territory while the AGREEMENT is in effect." The outline neither explicitly mentions Mr. Borschow or Parke Davis nor refers to the May 1 Distribution Agreement. Borschow testified that he executed the Distribution Agreement approximately two weeks after he received the outline.<sup>2</sup>

[\*\*7] From the execution of the agreement in 1985 to 1986, Borschow remained Parke Davis' exclusive distributor of the Deseret line. After Becton Dickinson's acquisition of Deseret in mid-1986, no changes were made in the relationship until November 1989, when Becton Dickinson granted distributorships to UMECO, Inc. and Cesar Castillo, Inc.

Moreover, according to Borschow and his salespeople, at approximately the same time that the additional distributors were established in November 1989, Becton Dickinson demanded that Borschow cease distributing the Monoject Syringe & Needle Line, made by a Becton Dickinson competitor, and begin carrying the Becton Dickinson syringe line. Becton Dickinson also threatened that if Borschow did not meet this demand, it would no longer be

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<sup>2</sup> At Mr. Borschow's deposition, the parties marked the Distribution Agreement as BDX-1 and the undated outline as BDX-3, and throughout its brief Appellant refers to the documents by those numbers. To avoid confusion, however, the Court will refer to BDX-1 and BDX-3 as the Distribution Agreement and the Outline, respectively.

supplied with the Deseret line. However, Becton Dickinson did not carry through on this threat. Although Borschow refused to drop Monoject, Becton Dickinson continued to supply Deseret products to Borschow.

## B. Proceedings Below

Borschow brought an action in federal district court for the District of Puerto Rico on February 6, 1990, alleging that Becton Dickinson's termination of Borschow's "exclusive" distributorship [\[\\*\\*8\]](#) violated Law 75 and that Becton Dickinson's threat to tie the Deseret line to its syringe line violated the Sherman Act. Borschow also alleged a conspiracy with Castillo and UMECO in restraint of trade and attempted monopolization. Federal jurisdiction was invoked on the basis of a federal question and diversity of citizenship.

On September 24, 1990, the district court permitted discovery limited to the threshold issue as to whether Borschow's distributorship was exclusive. On January 15, 1991, Becton Dickinson moved for summary judgment, asserting that taking these facts in the light most favorable to Plaintiff, Borschow cannot evade the effect of its written contract providing for non-exclusivity. If Borschow's contract was non-exclusive, according to Becton Dickinson, the Law 75 claim fails as a matter of law. In addition, Becton Dickinson argued that the outline was extrinsic evidence of the contracting parties' intent that could not be considered on summary judgment because of Puerto Rico's parol evidence rule.

The motion was referred to a magistrate judge, who issued a report and recommendation denying summary judgment on the ground that the extrinsic evidence raised issues [\[\\*\\*9\]](#) of fact regarding whether the agreement provided for exclusivity. The district court (Acosta, J.) initially adopted the magistrate judge's recommendation without comment, but on a motion for reconsideration, the court (Casellas, J.) granted partial summary judgment for Becton Dickinson.<sup>3</sup> The court held that Puerto Rico's parol evidence rule barred consideration of the outline and [\[\\*14\]](#) that the contract unambiguously provided for a non-exclusive distributorship. [Borschow Hosp. & Medical Supplies, Inc. v. Cesar Castillo, Inc., 882 F. Supp. 236, 239-40 \(D.P.R. 1995\)](#). In a subsequent order, the court granted partial summary judgment for Becton Dickinson on the antitrust claims due to lack of evidence of tying, anticompetitive injury or conspiracy and dismissed the pendent state law claims. Borschow timely appealed the judgment.

## II. DISCUSSION

### A. Standard of Review

[HN2](#) We review [\[\\*\\*10\]](#) a district court's grant of summary judgment *de novo*. [Werme v. Merrill, 84 F.3d 479, 482 \(1st Cir. 1996\)](#). The standard is well-rehearsed and familiar. "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" [Barbour v. Dynamics Research Corp., 63 F.3d 32, 36 \(1st Cir. 1995\)](#) (quoting [Fed. R. Civ. P. 56\(c\)](#)), cert. denied, 133 L. Ed. 2d 845, U.S. , 116 S. Ct. 914 (1996). "In operation, summary judgment's role is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." [Wynne v. Tufts Univ. School of Medicine, 976 F.2d 791, 794 \(1st Cir. 1992\)](#), cert. denied, 507 U.S. 1030, 123 L. Ed. 2d 470, 113 S. Ct. 1845 (1993). [HN3](#) "To succeed, the moving party must show that there is an absence of evidence to support the nonmoving party's position." [Rogers v. Fair, 902 F.2d 140, 143 \(1st Cir. 1990\)](#); see also [Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#).

[HN4](#) "Once the moving party has properly supported [\[\\*\\*11\]](#) its motion for summary judgment, the burden shifts to the non-moving party, who 'may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial.'" [Barbour, 63 F.3d at 37](#) (quoting [Anderson v. Liberty Lobby, Inc.,](#)

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<sup>3</sup> Judge Acosta took senior status before the motion for reconsideration, and the case was reassigned to Judge Casellas.

[477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#)). "There must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.'" [Rogers, 902 F.2d at 143](#) (quoting [Anderson, 477 U.S. at 249-50](#)) (citations and footnote in *Anderson* omitted). We "view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." [Barbour, 63 F.3d at 36](#).

## B. The Law 75 Claim

"The legislature of Puerto Rico enacted Law 75 to protect distributors, agents, concessionaires and representatives of a product or service in Puerto Rico. . . . More specifically, Law 75 was intended to protect dealers who built up a market, from suppliers who wish to appropriate their established clientele." [Medina & Medina v. Country Pride Foods, Ltd., 825 F.2d 1, 2 \(1st Cir. 1987\)](#). [HN5](#) [\*\*12] "Law 75 provides that, 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." [General Office Prods. Corp. v. Gussco Mfg. Inc., 666 F. Supp. 328, 328 \(D.P.R. 1987\)](#) (citing 10 L.P.R.A. § 278(a)).

Law 75 has proved fertile ground for litigation, and we recently have had occasion to consider its application to circumstances analogous to those presented here. [HN6](#) [\*\*13] Although "non-exclusive distributors are entitled to protection under Law 75," [Vulcan Tools of Puerto Rico v. Makita U.S.A., Inc., 23 F.3d 564, 569 \(1st Cir. 1994\)](#), "it is equally true . . . that Law 75 does not operate to convert non-exclusive distribution contracts into exclusive distribution contracts." *Id.* (citing [Gussco, 666 F. Supp. at 331](#)). As we said in *Vulcan Tools*, "the 'established relationship' between dealer and principal is bounded by the distribution agreement, [\*\*13] and therefore the Act only protects against detriments to contractually acquired rights." [Id. at 569](#).

[\*15] This case turns on whether Borschow and Parke Davis (now Becton Dickinson) contracted for a non-exclusive or exclusive distributorship. If the former, Borschow cannot prevail on its claim that Law 75 prohibits Becton Dickinson from supplying Deseret medical products to other distributors. See [Vulcan Tools, 23 F.3d at 569](#) (Law 75 did not prevent supplier from establishing additional distributorships in Puerto Rico where non-exclusive distributor was already operating even if existing distributor suffered economic harm as result); [Nike Int'l Ltd. v. Athletic Sales, Inc., 689 F. Supp. 1235, 1238-39 \(D.P.R. 1988\)](#) (where distributorship contract between Nike and distributor provided for notice of renewal from distributor and distributor failed to provide such notice, Law 75 did not bar termination of distributorship contract).

[HN7](#) [\*\*14] As a civil law jurisdiction, Puerto Rico eschews common law principles of contract interpretation in favor of its own civil code derived from Spanish law. See [Guevara v. Dorsey Labs., Div. of Sandoz, Inc., 845 F.2d 364, 366 \(1st Cir. 1988\)](#) [\*\*14] ("The Supreme Court of Puerto Rico has made clear that the common law of the United States is not controlling when filling gaps in the civil law system."); [Gussco, 666 F. Supp. at 332](#). Thus, we turn to [HN8](#) [\*\*15] Civil Code Article 1233, which "determines the manner in which courts should interpret contracts under dispute as to the meaning of their terms." [Hopgood v. Merrill Lynch, Pierce, Fenner & Smith, 839 F. Supp. 98, 104 \(D.P.R. 1993\)](#), aff'd, 36 F.3d 1089 (1st Cir. 1994) (table). Article 1233 provides:

[HN9](#) [\*\*16] If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed.

If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail.

31 L.P.R.A. § 3471 (1991). [HN10](#) [\*\*17] "Under Puerto Rican law, an agreement is 'clear' when it can 'be understood in one sense alone, without leaving any room for doubt, controversies or difference of interpretation. . . .'" [Executive Leasing Corp. v. Banco Popular de Puerto Rico, 48 F.3d 66, 69 \(1st Cir.\)](#) (quoting [Catullo v. Metzner, 834 F.2d 1075, 1079 \(1st Cir. 1987\)](#)) (internal quotation marks omitted), cert. denied, U.S. , 116 S. Ct. 171, 133 L. Ed. 2d 112 (1995); see also *Heirs of Ramirez v. Superior Court*, 81 P.R.R. 347, 351 (1959).

Citing the Puerto Rico Supreme Court in *Marina Ind., Inc. v. Brown Boveri Corp.*, 114 P.R. Dec. 64, 72 (1983) (official translation), several courts have interpreted Article 1233 [HN11](#) to be "strict in its mandate that courts should enforce the literal sense of a written contract, unless the words are somehow contrary to the intent of the parties." [Hopgood](#), 839 F. Supp. at 104; see also [Vulcan Tools](#), 23 F.3d at 567 ([HN12](#)) "When an agreement leaves no doubt as to the intention of the parties, a court should not look beyond the literal terms of the contract.").

This interpretation of Article 1233 is complemented by Puerto Rico's parol evidence rule, P.R. Laws Ann. tit. 32, App. IV, R. 69(B) (1983) ("Rule 69(B)'), which provides:

[HN13](#) When in an oral or written agreement, either public or private, all the terms and conditions constituting the true and final intention of the parties have been included, such agreement shall be deemed as complete, and therefore, there can be between the parties, or successors [\*\*16] in interest, no evidence extrinsic to the contents of the same, except in the following cases:

- (1) Where a mistake or imperfection of the agreement is put in issue by the pleadings;
- (2) Where the validity of the agreement is the fact in dispute.

This rule does not exclude other evidence of the circumstances under which the agreement was made or to which it is related such as the situation of the subject matter of the instrument or that of the parties, or to establish illegality or fraud.

[HN14](#) We have interpreted this rule in tandem with Article 1233 to require courts "to ignore [parol] evidence 'when the agreement . . . is clear and unambiguous.'" [Mercado-Garcia v. Ponce Fed. Bank](#), 979 F.2d 890, 894 (1st Cir. 1992) (quoting [Catullo](#), 834 F.2d at 1079).

Recently, we have held that [HN15](#) these provisions bar consideration of extrinsic evidence to vary the express, clear, and unambiguous terms of a contract. See [Executive Leasing Corp.](#), 48 F.3d at 69-70 (refusing to consider [\*16] parol evidence regarding implied loan term barring leasing company from dealing with other banks where contract did not include restriction but did include clear [\*\*17] integration clause); [Vulcan Tools](#), 23 F.3d at 564-68 (where contractual term providing for "non-exclusive" distributorship was clear and unambiguous, there was no need to consider extrinsic evidence of promise to limit number of distributors even absent contractual integration clause); see also [Hopgood](#), 839 F. Supp. at 103-05 (holding that term "indefinite" used in employment contract clearly signified employment at will and refusing to consider parol evidence of implied guarantee of three-year minimum employment).

This line of cases effectively parries the main thrust of Borschow's appeal. The Distribution Agreement clearly and unambiguously gives Borschow a "non-exclusive" distributorship. The integration clause, specifying that the terms and provisions of this Distribution Agreement constitute the "entire agreement" and "the final expression of intent," nullifies any other oral or written understandings reached between the parties. Crediting Mr. Borschow's testimony that he received the outline from Vallance promising an exclusive distributorship, as we must on summary judgment, we hold that the integration clause rendered inoperative any such side-agreement, and we are [\*\*18] barred from considering the extrinsic evidence by Rule 69(B).

Borschow attempts to evade the effect of this settled precedent by arguing that the entire agreement, properly construed, includes both the Distribution Agreement and the Outline. Because the documents contain mutually inconsistent terms, Borschow contends that Article 1233 of Puerto Rico's Civil Code permits liberal consideration of extrinsic evidence as to the parties' intent to resolve contractual ambiguity. To some extent, Borschow's reliance on this Civil Code principle finds some support in Puerto Rico case law. The Puerto Rico Supreme Court has held that:

The intention of the parties is the essential test provided in the Civil Code to fix the scope of contractual obligations. This test of intention is so essential in the interpretation of contracts that the Code proclaims its supremacy in providing that the evident intention of the parties shall prevail over the words, even where the latter would appear contrary to the intention . . . .

[Merle v. West Bend](#), 97 P.R.R. 392, 399 (1969). However, that court subsequently clarified that [HN16](#) "the strict mandate of the cited art. 1233 obliges us to abide [\*\*19] by the literal meaning of the terms of the contract when,

as in the present case, they leave no doubt as to the intention of the contracting parties." *Marina Ind. Inc. v. Brown Boveri Corp.*, 114 P.R. Dec. 64 (1983) (official translation).

In rejecting essentially the same argument now made by Borschow, we applied this principle in *Executive Leasing Corp.*:

The plaintiffs concede the loan agreement is clear. They argue, however, that the written agreement was not in fact the entire agreement, and that we must consider extrinsic evidence of the parties' intent with respect to integration. . . . Yet to consider extrinsic evidence at all, the court must first find the relevant terms of the agreement unclear. That requirement not being met, the district court correctly went no further.

[48 F.3d at 69](#) (excluding extrinsic evidence of exclusive dealing condition and of "actual practice" of parties); accord [Hopgood, 839 F. Supp. at 106](#) (explaining that *Marina* and *Merle* support principle that under Article 1233 the clear terms of the contract are the "embodiment of the indisputable intent of the parties as they entered into the contract").

For the [\[\\*\\*20\]](#) third time, we mean what we say, and say what we mean: [HN17](#) extrinsic evidence of the parties' intent is inadmissible in the face of a clear and unambiguous contract term under Puerto Rico Law. Because Borschow's distributorship was non-exclusive as a matter of law, the district court properly granted summary judgment for Appellees on the Law 75 claim.<sup>4</sup>

### C . Antitrust Claim -- Tying Arrangement

Asserting a *per se* violation of Section One of the Sherman Act, Borschow contends that [\[\\*\\*21\]](#) [\[\\*17\]](#) Becton Dickinson threatened to withhold sale of its patented Deseret line of medical products (the tying product) unless Borschow dropped the Monoject product and carried instead its own syringe line (the tied product).<sup>5</sup> Contending that this is "the case of the tie that didn't bind," Becton Dickinson argues that a threat alone is insufficient to constitute an illegal tying arrangement. We agree.

"[Section 1 HN18](#) of the Sherman Act prohibits a seller from 'tying' [\[\\*\\*22\]](#) the sale of one product to the purchase of a second product if the seller thereby avoids competition on the merits of the 'tied' product. See [15 U.S.C. § 1](#) ('Every contract . . . in restraint of trade or commerce . . . is declared to be illegal.')" [Data General Corp. v. Grumman Systems Support Corp.](#), 36 F.3d 1147, 1178 (1st Cir. 1994). "There are essentially four elements to a *per se* tying claim: (1) the tying and the tied products are actually two distinct products; (2) there is an agreement or condition, express or implied, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product." [Id. at 1178-79](#).<sup>6</sup>

<sup>4</sup> While the Puerto Rico parol evidence rule permits extrinsic evidence to establish fraud, Borschow does not allege that it was fraudulently induced into signing the Distribution Agreement. Nor is a claim of equitable estoppel properly before us. Borschow contends for the first time on appeal that Becton Dickinson should be estopped from denying the existence of an exclusive contract because of the conduct of its agent, Vallance. As this argument was not made below, it is waived. [Executive Leasing Corp., 48 F.3d at 70](#).

<sup>5</sup> See Amended Verified Complaint PP 28-29. Plaintiff also asserts a claim under the Clayton Act, § 3, that we need not separately address. See [Grappone, Inc. v. Subaru of New England, Inc.](#), 858 F.2d 792, 793 (1988) (pointing out that essential elements of unlawful tying arrangement are same for alleged violations of Sherman Act [§ 1](#) or Clayton Act § 3). In addition, Borschow conceded at oral argument that our holding that the Distribution Agreement was non-exclusive would foreclose relief on all of its antitrust claims except its tying claim.

<sup>6</sup> Borschow does not articulate a "rule of reason" theory of tying liability. Although the amended verified complaint contains conclusory allegations that Becton Dickinson's conduct generally had an adverse effect on competition, there is no evidence in the record to support the allegation that the threats of tying had such an adverse impact, or to provide a basis for providing

[\*\*23] The fatal flaw in Borschow's tying claim is that Becton Dickinson never withheld its Deseret line. Although Borschow has adduced evidence of various threats by Becton Dickinson, it is undisputed that these threats were not carried out. Permitted to carry both the Deseret line and the Monoject line, Borschow was never injured by the threat. See *Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803, 814 (1st Cir.) (holding that plaintiff must have been injured by anticompetitive act to have standing under antitrust laws), cert. denied, 488 U.S. 955, 102 L. Ed. 2d 381, 109 S. Ct. 392 (1988).

As a result, the second key element discussed above -evidence of a tie -- is missing:

**HN19** [↑] 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.

*Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984); [\*\*24] see also *T. Harris Young & Assoc., Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 822-23 (11th Cir.) ("For a tie to exist a seller must withhold product A unless the buyer also selects product B. Only after the existence of a tie is shown is it necessary to determine whether an illegal [\*18] tying arrangement exists.") (footnote omitted), cert. denied, 502 U.S. 1013, 116 L. Ed. 2d 749, 112 S. Ct. 658 (1991); *CIA Petrolera Caribe, Inc. v. Avis Rental Car Corp.*, 576 F. Supp. 1011, 1016 (D.P.R. 1983) ("Coercion is an essential element of any tying arrangement, i.e., forcing the purchaser or lessor to take the unwanted tied product along with the tying product."), aff'd, 735 F.2d 636 (1st Cir. 1984).

**HN20** [↑] Where a tying product has not been withheld, there is no tie. "There is no tie for any antitrust purpose unless the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one." 10 Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and their Application* P 1752b, at 280 (1996). Thus we hold that there is no genuine issue of material fact with respect to Borschow's tying claim.<sup>7</sup>

### [\*\*25] III. CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment is **AFFIRMED**.

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further discovery pursuant to *Fed. R. Civ. P. 56(f)*. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-31, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984) (noting that in absence of *per se* liability, antitrust plaintiff must prove that defendant's conduct had an "actual adverse effect on competition"); *R.W. International Corp. v. Welch Food, Inc.*, 13 F.3d 478, 487-88 (1st Cir. 1994) (rejecting request for further discovery despite conclusory allegations of antitrust injury where plaintiff distributors were in same position as defendant to ascertain effect of conduct at issue).

<sup>7</sup> This holding also disposes of Borschow's discovery claim. Borschow contends that the district court abused its discretion by refusing to allow further discovery. However, no amount of discovery would uncover evidence of a non-existent tie.



## *Johnson v. Hospital Corp. of Am.*

United States Court of Appeals for the Fifth Circuit

September 23, 1996, Decided

No. 94-11002

### **Reporter**

95 F.3d 383 \*; 1996 U.S. App. LEXIS 24832 \*\*; 1996-2 Trade Cas. (CCH) P71,579

ALFRED R. JOHNSON, D.O., ET AL., Plaintiff-Appellees, Cross-Appellants, versus HOSPITAL CORPORATION OF AMERICA, ET AL., Defendants, BEDFORD NORTHEAST COMMUNITY HOSPITAL, INC., ET AL., Defendants-Appellants, Cross-Appellees.

**Prior History:** [\[\\*\\*1\]](#) Appeals from the United States District Court for the Northern District of Texas. 3:89-CV-454-P. Jorge A Solis, US District Judge.

**Disposition:** AFFIRMED in part, REVERSED in part, VACATED in part and REMANDED.

## **Core Terms**

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damages, district court, patients, conspiracy, privileges, suspension, closure, tortious interference, admitting, antitrust, summary suspension, disparagement, malice, plaintiffs', suspend, legal right, award of damages, good faith, immunity, charts, business relationship, antigens, no evidence, environmental, recommended, medicine, stemming, reopen, contractual relationship, clearly erroneous

## **LexisNexis® Headnotes**

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Administrative Law > Judicial Review > Reviewability > Standing

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

### [\*\*HN1\*\*](#) **Reviewability, Standing**

In order to establish individual standing, a plaintiff must show that: (1) he has suffered an actual or threatened injury as a result of the actions of the defendant; (2) the injury is "fairly traceable" to the defendant's actions; and (3) the injury will likely be redressed if he prevails in his lawsuit.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

### [\*\*HN2\*\*](#) **Standards of Review, Clearly Erroneous Review**

When a district court sits as a finder of fact, its factual determinations will not be overturned on appeal unless they are clearly erroneous. Under the clearly erroneous standard, if the district court's account of the evidence is

plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

### **HN3** **Regulated Practices, Price Fixing & Restraints of Trade**

Section 1 of the Sherman Antitrust Act forbids contracts, combinations, or conspiracies in restraint of trade or commerce. 15 U.S.C.S. § 1. To prevail on a section one claim, plaintiffs must show that the defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market. Section one applies only to concerted action; unilateral conduct is excluded from its purview. The plaintiffs bear the burden of proving each element of the section one violation.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

### **HN4** **Actions Against Facilities, Governmental & Nonprofit Liability**

See Tex. Rev. Civ. Stat. Ann. 4495b, § 5.06(f).

**Counsel:** For ALFRED R JOHNSON, D O, WILLIAM J REA, MD, WILLIAM J REA AND ASSOCIATES, PA, ENVIRONMENTAL HEALTH CENTER - DALLAS, INC fka WJR and Associates, PA, Plaintiffs - Appellees-Cross-Appellants: Stephen A Coke, Richard Wellington Winn, Wesner, Coke and Clymer, Dallas, TX.

For BEDFORD NORTHEAST COMMUNITY HOSPITAL, INC, JIM LINTON, D O, ROBERT M MARTIN, PAUL HABERER, D O, RICHARD FEINGOLD, D O, BARRY FIRSTENBERG, D O, Defendants - Appellants-Cross-Appellees: Patton G Lochridge, Linn Hughes, McGinnis, Lochridge & Kilgore, Austin, TX.

**Judges:** Before JOLLY, DUHE, and STEWART, Circuit Judges.

**Opinion by:** E. GRADY JOLLY

## **Opinion**

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**[\*386]** E. GRADY JOLLY, Circuit Judge:

William J. Rea, M.D. and Alfred R. Johnson, D.O. sued the hospital where they formerly practiced, Bedford Northeast Community Hospital (the "Hospital"), its parent corporation, HCA Health Services of Texas, Inc. ("Health Services"), the Hospital's administrator, Robert M. Martin, and its chief of staff, Dr. Jim Linton, and three doctors, Drs. Barry Firstenberg, Richard Feingold, and Paul Haberer, who served on an ad hoc Hospital committee to investigate complaints made against Rea and Johnson, which resulted in the suspension of their admitting privileges. Rea and Johnson alleged that the Hospital's suspension of their admitting privileges and its later decision to close the unit to which they admitted patients violated federal antitrust law. They also asserted pendent state law claims of breach of contract, fraud, negligent misrepresentation, slander and business disparagement and tortious interference with contractual relations. **[\*\*2]** After a bench trial, the district court held that the Hospital,

Linton, Martin, and Haberer tortiously interfered with Rea and Johnson's contractual relations with their patients. The district court denied all other claims. The district court awarded Rea and Johnson both compensatory and exemplary damages.

We have before us an appeal and cross-appeal. The defendants appeal the award of damages for tortious interference with business relations, arguing that the only damages proved at trial were damages of Rea and Johnson's professional association, for which they lack standing to seek recovery. The defendants also argue that the Hospital's decision to close the unit to which Rea and Johnson admitted patients is protected by the affirmative defense of legal justification, and that the defendants are entitled to immunity in connection with the summary suspension of Rea and Johnson's admitting privileges. Rea and Johnson cross-appeal the denial of their antitrust and business disparagement claims. The overarching question before us, thus, is whether Rea and Johnson have proved that they are entitled to damages under any theory that they assert on appeal and, if so, in what amount. We **[\*\*3]** begin with a review of the relevant facts.

I

Rea and Johnson practice environmental medicine. This practice involves the treatment of patients with chronic pain or disease that is believed to be caused or aggravated by chemicals or other agents found in the patient's environment. Before the suspension of their hospital privileges, Rea and Johnson admitted patients to the Environmental Care Unit ("ECU"), a part of the Hospital's Internal Medicine Department.

The Hospital's relationship with Rea and Johnson had been tumultuous for some time before their suspension, arising from a Medicare **[\*387]** inspection in September of 1986. Its importance was heightened because Medicare receipts made up nearly one-half of the Hospital's gross revenue. The inspection uncovered several deficiencies that, unless timely remedied, would result in the loss of the Hospital's Medicare payments. Among the deficiencies noted by Medicare was the use of antigens in the ECU.<sup>1</sup> Medicare requires that any medication administered in the Hospital, including antigens, be properly labeled, dispensed through the Hospital's pharmacy, and come from an FDA-approved source. Rea and Johnson manufactured the antigens themselves. **[\*\*4]** They were not an FDA-approved source.<sup>2</sup> Martin notified Rea and Johnson that they would no longer be able to use the antigens in the Hospital until a suitable alternative source was found. Martin also advised the doctors that their reappointment and privileges could be in jeopardy if their recalcitrance continued. Irrespective of these instructions, Rea and Johnson continued to provide antigens to their patients, but only for self-administration.

**[\*\*5]** Other sources of friction arose between the Hospital and Rea and Johnson. After learning that Rea and Johnson violated hospital policy by rendering medical services to patients in the "ECU Hotel," which consisted of several rooms adjacent to the ECU used by the families of ECU patients "almost as a hotel," the Hospital decided to close it. Coinciding with its closure of the ECU Hotel, the Hospital also instituted a cash-only policy for ECU patients. The Hospital took this action after experiencing problems in bill collection when insurance coverage was denied to several ECU patients.

The immediate impetus for the Hospital's suspension of Rea and Johnson's admitting privileges--one of two factual bases for the present suit--occurred in January of 1987, less than six months after Medicare inspected the Hospital. The dispute began when the Hospital's Director of Pharmacy, Mike Warmington, notified Martin, the hospital administrator, of concerns he had about the drug regimen of two ECU patients under the care of Rea and Johnson.

On January 22, 1987, the Hospital's Medical Executive Committee ("MEC") met. The MEC was composed of the elected heads of the Hospital's various departments. **[\*\*6]** During that meeting, Martin relayed Warmington's

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<sup>1</sup> Rea and Johnson administered the antigens in small doses to their patients in order to determine the patient's sensitivity to the substance.

<sup>2</sup> Rea and Johnson also manufactured and administered "transfer factor," a blood product that is used to fight infections and enhance the immune system. Because transfer factor is an "investigational drug" requiring approval of the Hospital's Internal Review Board, which had not approved it, the Hospital directed Rea and Johnson not to administer it at the Hospital. Notwithstanding this instruction, they administered transfer factor to at least one patient after the prohibition.

concerns. Martin also raised the Hospital's earlier problems with Rea and Johnson surrounding the use of antigens and transfer factor in the ECU. Linton, the Hospital's chief of staff, and Firstenberg, the chairman of internal medicine, both expressed some concern that the Hospital's previous inquiry into antigen use was being brought up again now. Feingold recommended that the MEC bring in an outside consultant to investigate the charges against Rea and Johnson. Disregarding Feingold's suggestion, Linton appointed an ad hoc committee (the "Committee") to review the charts of certain ECU patients.<sup>3</sup> The Committee consisted of defendants Drs. Feingold and Firstenberg, defendant Dr. Paul Haberer, a former chief of staff at the Hospital, and a fourth member not named as a defendant, Dr. Jeffrey Mills.

[\*\*7] [\*388] Twenty-two days after its appointment, on February 13, 1987, three members of the Committee, Mills, Haberer, and Feingold, met for the first time to review the charts of four ECU patients. Firstenberg, who was out of town, did not attend the meeting. The Committee spent two hours reviewing the charts, but prepared no written findings or recommendations after its review. The charts showed that Johnson gave one patient four times the daily recommended dose of Halcion, a level described as toxic in the 1986 Physician's Desk Reference. A second patient received six times the daily recommended dosage of Halcion, while simultaneously receiving a second drug that "potentiates" or make stronger the effect of Halcion. At least one patient appeared from the charts to be addicted to narcotic pain killers. Other patients demonstrated depression and suicidal ideations for which no psychiatric evaluation was performed or treatment provided. Haberer reported the Committee's findings to Linton by telephone after the meeting, describing the situation as a "shooting gallery."

On the morning of February 16, 1987, Martin and Linton met to discuss the Committee's findings as orally reported to them [\*\*8] by Haberer. Feingold and Mills confirmed Haberer's report. Joined by Firstenberg, who had been absent from the Committee's meeting on February 13, Martin and Linton summoned Johnson. Johnson was informed that the Hospital was suspending his and Rea's admitting privileges immediately, but that the doctors' treating privileges were being suspended effective February 18, 1987, at noon. Both actions were taken pending further investigation of the doctors' medical practices through the Hospital's Fair Hearing Process, set forth in its Bylaws. The Hospital argues on appeal that it did not immediately suspend the doctors' treatment privileges in order to allow them "to make arrangements for new doctors to take over the care of the patients." Despite the promise Johnson made during the meeting to arrange substitute care, he did not. Martin and Linton arranged substitute physicians for the ECU patients.

The Hospital confirmed its suspension of Rea and Johnson by letter the same day, stating that suspensions were based upon § 8.1-4(a)-(f) of the Hospital's Bylaws, which governs summary suspensions. The letter gave no specific reason for the suspension. Sometime after the meeting concluded, [\*\*9] Firstenberg and Linton each reviewed for the first time the ECU charts that triggered the Hospital's suspension of Rea and Johnson.

On February 19, 1987, the MEC met to review the suspension and voiced considerable concern for the ECU patients' safety. The MEC voted unanimously to continue Rea and Johnson's suspension. On February 26, the MEC met a second time to consider the suspension. At this meeting, Rea and Johnson each spent an hour answering questions from the MEC regarding their treatment of patients. Following the doctors' appearance, the MEC voted unanimously a second time to affirm the summary suspension pending a full hearing before the Fair Hearing Committee.

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<sup>3</sup> The Hospital's Bylaws provide for the summary suspension of admitting privileges "whenever action must be taken immediately in the best interest of patient care . . ." Hospital Bylaws § 8.2. The Bylaws further require, however, that complaints about doctors be submitted in writing to the MEC, which is then to forward the complaint to the department head where the activities occurred--here, the Department of Internal Medicine. Bylaws § 8.1-1-5. The department head is then required to investigate the matter or appoint an ad hoc committee to investigate. Hospital Bylaws § 8.1-3. A written report of the investigation is then sent to the MEC, which may then take action. *Id.*

Under this framework, Firstenberg, as the Chairman of Internal Medicine, alone had authority to appoint the members of the Committee.

On March 26, 1987, the day before the Fair Hearing Committee met to consider the suspension, Martin closed the ECU. At the time, the ECU had no patients and it was doubtful there would be any new patients in the immediate future.

On March 27, 1987, the Fair Hearing Committee met for over seventeen hours to hear testimony from Rea and Johnson. Following the hearing, the committee voted to reinstate Rea and Johnson's privileges, although at least one member of the committee thought that the narcotic use in the ECU [\*\*10] was "excessive." Based on the committee's report, the MEC reinstated Rea and Johnson's privileges, but placed them on probation for twelve months, on the condition that the charts of their patients would be reviewed periodically.

Rea and Johnson appealed the probation decision to the Hospital's Board of Trustees, the final authority on admitting privileges. The Board of Trustees voted to reinstate the doctors without placing them on probation. The Board of Trustees, however, sent Rea and Johnson a letter of concern regarding the "questionable use of narcotics" in the ECU. The Hospital restored Rea and Johnson's [\*389] privileges on June 11, 1987, which was of little practical consequence to them, however, because the ECU had been closed.

On September 17, Health Services sold the Hospital to Bedford-Northeast Community Hospital, Inc. ("BNECH"). Martin continued to act as Hospital Administrator after the sale to BNECH. Although Martin discussed with Rea and Johnson the reopening of the ECU on several occasions, on December 15, 1987, the Hospital made a final decision not to reopen it.

On February 14, 1989, Rea and Johnson filed this suit, naming initially as defendants the Hospital Corporation [\*\*11] of America ("HCA") (which was later dismissed by order of the district court), the Hospital, Martin, Linton, Feingold, Firstenberg, and Haberer. They asserted violations of the Sherman Act, breach of contract, fraud, negligent misrepresentation, slander, business disparagement, and tortious interference with business relations. On February 15, 1990, Rea and Johnson joined as plaintiffs their professional associations, William J. Rea, M.D. and Associates ("PA1") and Environmental Health Center-Dallas, Inc., f/k/a/ WJR & Associates, P.A. ("PA2"). At the same time they added the Hospital's parent corporation, Health Services, as a defendant.

Following a bench trial, the district court held for defendants on the claims for antitrust, breach of contract, fraud, negligent misrepresentation, slander, and business disparagement. With respect to the claim for tortious interference with business relations, the district court concluded that two defendants, Firstenberg and Feingold, were entitled to civil immunity under Texas's peer review statute, and consequently denied the plaintiffs' claim against them. As to the remaining defendants, the district court concluded that the Hospital, Health [\*\*12] Services, Martin, Linton and Haberer engaged in two separate incidents of tortious interference with Rea and Johnson's contractual relations with their patients--first, by closing the Hospital's ECU and, second, by summarily suspending Rea and Johnson's admitting privileges. The district court awarded Rea and Johnson compensatory damages from February 16, 1987, the date of their summary suspensions, to December 15, 1987, the date on which the Hospital decided not to reopen the ECU. Based on expert testimony that the damages from lost patient revenue equaled \$ 653.23 per day, the district court awarded Rea and Johnson \$ 197,928.00 <sup>4</sup> in compensatory damages. The court also awarded Rea and Johnson exemplary damages in the amount of \$ 200,000.00. Each side has appealed the district court's judgment.

[\*\*13] II

Our task is to determine whether and to what extent Rea and Johnson have proved that they are entitled to damages under the business disparagement, antitrust or tortious interference claims asserted by them at trial and on appeal. We begin with the defendants' claim that Rea and Johnson have failed to prove standing to recover

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<sup>4</sup>The district court found the Hospital, Health Services and Martin jointly and severally liable to Drs. Rea and Johnson for \$ 122,154.00. In addition, the court found the Hospital, Health Services, Martin, Haberer, and Linton jointly and severally liable for an additional sum of \$ 75,774.00.

damages stemming from their summary suspension and the Hospital's closure of the ECU. We then examine each of the theories advanced by Rea and Johnson on appeal as a basis for their recovery of damages.<sup>5</sup>

### III

As a preliminary matter, the defendants contend that Rea and Johnson lack standing to seek damages stemming from their summary suspension and the Hospital's closure of the ECU. The defendants argue that the only damages proved were damages to Rea and Johnson's professional association, PA2; PA2, moreover, is barred from recovering any damages for tortious [\*\*14] interference because the limitations period has run, and [\*390] because PA2 had no admitting privileges. We are unconvinced by either argument.

The defendants correctly observe that the damages for tortious interference proved at trial were damages to PA2. The plaintiffs' expert on damages testified that the loss suffered in this case included lost profits from the sale of services and products provided to ECU patients. Because the fees for these services are paid to PA2, and not to Rea and Johnson directly, the calculation of damages derived entirely from the loss of earnings to PA2. The defendants are also correct that under Texas law a shareholder does not have an individual cause of action for personal damages caused solely by a wrong done to the corporation. See [\*Cullum v. General Motors Acceptance Corp., 115 S.W.2d 1196, 1201\*](#) (Tex.Civ.App.--Amarillo 1938, no writ).

We cannot agree, however, that Rea and Johnson lack standing to recover the damages proved at trial. PA2 assigned its rights to Rea and Johnson, who may then recover to the same extent as PA2. See [\*State Fidelity Mortg. Co. v. Varner, 740 S.W.2d 477, 480\*](#) (Tex.App.--Houston 1987). Contrary to the defendants' assertion, [\*\*15] PA2 was not barred from recovering damages by limitations. Rea and Johnson filed their tortious interference claim within the applicable two-year limitations period; their joinder of PA2 after the limitations period relates back to the initial filing of the suit. See [\*Fed. R. Civ. P. 17\(a\); Ratner v. Sioux National Gas Corp., 770 F.2d 512, 515, 520 \(5th Cir. 1985\)\*](#).

We conclude, moreover, that PA2 has standing to sue for recovery of damages stemming from the denial of Rea and Johnson's admitting [HN1](#) privileges. In order to establish individual standing, a plaintiff must show that: (1) he has suffered an actual or threatened injury as a result of the actions of the defendant; (2) the injury is "fairly traceable" to the defendant's actions; and (3) the injury will likely be redressed if he prevails in his lawsuit. [\*Save Our Community v. U.S.E.P.A., 971 F.2d 1155, 1160 \(5th Cir. 1992\)\*](#) (quoting [\*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 758-59, 70 L. Ed. 2d 700 \(1982\)\*](#)).

PA2 possesses this Article III requirement for standing. Because Rea and Johnson generate all of the revenues of PA2, they are the primary [\*\*16] assets of that association. As a result, PA2 is injured in fact by the Hospital's summary suspensions of Rea and Johnson and we may relieve that injury by awarding damages to PA2.<sup>6</sup> As assignees of PA2, Rea and Johnson may recover to the same extent as PA2.

[\*\*17] Having established that Rea and Johnson have standing to recover the losses sustained by their professional association, we now consider whether and to what extent they have proved that they are entitled to

<sup>5</sup> Rea and Johnson do not appeal the dismissal of their breach of contract, fraud, and negligent misrepresentation claims.

<sup>6</sup> We note that the Eleventh Circuit Court of Appeals has held that a corporation of which a suspended physician is the sole shareholder has no standing to sue for damages stemming from the denial of the physician's admitting privileges. See [\*Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1441 n.1 \(11th Cir. 1991\)\*](#). In *Todorov*, the Eleventh Circuit reasoned that "it is [the physician], not [his] corporation, who [is] seeking privileges at [the Hospital] and, thus, the relief prayed for in this case." *Id.*

Unlike the plaintiff in *Todorov*, Rea and Johnson do not seek injunctive relief since the Hospital has reinstated their admitting privileges. Even if, however, Rea and Johnson sought injunctive relief, PA2 would have constitutional standing to seek damages as it was injured by the Hospital's summary suspension of its primary assets, Rea and Johnson.

damages under any theory asserted by them on appeal. We first consider whether the plaintiffs' business disparagement claim, denied by the trial court, will support an award of damages to Rea and Johnson.

#### IV

Rea and Johnson cross-appeal the district court's denial of their claims for business disparagement, arguing that they properly established special damages. The district court found that Rea and Johnson failed to "show loss of patients or earnings that resulted directly from the alleged false communications made by Defendants." Relying on comment c. to § 632 of the Restatement (2d) [\*391] of Torts, Rea and Johnson argue that the actual disparagement need not be the sole, exclusive factor causing the plaintiffs' damages; instead, they assert, the disparagement need only be "a substantial factor in bringing about the loss."

We cannot agree. The elements of a claim for business disparagement are publication by the defendant of the disparaging words, falsity, malice, lack of privilege [\*\*18] and special damages. Hurlbut v. Gulf Atlantic Life Ins., 749 S.W.2d 762, 767 (Tex. 1987). To prove special damages, a plaintiff must provide evidence of direct, pecuniary loss attributable to the false communications of the defendants. *Id.* (rejecting a claim for business disparagement where "our review of the record reveals no evidence of the direct, pecuniary loss necessary to satisfy the special damages of a claim for business disparagement). Rea and Johnson provided no evidence of direct loss at trial, and can point to no such loss on appeal. We therefore conclude that Rea and Johnson are entitled to no damages for business disparagement.

#### IV

We next consider whether the plaintiffs' antitrust claim, denied by the trial court, can support an award of damages to Rea and Johnson. Although Rea and Johnson fail to articulate a coherent theory to support their antitrust claim, they allege that the Hospital, Health Services, Linton, Martin, Haberer, Firstenberg and Feingold violated section 1 of the Sherman Act by conspiring to exclude them from practicing medicine at the Hospital.<sup>7</sup> According to Rea and Johnson, the purpose of their summary suspensions and the Hospital's closure [\*\*19] of its ECU was "to deny all environmental medicine physicians as a class the ability to compete at the Hospital," with the effect that the medical practices of the individual defendants would benefit.

The district court denied Rea and Johnson's antitrust claim after concluding that they failed to demonstrate a conspiracy either to close the ECU or to summarily suspend their admitting privileges. The ECU's closure, the district court found, was a unilateral decision by the Hospital, acting through Martin, and therefore could not form the basis of a conspiracy. With respect to the alleged conspiracy to summarily suspend Rea and Johnson's admitting privileges, the district court [\*\*20] found that any "conspiracy . . . among the defendants . . . was not economically motivated." Although the district court recognized that Rea and Johnson's theory--that "once [Rea and Johnson] could no longer treat their patients . . . then these patients could be treated by other doctors, including the defendants"--"may be true in the abstract," the court found that "there is no evidence that any of the individual Defendants stood to benefit economically from the suspensions of the closing of the ECU." This was, the court noted, because many of Rea and Johnson's patients were from Canada and no patient of the plaintiffs "had ever been treated by, were referred by, or were ever treated afterward by any of the defendant doctors."<sup>8</sup>

**HN2**[] When a district court sits as a finder of fact, its factual determinations will not be overturned on appeal unless [\*\*21] they are clearly erroneous. Pacific Employers Ins. Co. v. M/V Gloria, 767 F.2d 229, 241 (5th Cir. 1985), *reh'g denied, 782 F.2d 1351 (5th Cir. 1986)*. Under the clearly erroneous standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety the court of appeals may not reverse

<sup>7</sup> Rea and Johnson also sued under state antitrust law. See Texas Free Enterprise and Antitrust Act, Tex. Bus. & Comm. Code § 15.05(a). Because the Texas Act mandates that its provisions be interpreted in harmony with federal antitrust law, *id.* at § 15.04(a), we do not separately analyze the plaintiffs' state law antitrust claims.

<sup>8</sup> In addition to finding no antitrust conspiracy, the court also found that Rea and Johnson failed to prove that the alleged conspiracy unreasonably restrained trade.

it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." [Anderson v. City of Bessemer City, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 105 S. Ct. 1504 \(1985\)](#).

[\*392] We consider first whether the district court erred in concluding that no antitrust conspiracy existed to close the ECU and then address whether the court erred in finding no such conspiracy with respect to the plaintiffs' summary suspension.

A

**HN3** [↑] [Section 1](#) of the Sherman Antitrust Act forbids contracts, combinations, or conspiracies in restraint of trade or commerce. [15 U.S.C. § 1](#). To prevail on a section one claim, plaintiffs must show that the defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market. See [Kiepfer v. Beller, 944 F.2d 1213, 1221 \(5th Cir. 1991\)](#). Section one applies only to concerted action; [\*\*22] unilateral conduct is excluded from its purview. [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 \(1984\)](#). The plaintiffs bear the burden of proving each element of the section one violation. See, e.g., [Jefferson Parish Hosp. Dist. No. 2, v. Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, 1567, 80 L. Ed. 2d 2 \(1984\)](#).

The initial--and determinative--question in this appeal is whether Rea and Johnson have established proof of a conspiracy either to close the ECU or to summarily suspend their admitting privileges. A plaintiff may rely on either direct or circumstantial evidence. [American Tobacco Co. v. United States, 328 U.S. 781, 809-10, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 \(1946\)](#). When, as here, plaintiffs rely on circumstantial evidence to prove the existence of a conspiracy, they must proffer sufficient evidence to permit the inference of an antitrust conspiracy. The Supreme Court in *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.* established the governing standard for what constitutes sufficient evidence to permit the inference of an antitrust conspiracy:

There must be evidence that tends to exclude the possibility of independent action. [\*\*23] . . . In other words, [a plaintiff] must show that the inference of conspiracy is reasonable in light of the competing interferences of *independent action or collusive action that could not have harmed [the plaintiff].*"

[475 U.S. 574, 588, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 \(1986\)](#) (citations omitted) (emphasis added).

In the present suit, we cannot say that the district court clearly erred by finding that Rea and Johnson failed to establish a conspiracy to close the ECU. The district court concluded that the closure of the ECU was a unilateral decision of the Hospital. The undisputed evidence amply supports this conclusion. Each of the defendant doctors testified without contradiction that he had no input into the decision to close the ECU, testimony that was confirmed by Martin. Recognizing that the evidence shows no conspiracy between the Hospital and the defendant doctors, Rea and Johnson insist on a conspiracy between the Hospital and the entity that acquired it in September 1987, BNECH.<sup>9</sup> Essentially, Rea and Johnson argue that the closure of the ECU consists of two subsidiary decisions--the decision by the Hospital to close the ECU and the decision of BNECH not to reopen [\*\*24] the ECU--and that the Hospital conspired with BNECH in making these decisions. We reject out-of-hand the existence of a conspiracy initially to close the ECU. BNECH was not incorporated until nearly six weeks after the ECU's closure; because it did not exist at the time, it simply could not have conspired with the Hospital to close the ECU.

We find no greater factual basis for Rea and Johnson's assertion of a later conspiracy not to reopen the ECU. Rea and Johnson provide no evidence that the Hospital's first parent, Health Services, took any action with respect to the ECU after [\*\*25] September 17, the date of the sale to BNECH. Absent such evidence, Rea and Johnson can point to little more than the mere opportunity to conspire. [\*393] In sum, the district court was not clearly erroneous in choosing to credit Martin's testimony that he decided unilaterally to close the ECU and, later, not to reopen the ECU and therefore in refusing to find an antitrust conspiracy surrounding the ECU's closure.

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<sup>9</sup> Six weeks after the Hospital closed the ECU, it was sold by its parent, Health Services, to a new entity, Bedford-Northeast Community Hospital, Inc. ("BNECH"). Thus, Rea and Johnson assert that prior to its closing, the Hospital and its soon-to-be parent, BNECH, conspired to close the ECU. In addition, they maintain that after the ECU's closing, the Hospital and its previous parent, Health Services, conspired not to reopen the ECU.

## B

Neither can we say that the district court erred by finding that Rea and Johnson failed to establish a conspiracy to summarily suspend their admitting privileges. As we noted earlier, to make such a showing, Rea and Johnson were required to provide "evidence that tends to exclude the possibility of . . . collusive action that could not have harmed [the plaintiff]." *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (citations omitted) (emphasis added). Furthermore, the Supreme Court has explicitly cautioned that "if the claim is one that simply makes no economic sense[,] respondents must come forward with more persuasive evidence to support their claim than otherwise would be necessary." *Id. at 1361*. Thus, if the [\*\*26] plaintiffs "had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id.*

Here, the district court concluded that Rea and Johnson provided no evidence that "any of the individual Defendants stood to benefit economically from the suspensions of the closing of the ECU," and thus that they had proved no antitrust conspiracy. As before, we cannot say that the district court committed error by finding that Rea and Johnson failed to establish an illegal conspiracy. There is no evidence that any individual defendant was in competition with Rea and Johnson at the time of the summary suspensions and the closure of the ECU. The district court's conclusions are supported by the testimony of Drs. Haberer, Firstenberg, Feingold and Linton, all of whom testified that they did not hold themselves out as being capable of treating environmental illnesses. Indeed, Drs. Haberer, Firstenberg, and Linton did not even have ECU privileges at the time of the suspensions.

The evidence supporting an antitrust conspiracy is even clearer relative to the Hospital and Health Services. [\*\*27] The evidence showed that patient admissions generate revenues for the Hospital as well as the admitting doctor. Consequently, there is no economic benefit that would inure to the Hospital and its parent from suspending the plaintiffs. Indeed, "as presumably rational businesses, [they] had every incentive not to engage in the conduct with which they are charged." *Id. at 1360*.

In sum, we see no error in the district court's determination that no antitrust conspiracy existed. We conclude therefore that Rea and Johnson's antitrust claim can support no award of damages to them.

## V

Finally, we consider whether the claim of tortious interference with business relations may support the district court's award of damages to Rea and Johnson. The plaintiffs asserted two claims based on tortious interference--first, the Hospital's closure of the ECU and, second, its summary suspension of Rea and Johnson. We examine first whether tortious interference stemming from the closing of the ECU may support an award of damages. We then consider whether tortious interference arising from the summary suspensions can support an award of damages.

## A

The district court held that the defendants, [\*\*28] Martin and the Hospital, tortiously interfered with the plaintiffs' contractual relationships with their patients when they closed the ECU on March 26, 1987, notwithstanding the Hospital's proprietary right to close one of its units. Relying on *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931 (Tex. 1991), the district court concluded that under Texas law only a good faith assertion of legal rights may be raised as a defense against a claim of interference with contractual relations; the court then found that although the Hospital had a proprietary right to close the [\*\*29] ECU, Martin and the Hospital did not act in good faith. Attacking the district court's judgment, the defendants argue that good faith is not required under Texas law when a party has a superior interest in the subject matter. Because they had the lawful right to close the ECU, the defendants contend, their decision to close the unit cannot be the basis of a claim for tortious interference with business relations.

To recover for tortious interference with an existing contract, the plaintiff must prove: (1) the existence of a contract subject to interference, (2) the act of interference was willful and intentional, [\*\*29] (3) such intentional act was a proximate cause of plaintiff's damage and (4) actual damage or loss occurred. *Victoria Bank & Trust Co. v. Brady*,

811 S.W.2d 931, 939 (Tex. 1991). Nevertheless, "even if a plaintiff establishes the elements of this cause of action, a defendant may still prevail upon establishing the affirmative defense of justification." Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 1996 WL 11237 (Tex. 1996).

After this case was tried, the Texas Supreme Court clarified the relationship of good faith to a defendant's affirmative defense of justification based on a legal right. See Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 1996 WL 11237 (Tex. 1996). The Court held categorically that "if the trial court finds as a matter of law that the defendant had a legal right to interfere with a contract, then the defendant has conclusively established the justification defense and the motivation behind assertion of that right is irrelevant." *Id. at \*7*. Although *Victoria Bank* stated that "the defense of legal justification protects only good faith assertions of legal rights," the Court in *Texas Beef* expressly

disavowed good faith as relevant [\*\*30] to the justification defense when the defendant establishes its legal right to act as it did. Only when mistaken, but colorable claims of legal rights are asserted is the good faith of the actor legally significant. Only then must the jury determine whether the defendant believed in good faith that it had a colorable legal right.

*Id.*

Thus, *Texas Beef* is dispositive of the plaintiffs' claim for damages based on the defendants' closure of its ECU. There is no agreement between the Hospital and the plaintiffs requiring the Hospital to keep its ECU open. As such, the Hospital has established conclusively its legal right to close its ECU. In the newly shed light of *Texas Beef*, the Hospital's motivation in closing its ECU is irrelevant to its defense of justification. We therefore conclude that Rea and Johnson's claim for tortious interference stemming from the Hospital's closure of its ECU can support no part of the damage award. Consequently, we reverse and vacate the judgment of the district court, and render judgment for the defendants on the claim that the Hospital's closure of its ECU tortiously interfered with the plaintiffs' business contracts. We now turn to the [\*\*31] plaintiffs' second claim for damages based on the defendants interfering with its business contracts.

B

As we have noted earlier, the district court also held that the plaintiffs had proved additional damages based on a second incident of contract interference--the Hospital's summary suspension of Rea and Johnson's admitting privileges. The district court concluded, however, that two of the defendants, Firstenberg and Feingold, acted without malice and therefore were entitled to immunity. The remaining defendants--Linton, Martin, Haberer and the Hospital--were not entitled to immunity from civil liability, the court held, because "the suspension of the Plaintiffs was not done without malice *and in the reasonable belief that their actions were not warranted by the facts known to them.*" These defendants contend that the district court applied the wrong standard for malice. The district court must be reversed, they argue, because its finding of malice is clearly erroneous when the correct standard is applied. Rea and Johnson cross-appeal, arguing that they presented overwhelming evidence of malice and bad faith on the part of Feingold and Firstenberg, as well as all other defendants.

[\*\*32] The defendants' qualification for civil immunity in relation to the suspensions of Rea [\*395] and Johnson is governed by Texas' peer review statute. In 1987--when the alleged tort occurred--that statute provided in pertinent part HN4[] that:

(f)

The following persons are immune from civil liability:

(1) a person reporting to or furnishing information to a medical peer review committee;

(2) . . . a member, employee, or agent of a medical peer review committee . . . who takes any action or makes any recommendation within the scope of the functions of the . . . committee . . . if such member, employee, or agent *acts without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to him . . .*

Tex. Rev. Civ. Stat. art. 4495b, § 5.06(f) (Vernon Supp. 1985) (emphasis added).

At the time of the district court's decision, "malice" had not been defined by any Texas court for the purpose of art. 4495b, § 5.06(f). Subsequently, however, Texas courts adopted the "actual malice" standard: "Malice as used in Article 4495(b) . . . [means] knowledge that an allegation is false or with reckless disregard for whether [\*\*33] the allegation is false." [Maewal v. Adventist Health Systems/Sunbelt, Inc., 868 S.W.2d 886, 893 \(Tex. Ct. App. 1993\)](#).

We agree with the defendants that the district court, lacking a definitive statement from any Texas court, applied the wrong standard for malice. The standard for common law malice requires "spite, ill will, evil motive or purposeful injury of another." [Id. at 892](#). The district court quite clearly based its denial of immunity on its conclusion that the Hospital, Martin, Linton and Haberer acted out of spite toward Rea and Johnson. The court observed that the suspensions were motivated by "past antagonism and conflict" between the plaintiffs and Haberer and Martin, "the perceived arrogance of the Plaintiffs, and, to some extent, disagreements over the legitimacy of the practice of environmental medicine." The court further found that Linton and Martin suspended the plaintiffs without either one of them reviewing a single chart; instead, they "took this drastic action on the basis of what they heard from Haberer, who had prior conflicts with Plaintiffs." The court specifically concluded that this conduct "showed malice on the part of [Martin, Linton and Haberer], [\*\*34] and that the acts were *intentional and willful*."<sup>10</sup>

This court has on many occasions held that the "clearly erroneous" standard of review does not insulate factual findings premised upon an erroneous view of controlling legal principles. [Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 422 \(5th Cir. 1980\)](#). In the light of the district court's erroneous application of the common law standard for malice, we vacate the judgment based on this claim and remand to the district court for further consideration and analysis, in accordance with [Maewal v. Adventist Health Systems/Sunbelt, Inc.](#), of whether any defendant acted with the knowledge that the allegations against Rea and Johnson leading to their suspensions were false or with reckless disregard for the falsity of those allegations.

If the district [\*\*35] court finds on remand that one or more defendants acted with knowledge of or reckless disregard for the falsity of those allegations, and therefore is not entitled to civil immunity, it must then recalculate its award of compensatory damages to Rea and Johnson. The court premised its award of damages not only on the summary suspension of admitting privileges, but also on the Hospital's closure of the ECU, for which the Hospital established the affirmative defense of justification. As we concluded earlier, the Hospital's closure of the ECU, in accord with its legal right to do so, can support no part of the damage award. Consequently, Rea and Johnson may not recover for lost patient revenue after the ECU's closure on March 26, 1987.<sup>11</sup> If the district court decides to award damages to the plaintiffs, and in the light of the fact that the compensatory damage award, if any, to Rea and Johnson on remand will be considerably [\*396] reduced upon recalculation, the district court also must reconsider and, if appropriate, recalculate its award of exemplary damages.

## [\*\*36] VI

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<sup>10</sup> With much less explanation, the district court granted immunity to Firstenberg and Feingold. The court simply found that the latter "did not act with malice and are, therefore, entitled to" civil immunity.

<sup>11</sup> Because Rea and Johnson admitted patients at the Hospital only to the ECU, and because, as we have held, *supra*, the Hospital had the proprietary right to close the ECU, they would have generated no patient revenue from hospital admission after this date even if their admitting privileges had not been suspended. They therefore can demonstrate no damages after this date stemming from the suspension of their admitting privileges.

Arguing that the Hospital's closure of the ECU is "mere subterfuge or retaliation," Rea and Johnson urge that the defendants "should not be permitted to dichotomize their accountability" for the damages to Rea and Johnson stemming from their suspension. In effect, they argue that they are entitled to damages even after March 26, even though neither they nor any other doctor could admit patients to the ECU. We cannot agree. Were we to accept this, the Hospital would be required to pay damages to Rea and Johnson notwithstanding its superior legal right to close the ECU. Because the revenue Rea and Johnson generated from admitting patients to the ECU would have ceased with the ECU's closure even if they had not been suspended, any damages to them resulting from the closure have no causal connection to the denial of their patient privileges, and thus the damage award they ask for would give Rea and Johnson a windfall.

Accordingly, we AFFIRM the district court's denial of the plaintiffs' claims for business disparagement and violations of section one of the Sherman Act, REVERSE AND VACATE the district court's award of damages to the plaintiffs for tortious interference with business relations arising from the Hospital's closure of the ECU, and VACATE the judgment based on the plaintiff's claim for tortious interference with business relations stemming from their summary suspensions and REMAND for additional findings of fact and recalculation of damages in a manner not inconsistent with this opinion.

AFFIRMED in part, REVERSED in part, VACATED in part and REMANDED.

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## **Delta Dental v. Blue Cross & Blue Shield**

United States District Court for the District of Rhode Island

September 26, 1996, Decided

C.A. No. 95-0546L

**Reporter**

942 F. Supp. 740 \*; 1996 U.S. Dist. LEXIS 14413 \*\*

DELTA DENTAL OF RHODE ISLAND, Plaintiff v. BLUE CROSS & BLUE SHIELD OF RHODE ISLAND, Defendant

**Disposition:** [\*\*1] Magistrate Judge Boudewyns' remand order of February 22, 1996 affirmed. Matter remanded

### **Core Terms**

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Dental, magistrate judge, removal, district court, antitrust, motions, state court, parties, res judicata, courts, remand order, nondispositive, involuntary dismissal, federal court, state law, well-pleaded, matters, federal law, practices, remanding, dispositive motion, clearly erroneous, factual findings, federal question, federal claim, final order, contractual, relations, asserts, merits

### **LexisNexis® Headnotes**

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Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

#### [HN1](#) [down arrow] **Magistrates, Pretrial Referrals**

Under [28 U.S.C.S. § 636\(b\)\(1\)\(A\)](#), the district court may refer to a magistrate judge for hearing and determination any pending pretrial matter, with the exception of eight motions specifically listed therein: a judge may designate a magistrate to hear and determine any pretrial matter pending before a court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A magistrate judge's determination of a matter not within the eight exceptions can be appealed to the district court under a clearly erroneous or contrary to law standard. [28 U.S.C.S. § 636\(b\)\(1\)\(A\)\(1994\)](#). As for the eight motions excepted by [§ 636\(b\)\(1\)\(A\)](#), the district court may also refer these matters to a magistrate judge under [§ 636\(b\)\(1\)\(B\)](#). In such cases, however, the magistrate judge may file only proposed findings of fact and recommendations for disposition with the district court. [28 U.S.C.S. § 636\(b\)\(1\)\(B\)\(1994\)](#). A party may serve and file objections to the proposed findings and recommendations, which the district court reviews de novo.

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

#### [HN2](#) [down arrow] **Magistrates, Pretrial Referrals**

Fed. R. Civ. P. 72 implements the two-tiered structure outlined by § 636(b)(1); it does so, however, using slightly different terminology. Instead of listing the eight matters excepted in 28 U.S.C.S. § 636(b)(1)(A), Rule 72 characterizes pretrial motions as either dispositive of a claim or defense of a party or not dispositive. For dispositive matters the provisions of § 636(b)(1)(B) apply, by which the magistrate judge files proposed findings and recommendations which the district court reviews de novo. Fed. R. Civ. P. 72(b). Conversely, a magistrate judge may determine nondispositive matters by order, appealable under the clearly erroneous or contrary to law standard. Fed. R. Civ. P. 72(a).

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

### HN3 **Magistrates, Pretrial Referrals**

A motion to remand is nondispositive and can be determined by a magistrate judge by final order.

Civil Procedure > ... > Removal > Postremoval Remands > Motions for Remand

### HN4 **Postremoval Remands, Motions for Remand**

Under 28 U.S.C.S. § 1441(a), a civil action filed in a state court may be removed to a federal district court if the action is one over which the district courts of the United States have original jurisdiction. If at any time after removal it appears that the district court lacks subject matter jurisdiction, the case shall be remanded to the state court as improperly removed. 28 U.S.C.S. § 1447(c).

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Well Pleaded Complaint Rule

### HN5 **Federal Questions, Well Pleaded Complaint Rule**

Under the well-pleaded complaint rule, whether a case is one arising under federal law must be determined from what necessarily appears in the plaintiff's statement of his own claim. An action arising under state law cannot be removed solely because a federal right or immunity can be raised as a defense. As such, the well-pleaded complaint rule makes the plaintiff the master of the claim, allowing the plaintiff to avoid federal jurisdiction by pleading only state claims and ignoring any federal claims he or she might have.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### HN6 **Public Enforcement, State Civil Actions**

Given the system of joint antitrust enforcement, states retain the ability to regulate commercial activities that takes place within their borders, even if the challenged activity has interstate aspects.

**Counsel:** ATTORNEY(S) FOR PLAINTIFF(S): William R. Landry, Esq., Blish & Cavanagh, Providence, RI.

ATTORNEY(S) FOR DEFENDANT(S): Steven E. Snow, Esq., Partridge, Snow & Hahn, Providence, RI.

**Judges:** RONALD R. LAGUEUX, Chief Judge

**Opinion by:** RONALD R. LAGUEUX

## Opinion

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### [\*741] MEMORANDUM AND ORDER

RONALD R. LAGUEUX, Chief Judge.

This case involves an antitrust action brought by Delta Dental of Rhode Island ("Delta Dental") alleging anticompetitive practices by defendant Blue Cross & Blue Shield of Rhode Island ("Blue Cross") in the market for prepaid dental services in Rhode Island. Delta Dental initiated this suit in Rhode Island Superior Court, relying exclusively on state law in asserting that Blue Cross has engaged in predatory pricing and other exclusionary practices in violation of the Rhode Island Antitrust Act, *R.I. Gen. Laws § 6-36-1 et. seq.* Delta Dental further claims that the challenged practices violate Rhode Island's common law doctrines of unfair competition and tortious interference with contractual relations.

[\*742] On the motion of Blue Cross, the case was removed to this District Court pursuant [\*\*2] to *28 U.S.C. § 1441(b)*. Subsequently, Magistrate Judge Timothy M. Boudewyns entered an order dated February 22, 1996 remanding the action to the state court, upon a finding that no federal question existed to support jurisdiction under *28 U.S.C. § 1331*. The matter is now before this Court on the appeal of Blue Cross from the Magistrate Judge's remand order. For the reasons that follow, the Magistrate Judge's Order is affirmed.

### I. Facts and Procedural Background

The following facts are not in dispute, unless otherwise noted. The somewhat tortured relationship between the parties dates back to Delta Dental's entry into the Rhode Island dental services market in the early 1970's. Because Delta Dental, as a new provider, had little administrative structure to speak of, it turned to Blue Cross' established health care network (which did not at that time include a dental benefits package) to provide the necessary support and administration. In June of 1973, the parties agreed to jointly develop a prepaid dental benefits plan for the Rhode Island market. Pursuant to the agreement between the parties (the "Administrative Agreement"), Delta Dental determined all professional matters [\*\*3] regarding the plan's coverage, such as fee schedules and benefits structures. Blue Cross assumed the management duties for the plan, including the maintenance of enrollment records and administration of claims.

The relationship between the parties broke down in the early 1990's. Complaining that Delta Dental was interfering with the effective administration of the plan,<sup>1</sup> Blue Cross terminated the Administrative Agreement on December 13, 1991, effective January 13, 1993. According to Delta Dental, however, Blue Cross' true motive for termination was a desire to develop its own dental benefits plan to compete with the Delta Dental plan. Delta Dental asserted that a program to develop such a competing plan had already been initiated prior to the December 1991 notice of termination, in violation of a non-competition clause in the Administrative Agreement.

[\*\*4] These events culminated in the parties' first trip to this federal court. In 1992, Blue Cross filed an action against Delta Dental here, seeking damages, declaratory relief, and injunctive relief for alleged violations of both federal and state antitrust laws. *Blue Cross & Blue Shield of Rhode Island v. Delta Dental of Rhode Island*, C.A. No. 92-0336L (D.R.I. filed June 22, 1992). At the heart of that case was the assertion that Delta Dental had provided false and misleading information to the dental community and potential customers -- first to discourage Blue Cross from entering the market, and then to discourage customers from purchasing Blue Cross' dental plan<sup>2</sup> [\*\*5] -- all in

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<sup>1</sup> Blue Cross asserted that Delta Dental no longer followed its recommendations regarding fee schedules, and further claimed that Delta Dental had hired an outside consultant to take on Blue Cross' management role.

<sup>2</sup> Blue Cross formally began competing with Delta Dental upon the January 1993 termination of the Administrative Agreement, and thus filed an amended complaint in July of 1993 encompassing the post-entry claims.

an effort to protect and maintain its dominance of Rhode Island's dental care financing market.<sup>3</sup> Blue Cross maintained that these and other practices violated [sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. § 1 et seq.](#), as well as §§ 6-36-4 and 6-36-5 of the Rhode Island Antitrust Act, *supra*.

Delta Dental denied the allegations in Blue Cross' complaint, and asserted as an additional defense the McCarran-Ferguson Act's "business of insurance" exemption from antitrust scrutiny, [15 U.S.C. § 1012](#). Moreover, Delta Dental filed numerous counterclaims stemming from the Administrative Agreement, including claims for breach of contract, conversion, breach of fiduciary duty, and intentional interference with contractual and business relations.

This initial dispute was eventually resolved by a settlement approved by this Court on [\*743] April 20, 1994. However, this second round of litigation between the parties commenced in September 1995, when Delta Dental filed the present action against Blue Cross in the Rhode Island Superior Court in and for the County of Providence. The complaint alleges that Blue Cross has engaged in exclusionary and predatory practices since its entry into Rhode Island's prepaid dental [\*\*6] benefits market in January 1993. Specifically, Delta Dental asserts that Blue Cross has engaged in illegal cross-subsidization and predatory pricing in an effort to achieve a monopoly. According to the complaint, Blue Cross has deliberately driven dental insurance prices to unprofitably low levels, choosing to operate at a loss in dental insurance while covering these losses with the profits generated by its other health care service plans. Delta Dental avers that Blue Cross is willing to sustain such losses until all competitors, unable to cover similar losses, are driven from the Rhode Island market.

Delta Dental asserts that the challenged conduct violates the Rhode Island Antitrust Act, *supra*. In addition, Delta Dental has asserted claims under the state common law doctrines of unfair competition, interference with contractual relations, and interference with prospective contractual relations, on the theory that Blue Cross has used the challenged practices to take former and prospective customers away from Delta Dental. Blue Cross has filed counterclaims against Delta Dental under federal and state [antitrust law](#), as well as state tort theories of intentional interference with [\*\*7] current contractual and prospective business relations.

While Delta Dental's complaint is based entirely on state law, Blue Cross removed the action to this Court under the "artful pleading" doctrine enunciated in [Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 \(1981\)](#). The crux of the argument is that while Delta Dental could have brought its claims in federal court under the Sherman Act, it instead chose to bring its claim exclusively under the state antitrust statute, allegedly in order to deprive Blue Cross of certain federal defenses as well as to avoid the *res judicata* effects of the previous federal litigation between the parties.

After a hearing before Magistrate Judge Timothy M. Boudewyns, the case was remanded to Providence County Superior Court. In his order of February 22, 1996, the Magistrate Judge concluded that: (1) no federal question was presented in the complaint, (2) the "artful pleading" exception to the well-pleaded complaint rule was inapplicable in this instance, and, (3) the action was not barred by the doctrine of *res judicata*, since the present case involved conduct that arose after the settlement of the [\*\*8] previous litigation in this Court.

Blue Cross filed a timely appeal from the Magistrate Judge's order remanding the case to state court. After hearing arguments of counsel, the Court took the matter under advisement. The matter is now in order for decision.

## II. The Nature of the Motion to Remand

As an initial matter, this Court must determine the proper standard of review to be applied to this appeal of the Magistrate Judge's remand order. To this end, the Court must decide whether a motion to remand is best characterized as a "dispositive" or "nondispositive" motion within the meaning of [28 U.S.C. § 636\(b\)\(1\), Rule 72 of the Federal Rules of Civil Procedure](#), and Local Rules 32(b) and 32(c).

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<sup>3</sup> In its complaint, Blue Cross alleged that by 1991 Delta Dental insured 30% of Rhode Island's population, encompassing 70% of the market for Rhode Island dental care financing and services.

**HN1**[] Under [28 U.S.C. § 636\(b\)\(1\)\(A\)](#), the district court may refer to a magistrate judge for hearing and determination any pending pretrial matter, with the exception of eight motions specifically listed therein:

a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to [\*\*9] suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

[\*744] A magistrate judge's determination of a matter not within the eight exceptions can be appealed to the district court under a "clearly erroneous or contrary to law" standard. [28 U.S.C. § 636\(b\)\(1\)\(A\)\(1994\)](#).

As for the eight motions excepted by [§ 636\(b\)\(1\)\(A\)](#), the district court may also refer these matters to a magistrate judge under [§ 636\(b\)\(1\)\(B\)](#). In such cases, however, the magistrate judge may file only proposed findings of fact and recommendations for disposition with the district court. [28 U.S.C. § 636\(b\)\(1\)\(B\)\(1994\)](#). A party may serve and file objections to the proposed findings and recommendations, which the district court reviews *de novo*. *Id.*

**HN2**[] [Rule 72 of the Federal Rules of Civil Procedure](#) implements the two-tiered structure outlined by [§ 636\(b\)\(1\)](#); it does so, however, using slightly different terminology. Instead of listing the eight matters excepted in [§ 636\(b\)\(1\)\(A\)](#), [Rule 72](#) characterizes pretrial motions as either "dispositive of a claim or defense [\*\*10] of a party" or not dispositive. For dispositive matters the provisions of [§ 636\(b\)\(1\)\(B\)](#) apply, by which the magistrate judge files proposed findings and recommendations which the district court reviews *de novo*. [Fed. R. Civ. P. 72\(b\)](#). Conversely, a magistrate judge may determine nondispositive matters by order, appealable under the "clearly erroneous or contrary to law" standard. [Fed. R. Civ. P. 72\(a\)](#).<sup>4</sup>

The Court now comes to the question of where a motion to remand fits within the framework established by [§ 636\(b\)\(1\)](#) and [Rule 72](#). While the First Circuit has identified the issue on at least two occasions, in each instance that Court has expressly chosen not to rule on jurisdictional grounds. See [Cok v. Family Court of R.I.](#), 985 F.2d 32, 34 (1st Cir. 1993); *Unauthorized* [\*11] [Practice of Law Comm. v. Gordon](#), 979 F.2d 11, 12-13 (1st Cir. 1992). The First Circuit did note, however, the split in the case law on whether a magistrate judge has the authority to enter a final order of remand: "While we note the existing and conflicting case law on this issue, we need not enter the fray at this time." [Gordon](#), 979 F.2d at 13. It is against this backdrop of conflicting case law, therefore, that this Court approaches the issue, a matter of first impression in this district.

Most district courts faced with the question have determined that a motion to remand is a nondispositive matter within a magistrate judge's authority to determine by final order under [Rule 72\(a\)](#). See, e.g., [Young v. James](#), 168 F.R.D. 24, 26-27 (E.D. Va. 1996); [Campbell v. International Business Machs.](#), 912 F. Supp. 116, 118-19 (D.N.J. 1996); [Banbury v. Omnitrition Int'l, Inc.](#), 818 F. Supp. 276, 278-79 (D. Minn. 1993); [Jacobsen v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.](#), 594 F. Supp. 583, 584-86 (D. Me. 1984). Two rationales support these decisions: one focusing on [§ 636\(b\)\(1\)\(A\)](#), and a second looking to the additional language in [Rule 72](#). The Court considers [\*12] each approach in turn.

A motion to remand is not one of the matters specifically excepted by [§ 636\(b\)\(1\)\(A\)](#). Reading this section to provide an exhaustive list of "dispositive" motions, some courts have deemed all non-listed pretrial matters, including motions to remand, nondispositive. See [Vaquillas Ranch Co. v. Texaco Exploration and Prod., Inc.](#), 844 F. Supp. 1156, 1160-63 (S.D. Tex. 1994) ("Congress had the opportunity to include in that list any motion which it considered to be dispositive, and it did not include motions to remand."); [White v. State Farm Mut. Auto. Ins. Co.](#), 153 F.R.D. 639, 642-43 (D. Neb. 1993) ("Had Congress wanted to exempt such an order from the authority of magistrate judges, it knew how to say so specifically.").

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<sup>4</sup> Local Rule 32 combines the approaches of both the statute and the Federal Rule, listing the eight exceptions in [§ 636\(b\)\(1\)\(A\)](#) as well as using the dispositive-nondispositive language of [Rule 72](#). See D.R.I. R. 32(b) & 32(c).

Other courts have taken a broader approach, looking beyond [§ 636\(b\)\(1\)\(A\)](#) to consider whether a motion to remand is "dispositive" under the language of [Rule 72](#). See [Banbury, 818 F. Supp. at 279](#); [City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc., 147 F.R.D. 122, 123-24 \(S.D. Miss. 1993\)](#). While those courts consider it relevant that remand orders are not excepted by [[\\*745](#)] [§ 636\(b\)\(1\)\(A\)](#), that absence is not critical to their [[\\*\\*13](#)] decisions. [Campbell, 912 F. Supp. at 118-19](#). Instead, those courts read [§ 636\(b\)\(1\)\(A\)](#) to provide a floor of eight dispositive motions to be decided under [Rule 72\(b\)](#), so that any other motions "dispositive of a claim or defense of a party" could also fall under [Rule 72\(b\)](#). *Id.*

Even under this broader approach, however, most courts have concluded that motions to remand are nondispositive and thus subject to final determination by a magistrate judge:

The motion to remand does not reach the merits of the underlying dispute but instead decides only the question of whether removal to the federal court was proper. The parties remain free to litigate the merits of the case following the disposition of the motion, whether in state or federal court.

[City of Jackson, 147 F.R.D. at 124](#). See also [Campbell, 912 F. Supp. at 118-19](#) (concluding that "remands merely transfer the action to a different forum rather than finally resolving the substantive rights and obligations of the parties.").

On the strength of such arguments, this Court joins the majority and concludes that [HN3](#) [↑] a motion to remand is nondispositive and can be determined by a magistrate judge by final [[\\*\\*14](#)] order. While the Court finds it relevant that motions to remand are not among the motions excepted by [§ 636\(b\)\(1\)\(A\)](#), this factor serves only as the starting point for this decision. More important is the effect that the disposition of a motion to remand will have on the status of the litigation. As noted by the authorities cited above, a decision on a motion to remand merely answers the question of whether there is a basis for federal jurisdiction to support removal, without reaching the merits of any claims, counterclaims, or defenses. As such, this Court cannot conclude that a remand order is "dispositive of a claim or defense of a party."

The Court does recognize that two district courts have reached the opposite conclusion, [Long v. Lockheed Missiles and Space Co., 783 F. Supp. 249 \(D.S.C. 1992\)](#) and [Giangola v. Walt Disney World Co., 753 F. Supp. 148 \(D.N.J. 1990\)](#). While noting that a motion to remand is not excepted by [§ 636\(b\)\(1\)\(A\)](#), the *Giangola* court held that a remand order is the equivalent of an "involuntary dismissal," a matter specifically excepted by [§ 636\(b\)\(1\)\(A\)](#). [Giangola, 753 F. Supp. at 152](#). Therefore, that Court concluded that a remand order, [[\\*\\*15](#)] as an involuntary dismissal, is a dispositive matter beyond the authority of a magistrate judge to determine by final order. *Id.*; see also [Long, 783 F. Supp. at 250-51](#) (following *Giangola*).

This Court respectfully disagrees with the reasoning of *Giangola* and *Long*. The first ground for disagreement concerns the nature of involuntary dismissals, as governed by [Rule 41\(b\)](#) of the Federal Rules. [Rule 41\(b\)](#) provides that "a dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction*, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." [Fed. R. Civ. P. 41\(b\)](#) (emphasis added). Under this section, dismissals for lack of jurisdiction are neither [Rule 41\(b\)](#) "involuntary dismissals" nor final decisions on the merits of the parties' claims. Therefore, a motion to remand, which essentially calls for a determination of whether subject matter jurisdiction exists, cannot be termed a dispositive motion. Accord [Young, 168 F.R.D. at 27](#) (reading [Rule 72](#) in conjunction with [Rule 41\(b\)](#) to defeat *Giangola* analysis).

Second, while a number of courts [[\\*\\*16](#)] have found motions other than those listed in [§ 636\(b\)\(1\)\(A\)](#) to be dispositive, *Giangola* is distinguishable. In *Woods v. Dahlberg*, the Sixth Circuit found that a magistrate judge's denial of a motion to proceed *in forma pauperis* was the "functional equivalent" of an involuntary dismissal, and thus dispositive. [894 F.2d 187, 187-88 \(6th Cir. 1990\)](#). Similarly, in *Ocelot Oil Corp. v. Sparrow Indus.*, the Tenth Circuit concluded that an order striking a plaintiff's pleadings as a discovery sanction had the identical effect of an involuntary dismissal, and was thus outside the magistrate judge's authority. [847 F.2d 1458, 1461-63 \(10th Cir. 1988\)](#). Read together, these cases offer support for the argument that [§ 636\(b\)\(1\)\(A\)](#) presents a non-exhaustive list

of dispositive motions, and that other motions [\*746] that have the identical effect as one of the eight listed motions should also be considered dispositive under [Rule 72](#).<sup>5</sup>

[\*\*17] In fact, a judge in this district has endorsed the view that [§ 636\(b\)\(1\)\(A\)](#) does not present an exhaustive list of dispositive motions. In [Yang v. Brown Univ., 149 F.R.D. 440 \(D.R.I. 1993\)](#), the magistrate judge, as a discovery sanction, had issued an order precluding the plaintiff from offering the testimony of her principal expert witness at trial. As the magistrate judge noted in his order, the sanction left the plaintiff unable to present a *prima facie* case, thus, in effect, defeating the plaintiff's claim. [Id. at 442-43](#). Reviewing this order, Senior Judge Pettine found that under such circumstances, "the Magistrate's order crosses the line from non-dispositive to dispositive decision-making. His ruling vitiates plaintiff's case. It is tantamount to an involuntary dismissal." *Id.*

However, the "functional equivalent" analysis relied upon in *Yang*, *Woods*, and *Ocelot Oil* is not applicable to remand orders. The motions at issue in those cases effectively terminated the litigation between the parties: in *Yang*, the magistrate's order rendered the plaintiff unable to present a *prima facie* case; in *Woods*, the denial of in forma pauperis status left [\*\*18] the plaintiff unable to pursue his claim; the striking of pleadings with prejudice in *Ocelot Oil* had the result of dismissing the plaintiff's action with *res judicata* effect. In each instance, the magistrate judge's order had an sense of finality to it -- a finality that is simply not present with an order remanding a case to a state court forum, where the parties will be allowed to assert all claims and defenses. Thus, even accepting that [§ 636\(b\)\(1\)\(A\)](#) does not provide an exhaustive list of dispositive motions, the Court nonetheless holds that a motion to remand is nondispositive.<sup>6</sup> Therefore, a magistrate judge may determine such by final order. The Court thus will review Magistrate Judge Boudewyns' order of February 22, 1996 under the "clearly erroneous or contrary to law" standard. [28 U.S.C. § 636\(b\)\(1\)\(A\); Fed. R. Civ. P. 72\(a\); D.R.I. R. 32\(b\).](#)

### [\*\*19] III. Review of the Magistrate Judge's Decision

**HN4** Under [28 U.S.C. § 1441\(a\)](#), a civil action filed in a state court may be removed to a federal district court if the action is one over which the district courts of the United States have original jurisdiction.<sup>7</sup> [\*\*20] If at any time after removal it appears that the district court lacks subject matter jurisdiction, the case shall be remanded to the state court as improperly removed. [28 U.S.C. § 1447\(c\)](#).<sup>8</sup> Magistrate Judge Boudewyns made such a finding in this case, remanding the case to state court for lack of subject matter jurisdiction. The Court now considers whether the magistrate judge's factual findings were clearly erroneous, or whether his legal conclusions were contrary to law.

<sup>5</sup> See also 12 Charles A. Wright et al., Federal Practice and Procedure § 3076.5 (Pocket Part 1996) ("[Rule 72](#) is in keeping with the legislative intent that, at the very least, the eight motions listed in the statute will be governed by the procedures and *de novo* review of [Rule 72\(b\)](#).").

<sup>6</sup> The Court also notes that *Giangola* has recently been called into question by a subsequent case from the same district. In *Campbell v. International Business Machs.*, the district court discusses a post-*Giangola* Third Circuit decision characterizing an order as "dispositive" on the ground that "it determined with finality the duties of the parties." [912 F. Supp. 116, 119 \(D.N.J. 1996\)](#) (quoting [N.L.R.B. v. Frazier, 966 F.2d 812, 817 \(3d Cir. 1992\)](#)). In finding that remand orders are nondispositive, the district court stated its belief that "*Giangola* would have been decided differently if *N.L.R.B. v. Frazier* had been on the books." *Campbell*, [912 F. Supp. at 119](#).

<sup>7</sup> "Except as otherwise expressly provided by Act of Congress, 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 or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." [28 U.S.C. § 1441\(a\)\(1994\)](#).

<sup>8</sup> "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . . The State court may thereupon proceed with such case." [28 U.S.C. § 1447\(c\)\(1994\)](#).

[\*747] The parties are both Rhode Island citizens for the purposes of diversity jurisdiction under [28 U.S.C. § 1332](#), as each is a corporation organized under Rhode Island law and each maintains its principal place of business in Providence, Rhode Island.<sup>9</sup> [\*\*21] Accordingly, removal of this case to federal court could only be based on the "arising under" federal question jurisdiction of [28 U.S.C. § 1331](#).<sup>10</sup> The Court concludes that the case does not arise under federal law, and thus affirms the magistrate judge's order remanding the case to state court.

The principles which guide this Court's exercise of federal question jurisdiction are familiar, and can be stated here with little additional comment. "A suit arises under the law that creates the cause of action." [American Well Works Co. v. Layne and Bowler Co., 241 U.S. 257, 260, 60 L. Ed. 987, 36 S. Ct. 585 \(1916\)](#) (Holmes, J.). The presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint" rule, which applies to the original jurisdiction of this Court as well as its removal jurisdiction. [HN5](#)<sup>11</sup> See [Gully v. First Nat'l Bank, 299 U.S. 109, 112-13, 81 L. Ed. 70, 57 S. Ct. 96 \(1936\)](#). Under the rule, "whether a case is one arising under [federal law] . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim." [Taylor v. Anderson, 234 U.S. 74, 75-76, 58 L. Ed. 1218, 34 S. Ct. 724 \(1914\)](#); see also [Gully, 299 U.S. at 112](#) ("[A] right [\*\*22] or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."). An action arising under state law cannot be removed solely because a federal right or immunity can be raised as a defense. [Tennessee v. Union and Planters' Bank, 152 U.S. 454, 459-61, 38 L. Ed. 511, 14 S. Ct. 654 \(1894\)](#). As such, the well-pleaded complaint rule makes the plaintiff the master of the claim, allowing the plaintiff to avoid federal jurisdiction by pleading only state claims and ignoring any federal claims he or she might have. See [Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 \(1987\)](#).

Turning to the record of this case, it appears that Delta Dental has chosen to exercise the plaintiff's choice afforded under the well-pleaded complaint rule. The parties recognize, and the Court agrees, that the present dispute could have been brought as a federal antitrust claim under the Sherman Act. Delta Dental has chosen to forego its rights under federal law, however, instead relying exclusively on state law in asserting its claims against Blue Cross. In that light, the case seems to call [\*\*23] for a straightforward application of the well-pleaded complaint rule and its corollaries: Delta Dental, as the master of the claim, has chosen to rely exclusively on state law and to litigate in state court -- a choice that Blue Cross cannot defeat, notwithstanding that the case could have been brought under the Sherman Act or that federal defenses might be available.

Blue Cross argues, however, that an exception to the well-pleaded complaint rule, the "artful pleading" doctrine, brings this case within the Court's removal jurisdiction. The Supreme Court created this exception in [Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 20 L. Ed. 2d 126, 88 S. Ct. 1235 \(1968\)](#), where it held that a claim pled under state law "arises under" federal law where federal law completely preempts the state cause of action on which the plaintiff relies. *Id. at 560*. In such cases, where the only possible relief is federal, the plaintiff cannot defeat the defendant's right of removal by failing to plead the necessary federal claim. *Id.*; see also [Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 23-24, 77 L. Ed. 2d 420, 103 S. Ct. 2841 \(1983\)](#) (discussing Avco). [\*\*24]

Clearly, this original formulation of the artful pleading doctrine is inapplicable to [\*748] the present matter. There has never been a clear congressional intent to pre-empt state regulation in the field of [antitrust law](#). See 1 P. Areeda & D. Turner, [Antitrust Law](#) P 208 (1978). Moreover, the state law on which Delta Dental has based its claim, the Rhode Island Antitrust Act, provides that no claim under the Act "shall be barred on the ground that the activity or conduct complained of in any way affects or involves interstate or foreign commerce." [R.I. Gen. Laws § 6-36-7\(c\)\(1992\)](#). [HN6](#)<sup>12</sup> Given this system of joint antitrust enforcement, states retain the ability to regulate

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<sup>9</sup> "For the purposes of this section and [section 1441](#) of this title [removal] -- (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has a principal place of business . . . ." [28 U.S.C. § 1332\(c\)\(1994\)](#).

<sup>10</sup> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." [28 U.S.C. § 1331\(1994\)](#).

commercial activities that takes place within their borders, even if the challenged activity has interstate aspects. See [\*Jones v. Rath Packing Co.\*, 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 \(1977\)](#); [\*Standard Oil Co. v. Tennessee\*, 217 U.S. 413, 421-22, 54 L. Ed. 817, 30 S. Ct. 543 \(1910\)](#).

Nonetheless, Blue Cross asserts that the Supreme Court extended the reach of the artful pleading doctrine in [\*Federated Dep't Stores, Inc. v. Moitie\*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 \(1981\)](#). In *Moitie*, [\*\*25] the plaintiff's initial federal antitrust action had been dismissed by the federal district court. Instead of appealing, the plaintiff relied on the same facts to assert state law claims of civil conspiracy, unfair competition, fraud, and restitution. This second case was removed to federal court, where the district court denied a motion to remand on the basis of the artful pleading doctrine, finding that the plaintiff's claims were "essentially federal law" claims. While reversing the lower court on the merits, the Ninth Circuit agreed that the claims were sufficiently "federal in nature" to support removal. See [\*id. at 395-98\*](#) & n.2 (discussing history of the case).

While the Supreme Court's opinion in *Moitie* concerns primarily the issue of *res judicata*, the Court in a footnote voiced its approval of the approach taken by the lower courts regarding the question of removal and artful pleading:

We agree that at least some of the claims had a sufficient federal character to support removal. As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court [\*\*26] will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." The District Court applied that settled principle to the facts of this case. . . . [and found] that respondents had attempted to avoid removal jurisdiction by "artfully" casting their "essentially federal law claims" as state-law claims. We will not question here that factual finding.

[\*Moitie\*, 452 U.S. at 397 n.2](#) (citations omitted). There is little doubt that the Supreme Court worked some alteration in the artful pleading doctrine with this footnote, as the Court rendered a state law claim "artfully pled" in the absence of federal preemption. See [\*Travelers Indem. Co. v. Sarkisian\*, 794 F.2d 754, 759](#) (2d Cir.), cert. denied, 479 U.S. 885, 93 L. Ed. 2d 253, 107 S. Ct. 277 (1986) ("Unquestionably, *Federated Stores* made some alteration of the master-of-the-complaint rule.").

What remains unclear, however, is "how far beyond the preemption context the Court intended to extend the artful pleading doctrine." *Id.* Generally, circuit courts have limited *Moitie* to its facts, reading the case as expressing only a modest expansion of the artful pleading [\*\*27] doctrine. The circuits have viewed *Moitie* as extending artful pleading only to those instances where claims previously filed as federal claims in federal court are resubmitted in state court as state law claims. See [\*Travelers\*, 794 F.2d at 760-61](#); [\*Salveson v. Western States Bankcard Ass'n\*, 731 F.2d 1423, 1427-29 \(9th Cir. 1984\)](#). In this light, the extension of artful pleading encompasses a subset of claims that would also be barred by the doctrine of *res judicata*: the state court proceeding would essentially provide the plaintiff with a "second bite" at a claim that has already been dismissed in a previous federal action.<sup>11</sup>

[\*\*28] [\*749] While the First Circuit has not yet ruled on the issue, the Court did address the implications of *Moitie* in [\*Patriot Cinemas, Inc. v. General Cinema Corp.\*, 834 F.2d 208 \(1st Cir. 1987\)](#). In discussing the removal of an antitrust claim in *Patriot Cinemas*, the First Circuit noted the language in *Moitie* regarding claims that are "federal in nature" or have a "sufficient federal character to support removal." [\*Id. at 217 n.4\*](#). While the Court recognized that this language might have "worked a revolution in the law of federal removal jurisdiction," the Court stated that it could not determine the extent of any such change at that time, as it lacked jurisdiction to do so. *Id.*

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<sup>11</sup> The Court notes that a few district courts have given *Moitie* a broader reading than these circuit courts. See [\*Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co.\*, 747 F. Supp. 1292, 1294-96](#) (finding claim "sufficiently federal in character" to support removal, where state antitrust claim could have been brought under federal law), vacated in part, [\*810 F. Supp. 986\* \(C.D. Ill. 1990\)](#) (relevant portion of prior decision not vacated); [\*Reid v. Walsh\*, 620 F. Supp. 930, 932-34 \(M.D. La. 1985\)](#) (federal claims "necessarily presented" by state securities law claims, where federal lawsuit on same facts filed on same day as state action).

The Court went on to suggest, however, that whatever change the Supreme Court intended in *Moitie*, it "may have been overruled *sub silentio* in *Franchise Tax Board*, which so strongly reaffirmed the well-pleaded complaint rule." *Id.* The First Circuit pointed to the Supreme Court's assertion in *Franchise Tax Board* that the law of removal jurisdiction "has remained basically unchanged for the past century." *Franchise Tax Board*, 463 U.S. at 7. Implicit in the First Circuit's discussion [\*\*29] is that the Supreme Court would not have made such a broad statement had *Moitie* indeed worked a sweeping change in the law of removal jurisdiction. Therefore, while the First Circuit has not decided the issue, it is evident that said Court would read *Moitie* narrowly, at most viewing the case as a modest expansion of the artful pleading doctrine in the vein of the *Travelers* and *Salveson* courts.

In light of this analysis, this Court concludes that the artful pleading doctrine is inapplicable to the present case. Magistrate Judge Boudewyns found that the conduct challenged in Delta Dental's state court complaint took place after the settlement of the prior federal action, a factual finding that this Court will not disturb unless clearly erroneous. As a review of the record confirms that there is adequate support for the magistrate judge's factual finding, the Court upholds that determination.

Turning to the legal issue, the facts of this case do not call for the application of the artful pleading doctrine. This is not a case where a plaintiff, stymied in prior federal litigation, has recast those same claims under the guise of a state cause of action. As Delta Dental [\*\*30] did not raise predatory pricing or cross-subsidization claims in the prior litigation, there were no such claims for Delta Dental to "resubmit" to the state court in the current action. Indeed, given the magistrate judge's factual finding, there was no way that the current claims could have been brought in the prior action, as the challenged conduct had not yet occurred. Therefore, the Court will not invoke artful pleading to deem Delta Dental's state law claims federal claims and thereby justify removal.

The question of whether *res judicata* applies in this case, however, is distinct from the Court's artful pleading analysis, and is left for determination by the state court. It is important to note that artful pleading as extended by *Moitie* and its progeny does not encompass all claims that might be barred by *res judicata*. The two doctrines address separate questions: in the removal/artful pleading context, as discussed herein, a court looks for prior federal claims recast as state claims. For *res judicata*, a court considers whether a second action arises out of the same transaction or series of transactions as a first action. See *Manego v. Orleans Bd. of Trade*, I\*\*31 773 F.2d 1, 5 (1st Cir. 1985), cert. denied, 475 U.S. 1084, 89 L. Ed. 2d 722, 106 S. Ct. 1466 (1986) (adopting transactional approach to *res judicata*). In other words, the net cast by *res judicata* is broader than that of artful pleading -- artfully pled claims are only a subset of those claims that would be barred by *res judicata*. Therefore, while the Court concludes that artful pleading is inapplicable, the Court offers no opinion on the broader issue of *res judicata*.

#### IV. Conclusion

For the foregoing reasons, the Court affirms Magistrate Judge Boudewyns' remand [\*750] order of February 22, 1996. Accordingly, this matter is remanded to the Rhode Island Superior Court in and for the County of Providence.

It is so ordered.

Ronald R. Lagueux

Chief Judge

September 26, 1996

## In re Medical X-Ray Film Antitrust Litig.

United States District Court for the Eastern District of New York

September 27, 1996, Decided ; October 2, 1996, FILED

CV-93-5904

**Reporter**

946 F. Supp. 209 \*; 1996 U.S. Dist. LEXIS 18732 \*\*; 1996-2 Trade Cas. (CCH) P78,375

In re Medical X-Ray Film Antitrust Litigation; This Document Relates To: All Cases

**Subsequent History:** Counsel Amended February 6, 1997.

**Disposition:** [\*\*1] Motion converted into summary judgment and denied.

### **Core Terms**

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increased price, prices, film, conspiracy, competitors, announced, x-ray, sales representative, dealers, summary judgment, customers, employees, parties, antitrust, discovery, documents, inferred, price information, Sherman Act, future price, exchanged, factors, circumstantial evidence, summary judgment motion, communications, defendants', conspire, contacts, deposition testimony, memorandum

### **LexisNexis® Headnotes**

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Civil Procedure > Judgments > Summary Judgment > General Overview

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

#### **HN1[] Judgments, Summary Judgment**

See [Fed. R. Civ. P. 12\(c\)](#).

Civil Procedure > Judgments > Summary Judgment > General Overview

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

#### **HN2[] Judgments, Summary Judgment**

The language in [Fed. R. Civ. P. 12\(c\)](#) has been deemed mandatory, requiring a district court to convert a motion for dismissal into a motion for summary judgment the instant materials external to the pleadings are considered.

946 F. Supp. 209, \*209LÁ996 U.S. Dist. LEXIS 18732, \*\*1

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

### **HN3** Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 12(b) provides that if, on a motion to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary judgment ... and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Fed. R. Civ. P. 56.

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

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

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

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

### **HN4** Entitlement as Matter of Law, Appropriateness

Fed. R. Civ. P. 56(c) provides that summary judgment must be granted if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of demonstrating the absence of any disputed material facts, and the court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought.

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

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

### **HN5** Burdens of Proof, Movant Persuasion & Proof

The showing needed on summary judgment reflects the burden of proof in the underlying action. A court must consider the actual quantum and quality of proof demanded by the underlying cause of action and which party must present such proof. Therefore, when the ultimate burden of proof is on the nonmoving party, the moving party meets his initial burden for summary judgment by showing, that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case.

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

946 F. Supp. 209, \*209L996 U.S. Dist. LEXIS 18732, \*\*1

## [\*\*HN6\*\*](#) Summary Judgment, Burdens of Proof

To survive the motion, the nonmoving party must then make a showing sufficient to establish the existence of [the challenged] element essential to that party's case.

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

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

## [\*\*HN7\*\*](#) 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.

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

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

## [\*\*HN8\*\*](#) Summary Judgment, Entitlement as Matter of Law

Summary judgment is appropriate when the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

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

## [\*\*HN9\*\*](#) Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act makes 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, illegal. [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

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

## [\*\*HN10\*\*](#) International Aspects, Commerce With Foreign Nations

946 F. Supp. 209, \*209L<sup>A</sup>996 U.S. Dist. LEXIS 18732, \*\*1

In order to establish a claim under [Section 1](#) of the Sherman Act, a plaintiff must be able to show: (1) concerted action, (2) by two or more persons, (3) which unreasonably restrains interstate or foreign trade or commerce. Such concerted action or agreement unreasonably restrains trade if (1) a specific intent to create an unreasonable restraint of trade is found or (2) the restraint constitutes a per se violation of the Sherman Act.

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

International Trade Law > General Overview

#### [HN11](#) Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

The specific elements necessary to prove a claim of horizontal price fixing, as set forth by the Supreme Court, are: (1) the existence of an agreement, combination or conspiracy, (2) among actual competitors, (3) with the purpose or effect of "raising, depressing, fixing, pegging, or stabilizing the price of a commodity," (4) in interstate or foreign commerce.

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

#### [HN12](#) Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

To establish the price-fixing element, the evidence must show a conscious commitment to a common scheme designed to achieve an unlawful objective. In order to survive a motion for summary judgment, a plaintiff must produce direct or circumstantial evidence that tends to exclude the possibility that the defendants acted independently of each other.

Antitrust & Trade Law > Sherman Act > General Overview

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

#### [HN13](#) Antitrust & Trade Law, Sherman Act

Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint on interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

#### [HN14](#) Antitrust & Trade Law, Sherman Act

While on summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion, antitrust law limits the range of permissible inferences from ambiguous evidence in a case under § 1 of the Sherman Act. Accordingly, a plaintiff must be able to show that "the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Antitrust & Trade Law > Sherman Act > General Overview

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

### **HN15** [blue icon] Antitrust & Trade Law, Sherman Act

If the moving party enunciates any economic theory supporting its behavior in a case under the Sherman, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. The nonmoving party's inferences must only be reasonable in order to reach the jury.

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

### **HN16** [blue icon] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

An agreement for price fixing may be proven, even absent proof that it was made express, when, in addition to proof of parallel pricing, there are present additional plus factors from which such an inference properly could be made. These plus factors include: (1) evidence of conduct that is contrary to the defendants' independent self-interest; (2) the presence or absence of a strong motive to enter into the alleged conspiracy; (3) the artificial standardization of products; and (4) a high level of interfirm communications.

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**Judges:** Charles P. Sifton, United States District Judge

**Opinion by:** Charles P. Sifton

## **Opinion**

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[\*210] SIFTON, Chief Judge.

In these consolidated antitrust actions, plaintiffs allege that defendants Eastman Kodak Co., E.I. DuPont de Nemours & Co., Miles, Inc., and Fuji Medical Systems, U.S.A., Inc. have fixed the prices of medical x-ray and imaging films since 1988, in violation of the Sherman Antitrust Act ("the Sherman Act"), 15 U.S.C. § 1. Defendants

have filed a renewed motion to dismiss the amended complaint, pursuant to [Rules 8, 9](#), and [12<sup>1</sup> of the Federal Rules of Civil Procedure](#). For the reasons set forth below, the motion is converted into one for summary judgment and, as such, is denied.

## [[\*\*2] PROCEDURAL BACKGROUND

The instant motion involves five cases filed as separate but related actions, which have been consolidated for pretrial purposes.<sup>2</sup> All five cases seek damages on behalf of a class of purchasers of medical x-ray film.<sup>3</sup> The original complaints allege that defendants, along with other unnamed co-conspirators, conspired to fix, raise, maintain, and stabilize the prices of medical x-ray and imaging films, including general radiography films, [\*211] mammography films, radiation therapy films, CRT and video imaging films, laser imaging films, duplicating films, and spot films sold in the United States to plaintiffs and other class members at supra-competitive levels from 1988 to the present, in violation of [Section 1](#) of the Sherman Antitrust Act. In furtherance of the conspiracy, defendants allegedly agreed to and did exchange current and future price information; agreed to and did coordinate pricing levels and movements; agreed upon prices and price levels; agreed to and did fix, stabilize, inflate and increase prices and price levels in relation to each other; and agreed to and did refrain from competing among themselves on the basis of price. Each complaint [[\*\*3]] seeks declaratory, injunctive, and compensatory relief on behalf of the named plaintiffs and the class for injuries sustained as a result of the foregoing activities.

[[\*\*4] On February 23, 1994, defendants moved to dismiss the complaints under [Fed. R. Civ. P. 8, 9\(b\)](#), and [12\(b\)\(6\)](#). At oral argument on April 6, 1994, the Court proposed that plaintiffs file an amended complaint with more particularized allegations that would not unduly bind plaintiffs, that defendants then file their answers within thirty days, and that automatic disclosure under the Civil Justice Expense and Delay Reduction Plan be expedited in order for the parties to depose four witnesses whose testimony plaintiffs claimed supports the allegations in the complaint. The parties consented to the Court's proposal, thereby disposing of the motion to dismiss.

Plaintiffs filed an amended complaint on April 14, 1994, alleging additionally that, in furtherance of the claimed conspiracy, defendants exchanged price increase announcements and other competitive information in advance of their release to the public; discussed future and prospective price increases during the course of trade association meetings; increased prices by approximately the same percentage amounts within a brief period of time of one another; and engaged in non-public meetings, telephone conversations, and facsimile message [[\*\*5]] exchanges in which future and prospective price increases were disclosed or discussed. The parties thereafter deposed four witnesses, all of whom are former employees of defendants: Joel Popham of Kodak, Gregory Gessert of Fuji, and Ronald Bloomquist and John Farrell of Agfa Corporation ("Agfa"), which merged with Miles, leaving Agfa a division of Miles effective December 31, 1991. The deposition testimony is summarized below.

Defendants subsequently renewed their motion to dismiss under [Fed. R. Civ. P. 8, 9](#), and [12](#), contending that the deposition testimony provides an insufficient factual basis upon which to state a claim under the antitrust laws. At

<sup>1</sup>It is not clear from defendants' motion papers whether they are proceeding under Rule 12(b)(6) or 12(c). Since defendants have filed answers to the amended complaint, the Court treats the motion as having been brought pursuant to Rule 12(c). See *Ad-Hoc Comm. of Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 835 F.2d 980, 982 (2d Cir. 1987); see also 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1367, at 514-17 (1990).

<sup>2</sup>These cases are: *Victoria Orthopedic Assoc. v. Eastman Kodak Co.*, 93 CV 5904; *Nutri-Dyn Midwest Inc. v. Eastman Kodak Co.*, 93 CV 5940; *Imco, Ltd. v. Eastman Kodak Co.*, 93 CV 5941; *Westmoreland Professional Corp. v. Eastman Kodak Co.*, 94 CV 889; and *Michael Cook v. Eastman Kodak Co.*, 94 CV 890.

<sup>3</sup>The class in each complaint is defined as:

all person, firms, corporations and other entities in the United States (excluding (a) federal, state and local governmental entities and political subdivisions, and (b) defendants and co-conspirators, and other manufacturers of medical x-ray film, their respective parents, subsidiaries and affiliates) that purchased medical x-ray film directly from any defendant, or any parent, subsidiary or affiliate thereof, at any time during the period from January 1, 1989 to the present.

oral argument on July 27, 1994, the Court attempted to clarify the procedural posture of the motion presented. While defendants considered the motion one for dismissal with the deposition testimony serving simply as an amplification and thus part of the pleadings, plaintiffs considered discussion of the deposition testimony as requiring that the motion be converted to one for summary judgment. After listening to argument from both sides, the Court granted a continuance of the motion in order to permit limited discovery and depositions [\*\*6] of the supervisors identified by the four witnesses previously deposed, as well as circumscribed discovery of individuals mentioned in the subsequent depositions, by agreement of the parties. The parties were instructed to supplement their papers with any other materials obtained through discovery that would bear on a motion for summary judgment, and oral argument was set for October 6, 1994.

By order dated October 5, 1994, the Court adjourned the motion to any date to be set by the magistrate. At a conference on October 24, 1994, to resolve discovery disputes, Magistrate Judge Caden outlined the limited discovery to be pursued in conformity with the Court's direction of July 27, 1994.

On November 16, 1994, all five cases were randomly reassigned to Judge Block, during which time discovery continued, but the instant motion was never decided.

In February 1996, the case was reassigned from Judge Block to the undersigned, and a status conference was held on February 8, 1996. The parties were directed to brief the outstanding motion, which is currently before the Court.

#### **[\*212] FACTUAL BACKGROUND**

The following is a summary of the deposition testimony of the four employees originally [\*\*7] deposed, upon which the complaint's allegations are based.

Joel Popham testified that he had been a sales representative for Kodak from October 1988 to May 1992. He stated that he had no personal knowledge of any employee of Kodak exchanging future price information prior to the public announcement of that information, no personal knowledge of any communication between an employee of Kodak and an employee of any other x-ray film manufacturer regarding pricing, and no personal knowledge of any agreement between or among any x-ray film manufacturers regarding pricing.

Popham did, however, testify that during a sales training meeting in November 1988 a group of Kodak employees began to whisper among themselves and then left the room. At the conclusion of the meeting, the instructor told the trainees that the other employees had left the room because they had been made aware that DuPont intended to announce a price increase and they needed to decide what kind of a response Kodak would make to that price increase. According to Popham, the price increase would have taken effect early in 1989. Popham further testified that he did not himself hear what the employees were whispering about, [\*\*8] and he did not know how these employees were made aware that DuPont was going to increase its prices. In April 1989, he learned that DuPont had increased its 1989 list prices for medical x-ray film.

Popham also explained that Kodak had sales contracts with various hospitals but that the hospitals did not deal with Kodak directly. Rather, Kodak sold the medical x-ray film to its authorized dealers throughout the United States who, in turn, functioned as distributors selling the film to the hospitals. He said that Kodak's principal competitors were DuPont, Fuji, Agfa, 3M and Konica, and they all, as well as Kodak, issued price lists for medical x-ray film they sold. The prices increased annually during Popham's employment with Kodak. They generally were announced late in the year and were put in effect shortly after January 1 of the following year. Popham was unable to recall whether DuPont's price increases in 1990 were the same as Kodak's price increases for that year.

Popham also testified that in the fall of 1989, 1990 and 1991, his Kodak sales district supervisor, Don Waddelow, telephoned the sales representatives in his district, including Popham, and informed them each year [\*\*9] that DuPont would be announcing a price increase. He instructed the sales representatives to talk to Kodak's customers and dealers to ascertain whether they had any information regarding this price increase. Popham testified that he was not instructed to communicate directly with a competitor, that he never did communicate with any competitors

about price increases, and that his supervisor's requests did not lead him to believe that his supervisor had direct information from DuPont about a price increase.

Popham thereafter contacted those customers and dealers who bought film from both Kodak and DuPont in an effort to obtain the requested information. In 1990 and 1991, his customer inquiries were fruitless, and he did not obtain any information regarding potential price increases. In 1989, however, a Kodak authorized dealer who was also a DuPont authorized dealer told Popham that he had been apprised of a pending DuPont price increase of between five and seven percent for 1990. Popham testified that this information was not already available in the field, but he did not know how the customer had learned the information.

Popham testified that in 1989, DuPont announced its price increase [\*\*10] before Kodak did, but in 1990 and 1991, Kodak announced its price increase before Dupont. He also explained that Kodak film dealers usually were informed of Kodak's price increases approximately thirty days before the price increase would become effective so that the dealers could buy an extra month's-worth of film at the old prices prior to the price increase. Although Popham and other sales representatives would have been made aware of the impending price increases before the dealers were, he testified that he did not disclose [\*213] those increases to anyone, nor was he aware that any other sales representative had.

John Farrell testified that he was employed by Agfa from March 15, 1989, until he was fired in July 1992, as a territory manager for the western half of Missouri, Kansas, Nebraska, and a portion of Iowa. He was responsible for promoting sales of Agfa products, including medical x-ray film, through a dealer network as well as through direct sales to hospitals. Farrell identified Kodak, DuPont, and Fuji as Agfa's major competitors in the sale of medical x-ray film at that time.

Farrell testified that there was a general industry-wide price increase in medical x-ray film in [\*\*11] January and February of 1990, 1991, and 1992 in which DuPont, Kodak, Fuji, and Agfa participated. According to Farrell, the price increases between the companies were very close in time and amount. He stated that he obtained advance notice in late October or early November prior to the increase of each of the three years that there would be general price increases in medical x-ray film by Kodak, DuPont, Fuji, and Agfa. He received the information through either telephone calls or by letter from Bob Eisen, his regional manager, who instructed Farrell to find out from his dealers or hospital contacts the details of the industry-wide price increase. Farrell then spoke with several dealers and hospitals who told him they had not been notified by any of the other companies concerning any type of price increase.

Farrell also testified that Mr. Eisen mailed to him written competitor information, including internal memoranda authored by Agfa's competitors and information on terms and conditions of sale offered by Agfa's competitors, such as DuPont, Fuji, and 3M, on more than one occasion during his employment with Agfa. Farrell was unaware of how Elsen obtained these documents. Farrell testified [\*\*12] further that Eisen mentioned to him on several different occasions that he had contact with Agfa's competitors, such as Kodak, but Farrell could provide no details concerning these contacts or the specific subjects discussed.

Farrell testified that he had no knowledge of any meetings among competitors regarding prices, that he had never attended any such meetings with competitors nor did he have any knowledge of others having done so, and that he was not aware of any exchanges of future price information.

Gregory Gessert testified that he was employed by Fuji from July 1990 until he was discharged in June 1992, as a sales representative in Montana for Fuji's x-ray film division. He identified Fuji's competitors in the medical x-ray film industry as Kodak, DuPont, 3M, Konica, and Agfa. Gessert recalled that Fuji increased its list prices for medical x-ray film in January 1991 and January 1992. He was instructed generally to collect competitive information, including pricing, and to report what he obtained on a competitive information form.

Gessert testified further that he met with Ronald Bloomquist, a sales representative for Agfa, in December<sup>4</sup> at a Christmas party held by the [\*\*13] Wisconsin Society of Radiological Technicians (WSRT), a district of the American Association of Radiological Technicians, and they exchanged pricing information. Specifically, Gessert provided a copy of a draft of the proposed Fuji price increases for 1992, and Bloomquist provided a memo Gessert believes notified distributors and dealers of an approximate percentage increase in Agfa film prices. Gessert faxed the draft he received to Tim Smalley, his supervisor, in Michigan.

Ronald Bloomquist testified that he was employed by Agfa from June 1989 until he was involuntarily terminated in November 1992, as a territory sales manager responsible for selling film and equipment to clinics in Wisconsin and parts of Northern Illinois. His supervisors were Robert Eisen and James Prelaske. He identified Kodak, DuPont, Fuji, and Konica as Agfa's competitors in the sale of x-ray film in the United States. He stated that in October 1989, 1990, [\*\*14] and 1991, he was told by Eisen and Prelaske of a forthcoming price increase of five or six percent by either Kodak or DuPont, before it was formally announced, to be effective in [\*214] January and February of each following year and that he should find out what he could about the competition.

Bloomquist testified that he attended Christmas parties in December 1989 and on December 13, 1990, held by WSRT, during which time he met with Gessert. On both occasions, the two discussed the industry price increase in medical x-ray film and the fact that each of their employers was announcing a price increase. Bloomquist specifically remembered that Gessert told him at the December 1990 meeting of Fuji's future price increase. In addition, during the 1990 meeting, Gessert provided Bloomquist with a Fuji internal memorandum addressed to Fuji's sales representatives preannouncing a future price percentage increase by Fuji.<sup>5</sup> Bloomquist was reluctant to provide Gessert with any documentation, but verbally relayed that Agfa was following the same direction as Fuji and contemplated a six-percent price increase. Bloomquist then telephoned Eisen with the information he had received from Gessert.

## [\*\*15] DISCUSSION

Defendants argue that the complaint should be dismissed pursuant to [Rules 8, 9](#) and [12 of the Federal Rules of Civil Procedure](#). As an initial matter, the Court must determine whether to treat the instant motion as one to dismiss the complaint or as a motion for summary judgment in light of the discovery that has been had thus far in the case and the information outside of the pleadings that informs the motion at hand. [Rule 12\(c\)](#), provides that

**HN1**[] if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [Rule 56](#), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by [Rule 56](#).

**HN2**[] This language, identical to that contained in [Rule 12\(b\)](#),<sup>6</sup> has been deemed mandatory, requiring a district court to convert a motion for dismissal into a motion for summary judgment the instant materials external to the pleadings are considered. See [Carter v. Stanton, 405 U.S. 669, 671, 31 L. Ed. 2d 569, 92 S. Ct. 1232 \(1972\)](#); see also [American Fed'n of State, County](#) [\*\*16] & [Mun. Employees, AFL-CIO v. Nassau County, 609 F. Supp. 695, 700 \(E.D.N.Y. 1985\)](#).

<sup>4</sup> The deposition does not specify the year in which this meeting took place.

<sup>5</sup> Bloomquist believes that Gessert showed him this document but did not give it to him.

<sup>6</sup> [Rule 12\(b\)](#) **HN3**[] provides that if, on a motion to dismiss for failure to state a claim upon which relief can be granted,

matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary judgment ... and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by [Rule 56](#).

As defendants point out, the Second Circuit has recognized that when a plaintiff "has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a [Rule 12](#) ... motion into one under [Rule 56](#) is largely dissipated." [Cortec Indus., Inc. v. Sum Holding L.P.](#), 949 F.2d 42, 48 (2d Cir. 1991), cert. denied, 503 U.S. 960, 112 S. Ct. 1561, 118 L. Ed. 2d 208 (1992). While the Court considered treating the initial four depositions as integral to the complaint for the purposes of the renewed [\*\*17] motion to dismiss, the Court, heeding defense counsel's suggestion, made clear on July 27, 1994, when it granted additional discovery, albeit circumscribed, that the continued motion would be converted to one for summary judgment. Cf. [Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc.](#), 996 F.2d 537, 539 (2d Cir.) (summary judgment motion considered after limited discovery permitted), cert. denied, 510 U.S. 947, 114 S. Ct. 388, 126 L. Ed. 2d 337 (1993). Moreover, even if evidence from the original four employee depositions was considered part of the pleadings, the additional discovery the Court permitted cannot be said to form the basis for the complaint since plaintiffs did not have access to the additionally discovered documents or witnesses before the complaint was filed.

[\*215] [Federal Rule of Civil Procedure 56\(c\)](#) [HN4](#)[<sup>↑</sup>] provides that summary judgment must be granted if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of demonstrating the absence of any disputed material facts, and the court must resolve all ambiguities and draw all inferences in favor of the party against [\*\*18] whom summary judgment is sought. See [Thompson v. Gjivoje](#), 896 F.2d 716, 720 (2d Cir. 1990).

[HN5](#)[<sup>↑</sup>] The showing needed on summary judgment reflects the burden of proof in the underlying action. The court must consider "the actual quantum and quality of proof" demanded by the underlying cause of action and which party must present such proof. See [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 254, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Therefore, when the ultimate burden of proof is on the nonmoving party, the moving party meets his initial burden for summary judgment by "showing" -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). [HN6](#)[<sup>↑</sup>] To survive the motion, the nonmoving party must then "make a showing sufficient to establish the existence of [the challenged] element essential to [that party's] case." *Id. at 322*. [HN7](#)[<sup>↑</sup>] "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." [Anderson](#), 477 U.S. at 247-48. Thus, [HN8](#)[<sup>↑</sup>] summary [\*\*19] judgment is appropriate "when the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." [Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.](#), 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

Defendants argue that plaintiffs have failed to state a legally cognizable claim for violation of the antitrust laws, thereby entitling defendants to judgment as a matter of law. [HN9](#)[<sup>↑</sup>] [Section 1](#) of the Sherman Act makes "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, . . . illegal." [15 U.S.C. § 1](#). [HN10](#)[<sup>↑</sup>] In order to establish a claim under [Section 1](#), a plaintiff must be able to show: (1) concerted action, (2) by two or more persons, (3) which unreasonably restrains interstate or foreign trade or commerce. See [Oreck Corp. v. Whirlpool Corp.](#), 639 F.2d 75, 78 (2d Cir. 1980), cert. denied, 454 U.S. 1083, 70 L. Ed. 2d 618, 102 S. Ct. 639 (1981); [In re Nasdaq Market-Makers Antitrust Litig.](#), 894 F. Supp. 703, 710 (S.D.N.Y. 1995); [Telecommunications Proprietary, Ltd. v. Medtronic, Inc.](#), 687 F. Supp. 832, 837 (S.D.N.Y. 1988). Such [\*\*20] concerted action or agreement unreasonably restrains trade if (1) a specific intent to create an unreasonable restraint of trade is found or (2) the restraint constitutes a *per se* violation of the statute. See [Times-Picayune Publishing Co. v. United States](#), 345 U.S. 594, 614, 97 L. Ed. 1277, 73 S. Ct. 872 (1953) (quoting [United States v. Columbia Steel Co.](#), 334 U.S. 495, 522, 92 L. Ed. 1533, 68 S. Ct. 1107 (1948)). Horizontal price fixing,<sup>7</sup> as alleged in the complaint, has been considered a *per se* violation of the statute.

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<sup>7</sup> Horizontal price fixing involves price-setting agreements entered into by competitors at the same level of the market structure, while vertical price fixing consists of pricing agreements between firms at different levels of the market structure, such as manufacturers and distributors. See [K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co.](#), 1994 U.S. Dist. LEXIS 7253, No. 92 Civ. 1167, 1994 WL 250115 at \*6 n.3 (S.D.N.Y. June 1, 1994), aff'd, 61 F.3d 123 (2d Cir. 1995).

See [Catalano, Inc. v. Target Sales, Inc.](#), 446 U.S. 643, 647, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980); [United States v. Container Corp. of Am.](#), 393 U.S. 333, 337, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969) ("interference with the setting of price by free market forces is unlawful *per se*") (citing [United States v. Socony-Vacuum Oil Co.](#), 310 U.S. 150, 224 n.59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)).

[\*\*21] [HN11](#)<sup>↑</sup> The specific elements necessary to prove a claim of horizontal price fixing, as set forth by the Supreme Court, are: (1) the existence of an agreement, combination or conspiracy, (2) among actual competitors, (3) with the purpose or effect of "raising, depressing, fixing, pegging, or stabilizing the price of a commodity," (4) in interstate or [\*216] foreign commerce. [United States v. Socony-Vacuum Oil Co.](#), 310 U.S. 150, 223-24, 84 L. Ed. 1129, 60 S. Ct. 811 (1940).

Defendants argue that plaintiffs have not presented a legally sufficient basis upon which to find the first element of a price fixing scheme, namely, a conspiracy or agreement. [HN12](#)<sup>↑</sup> To establish this element, the evidence must show "a conscious commitment to a common scheme designed to achieve an unlawful objective." [Monsanto Co. v. Spray-Rite Serv. Corp.](#), 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); see also [Minpeco, S.A. v. Conticommodity Serv., Inc.](#), 673 F. Supp. 684, 688 (S.D.N.Y. 1987). In order to survive a motion for summary judgment, a plaintiff must produce direct or circumstantial evidence "that tends to exclude the possibility" that defendants acted independently of each other. [Matsushita](#) [\*22] [Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 597-98, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (citing [Monsanto Co.](#), 465 U.S. at 764); see also [Capital Imaging](#), 996 F.2d at 545 ("to withstand defendants' summary judgment motion, plaintiffs must present evidence that casts doubt on inferences of independent (not combined) action or proper conduct by defendants.") (citing [Matsushita](#), 475 U.S. at 588). The Supreme Court has further elaborated on this statement by noting that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. at 597 n.21 (1986).

The Supreme Court has, of course, recognized that a conspiracy or agreement to restrain trade in violation of the Sherman Act need not be express but can be inferred from the circumstances:

It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. [HN13](#)<sup>↑</sup> Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence [\*23] of which, if carried out, is restraint on interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

[Interstate Circuit v. United States](#), 306 U.S. 208, 227, 83 L. Ed. 610, 59 S. Ct. 467 (1939) (citations omitted); see also [Oreck Corp. v. Whirlpool Corp.](#), 639 F.2d at 79 ("It is not necessary that such a combination be established by direct proof of oral or written agreements; it may be proven by inferences drawn from circumstantial evidence, including the acts and conduct of the alleged conspirators.") (citations omitted).

The Supreme Court has cautioned, however, that, [HN14](#)<sup>↑</sup> while "on summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion," [Matsushita](#), 475 U.S. at 587 (quoting [United States v. Diebold, Inc.](#), 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)), "antitrust law" limits the range of permissible inferences from ambiguous evidence in a § 1 case. [475 U.S. at 588](#); see also [Minpeco, S.A.](#), 673 F. Supp. at 688. Accordingly, plaintiffs must be able to show that "the inference of conspiracy is reasonable in light of the competing [\*24] inferences of independent action or collusive action that could not have harmed respondents." *Id.* (citation omitted); see also [Monsanto Co. v. Spray-Rite Serv. Corp.](#), 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1962) (holding that conduct equally consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy). The Supreme Court subsequently noted that it did not mean--

that [HN15](#)<sup>↑</sup> 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, a requirement that was not invented, but merely articulated, in that decision.

[Eastman Kodak Co. v. Image Technical Serv., Inc.](#), 504 U.S. 451, 468, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (footnote omitted).

[\*217] One of the more common forms of circumstantial evidence proffered to support a price fixing agreement or conspiracy is proof of parallel pricing between competitors, also known as conscious parallelism or oligopolistic price [\*\*25] coordination. Conscious parallelism has been described as

the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing suprareactive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

[Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.](#), 509 U.S. 209, 113 S. Ct. 2578, 2590, 125 L. Ed. 2d 168 (1993) (citations omitted).

Here, plaintiffs have asserted the existence of parallel pricing. They point to deposition testimony in which former and present employees of defendants' companies have stated that, every time there was a price increase between 1989 and 1993, the list prices for medical x-ray film among defendants were very close in amount and that the timing of the price increases was also close, often on the same day each year. According to plaintiffs, this testimony also reveals that defendants' price increases impacted actual pricing in the marketplace.

Defendants, without denying plaintiffs' description of the effect, size, and timing of the price increases, argue that proof of such parallel [\*\*26] behavior is not sufficient by itself to establish an agreement or conspiracy. They note that the Supreme Court has stated:

To be sure business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. But 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. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

[Theatre Enter., Inc. v. Paramount Film Distrib. Corp.](#), 346 U.S. 537, 540-41, 98 L. Ed. 273, 74 S. Ct. 257 (1954) (citations omitted); see also [United States v. International Harvester Co.](#), 274 U.S. 693, 708-09, 71 L. Ed. 1302, 47 S. Ct. 748 (1927) ("The fact that competitors may decide, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.") (citation omitted); [Apex Oil Co. v. DiMauro](#), 822 F.2d 246, 253 [\*\*27] (2d Cir.) ("parallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy. However, parallel conduct alone will not suffice as evidence of such a conspiracy even if the defendants 'knew the other defendant companies were doing likewise.' More must be shown.") (citation omitted), cert. denied, 484 U.S. 977, 98 L. Ed. 2d 487, 108 S. Ct. 489 (1987); [E.I. DuPont de Nemours & Co. v. F.T.C.](#), 729 F.2d 128 139 (2d Cir. 1984) ("The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws. ... Price uniformity is normal in a market with few sellers and homogeneous products.") (citing [Theatre Enter. v. Paramount Film Dist. Corp.](#), 346 U.S. at 541).

More recently, the Supreme Court has recognized with regard to predatory pricing, which may be orchestrated similarly to parallel pricing, that "this anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly." [Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.](#), 113 S. Ct. at 2590. At the same time, the Court acknowledged that

however [\*\*28] unlikely the possibility [of such a scheme's success] may be as a general matter, when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability.

[Id. at 2591](#) (citation omitted).

Accordingly, [HN16](#) an agreement may be proven, even absent proof that it was made express, when, in addition to proof of parallel [\*218] pricing, there are present additional "plus factors" from which such an inference properly

could be made. See [\*Interstate Circuit v. United States\*, 306 U.S. 208, 222-23, 83 L. Ed. 610, 59 S. Ct. 467 \(1939\)](#). These plus factors include: (1) evidence of conduct that is contrary to the defendants' independent self-interest; (2) the presence or absence of a strong motive to enter into the alleged conspiracy; (3) the artificial standardization of products; and (4) a high level of interfirm communications. See [\*Apex Oil Co. v. DiMauro\*, 822 F.2d at 254](#); [\*E.I. DuPont de Nemours\*, 729 F.2d at 139 n.10](#) (citations omitted). Thus, although evidence of parallel conduct between competitors alone is insufficient to prove an agreement or conspiracy, an agreement may properly be inferred [\*\*29] from conscious parallelism when these "plus factors" are present.

Here, plaintiffs claim that in addition to parallel pricing there is evidence of a number of "plus factors," including the exchange of future price increase information, advance notice of future price increases, dissemination of current price information, and contacts and communications between defendants.

Defendants note in response that the "mere opportunity to conspire does not by itself support the inference that an illegal combination actually occurred." [\*Capital Imaging Assoc., P.C. v. Mohawk Valley Med. Assoc., Inc.\*, 996 F.2d at 545](#); see also [\*Oreck Corp. v. Whirlpool Corp.\*, 639 F.2d at 79](#). They also argue something different by noting that each of the "plus factors" considered independently, such as the dissemination or gathering of price-related information, does not constitute a violation of the Sherman Act. See [\*United States v. Citizens & S. Nat. Bank\*, 422 U.S. 86, 113, 45 L. Ed. 2d 41, 95 S. Ct. 2099 \(1975\)](#) ("The dissemination of price information is not itself a *per se* violation of the Sherman Act."); see also [\*Catalano, Inc. v. Target Sales, Inc.\*, 446 U.S. 643, 647, 64 L. Ed. 2d 580, I\\*\\*301 100 S. Ct. 1925 \(1980\)](#) (Advance Price announcements are perfectly lawful."); [\*Greenhaw v. Lubbock County Beverage Ass'n\*, 721 F.2d 1019, 1030 \(5th Cir. 1983\)](#) ("[A] violation of the Sherman Act is not necessarily established by an exchange of price information. Further evidence of an actual fixing effect on Prices must be adduced before an antitrust violation is established.") (citation omitted); [\*Vermont Int'l Petroleum Co. v. Amerada Hess Corp.\*, 492 F. Supp. 429, 434 \(N.D.N.Y. 1980\)](#) ("price verification is not, of course, *per se* unlawful") (citing [\*United States v. United States Gypsum Co.\*, 438 U.S. 422, 453-59, 57 L. Ed. 2d 854, 98 S. Ct. 2864 \(1978\)](#)). So too, the mere possession of a competitor's price-related documents, even with evidence of parallel pricing, has been held not to give rise to an inference of a price-fixing agreement. See [\*Stephen Jay Photo., Ltd. v. Olan Mills, Inc.\*, 903 F.2d 988, 996 \(4th Cir. 1990\)](#) ("The fact that the price information about one company is found in a competitor's files or an employee reports a competitor's pricing policy to his home office and the two companies charge similar prices for their products, without more, cannot support [\*\*31] an inference [of conspiracy]."); see also [\*F.T.C. v. Lukens Steel Co.\*, 454 F. Supp. 1182, 1193 \(D.D.C. 1978\)](#).

Defendants, however, have failed to take into account that "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." [\*Continental Ore Co. v. Union Carbide & Carbon Corp.\*, 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 \(1962\)](#) (citations omitted); see also *id. at 707* ("Acts which are themselves legal lose that character when they become constituent elements of an unlawful scheme.") (citations omitted). Similarly, "seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background in which the behavior takes place." [\*Minpeco, S.A.\*, 673 F. Supp. at 688](#) (quoting [\*Apex Oil Co.\*, 822 F.2d at 254-55](#)). Thus, while each of these factors taken in isolation does not necessarily provide a basis alone for inferring an agreement or conspiracy, in combination, these factors, taken together and "on the ground," may support a reasonable inference that an agreement or conspiracy existed.

Turning to the evidence presented, [\*\*32] plaintiffs first point to the meeting between Gessert [\*219] and Bloomquist on December 13, 1990, as proof that defendants have exchanged future pricing information. Gessert provided Bloomquist with a Fuji memorandum, which, plaintiffs assert, was not addressed to any Fuji customer and not yet announced to the trade, and which set forth Fuji's upcoming percentage price increase for 1991. Bloomquist relayed this memorandum to his supervisor. Plaintiffs contend that, although Fuji had announced a price increase three days earlier, on December 10, 1990, that announcement stated only that prices would increase "commensurate with industry trends," without setting forth the actual percentage increase contained in the exchanged memorandum. The percentage increase was not announced publicly until December 26, 1990.

At the same meeting, plaintiffs note, Bloomquist gave Gessert a draft internal Agfa memorandum indicating that Agfa would announce a price increase of approximately six percent, which Gessert faxed to Timothy Smalley, Fuji's regional sales manager. Agfa did not publicly announce its price increases until January 14, 1991.

Defendants argue that the "chance encounter" between Gessert and [\*\*33] Bloomquist provides no basis from which to infer the existence of a conspiracy since the meeting was not prearranged, and the Fuji price increase announcement provided to Agfa had been distributed to customers three days earlier. Moreover, defendants point out that neither Bloomquist nor Gessert had any authority to set prices for their companies' x-ray film products. Furthermore, defendants contend that, prior to the exchange between Gessert and Bloomquist, all defendants had already decided on their respective price increases for the year, and three of them had made related announcements to the trade. In addition, defendants dispute plaintiffs' assertion that the Fuji memorandum in question was an internal document.

Plaintiffs also provide the affidavit of Kenneth Housemen, who worked as a sales representative for Agfa from 1985 to 1988, in northern Illinois, parts of Wisconsin, and Iowa. In his affidavit, Houseman states that he met with Robert Frits, a DuPont sales representative, and the two exchanged information prior to any public announcement regarding the percentage price increases their companies intended to implement in 1987. Similarly, Houseman states that he met with [\*\*34] Martin DiFusco, a Kodak sales representative, and exchanged 1987 future pricing information, including proposed percentage increases, for their respective companies prior to any public announcement of the 1987 Kodak price increase. Defendants discount this affidavit, arguing that the discussions involved previously-decided pricing information, that Houseman never stated that he relayed the information he received to his superiors, and that the contacts were random, unplanned encounters during a period of competitive behavior between defendants.

As additional circumstantial evidence supporting the existence of a conspiracy or agreement, plaintiffs offer proof that defendants had advance notice of each other's future price increases. Plaintiffs point to the fact that Robert Eisen, a regional sales manager for Agfa who notified sales representatives working below him of future competitor price increases, typically received information from Agfa's headquarters regarding competitor price increases which had not yet been announced prior to his attending a trade show in Chicago that normally occurred in November of each year. In October 1989 in particular, Eisen was told prior to any announcement [\*\*35] by DuPont that DuPont would lead the 1990 price increase, which it did.

In addition, as noted above, both Joyce Sudak and Joel Popham, former Kodak employees, testified that during a Kodak training presentation in November 1988 several employees left the room, allegedly to discuss information they had just received regarding DuPont's intention to announce a price increase in early 1989. Moreover, plaintiffs cite a number of instances in which various supervisors employed by defendants instructed their sales representatives to find out from dealers and customers about price increases that the supervisors had become aware of before these increases had been announced publicly.

[\*220] Defendants argue that a price-fixing agreement cannot be inferred from the requests of defendants' supervisors that sales representatives attempt to gather information regarding proposed competitor price increases since those sales representatives deposed testified that they did not have any basis for believing that their supervisors had direct information from competitors regarding a price increase and because it is implausible that defendants would have secretly met and agreed to fix prices but have left it [\*\*36] up to their sales people to discover in the market what the agreed upon prices were. Defendants, on the other hand, argue that the supervisors' requests that information be ferreted from the marketplace more persuasively demonstrate that these supervisors were engaging in legitimate, independent, competitive conduct to try to find information regarding competitor price activity during the months of the year each manufacturer historically announced price changes.

A third "plus factor" plaintiffs proffer to support the inference of a conspiracy or agreement is the dissemination among defendants of current price information detailing the terms and conditions of medical x-ray film sales to their customers, which plaintiffs argue, were not obtained from the customers themselves since they contain information not meant to be disseminated externally. At the very least, plaintiffs contend, there is a genuine issue of material fact as to how and why one defendant had access to another's internal marketing and pricing documents.

Defendants argue that a price-fixing agreement cannot be inferred from employees' possession of their competitors' price-related documents since the documents in question [\*\*37] reflect pricing decisions previously announced to dealers and customers rather than prospective pricing information, and there was no evidence presented regarding where the possessors obtained the information regarding their competitors. Defendants also assert that all of the witnesses asked about these documents testified that they did not receive any of them directly from a competitor and that such documents typically came from customers. Defendants emphasize that five of the supervisors deposed testified that sales representatives frequently and with ease obtained competitor pricing information from their customers.

Finally, plaintiffs argue that evidence of direct contacts between defendants and the existence of multiple opportunities to conspire support the inference of a conspiracy or agreement to fix prices. Defendants discount these direct communications, arguing that none related to specific or future x-ray film price increases. However, as plaintiffs point out, these contacts demonstrate the ability and actuality of flowing communications between defendants and among their employees. Moreover, plaintiffs argue that defendants had an opportunity to conspire since Kodak, DuPont, [\*\*38] Agfa, and Fuji attended meetings of the Radiological Society of North America, the American College of Radiology, and American Healthcare Radiology Administrators.

With regard to all of these "plus factors," the parties disagree over the interpretation and significance of the evidence presented to support each inference. Recognizing that it is not the Court's role on a motion for summary judgment to weigh the evidence presented, see [Apex Oil Co. v. DiMauro, 822 F.2d at 252](#) ("While some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the factfinder at trial.") (citations omitted), plaintiffs have presented a basis upon which the existence of a price-fixing agreement or conspiracy among defendants can reasonably be inferred. Despite the plausibility of defendants' innocent explanations for the circumstantial evidence plaintiffs have presented when considered piece by piece, this evidence when taken in combination tends to exclude the possibility that defendants acted [\*\*39] independently in setting their prices for medical x-ray film each year. Cf. [Minpeco, S.A. v. Conticommodity Serv., Inc., 673 F. Supp. 684, 688 \(S.D.N.Y. 1987\)](#) (denying motion for summary judgment when plaintiff was able to produce evidence of parallel conduct, a high level of communications, [\*221] and a common motive among defendants to conspire to raise prices). Directly analogous is the case of [Vermont Int'l Petroleum Co. v. Amerada Hess Corp., 492 F. Supp. 429 \(N.D.N.Y. 1980\)](#). In that case, the district court found the Society of Independent Gasoline Marketers of America ("SIGMA"), an industry organization comprised of independent gasoline marketers, to be "a clearinghouse for the exchange of retail price information among independent gasoline marketers." [Id. at 434](#). The court based its finding on the fact that information "was conveyed through telephone calls between SIGMA employees and those of the independents concerning posted retail prices, as well as planned price changes. In essence, SIGMA was the agent of the participating independents." [Id.](#) In much the same way, there is sufficient evidence in this case to infer that the market of medical x-ray film dealers and [\*\*40] customers, in conjunction with the ease of interfirm communications, served as a kind of clearinghouse from which competitors could gather information regarding current prices and impending price increases in order to coordinate their pricing activities. As the court in the *Vermont Int'l Petroleum Co.* case emphasized, evidence of price verification must be scrutinized carefully, "since it carries the potential for price-fixing agreements." [Id.](#) Accordingly, the Court finds there to be a reasonable basis from which to infer an agreement or conspiracy sufficient to preclude granting summary judgment, and thus, for the reasons set forth above, defendants' motion is denied.<sup>8</sup>

[\*\*41] The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

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<sup>8</sup> Because the Court has denied defendant's motion, the Court need not consider the sufficiency of plaintiffs' affidavit filed pursuant to [Fed. R. Civ. P. 56\(l\)](#). Moreover, because [Rule 12\(c\)](#) provides that all parties be given a reasonable opportunity to present materials relevant to a motion that has been converted to one for summary judgment, plaintiff's cross-motion to strike defendant's Local 3(g) statement for failing to comply with the Local Rules is denied.

946 F. Supp. 209, \*221L<sup>A</sup> 1996 U.S. Dist. LEXIS 18732, \*\*41

Dated: Brooklyn, New York

September 27, 1996

Charles P. Sifton

United States District Judge

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## Roma Constr. Co. v. aRusso

United States Court of Appeals for the First Circuit

September 27, 1996, Decided

No. 95-2107

**Reporter**

96 F.3d 566 \*; 1996 U.S. App. LEXIS 25442 \*\*

ROMA CONSTRUCTION COMPANY AND PETER ZANNI, Plaintiffs - Appellants, v. RALPH R. ARUSSO, ET AL., Defendants - Appellees.

**Subsequent History:** [\*\*1] As Corrected October 11, 1996.

**Prior History:** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. Hon. Francis J. Boyle, Senior U.S. District Judge.

**Disposition:** Reversed dismissals and the district court's decision not to admit Blakely and remanded.

## **Core Terms**

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district court, bribery, plaintiffs', extortion, innocent party, pleadings, state law, innocence, innocent victim, pro hac vice, Clayton Act, corruptly, legislative history, involvement, statutory language, racketeering activity, federal common law, municipal, custom, rights, coercive, courts, federal interest, cause of action, racketeering, antitrust, grounds, individual defendant, affirmative defense, federal court

## **LexisNexis® Headnotes**

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

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

### **HN1 [] Standards of Review, De Novo Review**

A federal appellate court reviews dismissals pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) under the rubric that all reasonable inferences from properly pleaded facts are to be drawn in the plaintiffs' favor.

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

Governments > Courts > Authority to Adjudicate

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

## **HN2** [down] Motions to Dismiss, Failure to State Claim

Upon considering a motion to dismiss for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a district court should not grant the motion unless it appears to a certainty that the plaintiff would be unable to recover under any set of facts.

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

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

## **HN3** [down] Standards of Review, De Novo Review

A federal appellate court reviews a decision on a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss under the same standard as the district court uses.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN4** [down] Racketeer Influenced & Corrupt Organizations, Remedies

The Racketeering Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1961 et seq.](#), creates, in [18 U.S.C.S. § 1964\(c\)](#), civil remedy for any person injured by reason of racketeering activity. It is unlawful for any person employed by or associated with any enterprise engaged in, or activities of which affect, 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. An "enterprise" includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity. "Racketeering activity" includes any one of a number of enumerated criminal acts indictable under federal or state law. A "pattern of racketeering activity" is two or more acts of racketeering activity within ten years.

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

## **HN5** [down] Crimes Against Persons, Bribery

See [R.I. Gen. Laws § 11-7-4](#) (1994).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

## [\*\*HN6\*\*](#) [down] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Where federal and state racketeering statutes provide for a civil remedy, a federal appellate court should deny remedies authorized by the Racketeering Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1961 et seq.](#), only with reference to statutes or case law, not on policy grounds.

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

Governments > Legislation > Effect & Operation > General Overview

International Trade Law > Dispute Resolution > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Governments > Courts > Authority to Adjudicate

International Law > Dispute Resolution > General Overview

## [\*\*HN7\*\*](#) [down] **Federal & State Interrelationships, Federal Common Law**

Federal courts have the power to formulate federal common law when a federal rule of decision is necessary to protect uniquely federal interests or when Congress has given the courts the power to develop substantive law. Areas of uniquely federal interests include areas such as the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## [\*\*HN8\*\*](#) [down] **Racketeer Influenced & Corrupt Organizations, Claims**

The Racketeering Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1961 et seq.](#), does not concern uniquely federal interests.

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

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

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

## [\*\*HN9\*\*](#) [down] **Justiciability, Standing**

The question of a party's innocence must be resolved via the incorporation of state law into the federal law of standing under the Racketeering Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1961 et seq.](#)

Governments > Legislation > Interpretation

#### **HN10**[] **Legislation, Interpretation**

A statutory term is generally presumed to have its common-law meaning.

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

Governments > Legislation > Interpretation

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

#### **HN11**[] **Crimes Against Persons, Bribery**

The term "corruptly" in [R.I. Gen. Laws § 11-7-4](#) indicates a specific corrupt intent that differs from the Model Penal Code commentary's condemnation of an involuntary payor's conduct as manifesting a degree of cooperation in the undermining of governmental integrity that is inconsistent with the complete exoneration from criminal liability.

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

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

#### **HN12**[] **Crimes Against Persons, Bribery**

The mens rea implicated by "corruptly" in [R.I. Gen. Laws § 11-7-4](#) concerns the intention to obtain ill-gotten gain; by contrast, the Model Penal Code converts the lack of willpower to stand up to abusive authority into a degree of culpability.

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > Elements

Governments > Legislation > Effect & Operation > General Overview

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

#### **HN13**[] **Commercial Bribery, Elements**

Rhode Island's bribery statute, [R.I. Gen. Laws § 11-7-4](#), does not foreclose a conclusion that persons paying what appears to be a bribe are "innocent parties."

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

**HN14** [blue icon] **Criminal Offenses, Racketeering**

See [R.I. Gen. Laws § 9-1-2.](#)

Civil Rights Law > Protection of Rights > Procedural Matters > Criminal Penalties

Torts > Remedies > Damages

Torts > Intentional Torts > General Overview

**HN15** [blue icon] **Procedural Matters, Criminal Penalties**

[42 U.S.C.S. § 1983](#) authorizes actions for equitable relief and/or damages against every person who under color of any custom or usage, of any state or territory, subjects or causes to be subjected any citizen of the United States or other person to the deprivation of any rights, privileges, or immunities secured by the United States Constitution and federal laws. Furthermore, those who commit actionable wrongs under that section are liable to the party injured in an action at law, suit in equity, or other proper proceeding in redress. Congress included customs and usages in [§ 1983](#) because of the persistent and widespread discriminatory practices of state officials. Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a custom or usage with the force of law.

Civil Rights Law > Protection of Rights > Procedural Matters > Criminal Penalties

Civil Rights Law > ... > Immunity From Liability > Local Officials > Knowledge

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Governments > Local Governments > Claims By & Against

**HN16** [blue icon] **Procedural Matters, Criminal Penalties**

Courts have set forth two requirements for maintaining a [42 U.S.C.S. § 1983](#) action grounded upon an unconstitutional municipal custom. First, the custom or practice must be attributable to the municipality. That is, it must be so well-settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice. Second, the custom must have been the cause of and the moving force behind the deprivation of constitutional rights.

Civil Rights Law > Protection of Rights > Procedural Matters > Criminal Penalties

Governments > Local Governments > Employees & Officials

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Governments > Local Governments > Claims By & Against

**HN17** [blue icon] **Procedural Matters, Criminal Penalties**

An unconstitutional policy or custom, actionable under [42 U.S.C.S. § 1983](#), may be inferred from a single decision or act, but the isolated action must be taken by a municipal official with final policy-making authority in the relevant

area of the city's business. However, the fact that a particular official -- even a policymaking official -- has discretion in the exercise of a particular function does not, without more, give rise to municipal liability based on an exercise of that discretion.

Civil Procedure > Attorneys > Pro Hac Vice

Governments > Courts > Authority to Adjudicate

#### **HN18** [blue icon] Attorneys, Pro Hac Vice

See U.S. Dist. Ct. R., D. R.I., R. 5(c).

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

Civil Procedure > Attorneys > Pro Hac Vice

#### **HN19** [blue icon] Standards of Review, Abuse of Discretion

When a party identifies a specific, logical reason for its request to permit an out-of-state attorney to be admitted pro hac vice, a federal district court's decision denying pro hac vice admission, based on criteria that are not set forth in writing, that do not reasonably support its action, and that do not appear to respond to any general policy of the court, amounts to an abuse of discretion.

**Counsel:** G. Robert Blakey, with whom Ina P. Schiff, Henry F. Spaloss and Spaloss & Rosson were on brief for appellants.

Kathleen M. Powers, with whom Marc DeSisto and DeSisto Law Offices were on brief for appellee Town of Johnston. Samuel D. Zurier, with whom Julius C. Michaelson and Michaelson & Michaelson were on brief for appellees aRusso, et al.

**Judges:** Before Torruella, Chief Judge, Cyr and Lynch, Circuit Judges. LYNCH, Circuit Judge, concurring.

**Opinion by:** TORRUELLA

## **Opinion**

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[\*568] **TORRUELLA, Chief Judge.** Plaintiffs-Appellants Roma Construction Co, Inc. ("Roma") and Peter Zanni ("Peter Zanni") (collectively, "the plaintiffs"), challenge the district court's dismissal of their claims against Defendants-Appellees Mayor Ralph R. a Russo ("a Russo"), Councilman Benjamin Zanni ("Benjamin Zanni"), Domenic DeConte, Vincent Iannazi, Anthony Izzo, et al. (collectively, "the individual defendants"), and the Town of Johnston, Rhode Island ("the Town") (together with the individual defendants, "the defendants"). Specifically, the district court granted judgment [\*2] on the pleadings regarding: (1) Roma's racketeering claims against the individual defendants and the Town under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [18 U.S.C. § 1964\(a\)](#), and [R.I. Gen. Laws § 7-15-1 et seq.](#) ("state RICO"); and (2) Roma's civil rights claims against the individual defendants and the Town under [42 U.S.C. § 1983](#). Roma also challenges the district court's decision to deny the *pro hac vice* admission of attorney G. Robert Blakey ("Blakey"). For the following reasons, we reverse the dismissal of the RICO, state RICO and civil rights claims, reverse the district court's decision not to admit Blakey, and we remand for further proceedings in accordance with this opinion.

## I. BACKGROUND

**HN1**[] We review dismissals pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) under the rubric that all reasonable inferences from properly pleaded facts are to be drawn in the plaintiffs' favor. [Perez-Ruiz v. Crespo-Guillen](#), 25 F.3d 40, 42 (1st Cir. 1994); [Dartmouth Review v. Dartmouth College](#), 889 F.2d 13, 16 (1st Cir. 1989).

Drawing all reasonable inferences for the plaintiffs, the tale proceeds as follows. The plaintiffs Peter Zanni and Roma entered [\*\*3] into a real estate development venture with Harry and Russell DePetrillo ("the DePetrillos"). Unknown to the plaintiffs, the DePetrillos had entered into an arrangement with the alleged de facto government of the Town, with a Russo as "the Boss," under which payments would be made to this enterprise in order to obtain necessary approvals. After the DePetrillos sold their share, Peter Zanni was informed of this preexisting deal, and was warned that his project was "dead" if he did not make payments. Having invested heavily in the project, and reasonably believing that he was dealing with a racketeering enterprise that had extorted and stolen for years during its control of the Town, Peter Zanni paid up. He continued paying for three years, until he was able to sell his share of the development. He then informed the FBI, and cooperated with its investigation and later with prosecutions of official corruption in the Town.

Peter Zanni and Roma brought federal and state civil racketeering claims and federal civil rights claims, charging that they were injured by the conduct of a Russo and his fellow individual defendants, as well as the Town. The district court dismissed these charges on [\*\*4] the grounds that the plaintiffs' own conduct rendered them unable to maintain standing to press their claims. The plaintiffs appeal the dismissals of their racketeering [\*569]<sup>1</sup> and civil rights claims, as well as the district court's decision to deny the *pro hac vice* admission of their desired counsel, G. Robert Blakey ("Blakey").

## II. DISCUSSION

We address first the plaintiffs' challenge to the dismissals of their causes of action, and then confront their appeal of the district court's decision to deny admission to Blakey.

### A. Causes of Action

After setting forth the applicable standard of review, we turn first to the plaintiffs' [\*\*5] challenge to the district court's dismissal of their racketeering claims. We then shift to the issue of the plaintiffs' [section 1983](#) claims.

#### 1. Standard of Review

**HN2**[] Upon considering a motion to dismiss for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#), the district court should not grant the motion unless it appears to a certainty that the plaintiff would be unable to recover under any set of facts. [Hospital Bldg. Co. v. Trustees of Rex Hosp.](#), 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976); [Gonzalez-Bernal v. United States](#), 907 F.2d 246, 248 (1st Cir. 1990). **HN3**[] We review under the same standard, [Holt Civic Club v. City of Tuscaloosa](#), 439 U.S. 60, 66, 58 L. Ed. 2d 292, 99 S. Ct. 383 (1978).

#### 2. The Racketeering Claims

<sup>1</sup> At oral argument, the plaintiffs stated that, on appeal, they did not wish to challenge the district court's dismissal of their racketeering claims against the Town. Plaintiffs also stipulated that they would not attempt to assert such claims against the Town in the future. Accordingly, vis-a-vis the Town, the only damage claims we address are those pursuant to [section 1983](#).

**HN4** [+] RICO creates a civil remedy for "any person injured in his business or property by reason of a violation of section 1962 of this chapter." [18 U.S.C. § 1964\(c\)](#). Subsection (c) of section 1962, in turn, declares that it is unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern [\*\*6] of racketeering activity or collection of unlawful debt." *Id.* § 1962(c). An "enterprise" is defined to include "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* [§ 1961\(4\)](#). "Racketeering activity" includes any one of a number of enumerated criminal acts indictable under federal or state law. See *id.* [§ 1961\(1\)](#). A "'pattern of racketeering activity' requires 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." *Id.* [§ 1961\(5\)](#).

The district court dismissed the plaintiffs' civil RICO claims on the ground that, by their own pleadings, plaintiffs were not innocent victims and therefore could not maintain civil RICO standing. The district court found support for the proposition that only innocent victims could collect damages via civil RICO in the legislative history of the provision. See *Organized Crime Control: Hearings on S. 30 Before the Subcomm. No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d. Sess. (1970) (stating, in the Act's [\*\*7] "Findings and Purpose," that "Congress finds that . . . organized crime activity in the United States harms innocent investors and competing organizations"); 116 Cong. Rec. H35,346-47 (Oct. 7, 1970) (statement of Rep. Steiger, the private civil remedy provision's sponsor) ("It is the intent of this body, I am certain, to see that innocent parties who are the victims of organized crime have a right to obtain proper redress."). The district court's reasoning can be better delineated in conjunction with a recitation of plaintiffs' claims. Drawing inferences in favor of the plaintiffs, their pleadings suggest the following situation. The plaintiffs joined the DePetrillos in a real estate venture, unaware that the DePetrillos had entered into a scheme in which regulatory approvals had already been granted in exchange for the DePetrillos' payment of \$ 10,000 to a Russo and his purported associates. The plaintiffs were similarly unaware that the DePetrillos had agreed to pay an additional \$ 40,000. Several years later, defendant [\*570] Councilman Benjamin Zanni approached them for the purported "balance due." As the district court emphasized, the plaintiffs then faced a dilemma. They could refuse [\*\*8] to pay, jeopardizing their \$ 2 million investment in the project, and as the district court suggested was their obligation, go immediately to the authorities. Or, they could submit to this extortion to protect their investment. They chose the latter route. The plaintiffs state that they complied with all rules and regulations, and did not seek preferential treatment, but paid to avoid threatened adverse consequences. Specifically, the plaintiffs point to Benjamin Zanni's alleged statement to Plaintiff Peter Zanni that the venture was "dead" unless the balance was paid. Three years later, after they sold their partnership interests in the venture, the plaintiffs contacted the FBI, and assisted agents in a sting operation.

Looking at these contentions, one reasonable conclusion is that the plaintiffs made these payments without any intent or desire to subvert governmental processes, but felt compelled to pay to protect their substantial investment in the venture, and did not contact the FBI until they had mitigated risks to their investment. However, the district court concluded that, even under this favorable view of the plaintiffs' conduct they could not be considered innocent parties, [\*\*9] and so could not, according to the district court's interpretation of RICO standing, maintain a civil RICO claim. The district court concluded that, since the plaintiffs' own pleadings indicate that they paid \$ 40,000 to the individual defendants to assure timely processing of permits and approvals necessary for their project, the plaintiffs were "neither innocent nor victims." [Roma Constr. Co. v. a Russo, 906 F. Supp. 78, 82 \(D.R.I. 1995\)](#).

The plaintiffs challenge the district court's dismissal of their civil RICO claims on the pleadings. Plaintiffs dispute that there is any "innocent party" requirement under RICO. In the alternative, the plaintiffs contend that, even assuming such an "innocent party" requirement, the district court erred as a matter of law in concluding, that even taking the most favorable view of the plaintiffs' pleadings, they were necessarily not "innocent parties." Although the district court spoke of the "innocent party" requirement as one of "standing," it appears to have also considered its "innocent party" requirement as being in the nature of an affirmative defense which could be determined at the pleadings stage. The district court analogized to [\*\*10] antitrust cases under the Clayton Act in which an "equal involvement" defense is recognized. See [Bateman Eichler, Hill Richards Inc. v. Berner, 472 U.S. 299, 310-11, 86 L. Ed. 2d 215, 105 S. Ct. 2622 \(1985\)](#); [Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 \(1968\)](#). Whether or not there exists such an "innocent party" requirement is a question of first

impression in this circuit and, indeed, we are not aware of any cases anywhere that adopt such a requirement. We need not, however, decide whether or to what extent RICO imposes an "innocent party" limitation, or whether any such requirement might take the form of a standing requirement or an affirmative defense, because we conclude that the district court erred in finding that plaintiffs could prove no set of facts which would show their nonculpability under all potentially applicable criminal statutes.<sup>2</sup>

[\*\*11] Our analysis commences with an examination of the standards under which the district court evaluated plaintiffs' behavior. In deciding that such payments, even if coerced, forced it to conclude that the plaintiffs were [\*\*571] not innocent victims, the district court cited two authorities. See [Roma Constr. Co., 906 F. Supp. at 81-82](#) (citing [R.I. Gen. Laws § 11-7-4](#) (1994) and Model Penal Code § 240.1 commentary at 41 (1980)). Initially, the district court noted that Rhode Island General Law [§ 11-7-4](#) states that

no person shall corruptly give . . . any gift or valuable consideration to . . . any public official as an inducement or reward for doing or forebearing to do . . . any act in relation to the business of . . . the state, city or town of which he or she is an official.

**HN5** [↑] [R.I. Gen. Laws § 11-7-4](#) (1994). The statutory language does not address the question of whether one who pays due to coercion is an innocent victim. The district court did not refer to, and we fail to find, any Rhode Island authority for direction on this point.

Rather, the district court drew on the commentary to the Model Penal Code's definition of bribery to conclude that the plaintiffs' payments, [\*\*12] even if construed to be the product of coercion, constituted illegal bribery. See [Roma Constr. Co., 906 F. Supp. at 81](#). The cited commentary to section 240.1 of the Model Penal Code states that

[a] private citizen who responds to an official's threat of adverse action by paying money to secure more favorable treatment evidences thereby a willingness to subvert the legitimate processes of government . . . . Such conduct constitutes a degree of cooperation in the undermining of governmental integrity that is inconsistent with the complete exoneration from criminal liability.

Model Penal Code § 240.1 commentary at 41 (1980). The district court thus concluded that since even the interpretation of the pleadings that most favors the plaintiffs requires a determination that plaintiffs capitulated to official threats of adverse action, they were not "innocent parties." Taken together with its reading of the legislative history that RICO was intended to protect "innocent parties" and with its assessment of public policy in the form of "economic incentives," the district court proceeded to dismiss the plaintiffs' claims on the pleadings. [Roma Constr. Co., 906 F. Supp. at 83](#). [\*\*13]

The district court thus ultimately relied on the policy concerns it understood to be addressed in the Model Penal Code. Assuming for the sake of argument that lack of "innocence" is an issue in a civil RICO claim, the question must be addressed whether the district court considered the correct sources for the definition of "innocence." **HN6** [↑] We believe that where racketeering statutes provide for a civil remedy, at the very least we should deny RICO remedies only with reference to statutes or case law, not on policy grounds. See generally [Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498-500, 87 L. Ed. 2d 346, 105 S. Ct. 3275 \(1985\)](#) (rejecting, due to RICO statutory language and legislative history that counsel a broad interpretation, a court of appeals-imposed RICO standing limitation as inappropriate judicial "statutory amendment" even though the Court shared the lower court's concerns about "extraordinary" uses of RICO). As a result, we turn to the question of whether the issue presented is properly

<sup>2</sup> In deciding not to address the broader issues discussed in the concurring opinion, we need not necessarily quarrel with our respected colleague's analysis. Concededly, dismissal of the complaint based on appellees' assertion of a fact-intensive "equal involvement" defense would be inappropriate on the undeveloped record presently before the court. The concurring opinion hypothesizes that the substance of any such defense would be informed by preexisting federal statutes embodying comparable defenses. By contrast, the district court's dismissal depends entirely on the existence, *vel non*, of either an absolute innocent-victim "standing" requirement or a law-based *in pari delicto* defense, each of which, by its very nature, is more readily susceptible to summary disposition than a fact-intensive "equal involvement" defense. Thus we caution that nothing we have said is meant to suggest that Congress intended to create either such a "standing" requirement or an *in pari delicto* defense.

one of federal common law for which the Model Penal Code might prove a legitimate source of uniform legal principles, or one to which we would apply Rhode Island law.

The Supreme Court has recognized [HN7](#) that federal [\*\*14] courts have the power to formulate federal common law when a federal rule of decision is necessary to protect "uniquely federal interests" or when Congress has given the courts the power to develop substantive law. [Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640, 68 L. Ed. 2d 500, 101 S. Ct. 2061](#) (citing [Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426, 11 L. Ed. 2d 804, 84 S. Ct. 923 \(1964\)](#) and [Wheeldin v. Wheeler, 373 U.S. 647, 652, 10 L. Ed. 2d 605, 83 S. Ct. 1441 \(1963\)](#)). Areas of "uniquely federal interests" include areas such as "the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." [451 U.S. at 641](#). Several courts have concluded that RICO does not implicate "uniquely federal interests," since "regulation of organized crime does not fall within the above categories and, although RICO is federal legislation, [\*572] individual states also take active roles in fighting organized crime and providing redress for its injured citizens." [Friedman v. Hartmann, 787 F. Supp. 411, 417 \(S.D.N.Y. 1992\)](#); [Minpeco v. Conticommodity Servs. Inc., 677 F. Supp. 151, 155 \(S.D.N.Y. 1988\)](#) ("RICO, although reflecting [\*\*15] Congress' intent in providing creative federal responses to the problems of organized crime, does not address a uniquely federal interest."); [Seminole Electric v. Tanner, 635 F. Supp. 582, 584 \(M.D. Fla. 1986\)](#). We agree that RICO [HN8](#) does not concern uniquely federal interests.

As a result, we inquire whether the question presented -- is RICO standing limited to "innocent" parties? -- falls within an area in which Congress has given the courts the power to develop substantive law. [Texas Industries, 451 U.S. at 640](#). The district court, in effect, decided that the issue of federal civil RICO standing and its relationship to a party's innocence was properly decided as a matter of uniform federal common law. The district court looked to uniform model codes and emergent trends as guides for fashioning a federal common law rule which would foster what it perceived as important federal interests underlying civil RICO. The district court suggested that the Congress that enacted RICO in 1970, which referred obliquely in legislative history to the purpose of aiding "innocent parties," would be cognizant of the emerging Model Penal Code trend in the law of bribery, presupposing that [\*\*16] Congress gave courts the power to develop substantive law regarding this issue.

We find no evidence of any congressional intent that the "innocence" of a RICO "victim" should be made to turn on a uniform federal common law rule. Neither party cites, and we have been unable to find, statutory provisions or legislative history evidencing such a grant of authority. While there has been a great deal of commentary regarding the appropriate scope of federal common law, see, e.g., [Morgan v. South Bend Community Sch. Corp., 797 F.2d 471, 475 \(7th Cir. 1986\)](#) (collecting commentary), it is not disputed that "when the federal government is not a party to the litigation" -- as is the case here -- "neutral state rules that do not undermine federal interests should be applied unless some statute (or the Constitution) authorizes the federal courts to create a rule of federal law," [id. at 475](#) (citing [Miree v. DeKalb County, 433 U.S. 25, 28-33, 53 L. Ed. 2d 557, 97 S. Ct. 2490 \(1977\)](#)). More specifically, the Supreme Court has rejected a judicially created restriction on RICO standing, despite voicing agreement with the policy concerns that drove the limitation in question. See [Sedima, 473 U.S. at 498-500](#). [\*\*17] As a result, assuming -- without concluding, as we ultimately find the plaintiffs to be innocent parties -- that RICO standing is limited to "innocent parties," we believe that [HN9](#) the question of a party's innocence must be resolved via the incorporation of state law into the federal law of RICO standing in order to answer the instant question. We recognize that the incorporation of state law into federal law implicates a serious problem of uniformity of federal law throughout the states. However, since RICO does not implicate uniquely federal interests and since there is a lack of support for the view that Congress authorized the federal courts to generate federal common law in this area, the incorporation of state law is the preferable alternative. See, e.g., [In re Sunrise Sec. Litig., 916 F.2d 874, 881 \(3d Cir. 1990\)](#) (finding it appropriate "to look to state law for guidance in deciding whether plaintiffs have stated a nonderivative [shareholders'] claim, [enabling them to maintain standing,] rather than to fashion federal common law"); [Leach v. Federal Deposit Ins. Corp., 860 F.2d 1266, 1274 \(5th Cir. 1988\)](#) (concluding that "the incorporation of state law to [\*\*18] determine whether a shareholder has been injured under RICO is preferable to generating federal common law" despite the possibility of "a serious problem of uniformity of federal law throughout the states"); cf. [In re Bieter Co., 16 F.3d 929, 935 \(8th Cir. 1994\)](#) (applying federal common law of attorney-client

privilege to a civil RICO action, where such application is authorized by Supreme Court Standard 503 and Supreme Court case law).

As a result, in assessing plaintiffs' innocence, we must apply Rhode Island bribery law. The district court concluded that the pleadings rendered the plaintiffs "not innocent" [\*573] vis-a-vis charges of bribery. See *Roma Constr. Co., 906 F. Supp. at 83* (stating that to allow the plaintiffs standing might result in a rule under which "persons, such as the plaintiffs, could engage in bribery of public officials with full knowledge that if the bribery scheme . . . broke down, they could seek a treble return on their illicit, but failed investment"). Turning to Rhode Island law, however, this conclusion cannot be reconciled with Rhode Island's bribery statute. The district court relied on the Model Penal Code's bribery provision, which states that [\*\*19]

- [a] person is guilty of bribery, a felony of the third degree, if he offers, confers, or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
  - (1) any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official, or voter; or
  - (2) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or
  - (3) any benefit as consideration for a violation of a known legal duty as a public servant or party official.

Model Penal Code § 240.1 ("Bribery in Official and Political Matters"). While the district court may have rightly concluded that the plaintiffs are not innocent of bribery under the Model Penal Code, we do not think that this fact counsels for the same conclusion under Rhode Island law, since the Code's own commentaries expressly recognize that the Code does not follow Rhode Island law. Part II Model Penal Code and Commentaries 6, n.2 (1980). Moreover, unlike Rhode Island's statute, the Model Penal Code provision contains no requirement [\*\*20] that a payor act "corruptly." Compare *R.I. Gen. Laws § 11-7-4* ("no person shall corruptly give") (emphasis added) with Model Penal Code § 240.1 ("[a] person is guilty of bribery . . . if he offers, confers, or agrees to confer upon another").<sup>3</sup>

[\*\*21] The plaintiffs argue that the Model Penal Code's omission of the term "corruptly" is no mere semantic distinction; rather, it represents a shift from the common law in expanding the scope of bribery sanctions for payors to situations in which the payor does not act corruptly. See generally James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, *35 U.C.L.A. L. Rev.* 815, 824 n.41 (1988). We agree. *HN10* [↑] "[A] statutory term is generally presumed to have its common-law meaning." *Evans v. United States*, 504 U.S. 255, 259, 119 L. Ed. 2d 57, 112 S. Ct. 1881 (1992); *United States v. Aguilar*, U.S. , , 115 S. Ct. 2357, 2370, 132 L. Ed. 2d 520 (1995) (Scalia, J., dissenting) (stating that "the term 'corruptly' in criminal laws has a long-standing and well-accepted meaning"). The term "corruptly" adds the element of corrupt intent to the crime of bribery. See generally *id. at 2370* (endorsing the proposition that "an act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another [\*\*22] person"); H.R. 748, 87th Cong., 1st Sess. 18 (1961) (reporting *section 201* federal bribery statute) (stating that "the word 'corruptly' which is also used in obstruction of justice [\*574] statutes (*18 U.S.C. §§ 1503-1505*) means with wrongful or dishonest intent").

<sup>3</sup> The federal bribery and gratuity statute, *18 U.S.C. § 201*, does not, by its terms, apply to local officials such as those involved in the instant case, *18 U.S.C. § 201(a)(1)*, although cases have held the statute applicable where local officials administer federally funded programs. See *United States v. Velazquez*, 847 F.2d 140, 142 (4th Cir. 1988) (concluding deputy sheriff was a "public official" with respect to federal bribery statute, where county jail was under contract with federal government to supervise federal prisoners); *United States v. Gallegos*, 510 F. Supp. 1112, 1114 (D.N.M. 1981) (ruling state government employee who worked under direct supervision of federal official in administration of federal grant program was "public official" for purpose of federal bribery statute). But see *United States v. Del Toro*, 513 F.2d 656, 662 (2d Cir.) (concluding city administrator who was city employee was not a public official even though he administered model cities program, for which the federal government provided 100% funding), cert. denied, 423 U.S. 826, 96 S. Ct. 41, 46 L. Ed. 2d 42 (1975). No allegation has been made that the defendants' bribery/extortion scheme was in connection with a federal contract or federal funding.

We agree that [HN11](#) the term "corruptly" indicates a specific corrupt intent that differs from the Model Penal Code commentary's condemnation of an involuntary payor's conduct as manifesting "a degree of cooperation in the undermining of governmental integrity that is inconsistent with the complete exoneration from criminal liability." Model Penal Code § 240.1 commentary at 41. [HN12](#) The *mens rea* implicated by "corruptly" concerns the intention to obtain ill-gotten gain; by contrast, the Model Penal Code converts the lack of willpower to stand up to abusive authority into a degree of culpability. See Lindgren, *supra* at 824 n.41 (stating that "the Model Penal Code has taken the questionable approach of making it bribery to capitulate to an extortion threat"). Admittedly, to delve into questions of what is done "corruptly" is more difficult than to apply the Model Penal Code's standard. But as one commentator has noted, "the best [\\*\\*23](#) that can be said for the [Model Penal Code's bribery] provision is that it makes difficult questions of crime definition easy, but this clarity is bought at the cost of ignoring the settled law of centuries and current notions of right and wrong." *Id.*

As a result, we must apply the common law standard of specific corrupt intent, as included in the Rhode Island statute, to the plaintiffs' story. The plaintiffs claim that they paid only to avoid adverse consequences, that their properties met the standards required for the approvals in question, and that they received nothing beyond fair treatment from payees. Examining these claims with an eye towards detecting corrupt intent, we think that a set of facts could be found from which it could be reasonably inferred that the plaintiffs did not make payments voluntarily to bring about an unlawful result, with the hope of a gain for themselves, but rather that they were the innocent victims of a criminal enterprise. As a result, we conclude that [HN13](#) Rhode Island's bribery statute does not foreclose a conclusion that they are "innocent parties."

Citing [United States v. Mariano, 983 F.2d 1150 \(1st Cir. 1993\)](#) and [United States \[\\[\\\*24\\]\]\(#\) v. Hathaway, 534 F.2d 386 \(1st Cir. 1976\)](#), the defendants assert that we have previously held that "bribery and extortion are not mutually exclusive concepts," [Mariano, 983 F.2d at 1159](#); [Hathaway, 534 F.2d at 395](#). However, we think these cases unavailing for three reasons. First, neither deals with Rhode Island's bribery statute. Second, even if these cases compelled us to conclude that bribery and coercive extortion are not mutually exclusive concepts under the Rhodes Island statute, in the instant case a genuine issue of material fact remains as to the plaintiffs' intent in making payments, based on a reading of the pleadings in the best light for the plaintiffs.

Third, and finally, *Mariano*, at least, involved two defendants who pled guilty to "corruptly giving . . . something of value" to local government officials "with intent to influence or reward" those officials, where the officials were part of a governmental unit that received substantial federal subsidies, in violation of [18 U.S.C. § 666\(a\)\(2\)](#). [Mariano, 983 F.2d at 1153](#). On appeal, both defendants challenged the district court's application of the sentencing guideline relating to bribery rather than [\\*\\*25](#) the guideline appropriate to providing an illegal gratuity. [Id. at 1159](#). They argued that "they were victims, not perpetrators, of an extortionate scheme, and that they received nothing extra in return." *Id.* Applying the clearly erroneous standard of review, we concluded that the "guideline analogy chosen by the district court was well within its purview," noting that "when there are two plausible views of the record, the sentencing court's adoption of one such view cannot be clearly erroneous." [Id. at 1160](#); see [United States v. St. Cyr, 977 F.2d 698, 706 \(1st Cir. 1992\)](#). In particular, we noted that the *Mariano* defendants could not "expect the courts to swallow their tale uncritically." [Mariano, 983 F.2d at 1160](#).

In this case, the district court improperly dismissed the plaintiffs' case before it had a chance to swallow, let alone digest, their story. At this stage of the game, since one plausible view is that the plaintiffs were in fact victims of coercive extortion, and since they have not pled guilty to a crime that involves "corrupt intent" as an element as we [\[\\*575\]](#) noted of the defendants in [Mariano, 983 F.2d at 1159](#), we conclude that the plaintiffs [\\*\\*26](#) in the instant case may press on with their claim. As a result, we reverse the district court's dismissal of the plaintiffs' federal RICO claims. Accordingly, we also reverse the district court's dismissal for lack of supplemental jurisdiction, see [28 U.S.C. § 1367](#), of state RICO claims pursuant to [R.I. Gen. Laws §§ 7-15-2, 7-15-3 and 9-1-2](#).<sup>4</sup> We remand both federal and state RICO claims for further proceedings in accordance with this opinion.

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<sup>4</sup> Similar to federal RICO, [R.I. Gen. Laws § 7-15-2\(c\)](#) provides that

[\*\*27] Because we conclude that even if RICO's civil remedies were limited to innocent parties, we would apply Rhode Island law to the question of the plaintiffs' innocence, and Rhode Island law compels a reversal of the district court's dismissal of their claims, we leave for a later time the question of whether those who are not innocent parties can be denied civil RICO remedies.

### 3. The Civil Rights Claim

The district court also dismissed the plaintiffs' claim that the individual defendants and the Town acted under color of state authority and municipal practice, and deprived the plaintiffs of property and rights in violation of [42 U.S.C. § 1983](#).

[Section 1983 HN15](#) [+] authorizes actions for equitable relief and/or damages against "every person who under color of any . . . custom or usage, of any State or Territory . . . subjects or causes to be subjected any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." [42 U.S.C. § 1983](#). Furthermore, those who commit actionable wrongs under that section "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding" [\*\*28] in redress." *Id.* In construing the terms "custom" and "usage," the Supreme Court has instructed that

Congress included customs and usages [in [section 1983](#)] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.

[Monell v. Department of Social Servs. of New York, 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 \(1978\)](#) (quoting [Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68, 26 L. Ed. 2d 142, 90 S. Ct. 1598 \(1970\)](#)); see [Bordanaro v. McLeod, 871 F.2d 1151, 1156 \(1st Cir. 1989\)](#).

[HN16](#) [+] Courts have set forth two requirements for maintaining a [section 1983](#) action grounded upon an unconstitutional municipal custom. First, the custom or practice "must be attributable to the municipality." *Id. at 1156*. That is, "it must be so well-settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice." *Id.* Second, "the custom must have been the cause of and the moving force behind the deprivation" [\*\*29] of constitutional rights." *Id.*

The district court concluded that in the facts alleged, "there [was] no evidence that the Town [] had any policy endorsing or advocating extortion and the acceptance of bribes by town officials." [Roma Constr. Co., 906 F. Supp. at 83](#). Furthermore, the district court went on to state that, even assuming "that there was a de facto municipal policy of extortion promulgated by a Russo and perpetrated by the other named defendants," the plaintiffs could not succeed in their [section 1983](#) claim because the alleged policy was not the cause of any constitutional harm. *Id.* Noting that there must be a "direct causal" [\*576] link between a municipal policy or custom and the alleged constitutional violation to find [section 1983](#) liability, *id. at 84* (quoting [City of Canton v. Harris, 489 U.S. 378, 385, 103 L. Ed. 2d 412, 109 S. Ct. 1197 \(1989\)](#)), the district court concluded that "in this case, the 'causal link' or 'moving force' behind any perceived constitutional violations is the plaintiffs' . . . continual, voluntary payment of bribes to the defendants," *id.*

For the reasons we have stated in our discussion regarding bribery and coercive extortion, we think a finder of fact [\*\*30] could reasonably infer that the plaintiffs' payments were made pursuant to coercive extortion, and thus

it shall be unlawful for any person employed by or associated with any enterprise to conduct or participate in the conduct of the affairs of the enterprise through racketeering activity or collection of an unlawful debt.

Rhode Island law also uses broad standing language that resembles that of [18 U.S.C. § 1964\(c\)](#) in its provision for civil liability for racketeering offenses. See [R.I. Gen. Laws § 9-1-2](#) (stating that [HN14](#) [+] "whenever any person shall suffer any injury . . . by reason of the commission of any crime or offense . . . he [or she] may recover his [or her] damages for such injury in a civil action against the offender") (emphasis added).

did not necessarily constitute "voluntary payment of bribes" with corrupt intent. At this stage, we must resolve reasonable inferences in favor of the plaintiffs. Thus, we conclude that the plaintiffs could show a direct causal link between the defendants' coercive extortion and the plaintiffs' losses.

As a result, we turn to the question of whether coercive extortion, if found, could be attributed to some *de facto* municipal policy. [HN17](#)<sup>1</sup> "An unconstitutional policy or custom may be inferred from a single decision or act . . . [but] the isolated action must be taken by a municipal official with 'final policy-making authority' in the relevant area of the city's business." [Rodriguez v. Furtado](#), 771 F. Supp. 1245, 1257 (D. Mass. 1991) (citations omitted). However, "the fact that a particular official -- even a policymaking official -- has discretion in the exercise of a particular function does not, without more, give rise to municipal liability based on an exercise of that discretion." [Pembaur v. City of Cincinnati](#), 475 U.S. 469, 481-82, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) (Brennan, J., plurality [[\\*\\*31](#)] opinion).

In their pleadings, the plaintiffs have alleged that a Russo as Mayor, Benjamin Zanni as a town councilman, and others operated a *de facto* government which controlled the Town for more than a decade, routinely engaging in bribery, extortion, corruption and other unlawful activities. While a showing that a Russo acted illegally in the exercise of his discretion as Mayor might not by itself give rise to municipal liability, we think that under these pleadings, the plaintiffs could indeed prove a set of facts from which a trier of fact could infer an unconstitutional policy or custom with respect to the Town's government. For example, a fact finder could conclude that extortion of outsiders, businessmen, or developers, if proven, was "the way things are done and have been done" in the Town. See [Kibbe v. City of Springfield](#), 777 F.2d 801, 806 (1st Cir. 1985) (quoting [Grandstaff v. City of Borger](#), 767 F.2d 161, 171 (5th Cir. 1985), cert. denied, 480 U.S. 916, 94 L. Ed. 2d 686, 107 S. Ct. 1369 (1987)), cert. granted, 475 U.S. 1064, 106 S. Ct. 1374, 89 L. Ed. 2d 600 (1986), cert. dismissed, [480 U.S. 257, 107 S. Ct. 1114, 94 L. Ed. 2d 293 \(1987\)](#). As a result, we reverse the district court's dismissal of the plaintiffs' [section 1983](#) claim on the pleadings, [[\\*\\*32](#)] and we remand for further proceedings on their claim.

## B. Blakey's *Pro Hac Vice* Admission

The plaintiffs also appeal the district court's denial of admission *pro hac vice* of their attorney, G. Robert Blakey ("Blakey"). On May 15, 1995, the plaintiffs moved for Blakey's admission *pro hac vice*. The district court denied the motion on June 2, 1995. On June 12, 1995, the plaintiffs moved for reconsideration of the court's order; the district court denied the motion for reconsideration on September 25, 1995.

The district court articulated two grounds for denying Blakey's *pro hac vice* admission. First, the district court noted that a previous motion by the plaintiffs seeking the admission *pro hac vice* of another of their attorneys, Spaloss, had already been granted. Second, the district court expressed concern about the amount of attorney's fees being generated by the plaintiffs.<sup>5</sup>

[[\\*\\*33](#)] The Supreme Court has recognized that "in many District Courts, the decision on whether to grant *pro hac vice* status to an out-of-state attorney is purely discretionary." [[577](#)] [Frazier v. Heebe](#), 482 U.S. 641, 651 n.13, 96 L. Ed. 2d 557, 107 S. Ct. 2607 (1987). However, the plaintiffs argue that the U.S. District Court for the District of Rhode Island is not one of those courts. [HN18](#)<sup>1</sup> Local Rule 5(c) of the District of Rhode Island provides in pertinent part that

any attorney who is a member in good standing of the bar of the United States Supreme Court, of any other United States District court, or of the highest court of any state, *shall on motion be permitted to appear* once in a calendar year in a case or group of related cases in association with a member of the bar of this court who is actively engaged in the practice of law within the State of Rhode Island . . . .

D.R.I. R. 5(c) (emphasis added). The plaintiffs argue that in contrast to the Local Rules of the other districts in this circuit, Rhode Island's rule does not by its terms provide for the court's discretion. Compare D.R.I. R. 5(c) ("shall on

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<sup>5</sup> A successful civil RICO plaintiff may collect reasonable attorney's fees in addition to treble damages. [18 U.S.C. § 1964\(c\)](#).

motion be permitted to appear") with D. Me. R. 3(d)(1) ("may at the discretion of [\*\*34] the Court . . . be permitted to practice"); D. Mass. R. 6(b) ("may appear and practice in this court in a particular case by leave granted in the discretion of the court"); D.N.H. R. 5(b) ("may at the discretion of the court"); D.P.R. R. 204.2 ("may be permitted"). The plaintiffs assert that the District of Rhode Island has promulgated a rule under whose clear language *pro hac vice* admission is not discretionary. As a result, the plaintiffs claim, the district court erred as a matter of law in concluding that it had discretion to deny Blakey's *pro hac vice* admission, or alternatively, the district court abused whatever discretion it had.

We do not consider the issue of whether this *pro hac vice* rule, which may be nondiscretionary, nonetheless leaves some discretion to deny admission. Even assuming that discretion existed, the district court's denial of such admission to Blakey was an abuse of that discretion. The district court's two articulated grounds simply cannot support its action. The district court stated that "we already have one *pro hac vice* . . . [and we're] not going to take more than one on a case." We may take judicial notice of the fact that the District [\*\*35] of Rhode Island has permitted multiple *pro hac vice* admissions in proceedings that were contemporaneous with the instant case. See *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995). Furthermore, regarding expense, in the instant case defendants were represented by more than ten attorneys, the plaintiffs by two; additionally, if the court was concerned about excessive attorney fees, it could have addressed that matter later, if and when the plaintiffs submitted their attorney fee application.

While it may be that Blakey has no right to *pro hac vice* admission, see *Leis v. Flynt*, 439 U.S. 438, 452, 58 L. Ed. 2d 717, 99 S. Ct. 698 (1979) (holding that an attorney does not have a federal right to state court *pro hac vice* admission), the rights of the plaintiffs are another matter. Particularly here, where HN19<sup>6</sup> the plaintiffs identified specific, logical reasons for their request,<sup>6</sup> we conclude that the district court's decision, based on criteria that are not set forth in writing, that do not reasonably support its action, and that do not appear to respond to any general policy of the District of Rhode Island, amounts to an abuse of discretion.

## [\*\*36] CONCLUSION

As a result of the foregoing, the judgment of the district court is **reversed**. *Appellants are allowed costs.*

**Concur by:** LYNCH

## Concur

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**LYNCH, Circuit Judge, concurring.** At issue is whether the plaintiffs have stated a claim under *Rule 12(b)(6), Fed. R. Civ. P.*<sup>7</sup> The plaintiffs' complaint cannot be dismissed "if relief could be granted under any set of facts that could be proved consistent with the allegations." *NOW v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 803, 127 L. Ed. 2d 99 (1994). The district court dismissed the claims because it imported into RICO a [\*578] standing requirement that the plaintiffs must be "innocent victims." See *Roma Constr. Co. v. a Russo*, 906 F. Supp. 78, 81 (D.R.I. 1995). The review by this court of the dismissal is de novo. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). This ruling, one of law, was, I believe, in error. The question is, concededly, one of first impression here. Because I analyze the matter differently than does the majority, I write separately.

[\*\*37] The question of who has standing to bring actions under RICO is a matter of federal law. The pertinent provision of RICO provides:

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<sup>6</sup> See, e.g., Kevin Roddy, *RICO in Business and Commercial Litigation* (1993) (describing Blakey as "the acknowledged author" of the federal RICO statute and of "excellent" commentaries on RICO application).

<sup>7</sup> At oral argument, plaintiffs stipulated that their RICO claim is not asserted against the town, but only against the individual defendants.

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). There is no qualification on the phrase "any person injured in his business or property" limiting the phrase to "innocent" persons. RICO defines a "person" as "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). On the language of the statute, plaintiffs meet this definition.<sup>8</sup>

In general, the intent of Congress manifested in the text of \*\*38 the statute governs the issue of standing:

In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."

United States v. Turkette, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980)). The language of RICO should thus be the primary guide to determining Congressional intent. See Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 n.13, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985). Indeed, the Supreme Court has consistently adhered to the language of RICO in interpreting its meaning and rejected surplus requirements not found in the statutory language. See, e.g. Scheidler, 114 S. Ct. at 806 (holding that RICO does not require an economic motive behind the racketeering activity); Reves v. Ernst & Young, 507 U.S. 170, 177-79, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993) (looking to statutory language to determine the scope of RICO liability for "conduct" or "participation"); Sedima, 473 U.S. at 488-92 (holding that private actions under RICO do not require a criminal \*\*39 conviction on the underlying predicate offenses); Turkette, 452 U.S. at 580-87 (holding that the term "enterprise" as used in RICO is not restricted to criminal enterprises); cf. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 265-69, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992) (construing the word "injury" to require proximate cause by reference to statutory history and judicial interpretation of same language in Clayton Act).

Despite the lack of any "innocent victim" requirement in the statutory language, the district court relied upon an isolated statement in the legislative history to fashion a requirement that only "innocent victims" be allowed to sue. The district court's reliance on a snippet of legislative history, lifted out of context,<sup>9</sup> to create an absolute standing

<sup>8</sup> Of course, other questions about the parameters of RICO standing are not raised by this case, which concerns only whether there is an "innocent victim" requirement.

<sup>9</sup> The court relies on a statement by Representative Steiger on October 7, 1970, that "it is the intent of this body, I am certain, to see that innocent parties who are the victims of organized crime have a right to obtain proper redress." 116 Cong. Rec. 35,346-47 (1970). That statement was made during debate over a proposed amendment, ultimately withdrawn, which would have authorized private injunctive relief. See Abrams, *The Law of Civil RICO* § 1.4, at 30 (1991). The district court's characterization of the remarks as coming from "the sponsor of the provision that eventually created a private civil remedy" could cause a misapprehension. In fact, RICO originated in a bill filed in the Senate, S. 30. By October 7, 1970, the Judiciary Committee had already reported out that bill, which included "the RICO provision ultimately enacted as section 1964(c), which created a treble damage remedy." Id. at 30. The debate in which Representative Steiger made the quoted remarks was over private injunctive relief.

Further, Representative Steiger referred, in the very same remarks relied upon by the district court, to victims of "organized crime." Yet it was clear to both the House and the Senate that the reach of civil RICO extended well beyond organized crime. "Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 246, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989); see also Sedima, 473 U.S. at 499 ("Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued." (citation omitted)); Abrams, *supra*, § 1.1, at 5 ("RICO's name might suggest that the private cause of action reaches primarily racketeers and other organized crime figures. Developments since RICO's 1970 enactment, however, have laid firmly to rest any suggestion of limited reach.").

[\*579] bar to anyone not "innocent," was inappropriate. "Even if we were to read this statement to say what [defendants] say[] it means, it would not amount to more than background noise drowned out by the statutory language." [Holmes, 503 U.S. at 269 n.15](#). This selection from the legislative history cannot overcome the plain text of RICO, which is unambiguous. It represents "a rather thin reed upon which to base a requirement [\*40] . . . neither expressed nor . . . fairly implied in the operative sections of [RICO]." [Scheidler, 510 U.S. at 260](#). Even were there occasion to consider the legislative history relied upon by the district court, it says only that the statute will protect innocent victims, not that the statute will deny standing to those who are not innocent victims. See [Turkette, 452 U.S. at 591](#) (noting that "negative inferences" need not be drawn from positive statements in legislative history).

[\*\*41] The Supreme Court has emphasized the broad reach of RICO's language: "If the defendant engages in a pattern of racketeering activity . . . and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional . . . requirement." [Sedima, 473 U.S. at 495](#). There is nothing in the language of RICO which suggests that Congress intended to deny standing to plaintiffs who are alleged to have committed bribery or paid extortion, whether under coercion or not.

Standing involves three analytically distinct requirements: injury-in-fact, a causal connection between the injury and the conduct complained of, and whether the wrong may be redressed. [Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 \(1992\)](#). All three elements of the standing inquiry are satisfied on the pleadings here. Plaintiffs have adequately alleged injury-in-fact (financial loss), a causal connection (defendants' corruptly demanding payments), and that the injury will be redressed by a favorable decision (availability of RICO damages). See [Sedima, 473 U.S. at 496](#) (noting that RICO plaintiff [\*42] has standing only if "he has been injured in his business or property by the conduct constituting the violation"); [Libertad v. Welch, 53 F.3d 428, 436 \(1st Cir. 1995\)](#). This is not a case where the plaintiffs attempt to assert the rights of others. Cf. [Carter v. Berger, 777 F.2d 1173 \(7th Cir. 1985\)](#) (county, not individual taxpayers, may sue under RICO for bribery scheme resulting in underpayment of taxes). Accordingly, I would end the standing analysis there.

In considering whether there is an "innocent victim" standing requirement, I doubt that Congress intended for the federal courts to refer to and incorporate state law.<sup>10</sup> [\*43] The [\*580] defendants argue that the innocent victim requirement is to be found in the distinction, found in some state laws, between bribery and coercive extortion. They buttress their argument by reference to provisions of the Model Penal Code. The matter of whether the activities in which these plaintiffs engaged fit within the category of bribery or of coercive extortion is, in my view, not relevant to the issue of standing.<sup>11</sup>

Although RICO references state law in its definition of "racketeering activity,"<sup>12</sup> it makes no substantive distinction between "bribery" and "extortion." RICO defines "racketeering activity" in [18 U.S.C. § 1961\(1\)\(A\)](#) to mean, *inter alia*, "any act or threat involving . . . bribery [or] extortion . . . which is chargeable under State law and punishable by

<sup>10</sup> Caselaw holding that minority shareholders suffer no injury to their property apart from the injury the corporation suffers and so have no standing to sue under RICO provides no comfort to defendants. Such caselaw does not support the principle that reference should be made to state law to determine the contours of any "innocent victim" defense. It is true that some decisions refer to state law to define property interests of shareholders as opposed to corporations to determine whether the former may bring a RICO action. See, e.g., [Leach v. FDIC, 860 F.2d 1266 \(5th Cir. 1988\)](#), cert. denied, [491 U.S. 905, 109 S. Ct. 3186, 105 L. Ed. 2d 695 \(1989\)](#). Other caselaw, including that of this circuit, see [Roeder v. Alpha Indus., 814 F.2d 22, 29-30 \(1st Cir. 1987\)](#), refers to general principles of corporate law to hold that a shareholder may not sue under RICO to vindicate a duty owed to the corporation. See [Rand v. Anaconda Ericsson, Inc., 794 F.2d 843, 849](#) (2d Cir.), cert. denied, [479 U.S. 987, 93 L. Ed. 2d 582, 107 S. Ct. 579 \(1986\)](#); [Warren v. Manufacturers Nat'l Bank of Detroit, 759 F.2d 542, 545 \(6th Cir. 1985\)](#); Abrams, *supra*, § 3.3.6, at 147-52. In any event, the issue of whether state law should be referenced in defining the term "property" is simply not present in this case.

<sup>11</sup> If it were, then I would agree that on the facts pleaded it is impossible to draw the conclusion that this case involves exclusively bribery.

<sup>12</sup> This reference to state law is in the context of RICO's definition of predicate offenses. From this, defendants would infer a Congressional desire -- expressed nowhere in the statute -- to reference state law with respect to affirmative defenses as well.

imprisonment for more than one year." Thus, the federal statute recognizes, without distinction, acts "involving" either bribery or extortion as predicate offenses for purposes of RICO. Further, even in defining such a predicate offense, state law plays a limited role:

The labels placed on a state statute do not determine whether that statute proscribes bribery for purposes of the RICO statute. Congress intended for "bribery" to be defined generically when it included bribery as a predicate act. H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. [\*\*44] News 4007, 4032 ("State offenses are included by generic designation."). Thus, any statute that proscribes conduct which could be generically defined as bribery can be the basis for a predicate act.

[United States v. Garner, 837 F.2d 1404, 1418 \(7th Cir. 1987\)](#), cert. denied, 486 U.S. 1035, 100 L. Ed. 2d 608, 108 S. Ct. 2022 (1988); accord [United States v. Forsythe, 560 F.2d 1127, 1137 \(3d Cir. 1977\)](#). Here, the plaintiffs' complaint also alleges, in addition to the state law predicate offense, a predicate federal offense, violation of [18 U.S.C. § 1951](#) (wrongful use of official authority to obstruct, delay, and effect commercial activity in interstate commerce). That statute also does not draw the distinction defendants urge.

Nonetheless, standing issues aside, [\*\*45] the question remains whether there is some form of requirement in RICO, which may be tested on a motion to dismiss, that plaintiffs be innocent victims. At least two other possibilities emerge: that such a requirement is inherent in the cause of action or that it is an affirmative defense.

To the extent that the existence of a cause of action is a matter analytically distinct from the issue of standing, see [Libertad, 53 F.3d at 438 n.5](#), a cause of action has been stated here.<sup>13</sup> There is nothing in the language of RICO which suggests that only innocent plaintiffs have a cause of action. See [Scheidler, 114 S. Ct. at 806](#) ("The statutory language is unambiguous and [the] legislative history [evidences] no such 'clearly expressed legislative intent to the contrary' that would warrant a different construction." (citation omitted)). Under the proximate causation test of [Holmes, 503 U.S. at 268](#), there is a cause of action stated.<sup>14</sup> The damages alleged here on the [\*581] pleadings are neither remote nor speculative. These plaintiffs have alleged direct injury to their property, which *Holmes* requires. [Holmes, 503 U.S. at 265-69](#); see also [id. at 276-86](#) (O'Connor, J., [\*\*46] concurring) (analyzing the causation issue as part of the standing issue). Again, viewing this as a matter of whether there is an "innocent victim" requirement inherent stating a cause of action, I do not believe state law is pertinent.

[\*\*47] The district court opinion also suggests that the "innocent victim" argument may be available as an affirmative defense. If so, there are a range of possibilities for the contours of the defense. The range includes a sort of absolute defense if the plaintiff has done anything wrong, which is what the district court thought and to which it applied the label of an *in pari delicto* defense.<sup>15</sup> [\*\*48] At the other end of the range is the position that the

<sup>13</sup> But cf. Sunstein, *Standing and the Privatization of Public Law*, 88. Colum. L. Rev. 1432, 1433 (1988) (arguing that "for purposes of standing, the principal question should be whether Congress has created a cause of action").

<sup>14</sup> It may also be, as the district court suggested, see *Roma*, 906 F. Supp. at 82 n.1, that the plaintiffs' relative culpability may be considered in deciding, under *Holmes*, the issue of proximate causation based on the evidence presented. See, e.g., [Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142-47, 20 L. Ed. 2d 982, 88 S. Ct. 1981](#) (White, J., concurring) (treating relative culpability, in antitrust context, as part of causation analysis), overruled on other grounds by [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#). The issue of proximate cause may not be decided at the pleading stage given the allegations in this complaint.

Relative culpability may also be relevant to the measure of damages. The opinions in *Perma Life* posit that the benefits received by a plaintiff from its participation in wrongdoing "can of course be taken into consideration in computing damages." [Perma Life, 392 U.S. at 140](#); see also II Areeda & Hovenkamp, [Antitrust Law](#) P365c3, at 248 (1995 rev. ed.).

<sup>15</sup> This common law defense derives from the Latin *in pari delicto potior est conditio defendantis*: "In a case of equal or mutual fault . . . the condition of the [defending] party is the better one." *Black's Law Dictionary* 791 (6th ed. 1990). The *in pari delicto*

relative guilt of the plaintiff is irrelevant. That, I believe, cannot be so,<sup>16</sup> and even the plaintiffs do not argue that position. While some affirmative defenses, such as the statute of limitations, may on occasion be decided on the pleadings, the assertion of an affirmative defense here would not afford a basis to dismiss the complaint under [Rule 12\(b\)\(6\)](#). Under any of the plausible articulations of such a defense, the inferences to be drawn from the facts pled here do not permit dismissal.

I would reject the proposition, urged by defendants, that an absolute *in pari delicto* defense is embedded in RICO. In construing the language of RICO, the Supreme Court has looked to precedent under the Clayton Act, the statute upon which RICO was modeled. See [Holmes, 503 U.S. at 268](#) ("We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in [the Sherman Act], and later in the Clayton Act's § 4. It used the same words, and we can only assume that it intended them to have the same meaning that courts had already given them." (citations omitted)). The Supreme Court, in [Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-40, 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, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#), explicitly rejected the existence of an *in pari delicto* defense under the Clayton Act. In [Pinter v. Dahl, 486 U.S. 622, 100 L. Ed. 2d 658, 108 S. Ct. 2063 \(1988\)](#), the Court reaffirmed that [\*\*49] in its contemporary "broadened" construction, precisely the construction contemplated by the district court here, the *in pari delicto* defense "is not appropriate in litigation arising under federal regulatory statutes." [Id. at 632](#); see [Sullivan v. National Football League, 34 F.3d 1091, 1107-09 \(1st Cir. 1994\)](#), cert. denied, 131 L. Ed. 2d 133, 115 S. Ct. 1252 (1995). For the same reasons, an "unclean hands" defense would seem to be unavailable, as it is not a defense to an antitrust treble damage action. See [Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 214, 95 L. Ed. 219, 71 S. Ct. 259 \(1951\)](#), overruled on other [\*582] grounds by [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#); see also [Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 \(1964\)](#).

That there is no *in pari delicto* defense does not mean there is no defense at all in which the relative guilt of the plaintiffs may be weighed. It is far more likely that there is in RICO an "equal involvement" defense similar to the "equal involvement" defense recognized under the Clayton Act in *Perma Life*.<sup>17</sup> Recognition of such a defense, patterned on the Clayton Act defense, was extended to securities actions in *Bateman Eichler, Hill* [\*\*50] [Richards, Inc. v. Berner, 472 U.S. 299, 306-11, 86 L. Ed. 2d 215, 105 S. Ct. 2622 \(1985\)](#). The equal involvement defense is more demanding of those asserting it than the *in pari delicto* defense and only bars the claims of a plaintiff who "truly bore at least substantially equal responsibility [as the defendant] for the violation" of the federal law at issue. [Id. at 308](#).

[\*\*51] This circuit has also recognized an equal involvement defense in antitrust actions. [Sullivan, 34 F.3d at 1107](#) ("A plaintiff's 'complete, voluntary, and substantially equal participation' in an illegal practice under the antitrust laws

defense, though "in its classic formulation . . . narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury . . ." is now generally given "a broad application to bar actions where plaintiffs simply have been involved generally in 'the same sort of wrongdoing' as defendants." [Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306-07, 86 L. Ed. 2d 215, 105 S. Ct. 2622 \(1985\)](#) (quoting *Perma Life*, 392 U.S. at 138).

<sup>16</sup> See, e.g., discussion in footnote 14 *supra*.

<sup>17</sup> In *Perma Life*, five concurring Justices, in four separate opinions, recognized the existence of the equal involvement defense. Justice White wrote that he "would deny recovery where plaintiff and defendant bear substantially equal responsibility for [the] injury resulting to one of them . . ." [392 U.S. at 146](#) (White, J., concurring). According to Justice Fortas, "if the fault of the parties is reasonably within the same scale -- if the 'delictum' is approximately 'par' -- then the doctrine should bar recovery." [392 U.S. at 147](#) (Fortas, J., concurring). Justice Marshall wrote that he "would hold that where a defendant in a private antitrust suit can show that the plaintiff actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault, the plaintiff should be barred from imposing liability on the defendant." [392 U.S. at 149](#) (Marshall, J., concurring). Justice Harlan, in an opinion joined by Justice Stewart, indicated that the defense should be allowed in cases where "the plaintiffs were substantially as much responsible . . . as the defendants." [392 U.S. at 156](#) (Harlan, J., concurring in part and dissenting in part).

precludes recovery for that antitrust violation." (quoting [CVD, Inc. v. Raytheon Co., 769 F.2d 842, 856 \(1st Cir. 1985\)](#), cert. denied, 475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986))).

Testing the allegations of the complaint against the Supreme Court's articulation of the equal involvement defense, this complaint survives a [Rule 12\(b\)\(6\)](#) motion. Under that defense:

a private action for damages . . . may be barred on the grounds of the plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of [RICO] and the protection of the . . . public.

[Bateman, 472 U.S. at 310-11](#). Both the Supreme Court and this court have cautioned against deciding such defenses in the absence of factual development. See [id. at 311 n.21](#) ("We note, [\*52] however, the inappropriateness of resolving the question of respondents' fault solely on the basis of the allegations set forth in the complaint."); [Sullivan, 34 F.3d at 1109](#) ("Ultimately . . . these are factual questions for the jury . . .").

The defendants make a misplaced attempt to argue in favor of the more defendant-helpful *in pari delicto* defense by relying on [Tafflin v. Levitt, 493 U.S. 455, 107 L. Ed. 2d 887, 110 S. Ct. 792 \(1990\)](#). *Tafflin*, they urge, weakens the analogy of RICO to the Clayton Act, and, therefore, to the equal involvement defense. In *Tafflin*, the Court held that RICO did not vest exclusive jurisdiction in the federal courts where the language of the statute did not purport to do so and the legislative history did not show that Congress addressed the question. [Id. at 460-62](#). The Court rejected the argument that it should derive such an exclusivity from the fact that actions under the Clayton Act may only be brought in federal court. [Id. at 462-63](#). The analogy to the Clayton Act did not provide the answer because Congress was also [\*583] presumed to have operated against a backdrop of well-established law governing when there was exclusive federal jurisdiction. [Id. at 459-60](#). [\*53] There is no such "judicial default rule" which operates in defendants' favor here. Cf. [Landgraf v. U.S.I. Film Products, 511 U.S. 244, 114 S. Ct. 1483, 1505, 128 L. Ed. 2d 229 \(1994\)](#) (discussing judicial default rules in the context of retroactivity of statutes).

Similarly, there is no comfort for defendants in the Supreme Court's rejection in *Sedima* of application of the "antitrust injury" rule to RICO. "This is so because 'RICO injury' would [otherwise] be an unintelligible requirement, not because there is no parallel between the two statutes." [Carter v. Berger, 777 F.2d 1173, 1176 \(7th Cir. 1985\)](#) (noting the Court's remark in [Sedima, 473 U.S. at 489-90](#) & n.8, that Congress relied on the analogy to antitrust).

Indeed, RICO was enacted in 1970, after the *Perma Life* decision, of which Congress was undoubtedly aware. The modelling of RICO on the Clayton Act was done against the backdrop of judicial recognition of an equal involvement defense. The piece of legislative history relied upon by defendants, to the extent it should be considered at all, may be equally read to support the proposition that Congress implicitly allowed an affirmative equal involvement defense as under [\*54] the Clayton Act.

But defendants do have a point. The analogy to the Clayton Act is not perfect. Indeed, the American Bar Association report from which the civil RICO provisions emerged suggests that not all the accoutrements of the Clayton Act should be imported into RICO. See 115 Cong. Rec. 6995 (1969) (Report of A.B.A. Antitrust Section); Abrams, *supra*, § 1.4, at 25-26. This may be a situation where Congress did not explicitly contemplate the question and so congressional "intent" in the classic formulation simply does not exist. The courts then are left with the delicate task of providing the answer.

I very much doubt that the federal definition of "innocence" for purposes of the equal involvement defense would ordinarily involve reference to and incorporation of state law, as the majority asserts.<sup>18</sup> The Supreme Court did not

<sup>18</sup> There may be situations, not present here, in which the state has such an exceptionally strong policy interest in the enforcement of its own laws that Congress would choose to accommodate that interest in the RICO enforcement scheme. This may be more true under RICO than other statutes in as much as Congress has referred to violations of state law in defining predicate offenses under [18 U.S.C. § 1961\(1\)\(A\)](#). However, the recognition of an interest in enforcement is not the same as the recognition of an interest in a defense. The Rhode Island bribery and extortion statutes do not evidence such an overwhelming

look to state law to define the defense in either *Perma Life* or *Bateman*, nor should we do so here. Nor has this court looked to state law to define the defense under the Clayton Act in the aftermath of *Perma Life*.

[\*\*55] To say there is some form of affirmative defense like the equal involvement defense does not describe precisely the content of such a defense. Even the Supreme Court Justices in *Perma Life* did not agree on the content. See *supra* footnote 17. In the absence of factual findings in which to set the questions of the honing of such a defense, there is, and should be, reluctance to engage now in such refinement. The precision of any standard awaits further development. It is enough now to say that the positions at the extremities -- that any wrongdoing disables a plaintiff or that wrongdoing is irrelevant -- are untenable.

The equal involvement defense recognized under the Clayton Act and the Securities Act derives its contours from federal policy as recognized by federal statutes. There is no reason not to apply that paradigm to RICO.<sup>19</sup>

[\*\*56] [\*584] As to the claim under [42 U.S.C. § 1983](#), the plaintiffs have adequately alleged that the harm they suffered was caused by the extortionist policies and practices in which the town officials are claimed to have engaged. Again, there is no need to delve into the distinction between coercive extortion and bribery.

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interest in affording defendants an *in pari delicto* defense, even before reaching the issue of whether Congress would have wanted to import Rhode Island law into RICO.

<sup>19</sup> The district court was very troubled by the notion of rewarding people who pay bribes to public officials with RICO treble damages, whatever the circumstances of the payment. *Roma*, 906 F. Supp. at 82-83. That is certainly a reasonable concern. Policy arguments may be made both for and against such a result. In the antitrust field, the Supreme Court has noted that because of the "important public purposes" served by private suits, it is inappropriate to invoke "broad common-law barriers to relief." [Perma Life](#), 392 U.S. at 138. Thus "the plaintiff who reaps the reward of treble damages 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. at 139*.

This strong enforcement rationale certainly is present in RICO, a statute intended to increase the arsenal of weapons striking at criminal activity. In addition, it may be inherently unfair to deny plaintiffs any ability to pursue a RICO claim where their fault is relatively small. An absolute "innocent victim" requirement would create such an undesirable imbalance.



## **Little Caesar Enters. v. Smith**

United States District Court for the Eastern District of Michigan, Southern Division

September 30, 1996, Decided ; October 2, 1996, FILED

93-40520, 93-40521

### **Reporter**

172 F.R.D. 236 \*; 1996 U.S. Dist. LEXIS 21012 \*\*; 1997-1 Trade Cas. (CCH) P71,817

LITTLE CAESAR ENTERPRISES, INC., Plaintiff, vs. GARY G. SMITH, LINDA M. SMITH, BRIAN T. SMITH, AND SMITH FAMILY FOODS, INC., Defendants. GARY G. SMITH, LINDA M. SMITH, BRIAN T. SMITH, SMITH FAMILY FOODS, INC., JOHN W. HENNESSY, DANI L. HENNESSY, PIZZA FARM, INC., SHARON A. FIELDS, LCP OF LENOIR CITY, INC., LCP OF EAST NASHVILLE, INC., LCP OF CHAPMAN SQUARE, INC., AND LCP OF POWELL PLACE, INC., Plaintiffs, vs. LITTLE CAESAR ENTERPRISES, INC., BLUE LINE DISTRIBUTING, INC., AND LITTLE CAESAR NATIONAL ADVERTISING PROGRAM, INC., Defendants.

**Subsequent History:** **[\*\*1]** Adopting Order of March 31, 1997, Reported at: *172 F.R.D. 236, 1997 U.S. Dist. LEXIS 6989.*

## **Core Terms**

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franchisees, buyers, products, distributors, tie-in, logoed, coercion, alternate, franchise, tie, tied product, seller, franchise agreement, supplier, damages, proofs, plaintiffs', prices, buy, class action, class certification, conditions, tying arrangement, announced, cases, class member, contractual, defendants', competitors, predominate

## **LexisNexis® Headnotes**

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Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

### **HN1 [] Parties, Joinder of Parties**

Fed. R. Civ. P. 23(a) contains four prerequisites that must be satisfied before a lawsuit can proceed as a class action. The Rule provides: (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## **HN2** **Prerequisites for Class Action, Predominance**

Fed. R. Civ. P. 23(b) requires for a class action that (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## **HN3** **Class Actions, Certification of Classes**

The only issue before a court on a motion for class certification is whether plaintiff is asserting a claim, which, assuming its merit, will satisfy the requirements of Fed. R. Civ. P. 23. In determining whether to certify a class, inquiry into the merits of plaintiffs' claims is inappropriate. A Rule 23 determination is wholly procedural and has nothing to do with whether a plaintiff will ultimately prevail on the substantive merits of its claims. The particular merits of plaintiffs' claims are to be accepted as valid in considering a class certification motion under Rule 23. Nonetheless, the court must undertake an analysis of the issues and the nature of required proof at trial to determine whether the matters in dispute and the nature of plaintiffs' proofs are principally individual in nature or are susceptible of common proof equally applicable to all class members. Moreover, when a court is in doubt as to whether to certify a class action, it should err in favor of allowing a class.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

## **HN4** **Parties, Joinder of Parties**

The "impracticability" of Fed. R. Civ. P. 23(a)(1) does not require impossibility, but only difficulty or inconvenience in joining all members of the class. The numerosity requirement is met when plaintiffs demonstrate that the number of potential class members is large, even if plaintiffs do not know the exact figure.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [\*\*HN5\*\*](#) Prerequisites for Class Action, Predominance

[\*Fed. R. Civ. P. 23\(a\)\*](#) also requires that the proposed class members present common questions of law and fact. The resolution of common issues must affect all or most of the class members. This criterion requires only some common issues of law or fact, not the predominance of common issues required by [\*Rule 23\(b\)\(3\)\*](#).

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [\*\*HN6\*\*](#) Class Actions, Class Members

Typicality exists when the class representative presents issues common to the class, and the representative's position on those issues is not antagonistic to the position of the other class members. Under this requirement, the interests of the class representative should be generally coextensive with those of the class members he or she seeks to represent. The typicality requirement is met if the plaintiff's claim arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and her or his claims are based on the same legal theory. Typicality may exist where there is a very strong similarity of legal theories, even if substantial factual distinctions exist between the named and unnamed class members.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

## [\*\*HN7\*\*](#) Class Actions, Certification of Classes

The district court is given broad discretion in dealing with class actions under [\*Fed. R. Civ. P. 23. Rule 23\(c\)\(1\)\*](#) states that a class certification order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. Affording plaintiffs the opportunity to provide such substitutes is the common practice in cases where, although the current named representatives are inadequate, adequate representatives are known and available as substitutes.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Class Members > Named Members

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [\*\*HN8\*\*](#) Prerequisites for Class Action, Adequacy of Representation

The fourth and final requirement of [\*Fed. R. Civ. P. 23\(a\)\*](#) is that the named plaintiff must fairly and adequately represent the interests of the class. This requirement has two prongs: the first concerns the zeal and competence of the named plaintiffs' legal representation, the second concerns conflicts of interest between the named plaintiffs and the class.

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

## [HN9](#) [blue download icon] Tying Arrangements, Sherman Act Violations

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Such an arrangement violates § 1 of the Sherman Act 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 > ... > Private Actions > Remedies > General Overview

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

## [HN10](#) [blue download icon] Private Actions, Remedies

In addition to proving the illegal tying arrangement, plaintiffs must also prove the impact of such a violation. It must be shown that the illegal tie caused harm to consumers of the tied product in the tied market and that this affected a substantial volume of commerce. The impact or the fact of damages is separate from proving the actual measure of damages for each class member. Liability and damages phases of litigation are generally bifurcated, and a class action on liability should not be avoided merely because the specific damage claims will need to be handled in individual trials. The class plaintiffs need only show that all suffered some loss in their business, and that there was a causal relation between the tying arrangement and that loss. There is no requirement that the loss be personal or unique to a plaintiff, and the fact of damages is different than a measure of individual damages for each specific plaintiff in the class.

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

## [HN11](#) [blue download icon] Price Fixing & Restraints of Trade, Tying Arrangements

It is only when the buyer's freedom to choose a given product is restricted that the tying doctrine comes into play: so long as the buyer is free to take either product by itself there is no tying problem. Where plaintiff franchisees place no reliance on express contractual tie-ins, each, individually, must prove that his purchases were coerced as an element of establishing a *prima facie* case of illegal tying.

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

## [HN12](#) [blue download icon] Price Fixing & Restraints of Trade, Tying Arrangements

A tying claim consists solely of three elements. Assuming economic power over the tying product and a not insubstantial amount of commerce, the plaintiff need only show that a seller conditioned the sale of one product (the tying product) on the purchase of another product (the tied product). Once a plaintiff proves that a defendant has conditioned the sale of one product upon the purchase of another there is no requirement that he prove that his purchase was coerced by the seller's requirement.

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

## [HN13](#) [blue download icon] Price Fixing & Restraints of Trade, Tying Arrangements

Coercion is not a separate element, but may be a necessary element of proof implicit in proving that there was an actual tie of one product to the sale of another. In the absence of an express contractual written tie, or in the

absence of similar contract clauses which, when considered with other common proofs extrinsic to the contract, have the practical economic effect of precluding the purchase of the tied product from a competing third party source, plaintiffs may be required to resort to proof of coercion based on specific instances involving each individual plaintiff.

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

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

#### **HN14** [blue icon] **Price Fixing & Restraints of Trade, Tying Arrangements**

Where there is an express contractual tying arrangement, or where the practical economic effects flowing from the contract clauses and other common proofs establish a tie, individual proof of coercion is not necessary, and common proof of the tie-in can be made. If plaintiffs wish to establish a tie by common proofs, they should be precluded from introducing individual evidence of specific threats or specific instances of defendants' refusal to grant approval that would be necessary for an individual plaintiff to buy from a third party source.

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

#### **HN15** [blue icon] **Price Fixing & Restraints of Trade, Tying Arrangements**

Coercion is implied where a contract explicitly requires the tie because a contract is backed by the force of law. Coercion remains a necessary element of an unlawful tying arrangement but it is inferred on a class-wide basis; a contractual provision is coercive in and of itself because it is backed by the force of law.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

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

#### **HN16** [blue icon] **Tying Arrangements, Defenses**

It is not a legitimate defense for the defendant to prove the plaintiff would have bought defendant's tied product even if there had been no tie. While the quality and relative price of defendant's product may be relevant to the fact of damages and its individual measurement, tying is a per se antitrust violation because it deprives the buyer of free choice in a market of competitors. Such restraint of free market forces is presumed to have an effect on market quality and more commonly on market price of the defendant's product.

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

#### **HN17** [blue icon] **Price Fixing & Restraints of Trade, Tying Arrangements**

While not a separate element of the *prima facie* case, proof of coercion may be necessary to prove the first element of a tying claim -- that the sale of one product is in fact conditioned on the purchase of another -- in the absence of an express contractual tie.

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

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

#### **HN18** [blue icon] Conveyances, Franchises

While the district court's ruling on a motion for class certification is not to consider the merits of the case or even the sufficiency of the evidence as would be done in a motion for summary judgment, it is worth reviewing some of the proffered evidence to determine if it is common to the class in order to help make a judgment whether the common evidence predominates over the evidence that need be individual.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

#### **HN19** [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

The commonality of proofs of a tie-in is an easy issue where there is an express contractual tie or an announced tie-in. The inability to prove a tie-in by the express or direct application of the contract or by a defendant's announcement will make the proofs far more complicated. This will often, if not generally, require use of individual proof of coercion, particularly where salesmanship, refusals, pressure, or subtle threats are involved. Yet, in evaluating whether common questions of law or fact predominate, the critical question under Fed. R. Civ. P. 23(b)(3) is not whether the proofs are external to the contract terms, nor whether they are complex instead of simple proofs. Rather, the critical question for Rule 23(b)(3) is whether the method of proving coercion involves facts -- even if complex and external to the contract -- that are predominately common to the class and not individual.

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

#### **HN20** [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

The important inquiry centers on the buyer's state of mind and whether the buyer was forced or coerced into making the purchase of the tied product by the seller's conduct. Yet, this does not render irrelevant the nature of the seller's action and intent. "Forcing" and "coercion" mean something less than that the buyer would not have bought from the defendant but for the alleged illegal act. Even if the buyer would have bought from the defendant without the illegal act, an act is still an illegal tie if it created an impermissible added inducement to purchase defendant's product B, or impermissibly altered the market and competitive capabilities of alternate sellers to lessen or remove altogether the consumer's choice in choosing a competitor's product.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

#### **HN21** [blue icon] Class Actions, Prerequisites for Class Action

The need to compute individual damages will not prevent class certification on issues of liability.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

172 F.R.D. 236, \*236L<sup>A</sup>1996 U.S. Dist. LEXIS 21012, \*\*1

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

## **HN22**[] Prerequisites for Class Action, Adequacy of Representation

In addition to the requirements under [Fed. R. Civ. P. 23\(a\)](#) of numerosity, common questions, typicality, and fair and adequate representation, [Fed. R. Civ. P. 23\(b\)\(2\)](#) requires the plaintiffs to show that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## **HN23**[] Class Actions, Prerequisites for Class Action

The defendants' allegedly wrongful conduct need not be directed at or damaging to every member of the class for a class action under [Fed. R. Civ. P. 23\(b\)\(2\)](#).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

## **HN24**[] Prerequisites for Class Action, Predominance

[Fed. R. Civ. P. 23\(b\)\(2\)](#) requires a showing that the party opposing the class acted on grounds generally applicable to the class. Unlike [Fed. R. Civ. P. 23\(b\)\(3\)](#), it does not require the court to determine the predominance of common questions of law and fact or the superiority of class action treatment of adjudication.

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For MORLEY CANDY MAKERS WEST, INCORPORATED, [\*\*5] respondent (93-CV-40521): Linda C. Scheuerman, Julia F. Blakeslee, Jaffe, Raitt, Detroit, MI.

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**Judges:** STEVEN D. PEPE, UNITED STATES MAGISTRATE JUDGE. HONORABLE PAUL V. GADOLA

**Opinion by:** STEVEN D. PEPE

## **Opinion**

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### **[\*238] REPORT AND RECOMMENDATION ON PLAINTIFFS' SECOND MOTION FOR CLASS CERTIFICATION**

[Corrected Version]

*I. Background Facts:*

The current motion involves only the antitrust tie-in class in the second of these two consolidated cases. The Smith plaintiffs (hereinafter referred to as "Smiths" or "plaintiffs") are current franchisees of Little Caesar Enterprises ("LCE") who have owned and operated three carry-out-only Little Caesar restaurant franchises in the Jacksonville, Florida, area since 1983. The plaintiffs bring this action seeking damages and declaratory and injunctive relief on behalf of themselves and a proposed class for alleged [\*239] antitrust tie-in violations by defendants. From 1989 to date, the relevant class period in dispute, Blue Line Distributing, Inc. ("Blue Line"), a wholly owned subsidiary of Little Caesar [\*6] Enterprises, Inc. ("LCE"), has sold to LCE franchisees virtually all goods necessary to operate their Little Caesar Restaurants.

Little Caesar was founded in Michigan in 1959 by Michael Ilitch, who began to franchise his "Little Caesar" restaurants in 1962. There are presently in excess of 500 franchisees nationwide operating over 3,000 carry-out type restaurants. LCE also has a substantial number of company-owned outlets comprising approximately 25% of the carry-out units. Blue Line purchases all of the items used in Little Caesar's restaurants from producers and suppliers and then re-sells them to LCE franchisees making a single delivery of the multiple goods. Most of these items are produced to meet LCE specifications. These items include foodstuffs, beverage products, sign equipment, paper products, salad dressing, other condiments with LCE's proprietary symbols and marks, and other items. Blue Line initially had only one warehouse in Farmington Hills, Michigan, and thus was limited in the number of midwestern franchisees to whom it could distribute goods. Other distributors were approved by LCE in various regions throughout the country.

In the middle 1980's, Blue Line began to [\*7] expand the number of its distribution warehouses throughout the country. The Smith plaintiffs allege that LCE and Blue Line replaced other distributors with the newly opened Blue Line distribution warehouses. They allege that by August 1989 defendants had eliminated the majority of third party distributors servicing Little Caesar franchisees and thereafter eliminated virtually all of the remaining distributors in the continental United States except for two remote areas in Idaho that Blue Line did not consider economically feasible to service.

Plaintiffs accuse defendants of unlawfully tying sales of the above-noted goods from Blue Line to the sale and continued operation of the Little Caesar franchises. They allege that the defendants have used Little Caesar's inherent monopoly power derived from its copyrights, trademark, service names, and trade names to impose contractual and other uniform restrictions on the distribution of the various goods to franchisees, thereby eliminating the possibility of renewed competition with Blue Line by other food distributors.

Plaintiffs allege that LCE franchisees who have invested substantial funds in their restaurants and signed long-term franchise [\*8] agreements were effectively "locked in" to the LCE franchise system. While the franchise agreements provide to each franchisee the right to request that LCE approve an alternate distributor of products made to LCE specifications, plaintiffs accuse defendants of a pattern of wrongfully refusing requests for approval of alternative sources of distribution other than Blue Line. In Judge Gadola's Memorandum Opinion and Order ([Little Caesar Enterprises, Inc. v. Smith, 895 F. Supp. 884 \(E.D. Mich. 1995\)](#)), he denied class certification of a national class of Little Caesar franchisees who asserted that defendants had been involved in a tie-in arrangement orchestrated by a master plan to deny entry into the marketplace of approved alternate distributors to Blue Line Distributing, Inc. Because the bulk of the franchisees had contracts in which they could seek an alternate distributor of paper products and other goods, the Court found that there was not an express contractual tie-in arrangement. Thus, following a long line of cases that I analyzed in my earlier Report and Recommendation, Judge Gadola determined that individual questions for the various class members would predominate over [\*9] common questions of law and fact, and, thus, class treatment was not appropriate. He also granted summary judgment on

the tie-in claim against the named plaintiffs who had contractual rights to seek an alternate distributor of all items distributed by Blue Line other than proprietary products.<sup>1</sup>

[\*240] LCE in June 1989 entered into a licensing agreement that gave Blue Line the exclusive right to distribute logoed products to franchisees. In Judge Gadola's earlier opinion, he determined that this 1989 licensing agreement applied [\*10] only to those items that bear the Little Caesar registered mark, such as items on logoed paper products (bags, cups, napkins), packaging, and condiments such as salad dressing which a Little Caesar's franchise provides its customers in the sale of its food products. Defendants assert that well in excess of 90% of the food products and other items sold by Blue Line to a franchisee involve items other than these logoed products. Plaintiffs dispute these figures. Nonetheless, plaintiffs contend that because the profit margin for a distributor on logoed products is greater than other items, other potential distributors cannot effectively compete with Blue Line if they are not given access to these logoed products.

This 1989 exclusive licensing agreement with Blue Line was initially kept secret from the franchisees and only came to light several years later. For franchisees renewing their franchises or entering into new franchises after the middle of 1990, the Franchise Agreement contained restrictive language not permitting them to seek an alternate source of supply of logoed paper supplies and signage.<sup>2</sup>

[\*\*11] These logoed products are essential to the operation of a Little Caesar franchise. Plaintiffs are contending that defendants are using this 1989 exclusive Blue Line licensing right on logoed paper, combined with the new 1990 contractual limits on franchisees seeking alternate distributors of logoed products, to preclude alternate sources of supply and competition on these logoed items. Plaintiffs assert that the defendants' denial of access to these logoed products is also intended to make it less profitable or more burdensome for alternate distributors of franchise supplies to enter the market. In sum, plaintiffs argue that the franchisees were squeezed into *buying* logoed items and supplies from Blue Line at super-competitive or above-market prices because of defendants' illegal actions to preclude competition.

In reaching its decision denying class certification and granting partial summary judgment, the Court left open the question as to whether there might be a "basis for certification of a national class action [involving] the franchise agreements signed after mid-1990 [that] prevent franchisees from requesting an alternate distributor of logoed products." *Id. at* [\*12] 905. The Court noted: "It could be argued that the post mid-1990 agreements, combined with the 1989 exclusive licensing agreement, evidence an express contractual tie-in of logoed products which could receive class treatment." Thus, the Court did not grant summary judgment on the tie-in claim involving the mid-1990 Franchise Agreements.

The Smith plaintiffs thereafter filed this modified motion for a class certification on the surviving tying claims pursuant to Fed. R. Civ. P. 23(b)(3) (for damages) and 23(b)(2) (for injunctive and declaratory). They define the proposed class as:

All franchisees of Little Caesar Enterprises, Inc. ("LCE") who, as of the date of the filing of the Complaint, operated Type C carry-out Little Caesar restaurants in the Continental United States, and who have operated at least one restaurant pursuant to a franchise agreement which was executed, renewed or modified subsequent to mid-1990 to restrict franchisees from requesting alternate suppliers of "signage and other

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<sup>1</sup> These included special LCE ingredients such as Pan Pan Dough and special spice mixes. Plaintiffs are not challenging Blue Line's exclusive distribution of these items. These are different from the "logoed products" involved in this motion. These "logoed products" are not a secret part of the ultimate product being sold and consumed by customers, but cups, boxes, and packaging with the famous Little Caesar figure on them that can be produced to quality and design specifications set by LCE.

<sup>2</sup> The amended Franchise Agreement prevented franchisees from seeking alternate suppliers from "signage or other products bearing the Little Caesar name and Proprietary marks." Lockridge Declaration, Exhibit 12, referring to § 7 of the Little Caesar Franchise Agreement of form AC(8/90). While signage is covered by this agreement, it is a one-time purchase of an outdoor sign that requires supplier expertise, and this opinion will use the term "logoed paper products" throughout as dealing with the relevant limitation in these post mid-1990 franchise agreements.

products bearing the Little Caesar name and Proprietary marks." The class excludes defendants, any persons who are not franchisees as of the filing of the Complaint, who are current [\*\*13] officers or [\*\*241] directors of LCE or its subsidiaries, members of their immediate families, any entity in which any excluded person has a controlling interest, the legal representatives, heir, successors or assigns of any such excluded party, and the affiliates and co-conspirators of any defendant.

Plaintiffs' Brief at 1-2.

## *II. Class Certification on Plaintiff's Tying Claims:*

### *A. Background Law:*

#### *1. Class Actions:*

[HN1](#)[] [Fed. R. Civ. P. 23\(a\)](#) contains four prerequisites that must be satisfied before a lawsuit can proceed as a class action. The Rule provides:

**(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to the requirements of [Rule 23\(a\)](#), [HN2](#)[] plaintiffs must demonstrate that their case falls within the guidelines of [Rule 23\(b\)](#). [\*\*14] That Rule provides:

**(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

\* \* \* \*

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[\*\*15] [In re Consumers Power Co. Securities Litigation, 105 F.R.D. 583, 600 \(E.D. Mich. 1985\).](#)

[HN3](#)[] The only issue before a court on a motion for class certification is "whether plaintiff is asserting a claim, which, assuming its merit, will satisfy the requirements of [Rule 23 . . .](#)" [Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, U.A., 657 F.2d 890, 895 \(7th Cir. 1981\)](#), cert. denied sub nom. [Chicago Journeymen Plumbers' Local Union No. 130, U.A. v. Eggleston](#), 455 U.S. 1017, 102 S. Ct. 1710, 72 L. Ed. 2d 134 (1982). In determining whether to certify a class, inquiry into the merits of plaintiffs' claims is inappropriate. [Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 \(1974\)](#); [Weathers v. Peters Realty Corp., 499 F.2d 1197, 1201 \(6th Cir. 1974\)](#). A [Rule 23](#) determination is wholly procedural and has nothing to do with whether a plaintiff will ultimately prevail on the substantive merits of its claims. [Blackie v. Barrack, 524 F.2d 891, 901 \(9th Cir. 1976\)](#).

1975), cert. denied, 429 U.S. 816, 50 L. Ed. 2d 75, 97 S. Ct. 57 (1976). The particular merits of plaintiffs' claims are to be accepted as valid in considering a class certification motion under Rule 23.

[\*\*16] Nonetheless, the Court must undertake an analysis of the issues and the nature of required proof at trial to determine whether the matters in dispute and the nature of plaintiffs' proofs are principally *individual* in nature or are susceptible of *common proof* equally applicable to all class members. See, e.g., Denver v. American Oil Co., 53 F.R.D. 620 (D.Colo. 1971). Moreover, when a court is in doubt as to whether to certify a class action, it should err in favor of [\*242] allowing a class. Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985), cert. denied sub nom. Weinstein v. Eisenberg, 474 U.S. 946, 88 L. Ed. 2d 290, 106 S. Ct. 342, 106 S. Ct. 343 (1985); Horton v. Goose Creek Independent School Dist., 690 F.2d 470, 487 (5th Cir. 1982), cert. denied, 463 U.S. 1207, 77 L. Ed. 2d 1387, 103 S. Ct. 3536 (1983); Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968), cert. denied, 394 U.S. 928, 22 L. Ed. 2d 459, 89 S. Ct. 1194 (1969).

It is clear that the Smith plaintiffs satisfy the first two prerequisites of Rule 23(a). Rule 23(a)(1) requires that the class be so large that joinder of all members would be "impracticable." HN4 [↑] The "impracticability" of Rule 23(a)(1) does not require impossibility, but only [\*\*17] difficulty or inconvenience in joining all members of the class. Jordan v. Global Natural Resources, Inc., 102 F.R.D. 45, 51 (S.D. Ohio 1984) ("satisfaction of the numerosity requirement does not require that joinder is impossible, but only that plaintiffs will suffer a strong litigational hardship or inconvenience if joinder is required."); 4 H. Newberg, *Newberg on Class Actions* ("Newberg"), § 18.03 (3d ed. 1992). The numerosity requirement is met when plaintiffs demonstrate that the number of potential class members is large, even if plaintiffs do not know the exact figure. See Piel v. National Semiconductor Corp., 86 F.R.D. 357, 365 (E.D.Pa. 1980). Based on an earlier submission by defendants, as of September 30, 1993, there were 244 franchisees that had only the mid-1990 Franchise Agreement and 214 franchisees, like Gary Smith, who had a mixture of old franchises on some outlets and new 1990 franchises on other outlets. Thus, plaintiffs have made the necessary showing to meet the requirement of numerosity.

HN5 [↑] Rule 23(a) also requires that the proposed class members present common questions of law and fact. The resolution of common issues must affect all or most of the [\*\*18] class members. Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 469 (5th Cir. 1986). This criterion requires only *some* common issues of law or fact, not the *predominance* of common issues required by Rule 23(b)(3). This requirement is satisfied here.

The common questions of law and fact presented on the tying claim include the following issues:

- a. Whether LCE has market power in Little Caesar's franchises;
- b. Whether defendants imposed an illegal tying arrangement on franchisees by a combination of the 1990 Franchise Agreement and Blue Line exclusive licensing agreement;
- c. Whether defendants used their market power over LCE logoed products to exclude competitive distributors of logoed products ("the narrow tie-in");
- d. Whether defendants used their market power over LCE logoed products to exclude competitive distributors of all other franchise foodstuffs and supplies ("the expanded tie-in");
- e. Whether, as a result of defendants' illegal tying arrangement, defendants charged prices for logoed products higher than the prices that would have prevailed absent the illegal conduct, and thus whether all class plaintiffs suffered the "fact of damages."
- f. Whether, [\*\*19] as a result of defendants' illegal tying arrangement, defendants charged prices for some or all other franchise foodstuffs and supplies higher than the prices that would have prevailed absent the illegal conduct.
- g. Whether defendants' anticompetitive conduct affected interstate commerce, and if so, to what degree.

The *typicality* requirement of Rule 23(a) is somewhat more difficult, but I believe it is also fulfilled. HN6 [↑] "Typicality exists when the class representative presents issues common to the class, and the representative's position on those issues is not antagonistic to the position of the other class members." Consumers Power Co., 105 F.R.D. at 602. Under this requirement, the interests of the class representative should be generally coextensive with those of the class members he or she seeks to represent. The typicality requirement is met if the plaintiff's claim

"arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and her [\*243] or his claims are based on the same legal theory." Newberg, § 18.08. Typicality may exist where there is a very strong similarity of legal theories, even if substantial factual [\*\*20] distinctions exist between the named and unnamed class members. [Appleyard v. Wallace, 754 F.2d 955, 958 \(11th Cir. 1985\)](#).

In the present case, the Smith plaintiffs base their claim on a nationwide course of conduct by defendants which affected all class members. The class representatives' claims arise from precisely the same events, legal documents, and consequences and legal theories affecting all franchisees -- the illegal tying scheme imposed by defendants on the franchisees.

Defendants argue that because Gary Smith in the spring of 1992 wrote for the specifications for paper supplies and asserted his position that he could seek an alternate supplier of logoed goods under his mid-1990 Franchise Agreement, this should bar his being a typical class representative and also show this was an individual and not a common issue of fact. In an April 7, 1992, response, LCE's Director of Quality Assurance stated:

Please note that no specifications have been included for logoed items, such as pizza bags, as these items may only be purchased from Blue Line Distributing, Inc.

Smith again wrote for the Approved Supplier List for all items, including paper goods. In response [\*\*21] to this second request, David Deal wrote on May 7, 1992, quoting the restriction in the mid-1990 Franchise Agreement to "help clarify your 'understanding' of my franchise agreement." (The quotation marks around "understanding" could be interpreted by a jury to indicate an incredulity about Smith's asserted belief as to what the Franchise Agreement clearly said.)

Please be advised that Blue Line is the sole approved supplier of paper products containing the Little Caesar name or proprietary marks. It is my understanding that under the Franchise Agreement you do not have the right to request that any other suppliers be approved for those products.

Altermann Declaration. Exh. 4.

Smith wrote back on May 15, 1992, that the Franchise clause allowing a franchisee to purchase goods "including paper goods as approved by LITTLE CAESAR" from any source approved by LCE gave him the right. He asserted that if Blue Line were "the sole distributor of paper products," was there a "monopoly and perhaps illegal tying arrangement?" Smith repeated his earlier request that AmeriServ be approved as a distributor.

Defendants argue that if the tie-in claim is based on the mid-1990 Franchise [\*\*22] Agreement forcing a state of mind in franchisees that they could not seek an alternate distributor other than Blue Line for logoed goods, Smith's letter shows he did not have that state of mind, at least until after Deal's May 7, response. Thus, they claim Smith is not typical.

Defendants also contend that the contract must be ambiguous and thus requires extrinsic evidentiary input on the intent of the parties (obviously a question that could require individual and not common proofs). I do not find any ambiguity or incompatibility between the contract clauses. The mid-1990 Franchise Agreement makes it clear that the franchisee can purchase logoed goods from an alternate source if one is approved other than Blue Line. If no other distributor of logoed goods is approved, however, the franchisee cannot ask that an alternate distributor of these goods be approved. Mr. Deal's response is a correct interpretation of the unambiguous contract he had drafted and a clear articulation of Blue Line's position. Whether Mr. Smith really believed his assertions or these were merely tactical assertions made in the hope they would get Blue Line to relent or clearly articulate its position so Smith [\*\*23] could accuse Blue Line of antitrust violations, which he did in his next letter, does not seem a critical issue.

The critical question is what the Franchise Agreement says and what a reasonable franchisee would understand it to mean. If defendants have demonstrated Gary Smith is unreasonable, maybe he is not typical. Whether Gary Smith really believed or [\*244] feigned belief that he could demand what his Franchise Agreement clearly and expressly precluded him from demanding is not the centerpiece of the antitrust question this Court must resolve. Deal's response made clear that Gary Smith, like all post-mid-1990 franchisees, was in a market with a single approved supplier of logoed products (Blue Line), and that the Franchise Agreement and the defendants were not

going to allow such franchisees to request an alternate supplier of logoed products. Smith is one of these franchisees and knew of the constraints on him at least after May 7, 1992.

I believe Gary Smith's claim is typical for purposes of Rule 26(a)(3). The other issue is whether Gary Smith, who owned franchises with both pre and post-mid-1990 Franchise Agreements should represent purported class members who only have post-mid-1990 [\*\*24] Franchise Agreements. It is possible the Court could grant summary judgment against these "hybrid" franchise holders who have both pre and post-mid-1990 Franchise Agreements. This could eliminate Gary Smith's tie-in claim on the mid-1990 Franchise Agreement and leave those with only mid-1990 Franchise Agreements without a representative.

While I do not believe it to be essential at this time, and do not recommend it, if the Court determines Gary Smith is not typical or does not adequately represent franchisees with solely post-mid-1990 Franchise Agreements, the Court could give plaintiffs a fixed and limited time to come forward with a substitute class representative and, if one is not produced, refuse to certify the class. In other words, the Court may condition the class certification upon plaintiffs' production of an adequate representative within a fixed period of time.<sup>3</sup>

[\*\*25] [HN8](#) [↑] The fourth and final requirement of [Rule 23\(a\)](#) is that the named plaintiff must fairly and adequately represent the interests of the class. This requirement has two prongs: the first concerns the zeal and competence of the named plaintiffs' legal representation, the second concerns conflicts of interest between the named plaintiffs and the class. In this case, defendants have not challenged that plaintiffs are represented by competent counsel who have experience in this type of litigation. Gary Smith has also demonstrated a strong and indeed tenacious interest in taking an active role in the litigation and in vigorously protecting the interests of the entire class. He has repeatedly come from Florida to Michigan for important motion hearings even when it was clear his presence was not needed. Few could argue that Gary Smith is the leader of this crusade to end Blue Line's near-monopoly on distribution to Little Caesar franchises. As discussed above, the interests of the Smith plaintiffs generally are not in conflict with those of the class on the tying claim. Their interests in establishing the illegal nature of the defendants' conduct coincide with those of the proposed class.

[\*\*26] The most difficult issue in this motion, as with the prior class certification motion, is whether, under [Fed. R. Civ. P. 23\(b\)\(3\)](#), the plaintiffs' *common* issues of fact predominate over *individual* issues of fact. Additional background on the law of tying and its case [\*245] law development under [Rule 23\(b\)\(3\)](#) is necessary to analyze plaintiffs' proposed methods of proving both the alleged illegal tying and the impact of that tying on the class members (*i.e.* the "fact of damages" as a consequence of the alleged wrong).

## 2. *Illegal Tying:*

[Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2079 \(1992\)](#), elaborated on the elements of a prima facie tying case:

[HN9](#) [↑] 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

<sup>3</sup> [HN7](#) [↑] This Court is given broad discretion in dealing with class actions under [Fed. R. Civ. P. 23](#). [Rule 23\(c\)\(1\)](#) states that "[A class certification] order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." [Carpenter v. Stephen F. Austin State University, 706 F.2d 608, rehg. denied, 712 F.2d 1416 \(5th Cir. 1983\)](#), allowed substitution of adequate class representatives for representatives found to be inadequate during the course of the class claims. Affording plaintiffs the opportunity to provide such substitutes is the common practice in cases where, although the current named representatives are inadequate, adequate representatives are known and available as substitutes. [Davis v. Thornburgh, 903 F.2d 212, 233](#) (3rd Cir.) (Becker, CJ, concurring in part and dissenting in part), cert. denied, [498 U.S. 970 \(1990\)](#); see also, [Hanzley v. Blue Cross of Western New York, 1989 U.S. Dist. LEXIS 9308](#), Unpub. op. No. CIV-86-35E, 1989 WL 39427 (W.D.N.Y. 1989) (copy attached). Thus, this Court could permit a substitute class representative if it becomes necessary. Because any substitute class representative was covered in the earlier motion for class certification and by this motion, the statute of limitations has been tolled for substantial periods during this litigation and will continue to be tolled if this proposed class is certified. Wright, Miller & Kane, 7B Federal Practice & Procedure: Civil 2d at §§ 1791, 1994.

any other supplier." [\*Northern Pacific R. Co. v. United States\*, 356 U.S. 1, 5-6, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 \(1958\)](#). Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic [\*\*27] power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. [\*Fortner Enterprises, Inc. v. United States Steel Corp.\*, 394 U.S. 495, 503, 89 S. Ct. 1252, 1258, 22 L. Ed. 2d 495 \(1969\)](#).

See also, [\*Bell v. Cherokee Aviation Corp.\*, 660 F.2d 1123, 1127 \(6th Cir. 1981\)](#) (citing [\*Fortner Enterprises v. U.S. Steel Corp.\*, 394 U.S. 495, 499, 22 L. Ed. 2d 495, 89 S. Ct. 1252 \(1969\)](#), ("Fortner I") and [\*Northern Pac. Ry. Co., supra, at 6\*](#)).

### 3. Damages -- the Fact of Damages v. Individual Damages:

**HN10** In addition to proving the illegal tying arrangement, plaintiffs must also prove the impact of such a violation. It must be shown that the illegal tie caused harm to consumers of product B in the tied market and that this affected a substantial volume of commerce.

The impact or the *fact of damages* is separate from proving the actual measure of damages for each class member. Liability and damages phases of litigation are generally bifurcated, and a class action on liability should not be avoided merely because the specific damage claims will need to be handled in individual trials.<sup>4</sup>

[\*\*28] The class plaintiffs need only show that all suffered some loss in their business, and that there was a causal relation between the tying arrangement and that loss. [\*Bogosian v. Gulf Oil Corp.\*, 561 F.2d 434, 454 \(3d Cir. 1977\)](#), cert. denied, 434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978). The court noted particularly that there was no requirement that the loss be personal or unique to a plaintiff, and that the *fact of damages* was different than a measure of *individual damages* for each specific plaintiff in the class. The *fact of damages* could be

made on a common basis so long as the common proof adequately demonstrates some damage to each individual. Whether or not fact of damage can be proven on a common basis therefore depends upon the circumstances of each case.

[\*561 F.2d at 454\*](#). It noted on the facts of that case:

If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear [\*\*29] that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage.

Under such circumstances, proof on a common basis would be appropriate. [\*561 F.2d at 455\*](#). Nor is the fact that there will be uncertainty [\*246] later in the individual measure of damages fatal to common proof of the fact of damages so long as it can be clearly shown that the illegal behavior of defendants did cause some damage in fact to each class member.<sup>5</sup>

<sup>4</sup> *Wright, Miller & Kane, Federal Practice and Procedure: Civil* 2d at § 1781, notes:

In this connection it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate. Rather, the question of damages can be severed from that of liability and tried on an individual basis. Allowing split proceedings furthers the [\*Rule 23\*](#) purpose of promoting judicial economy . . . .

(Footnote omitted.)

<sup>5</sup> See, e.g., [\*Story Parchment v. Paterson Parchment Paper Co.\*, 282 U.S. 555, 562, 75 L. Ed. 544, 51 S. Ct. 248 \(1931\)](#):

The rule which precludes recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

Defendants argue that the damages or fact of damage issue is too complicated for class treatment, and that *Bogosian* [\*\*30] and other cases are flawed in their reasoning. I find no precedent in this circuit that accepts this argument. The gestalt of much of defendants' argument is an attempt to make this case appear overwhelmingly complicated and thereby remove the class action tool from plaintiffs' hands. Simple express tie-ins do not come to federal courts today because they are too easily detected. Without prejudging the merits of this case, if plaintiffs are correct on their claims, then the complexity of the tie-in scheme and its long-undetected duration--which is the result of its covert, complex and subtle dimension--are the causes of any complexity on liability or on the actual measure of damages. If it is ultimately proven that defendants violated the Sherman Act, it seems unfair and ironic that the party who caused the complexity on liability and damages should benefit from such acts by disarming the plaintiffs and the Court of the most efficient and effective tool for resolving the issues. I believe defendants' complexity arguments are exaggerated, should not intimidate or overwhelm this Court, and should not prevail.

#### *4. Is Coercion an Element of a Tying Claim, and Is It Amenable to Common [\*\*31] Proofs?*

In the present case, there exist several questions regarding the extent to which coercion of the franchisees must be proven. Plaintiffs assert that proof of coercion is not a separate and essential element of a tie-in *prima facie* case. Defendants contend that it is either a separate element or a necessary part of the proof on the issue whether two products are actually tied when there is not an explicit tie-in in the franchise contract. Because there is no clear and express tie-in of the LCE franchise with the foodstuffs and supplies, or even with the logoed products in this case, defendants argue that coercion must be proven, and such proofs must be made on an individual basis, i.e., there must be evidence that each franchisee felt that it was forced to buy the "tied products" from Blue Line in order to maintain its Little Caesar franchise (the "tying product"). Defendants note that part of plaintiffs' claim that the Blue Line exclusive license over logoed products precluded purchase of other foodstuffs and products from an alternate supplier is based on the asserted preference of franchisees for "one-stop" shopping and their aversion to having multiple suppliers delivering [\*\*32] different products to the outlet at different times. Defendants contend that such preference for one-stop shopping varies among the franchisees and would necessitate individual proofs. Even though plaintiffs assert that they will use common proofs on such preference by calling only a limited number of representative franchisees to testify to this preference, defendants assert that they can call in rebuttal a parade of individual franchisees who are willing to take more than one delivery from various distributors each week. Plaintiffs argue that if coercion must be separately proven to show a tie-in, it is amenable to common or class-wide proofs, and thus common proofs "predominate" over individual proofs and [Rule 23\(b\)\(3\)](#) is satisfied.

##### *a. The Third Circuit Analysis:*

Because the Sixth Circuit case law on coercion as a separate element of tying and on when it is amenable to common proofs is incomplete, it is worth analyzing these two issues and their effect upon class certification as they developed in the Third Circuit, which has undertaken the most thorough and helpful analysis of these issues. In addition, the recent (1996) analysis by Professors Areeda, Hovenkamp and Elhauge [\*\*33] in their treatise [\*247] provides helpful insights and warnings of common judicial missteps and confusions.<sup>6</sup>

The Eastern District of Pennsylvania, in [\*Ungar v. Dunkin' Donuts of America, Inc.\*, 68 F.R.D. 65 \(E.D. Pa. 1975\), rev'd, 531 F.2d 1211](#) (3d Cir.), cert. denied, 429 U.S. 823, 50 L. Ed. 2d 84, 97 S. Ct. 74 (1976), held that coercion was not a separate element of proof necessary to establish an illegal tie-in. *Ungar* involved Dunkin' Donuts' alleged tie-in of real estate, equipment, signs, and supplies to a Dunkin' Donuts franchise. Dunkin' Donuts offered what was called a "turnkey" franchise in which it bought or rented real estate, completely outfitted a Dunkin' Donuts retail outlet, and then provided it to a "franchisee" who merely had to "turn the key" in order to be in business. The district court noted that several of these franchisees could [\*\*34] not afford to acquire their own real estate, build their own shop, or buy equipment independently, and many of them never considered dealing with anybody but Dunkin'

[\*Id.\* at 92-92 n.8.](#)

<sup>6</sup> Areeda, Hovenkamp, and Elhauge, [\*Antitrust Law\*](#), Vol. X, [\*An Analysis of Antitrust Principles and Their Application\*](#), (Little, Brown & Co. 1996).

Donuts. Several franchisees acknowledged that they were "persuaded" by the defendant's sales persons, and not coerced to deal with the defendant on the tied products.

For periods after 1970, Dunkin' Donuts did not have an express contract provision requiring the franchisees to buy equipment and other items. Yet, the plaintiffs accused Dunkin' Donuts of having a "de facto policy of tying." They also accused Dunkin' Donuts of only approving other suppliers if those suppliers gave a kick-back to Dunkin' Donuts, which required the franchisees to pay a higher price to acquire products from these "approved" suppliers than would have existed in a free market. Because the district court found that coercion was not a necessary element, it found that the individual franchisees would not have to testify about their being coerced into buying the tied items. Thus, the district court concluded that the case could proceed as a class action under [Fed. R. Civ. P. 23\(b\)\(3\)](#) because common proofs of a company's pervasive policy of illegal [\[\\*35\]](#) tying would predominate over individual issues.

The Third Circuit reversed the district court. In highlighting the central harm to the marketplace that was involved in tying, the court concluded that "it is only when the buyer's freedom to choose a given product is restricted that the tying doctrine comes into play." [531 F.2d at 1226](#).

Coercion is implicit--both logically and linguistically--in the concept of leverage upon which the illegality of tying is premised:

[531 F.2d at 1218](#). The Court continued:

we simply cannot accept the district court's view that the Supreme Court has not set forth a coercion requirement in tying cases.

[Id. at 1219](#). It then acknowledged that:

Saying that coercion is an element of a tying claim is, of course, not the same thing as saying that it must be established on an individual basis, but we think that the two statements are logically related. What is sufficient to coerce one buyer's choice may not be sufficient to coerce another buyer's choice; an item that one buyer might accept voluntarily, another might accept only if forced to do so. The expressions "coercion" and "individual coercion", in our view, reflect [\[\\*36\]](#) different perspectives on the same phenomenon. In the context of substantive tying law, "coercion" is the relevant term. But in the context of a class action, the question is whether "individual coercion" must be established by each plaintiff.

[531 F.2d at 1219](#).

In the *Ungar* case, for the relevant periods after 1970 there was not an express contractual tying arrangement that specifically removed from the franchisees the freedom to acquire the "tied products" from another source. On those facts, the Court found that individual coercion had to be proven. Thus, common questions of fact did not predominate and class certification was inappropriate under [Fed. R. Civ. P. 23\(b\)](#). The Third Circuit left open the question whether individual coercion needed to be shown when there was an express contractual provision. [531 F.2d at 1226 n.17](#).

[\[\\*248\]](#) After outlining the three elements from *Eastman Kodak* noted above as making out a *prima facie* tie-in claim, the court considered the first element of whether there was "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." [Id. at 1224](#) (citing *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)). It notes:

Obviously, with respect to the first element, a formal agreement is not necessary, although it is sufficient. But, in the absence of a formal agreement, a plaintiff must establish in some other way that a tie-in was involved and not merely the sale of two products by a single seller. This can be done by proof that purchase of one product, the tied product, was not voluntary, i.e., by proof of coercion.

[531 F.2d at 1224](#) (footnote omitted). It noted that while a number of franchisees might have agreed to accept burdensome or uneconomic terms in purchasing the tied product, this alone was not sufficient to prove the coercion

element of an illegal tie-in, although the Court acknowledged that such facts were some evidence of coercion. [Id. at 1225](#). In making its analysis, the Third Circuit looked to the policy behind the *per se* bar on tie-ins:

The purpose of the antitrust laws is to stimulate economic competition, the essence of which is the presence of many competing sellers; salesmanship--the art of persuasion and influence--is inherent in competition among sellers. [HN11](#) [\*\*38] It is only when the buyer's freedom to choose a given product is restricted that the tying doctrine comes into play: so long as "the buyer is free to take either product by itself there is no tying problem." [Northern Pacific Ry. v. United States, supra, 356 U.S. at 6 n.4.](#)

[531 F.2d at 1226](#). The Court concluded that on the facts before it:

Where, as here, plaintiff franchisees place no reliance on express contractual tie-ins, each, individually, must prove that his purchases were coerced as an element of establishing a *prima facie* case of illegal tying.

*Id. Ungar* made a critical distinction that the doctrine of coercion was implicit in the existence of a tie-in, and that, at least in the absence of an express contractual tie, coercion on an individual basis (or "individual coercion") was required to be shown to demonstrate that an illegal tie existed.

Following *Ungar*, the Eastern District of Pennsylvania faced another case in which various oil companies were accused by their franchise gas station distributors of conditioning the leasing or subleasing of a gas station site on their purchase of gasoline supplied by the oil company-lessor. [Bogosian](#) [\*\*39] [v. Gulf Oil Corp., 62 F.R.D. 124 \(E.D.Pa. 1973\), vacated and remanded, 561 F.2d 434 \(3d Cir. 1977\)](#), cert. denied, 434 U.S. 1086 (1978). In *Bogosian*, no single lease provision required the lessee to purchase all its gasoline from the lessor. Yet, the lease provisions were for terms of only six to twelve month, the lessee had to purchase a license to use the lessor's trademark, and, as a condition of that, the lessee was required not to sell other gas from pumps bearing that oil company's trademark. In addition, the lessee could make no alteration to the leasehold (such as putting in an additional gas storage tank and pump) without the lessor's approval. Finally, the lease could be terminated whenever the lessee failed to purchase the stated quantity of gasoline from the lessor. The defendant lessor oil companies asserted that this did not prevent the lessees from installing their own pumps and tanks to sell a different brand of gas. The plaintiffs asserted that this requirement was uneconomical on a six to twelve month lease, particularly because such alterations of the leasehold premises would be grounds for termination and further that the station operator would be unable [\*\*40] to meet the minimum contract purchase quota of the lessor's gasoline if they sold a competing brand.

The district court initially held that because no single lease provision expressly required the purchase of gasoline from the defendants, there were thus disparate legal and factual claims and it would be necessary to make "a factual determination in each and every lease that there was such economic coercion in fact as to constitute an illegal tie- [[\\*249](#) in agreement]." [Id. at 137](#). Citing some of the same cases on coercion that the defendants cited in this case on the first class certification motions, the district court found that a class action was inappropriate because common questions did not predominate over individual issues of fact. [Id. at 135-36](#).

The Third Circuit disagreed with the district court, stating:

Relying upon *Ungar*, defendants appear to argue that coercion is a requirement of proof in all tying cases. Neither *Ungar* nor any other case has so held. Rather, *Ungar* affirmed that under a long line of Supreme Court precedents [HN12](#) [\*\*41] a tying claim consists solely of the three elements quoted above. Assuming economic power over the tying product and a not insubstantial [\*\*41] amount of commerce, the plaintiff need only show that a seller conditioned the sale of one product (the tying product) on the purchase of another product (the tied product).

[561 F.2d at 449](#).

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We therefore conclude that once a plaintiff proves that a defendant has conditioned the sale of one product upon the purchase of another there is no requirement that he prove that his purchase was coerced by the seller's requirement.

561 F.2d at 450.

\*\*\*

We cannot agree with the district court that proof of coercion is necessary to the existence of a tie-in on the theory under which the lease claim is brought. Plaintiffs do not contend that defendants pressured them into refraining from selling competing brands, but that the lease contracts themselves precluded them from doing so. Defendants acknowledge that the only way a lessee could sell other brands under the lease agreements would be to install his own pumps and tanks. Whether such a course is realistically open to a short term lessee is a common question of fact which can be developed by expert testimony concerning the relative costs and benefits of making such installations. Similarly, a lease provision [\*\*42] which permits termination of the lease when a stated quantity of gasoline is not purchased from the lessor hardly leaves the lessee open to reject some or all of the lessor's gas in favor of that of a competitor. If plaintiffs are able to show that the lease agreements in use by all defendants have similar clauses which have the practical economic effect of precluding the sale of other than the lessor's gasoline, they will have shown that the purchase of gasoline was tied in to the lease of the service station. Under these circumstances the lease agreement itself conditions the sale of one product (here a lease) upon purchase of another, and as we indicated in part III B 1 a, *supra*, proof of coercion is not a required element of the plaintiff's case.[n.11 omitted] Thus, this case differs from *Ungar* in which plaintiff's proof of the existence of a tie-in focused not on the terms of the agreement but on proof of salesmanship accompanied by threats of termination.<sup>12</sup>

<sup>12</sup>/ It follows from the foregoing discussion that if class certification is granted, plaintiffs will be precluded from introducing evidence of threats of termination to prove the existence of a tie-in. [\*\*43] *Ungar, supra*. Similarly, plaintiffs could not prove that they were precluded from installing tanks and pumps by the clause requiring the lessor's approval of leasehold alterations if proofs that such approval would be withheld depended on specific instances of the clause being exercised in that manner.

561 F.2d at 452.

Thus, the Third Circuit in *Bogosian* held that [HN13](#) coercion was not a separate element, but may be a necessary element of proof implicit in proving that there was an actual tie of one product to the sale of another. In the absence of an express contractual written tie, or in the absence of similar contract clauses which, when considered with other common proofs extrinsic to the contract,<sup>7</sup> have the [\[\\*250\]](#) practical economic effect of precluding the purchase of the tied product from a competing third party source, plaintiffs may be required to resort to proof of coercion based on specific instances involving each individual plaintiff.<sup>8</sup> [\*\*45] Yet, [HN14](#) where there is an express contractual tying arrangement, or where the practical economic effects flowing from the contract clauses and other common proofs establish a tie, individual proof of coercion is not necessary, and [\[\\*\\*44\]](#) common proof of the tie-in can be made.<sup>9</sup> It is worth noting that the Third Circuit ruled that if plaintiffs wish to establish a tie

<sup>7</sup> While it could be argued that demonstration of coercion by proofs extrinsic to the contract should preclude class treatment under [Rule 23\(b\)\(8\)](#), it is clear that in *Bogosian*, proof of the practical economic effects would indeed require such extrinsic proofs, probably by an economic expert, as to the practical market effects and limitations a gas station operator faced in light of the various contract terms.

<sup>8</sup> *Bogosian* noted that several cases involving coercion in a tie-in setting dealt with a pattern of making a request or suggestion that the buyer acquire the tied product from the seller "coupled with pressure, intimidation, in short . . . coercion." [561 F.2d at 451](#). It is clear, in a case in which the tie is to be established by a request or a suggestion followed by pressure, intimidation, or traditional types of coercion, that individual proofs would generally predominate and a class action would be inappropriate.

<sup>9</sup> Other courts have explained why [HN15](#) coercion is implied where a contract explicitly requires the tie because a contract "is backed by the force of law." [Halverson v. Convenient Food Mart, Inc.](#), 69 F.R.D. 331, 335 (N.D. Ill. 1974); [McCoy v. Convenient Food Mart, Inc.](#), 69 F.R.D. 337, 340 (N.D. Ill. 1975). Coercion remains a necessary element of an unlawful tying arrangement but it is inferred on a class-wide basis; a contractual provision is coercive in and of itself because it is backed by the force of law. See also, 7- [Eleven Franchise Antitrust Litigation, 1972 Trade Cas. \(CCH\) P74,156 \(N.D.Cal. 1972\)](#).

by common proofs, they should be precluded from introducing individual evidence of specific threats or specific instances of defendants' refusal to grant approval that would be necessary for an individual plaintiff to buy from a third party source. The Third Circuit in *Bogosian* vacated the district court order that denied class certification and remanded for reconsideration in light of its opinion. [\*Id. at 457.\*](#)

The wrong that the *per se* prohibition on tying seeks to remedy is the removal of the buyer's free choice in the tied market. In establishing a *prima facie* case, the plaintiff need not prove that other competing products in the tied market are superior to defendant's or that the plaintiff would have chosen a competitor's product. *Bogosian* makes it clear that [HN16](#) it is not a legitimate defense for the defendant to prove the plaintiff would have bought defendant's tied product even if there [\\*\\*46](#) had been no tie. [561 F.2d at 449.](#) While the quality and relative price of defendant's product may be relevant to the *fact of damages* and its individual measurement, tying is a *per se* antitrust violation because it deprives the buyer of free choice in a market of competitors. Such restraint of free market forces is presumed to have an effect on market quality and more commonly on market price of the defendant's product. As the Third Circuit noted in *Bogosian*:

It has never been an element of plaintiff's case to disprove, nor even a permitted defense, that the tied product is superior to others available on the market, or that even without the tie requirement plaintiff would have purchased the tied product.

\* \* \*

The purpose of the rule against tying is to insure that a buyer's choice is counseled solely by his perception of the merits of the tied product, so that the seller with economic power over the tying product does not gain an artificial advantage over competitors engaged in sales of the tied product. The antisocial conduct which the rule seeks to deter is the act of *the seller conditioning* sale of one product upon purchase of another. One can hardly imagine [\\*\\*47](#) anything which would vitiate that purpose more than a requirement that a violation depends upon proof that the buyer bringing suit would not have purchased the tied product but for the tie requirement. The issue is whether the seller acted in a certain way, not what the buyer's state of mind would have been absent the seller's action.

#### [561 F.2d at 448-49.](#)

Following the 1977 remand by the Third Circuit, and before the 1984 remand consideration by the Eastern District of Pennsylvania, the Supreme Court decided [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). *Jefferson Parish* set out a two-step analysis in tying cases: "whether petitioners are selling two separate products that may be tied together, [\\*251](#) and, if so, whether they have used their market power to force their patients to accept the tying arrangement." [Id. at 18.](#) The Court made several statements indicating that there is a coercion requirement. The Court noted:

We have condemned tying arrangements when the seller has some special ability--usually called "market power"--to force a purchaser to do something that he would not do in a competitive market. [Citations [\\*\\*48](#) omitted] When "forcing" occurs, our cases have found the tying arrangement to be unlawful.

#### [466 U.S. at 13-14.](#) In a footnote, the Court noted:

This type of market power has sometimes been referred to as "leverage." . . . "Leverage" is loosely defined here as a supplier's power to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product." 5 P. Areeda & D. Turner, [Antitrust Law](#) P 1134a, p. 202 (1980).

#### [466 U.S. at 14 n.20.](#)

The Court later noted:

*Per se* condemnation--condemnation without inquiry into actual market conditions--is only appropriate if the existence of forcing is probable.

466 U.S. at 15. "Only if patients are forced to purchase [the tied product] as a result of the hospital's market power would the arrangement have anticompetitive consequences." Id. at 25. Like the Third Circuit in *Bogosian*, the Supreme Court in *Jefferson Parish* looked to the underlying policies of the Sherman Act.

Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, **[\*\*49]** acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take . . . . By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market.

466 U.S. at 10 (quoting *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)).

While the Third Circuit in *Bogosian* focused on the action of the seller that precluded the buyer's choice, not the buyer's actual state of mind, 561 F.2d at 450,<sup>10</sup> **[\*\*50]** *Jefferson Parish* used a perspective that focused more upon the effects on the consumer in the marketplace.<sup>11</sup> Yet, neither this case nor other subsequent cases have specifically made coercion an independent element of proof in the tying case, although this was an issue considered by the Eastern District of Pennsylvania after *Jefferson Parish* in the 1984 *Bogosian* remand determination.

*b. Sixth Circuit Case Law on Coercion:*

The Sixth Circuit in *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123 (6th Cir. 1981), appears to have limited the coercion element in the same manner as the Third Circuit in *Bogosian*. In *Bell*, defendant Cherokee had leased airport space to Executive with an express contract provision requiring Executive to purchase all aircraft fuel and non-emergency maintenance service from Cherokee. The defendant argued that it was the plaintiff's corporation (Executive) that proposed the express written tie-in, and thus **[\*252]** there was no coercion. The Sixth Circuit cited *Bogosian* and rejected this defense. The court stated that "we do not think that coercion is an element of an illegal tying arrangement," but later added that "where the tie-in **[\*\*51]** is clear on the face of the contract . . . there is no need to inquire into coercion." Id. at 1131. The Sixth Circuit noted further that:

Coercion might be relevant in determining whether a seller in fact conditioned the purchase of one product on the purchase of another.

*Id.* This is consistent with the Third Circuit's position in *Bogosian* that, HN17 while not a separate element of the *prima facie* case, proof of coercion may be necessary to prove the first element of a tying claim -- that the sale of one product is in fact conditioned on the purchase of another -- in the absence of an express contractual tie.

Dictum in *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), indicates that coercion is still relevant in tying cases where there is not an express tie-in. An "essential characteristic" of an illegal tying arrangement [is] the seller's ability to coerce customers into buying an unwanted tied product." *Virtual Maintenance, 11 F.3d at 665* (quoting *A. I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986)).

<sup>10</sup> As noted above, the Third Circuit state in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), cert. denied, **434 U.S. 1086**, **55 L. Ed. 2d 791**, **98 S. Ct. 1280** (1978), that the rule against ties "seeks to deter the act of the seller conditioning sale of one product on the purchase of another." 561 F.2d at 450 (emphasis in the original). "The issue is whether the seller acted in a certain way, not what the buyer's state of mind would have been absent the seller's action." *Id.*

<sup>11</sup> Defendants here argue that this requires an inquiry into whether Little Caesar franchisees felt coercion to buy from Blue Line. Yet, for reasons stated below, the actual and anticompetitive effects in the marketplace can occur without proof that the individual franchisees knew of them or of the reasons for them.

It is also significant that, like the Third Circuit, the Sixth Circuit rejected the defense [\*\*52] theory "that even without the tie-in requirement plaintiff would have purchased the tied product."<sup>12</sup> *Bogosian, 561 F.2d at 449*. See also *Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 721-25 (7th Cir. 1979)*, cert. denied, 445 U.S. 917, 63 L. Ed. 2d 601, 100 S. Ct. 1278 (1980), cited by the *Bell* court for this proposition that the illegality of a tie-in is its wrongful restraint in the marketplace of the buyer's freedom "to take either product by itself," *Northern Pacific R. Co., supra, 356 U.S. at 6, n.4*, or not at all. Unlike a fraud case, in which a defendant has available the defense that the plaintiff would have bought the item notwithstanding the misrepresentation or material omission (i.e. "lack of reliance"), the same is not true in a *per se* tie-in antitrust case. The antitrust laws are concerned with harm to the marketplace caused by unreasonable restraints on competition. As noted in *Fortner I, supra*:

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the [\*\*53] precise harm they have caused or the business excuse for their use.

\* \* \*

Where [tying] conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." . . . They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." . . . They are unreasonable in and of themselves . . .

*394 U.S. at 498 (1969)* (quoting *Northern Pac., supra, 356 U.S. at 5-6*, footnote and citations omitted.) Jefferson Parish adds that "application of the *per se* rule focuses on the probability of anticompetitive consequences."

The rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great [\*\*54] as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct.

*466 U.S. at 15-16* and n.25 (citation omitted).

#### [\*253] c. Other Cases Allowing Common Proofs of a Coercive Tie-In:

Other cases without express contractual ties have allowed class certification where common proofs of coercion or forcing demonstrate a tie-in. One case involved a "firm policy" of the defendant having a "uniform effect" of tie-in and where statements of an agent of defendant to 99% of prospective franchisees and consistent form letters showed a tie-in.<sup>13</sup>

[\*\*55] Another case involved common proofs of an unremitting policy of tie-in accompanied by sufficient market power in the tying product to restrain competition in the tied product.<sup>14</sup> Other courts have found that where

<sup>12</sup> If the issue of whether defendants would have purchased from Blue Line at higher costs (even if they had a choice) was relevant, then individual proofs of each franchisee would predominate.

<sup>13</sup> *Martino v. McDonald's System, Inc., 81 F.R.D. 81 (N.D. Ill. 1979)* (prior to the express tie-in in 1964, from 1961-1964 McDonald's had a uniform policy of tying a lease from a subsidiary of the defendant to McDonald's franchisees.)

<sup>14</sup> *Hill v. A-T-O, Inc., 535 F.2d 1349, 1354 (2d Cir. 1976)* (The sale of a vacuum cleaner was tied to the sale of membership in a buying club. The sale of these items was done by door-to-door salespersons, and it was undisputed that the only way one could buy a membership in the buying club was to also purchase a compact vacuum cleaner.)

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sufficient economic power exists in the tying market, an appreciable number of buyers accepting burdensome or uneconomic terms in the tied market can be either sufficient<sup>15</sup> [**\*\*56**] or at least some<sup>16</sup> common proof of a tie-in.

An admission by a defendant that a subsidiary of the franchisor was the prime lessor on all stores has been taken to indicate that common proofs of a tie exist.<sup>17</sup> *Newberg on Class Action* notes:

Evidence of an unremitting policy of tie-in and sufficient market power may also be proffered to show classwide coercion. Allegations alone of such a policy may be insufficient, however, and the plaintiff should bolster such charges with evidence such as classwide adherence to the tie-in policy.

*Id.* at § 18.30 (footnotes omitted).

**[\*\*57] d. The Antitrust Treatise of Professors Areeda, Hovenkamp and Elhauge:**

Excerpts from Professors Areeda, Hovenkamp and Elhauge's treatise bring together the themes in the case law, clarify common errors, and focus on the policy behind prohibition on tie-ins to project how courts should address certain issues where there is not a clearly expressed tie-in, and where part of the actions or thinking of the seller is hidden from the buyer.

A tying condition occurs when its "practical effect" is to foreclose, even partially, rival suppliers of the allegedly tied product.

*Id.* at P1752, p. 279 (references to subsection in the book omitted).

**[\*254]** To decide that issue [of whether two products have been tied together], the courts have often asked whether the plaintiff's purchase of the defendant's bundle was "coerced" and "forced" or in fact "voluntary." But these terms must be understood merely as shorthand for a more nuanced inquiry into whether the defendant has so acted as to constrain buyer choices *illegitimately*.

*Id. at 280.*

If the tied customers might have purchased elsewhere, an impact on the defendant's "competitors" should be found even **[\*\*58]** if there are no competitors because of the tie.

*Id. at 282* (footnote omitted).

<sup>15</sup> In *Image Technical Services v. Eastman Kodak Co.*, 1994 U.S. Dist. LEXIS 12652, 1994 WL 508737 (N.D. Calif. 1994), Kodak was selling replacement parts for its copiers only to buyers who agreed not to buy service for the machines from independent service organizations. In certifying a class action, the district court addressed the 23(b)(3) issue of predominance by noting that plaintiffs sought to prove coercion under Ninth Circuit case law that permits coercion to be implied from proof that "an appreciable number of buyers have accepted burdensome terms, such as a tie-in, and there exists sufficient economic power in tying market." *Moore v. Jas. H. Matthews and Co.*, 550 F.2d 1207, 1217 (9th Cir. 1977). See also, *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108, 118-19 (C.D. Cal. 1978).

<sup>16</sup> While the Ninth Circuit accepts such proofs as adequate proofs of coercion, the Third Circuit in *Ungar v. Dunkin' Donuts*, 531 F.2d 1211, 1225 (3d Cir. 1976), discussed in detail above, held that such proofs constitute "some evidence of coercion," but could not "accept the proposition that such proof, alone, would suffice to establish, *prima facie* the coercion element of an illegal tie-in claim."

<sup>17</sup> *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108, 118-19 (C.D. Cal. 1978). The defendant had admitted to the Federal Trade Commission that its subsidiary was the prime lessor on all of its stores, and that all stores were fully equipped and ready for operation when turned over to a franchisee. *Id. at 118*. The court noted that in the absence of such an admission of the universal acceptance of the lease and initial equipment package, the court would not certify a class. *Id. at 119*. While the court found that the coercion element in its case was amenable to common proof on the tie between the franchise and the lease and equipment package, these claims were not certified for class treatment because common proofs did not exist on the *fact of damage* with respect to these alleged ties.

. . . a tying "agreement" or "condition" is present when the defendant has taken advantage of customers' desire for his product *A* to constrain *improperly* their choice between his product *B* and that of his rivals (footnote 16 omitted). Given the constraints created by the defendant, customers choose his *B* "voluntarily." At the same time, the improper constraint "coerces" or "forces" those choices.<sup>17/</sup> Unfortunately, both verbs are often used loosely by litigants and judges.

<sup>17/</sup> See P1754b (collecting cases showing that coercion merely express the need for proving a tying condition).

Courts usually say that two products are not tied unless buyers are "coerced" or "forced" to take them together (footnote omitted). They are certainly correct that more must be shown than buying two products from the defendant, and "coercion" or "forcing" is often a useful shorthand for the necessary showing.

\* \* \*

Furthermore, "coercion" often raises abstract, extraneous, and metaphysical questions about whether the buyer acted "willingly" or "voluntarily." After all, every [\*\*59] package purchase is voluntary in that buyers preferred it to the other available options (such as buying elsewhere or doing without) and in that its price did not exceed its value to them. It is involuntary in that others have constrained or structured the options. The legal question then is whether the defendant constrained or structured those options illegitimately and by what standard. . . ."the only thing that can be said with absolute certainty on the subject [of coercion] is that the concept has proved elusive." . . . The buyer's volition does not distinguish what should be condemned nor what should be allowed.

In sum, the language of "coercion," "forcing," and "voluntariness" should be understood as inviting a specific factual inquiry about whether the defendant has illegitimately constrained buyer choices and precise articulation of the standards for determining legitimacy.

*Id. at 283-86* (some citations and footnotes omitted).

In the present case, defendants frequently note facts that seem curious and inconsistent with antitrust claims that involve "coercion," "forcing," and "conditioning" claims. For example, there are many contented franchisees who freely [\*\*60] choose to buy paper products and other supplies from Blue Line. Why did so few other franchisees other than Gary Smith seek an alternate supplier to Blue Line? Indeed, even many franchisees who own outlets with both the old and new franchise agreements have not used their right under the old contracts to seek an alternate supplier of logoed products which, if honored, would provide an alternate source of logoed goods for all the franchisees in the area.

Areeda, Hovenkamp and Elhauge note that an illegal tie-in constraint on buyers' choices can occur even if there are no competitors or if the buyers would not have purchased from a competitor. "The buyer's volition does not distinguish what should be condemned nor what should be allowed."

Where there is a tying arrangement, it is not made legal by the fact that the "buyers would have purchased the defendant's product without regard to the tie, [or buyers] do not consider the contract onerous or suffer rigorous enforcement . . ." *Id. at 292*. The relevant question is whether the seller "has illegitimately constrained buyer choices." The authors note that:

[\*255] Jefferson Parish said, "tying arrangements need only be condemned [\*\*61] if they restrain competition on the merits by forcing purchases that would not otherwise be made."

*Id. at 295* (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)). Yet, the authors clarify:

But the Supreme Court did not invite inquiries into what buyers would otherwise have done, for the Court made plain that sufficient "forcing" exists when buyers "might have preferred" to buy the tied product elsewhere. Tying "occurs when the buyer must accept the tied item and forego possibly desirable substitutes."

Id. at 295, citing [\*Moore v. Jas. H. Matthews\*, 550 F.2d 1207, 1217 \(9th Cir. 1977\)](#) (emphasis added).

The policy rationale is simple. "Even if some of the [buyers] would have selected [the defendant's tied product] regardless of the tying arrangement, the arrangement prevented them from making that choice freely."

Id. at 295, citing [\*Tic-X-Press v. Omni Promotions Co.\*, 815 F.2d 1407, 1417 \(11th Cir. 1987\)](#).

While this treatise was revised well after *Jefferson Parish* (1984) and its focus on the buyer, these antitrust scholars still quote Bogosian's conclusion **[\*\*62]** that:

The issue is whether the seller acted in a certain way, not what the buyer's state of mind would have been absent the seller's action.19/

19/ *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449-450 (3d Cir. 1977), cert. denied, 434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978); [\*Anderson Foreign Motors v. New England Toyota Distributors\*, 475 F. Supp. 973, 988 \(D. Mass. 1979\)](#) (tying test focuses not on buyer's state of mind but on seller's actions).

Speculation about what buyers would have done had the defendant allowed them to exercise independent judgment is often unreliable and involves the very sort of burdensome inquiry into actual market conditions the per se rule was meant to avoid. . . . Moreover, the very existence of the tie prevents buyers from changing their minds and discourages rivals, including new entrants, from tying to woo them from the defendant.20/

20/ Associated Press, note 5, at 756, 759 (key evil of tying is that "it forces the buyer to give up his independent judgment").

There is little reason to undertake that burden when the defendant himself doubted the outcome sufficiently to impose the restraint and **[\*\*63]** when there is a better test. The best way to test whether buyers would otherwise have taken the defendant's tied product would be to offer the tying and tied products separately.21/ If the best the defendant can say about an otherwise unlawful tie is that it has no effect, there is little reason to tolerate it.22/

21/ See, e.g., Photovest *v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), cert. denied, 445 U.S. 917, 63 L. Ed. 2d 601, 100 S. Ct. 1278 (1980)], note 6, at 725.

22/ While the existence of a tying restraint does not depend on what buyers would otherwise have done, there would be no foreclosure (P1724c) and perhaps no separate products (PP1743a, 1748) absent a reasonable possibility that buyers would purchase the tied product elsewhere. It is enough that buyers might have wanted to purchase the tied product elsewhere in the absence of the defendant's tying conditions. . . .

Id. at 295-96.

The authors note that the Supreme Court has

wisely refused to require rigorous enforcement of a tying contract. Both *International Salt* and *Northern Pacific* held products tied together even though the contractual obligation **[\*\*64]** to buy the tied product was often unenforced, waived, or leniently administered (footnote omitted). The reason is that the "overhanging threat of enforcement is ever present" to influence buyer choices.

*Id. at 297.*

In situations involving seller approval of alternate suppliers, Areeda, Hovenkamp, and Elhauge state:

When the number or size of disinterested suppliers the defendant is willing to approve is too small to provide buyers with workably competitive choices, the products should be deemed tied together.

[\*256] *Id. at 300.* The authors suggest as a rule of thumb that the buyers of the defendant's product A should have a 50 percent supply of product B from alternate available sources in order not to constitute a tie.

The present case does not involve a clear, express tie in a single contract as was involved in the Sixth Circuit's *Bell v. Cherokee Aviation Corp.* case. Rather, in a market where there are no current alternate suppliers of logoed items and no current alternate suppliers of other foodstuffs and supplies, the post-mid-1990 franchisees were contractually limited from seeking an alternate supplier of logoed goods. Plaintiffs assert that [\*\*65] this new 1990 express contractual limitation was drafted with defendants' intention that it work in tandem with the covert 1989 licensing agreement that gave Blue Line the exclusive right to have logoed products produced and the exclusive right to distribute logoed products either to franchisees or to third-party distributors approved by LCE. These facts involve what Areeda, Hovenkamp and Elhauge call an "understood condition."

**1754c. Understood condition.** The situation is exactly the same when a defendant makes no formal announcement but so acts as to lead reasonable buyers to understand that they cannot get product A unless they also take his product B. There is then a tying condition promulgated by the defendant's own conduct, which clogs competition by denying rivals free access to buyers. We stress two requirements for an understood tying condition.

First buyers must actually and reasonably believe that such a condition exists, for otherwise there is no understood condition. As a practical matter, however, there is no need to inquire into subjective belief once the tribunal is persuaded that the circumstances generate a reasonable belief that a tying condition [\*\*66] exists, for subjective beliefs can be inferred from objective circumstances.<sup>13/</sup> And, any subjective belief must still be objectively reasonable. . . .

<sup>13/</sup> Even so, the defendant should be allowed to rebut such an inference with credible proof that buyers did not actually believe this threat--such as direct statements from them of disbelief or proof that buyers frequently violated the condition without loss.

*Id. at 303-304.*

Second, buyers' reasonable belief that they must buy defendant's B in order to get his A must be the result of the defendant's own conduct that could reasonably be expected to bring that belief about.<sup>15/</sup>

<sup>15/</sup> See *ibid.*; *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 460 (3d Cir. 1977)*, cert. denied, *434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978)* ("The issue is whether the seller acted in a certain way, not what the buyer's state of mind would have been absent the seller's action."); *Anderson, note 5, at 988* (tying test focuses not on buyer's state of mind but on the seller's conduct in conditioning).

Otherwise, a defendant would be unfairly punished though he has not created a reasonably understood [\*\*67] tying condition. . . .

Once we have an absolute and unqualified understood condition, the consequences are the same as an announced condition. But the announced condition is more likely to be clear, while the plaintiff may have difficulty persuading the tribunal that an understood condition exists. . . .

In these ambiguous situations . . . the tribunal may have difficulty judging what constitutes a sufficient and *illegitimate* constraint on buyer choices. Such judgments depend on substantive antitrust policy, which does not differ between the Sherman and Clayton Acts.

Id. at 305 (footnote omitted).

The authors then create a series of presumptions from circumstantial facts. They note, first of all, that even with an announced condition,

The defendant might have relented if asked. Nonetheless, the defendant is engaged in tying, at least presumptively. The announcement is intended to constrain buyer choice and, absent contrary evidence, creates the reasonable impression among buyers that their ability to purchase product A is conditioned on their purchases of product B.<sup>21/</sup> This is enough.

<sup>21/</sup> The announcement also implies that the defendant <sup>\*\*68]</sup> intended to implement a tying condition even if uncommunicated to buyers. See P1755.

[\*257] Id. at 305-306 (emphasis in the original). In such situations, Areeda, Hovenkamp, and Elhauge do not feel that the plaintiff needs to affirmatively prove that requests by other buyers to buy A separately were rebuffed by the defendant, nor must they show the onerous nature of the bundling of the two products which buyers would not otherwise have accepted but for the tie, nor what the buyers understood with respect to the announced condition, nor the percentage of bundled sales versus separate sales, nor the termination of customers or franchisees who buy B from rivals. The authors note:

After all, when the defendant feels the need to announce the condition, he must have thought it would have some effect.

Id. at 306.

In the absence of an express contract, or a clearly announced condition, some other proof of "coercion" is required. Yet this coercion means only that there is a conditioning or other illicit market manipulation of the sale of one item on that of another, and not that the purchase otherwise would not have been made but for the tie. Again, according <sup>\*\*69]</sup> to these authors, "foreclosure resulting from 'coercion,' not coercion alone, is the gravamen of the tying offense." Id. at 298. These commentators observe that the question of whether the customer would have purchased the tied product absent the tie is irrelevant in cases involving announced or understood conditions as well those involving unambiguous tying contracts. Id. at 307. Yet, the authors note that certain courts have confused this concept by the use of the term "coercion."

Unfortunately, some erroneous dicta have required proof of "coercion" -- apparently in the sense of a purchase that would not otherwise have been made -- even though an announced or understood condition has been established.<sup>31/</sup>

<sup>31/</sup> If the plaintiff is a purchaser, however, he would not be able to obtain damages for purchase of a tied product that he would have taken in the same amount and at the same price absent the tie. With respect to such purchases he has suffered no injury-in-fact.

Id. at 307.

These courts recognize that no such proof is needed for express tying contracts and distinguish the nonexpress case as requiring coercion (typically in the sense <sup>\*\*70]</sup> of a proved announced or understood condition), but then appear beguiled by their coercion language to require proof that coercion caused buyers to take a product they would not otherwise have taken.<sup>32/</sup>

<sup>32/</sup> See Tic-X-Press, note 10, at 1415-1416; [Will v. Comprehensive Accounting Corp., 776 F.2d 665, 669 n.5 (7th Cir. 1985)] Unijax v. Champion Intl., (quoting Ungar v. Dunkin' Donuts, 531 F.2d 1211, 1218 n.8

(3d Cir.), cert. denied, 429 U.S. 823, 50 L. Ed. 2d 84, 97 S. Ct. 74 (1976); [Response of Carolina v. Leasco Response, 537 F.2d 1307, 1327 n.8 \(5th Cir. 1976\)](#) (quoting Ungar); [Capital Temporaries v. Olsten Corp., 506 F.2d 658, 662-663 \(2d Cir. 1974\)](#).

This is mostly dicta, either because the existence of an announced or understood condition was either unclear or not at issue. These cases should be understood merely to require the necessary condition and some proof that without that condition the buyers *might* have wanted another product.<sup>33/</sup>

<sup>33/</sup> See P1753c; *Smith*, note 8, at 1331-1332 & n.15 (class action need not be dismissed though some members of class desired defendant's tied product; tying condition evidenced [\*\*71] by form contract).

Otherwise, courts would be burdened with assessing proof the buyers were caused or coerced to take tied products they did not want even when it is undisputed that there was an announced or understood condition that product *B* had to be bought to get product *A*. *That unnecessary burden is especially great when courts refuse to certify class actions because they require proof of individual coercion, which varies among customers, beyond an announced or understood tying condition.*<sup>35/</sup>

<sup>35/</sup> Ungar, note 8; *Waldo* [v. [North American Van Lines, 669 F. Supp. 722, 727-728 n.8 \(W.D. Pa. 1987\)](#). See also [Olmstead v. Amoco Oil Co., 1977-1 Trade Cas. \(CCH\) P61,487](#) (M.D. Fla.) (refusing to certify a class of gasoline dealers forced by their dealership contracts to operate car wash facilities as well; dealers who wished to have the car wash and would have taken it anyway suffered no injury and thus could not be included in a class seeking damages). And see [Service & Training v. Data General Corp., 963 F.2d 680, 685 \(4th Cir. 1992\)](#) (stating in tying class action that absent evidence of an "express tying agreement" the plaintiff must present "evidence [\*\*72] that affirmatively 'tends to exclude the possibility' that [the defendant] and [his customers] 'were acting independently' in the sales and purchases of products" (quoting [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#)).

[\*258] [Id. at 307-308](#) (emphasis supplied).

The authors provide courts guidance on the types of proofs that may be sufficient to prove a tie-in when the tie is not expressed clearly in a contract or in an announcement by defendant. In considering whether a silent plan or covert intention of the seller to tie the products together can constitute a tie, the authors conclude that it should not because the basic test of tying "is whether the defendant seller has illegitimately constrained buyers' choices in buying product *B* from the defendant rather than from his competitors." [Id. at 313](#). A defendant using solely a silent decision to tie has done nothing to induce anyone to purchase his second product because the buyers do not know of the silent condition. If they did, it would then have become an understood condition. It is in this sense that the "buyer's state of mind" (see [Jefferson Parish, \[\\*73\] 466 U.S. at 12](#), and Judge Gadola's opinion in this case, [895 F. Supp. at 905](#)), is important. Did defendants' actions create sufficient non-covert effects in the marketplace of which the buyer was aware that they helped induce his choice of seller's product *B*? If so, then not *all* of the seller's actions or intentions need be publicly known.

The critical first question is what sorts of proofs are necessary to constitute a prima facie case of an "understood tie in," particularly if certain facts are not known to plaintiffs until after the suit is filed, as in this case. The second question is whether such proofs are available in this case, and, if so, are they predominately common to all class plaintiffs or predominately individual.

Areeda, Hovenkamp and Elhauge have a complete section on Proving Understood Conditions that makes out an impermissible tie-in.

The authors considered various presumptions which they believe should prevail in the absence of contrary evidence. They start with an easy case. When the defendants make products *A* and *B* available separately, a tying condition is presumptively absent even when buyers request or choose a bundle of products. The conclusion [\*\*74] is not undermined even when there is "a high percentage of bundled sales, onerous terms for the tied product, or a single contract covering both products, although these factors might help resolve more ambiguous cases . . . ."

They also conclude that: "A form contract covering two products is presumptively a tie even though the buyers have not requested separate provision and been rebuffed." *Ibid.* The authors noted that in ambiguous cases, other relevant proofs include a high percentage of defendant's transactions are bundled or the terms for defendant's products are onerous. A high proportion, or even 100 percent, of bundled sales does not itself indicate that the two products have been tied together. The buyers may prefer to acquire the products together. Yet, "a high percentage of bundled sales can usefully supplement other evidence to indicate an understood tying condition." *Id. at 317.c*

In another example where the defendant employs a "form contract" covering two products, this initially indicates an understood tying condition but the seller can offer evidence to rebut this inference. In such a case, a high percentage of bundled sales would then be surrebuttal evidence [\*\*75] by plaintiff. In the form contract example, the authors acknowledge that 80 percent taking the bundled items *A* and *B* might indicate that a vast majority of customers reasonably assumed they had no choice. Admitting that any market percentage line is arbitrary, they would require

90 percent bundling to make persuasive otherwise insufficient evidence of a tying condition or more than 10 percent unbundling to rebut an otherwise established or presumed inference of a tying condition.

*Id. at 318* (footnote omitted).

Regarding onerous conditions, the authors state that: "A tie is not conclusively established by evidence that taking product *B* is onerous because its price is higher or its [\*259] quality lower than market alternatives." *Id. at 318*. Price-quality claims are difficult to resolve, and buyer testimony of lower quality is self-serving. An objectively higher price might be offset by higher quality. Nonetheless, the authors note:

We can presume that a rational customer would not take an overpriced or inferior product *B* unless he must in order to get the defendant's product *A* -- that is, unless there was a tying condition.*20/*

*20* [\*\*76] / *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1181 (1st Cir. 1994) (contract provided some but insufficient prima facie evidence of a tie; tying condition might be inferred if alleged tied product "inferior or overpriced"); *Detroit City Dairy v. Kowalski Sausage Co.*, 393 F. Supp. 453, 464-466 (E.D. Mich. 1975) (relying in part on high price for defendant's tied product coupled with evidence of direct threats from the defendant's employees).

To be sure, the typical buyer burdened with an above-market quality-adjusted price for product *B* is compensated in the form of a lower price than he would otherwise have paid for product *A*. Nevertheless, a customer might prefer to buy product *B* elsewhere notwithstanding recompense when buying it from the defendant.

*Id. at 318-19* (n.21 omitted). This leads the authors to conclude that if the buyer purchased product *B* from the defendant, it tends to suggest that the buyer did so in order to get product *A*.

Indeed, where the defendant's opening position involves both products, rebuffed efforts to buy product *A* separately or proof that such a request would be futile could indicate [\*\*77] an illegal tie-in. Here, the authors note the relevance of evidence that might have been kept secret from the buyer until discovery in litigation.

For convenience in administering the antitrust laws, moreover, we would infer futility from defendant's internal documents or admissions known to the tribunal--though not to customers--that defendant would not sell *A* separately.

*Id. at 325.*

In the present case, Little Caesar and Blue Line did not specifically announce a tie-in. But, plaintiffs assert that they specifically did announce that franchisees could not request an alternate supplier of logoed products, and the surrounding circumstances, which circumstances were contributed to by the defendants, made an alternate choice of suppliers of logoed products impossible. Thus, franchisees with a mid-1990 franchise agreement who chose to continue purchasing product A (continuing as a Little Caesar franchisee) knew they were required to continue buying paper products from Blue Line and could not seek an alternate supplier of such goods.

In the present case, plaintiffs' tie-in case rests on the assertion that because of the surreptitious 1989 exclusive licensing agreement [\*\*78] with respect to paper products, the defendants had precluded any alternate suppliers and, through the express contractual provision in the existing market conditions, induced the franchisees not to seek an alternate supplier.<sup>18</sup>

### *III. Plaintiffs' Suggested Mode of Proof:*

Plaintiffs assert that they intend as their primary proofs to use documents obtained from the defendants in discovery and expert opinions of economists and others, that will constitute common proof of a national effort by the defendants to use their market power, particularly their exclusive right to have manufactured and to distribute logoed products essential to a franchise operation, to create a situation where Blue Line [\*\*79] was not only the sole distributor of logoed paper products but maintained its position as the near exclusive distributor of all supplies necessary to operate a franchise.

Considering certain of the factors that Areeda, Hovenkamp and Elhauge found relevant in ambiguous cases of the understood condition tie-in, in the present case, in all relevant respects Blue Line is virtually the [\*260] exclusive distributor of logoed paper goods and other foodstuffs and supplies for a franchise.

Second, the proofs will show that a form franchise contract was used after mid-1990 with respect to all of the proposed class members. This contract expressly prohibits the franchisees from requesting an alternate supplier of logoed paper products in a market in which Blue Line was at the time the sole distributor of such products. While this was not an express form contract tying product A and B together, the relevant inquiry for an "understood condition" tie-in is its practical economic effect in a market where these franchisees had only Blue Line as a distributor of product B.

While the Little Caesar/Blue Line exclusive license agreement was not known to the parties at the time, its consequences [\*\*80] were apparent in the marketplace at least to the extent that no other entities had produced or attempted to distribute logoed paper products to Little Caesar franchisees. Also, because Blue Line was a wholly owned subsidiary of Little Caesar, the exclusive licensing agreement in effect meant little more than Little Caesar Enterprises was refusing to allow production or distribution of logoed paper products without its consent. While the facts show that LCE did relent in the two recent applications for alternate distributors that were approved during the pendency of this lawsuit, there is evidence that, during the earlier relevant time periods, Little Caesar withdrew the rights to distribute logoed paper products from at least one of the prior competing distributors, PYA Monarch, and other documents made available to plaintiffs through discovery show that this was known to be a strategic business tactic that made it more difficult for competing distributors to compete with Blue Line and satisfy the franchise preferences for one-stop shopping.

Plaintiffs also assert that the contracts entered into by the franchisees resulted in the charging of supra-competitive prices, thus being the [\*\*81] "onerous contract" evidence referred to by Areeda, Hovenkamp and Elhauge. While defendants can point to the fact that recent applications for alternate distributorships that were pending during this

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<sup>18</sup> An issue that has not been briefed or argued and awaits further judicial resolution is whether the subclass of "hybrid" franchisees, who also had an old franchise agreement without the restrictive language and were permitted to seek alternate suppliers of paper products but failed to do so, have a tie-in claim?

lawsuit have been approved, and even note that these distributors have not yet entered the marketplace to provide goods and services, plaintiffs will show that during the relevant time at least one other applicant for distribution services, AmeriServ, was denied the right to be a distributor. Plaintiffs will also show through expert and other testimony that because the mark-up on logoed paper goods is higher than that of other items, defendants' tactic of denying access to logoed paper goods to alternate distributors made it more difficult for competitors to enter the market and match or beat Blue Line's pricing.

**[HN18]** While the Court's ruling on a motion for class certification is not to consider the merits of the case or even the sufficiency of the evidence as would be done in a motion for summary judgment, it is worth reviewing some of the proffered evidence to determine if it is common to the class in order to help make a judgment whether the common evidence predominates over the evidence **[\*\*82]** that need be individual.

In referring to the deposition of LCE's President, David Deal, he acknowledged that the reason the franchise agreement was modified in 1990 was "because we wanted to conform the Franchise Agreement to the business intent we had to control distribution of our trademarked items." Plaintiffs' Exh. 14, Deal Dep. at 186.

A September 22, 1988, memorandum from Deal to Ilitch dealing with Blue Line's expansion into the southeast United States where it would compete with the existing distributor, PYA Monarch, Deal noted that the approach used in the past of merely disapproving the competitive distributor would not work because PYA had been doing a credible job in the southeast at the time. It appears another competitor, Sysco, would be disapproved. In dealing with the franchisees, the tone of the announcement was to state an expectation that the franchisees would swing over to Blue Line or "in the PYA area, we are going to fight them (albeit with a stacked deck)," apparently referring to the exclusive access to logoed products that Blue Line would have. Plaintiffs' Exh. 8 at p. 1.

**[\*261]** In a November 12, 1991, memo from David Deal to David Kushner, he notes:

The **[\*\*83]** original intent of the agreement was to provide an exclusive arrangement for Blue Line to distribute paper products and other supplies to Little Caesar restaurants so that Little Caesar would be able to exclude third parties from these offerings. It was not contemplated at that time to put in place an even broader agreement to involve products that do not ultimately find their way to the customer, such as uniforms, signage, etc.

Plaintiff's Exh. 21. At his deposition, when asked to explain what he meant when he said he was going to fight PYA Monarch "albeit with a stacked deck," Deal admitted: "That we were going to leverage every business advantage we had seen." *Id. at 400*. He later noted that the competitive strategy intended "Pushing our business advantages within the limit of the law." *Id. at 404*. He noted that one of those advantages was the fact that Blue Line had exclusive access to logoed items.

In a memo of April 20, 1992, in dealing with how to compete with AmeriServ when it was about to enter the southeast as an alternate distributor to Blue Line, Deal again wrote Ilitch outlining a number of tactical considerations. Again, apparently the anticipation was **[\*\*84]** that AmeriServ would not be given access to logoed paper products, so that franchisees who purchased from AmeriServ would also have to purchase at least some items (*i.e.* logoed products) from Blue Line. Deal's memo concluded,

The result of these elements will be to put us in. the best competitive position and also require the stores to take two deliveries per week - one from us and one from AmeriServ. I am hopeful, that, over time, they will see that this inconvenience is not giving them any significant benefit. This was a fairly significant factor in our ability to wear down those stores that initially wanted to continue with PYA Monarch several years ago.

Plaintiffs' Exh. 11 at p. 1. Deal's deposition also acknowledged that restricting PYA Monarch's ability to get logoed and proprietary items was an intentional effort to force the franchisees in the southeast to take two deliveries, one from Blue Line and one from PYA Monarch. *Id. at 404*.

In Deal's deposition, while denying that the defendants had a master plan to control distribution of goods to franchisees, he acknowledged: "Certainly we wanted as much of the business as we could obtain through being

competitive [\*\*85] and leveraging everything we could to our advantage that was legal . . ." Plaintiff's Exh. 14, Deal Dep. at 378. In listing the specific business advantages that he had vis-a-vis competing distributors, among other advantages Deal noted that "we had access to our trademarked and proprietary items." *Id. at 389.*<sup>19</sup>

[\*\*86] Plaintiffs also refer to a July 5, 1991, letter from Matt Ilitch, Vice-President for Distribution at Blue Line, to Kathy Campbell of Leprino Foods, who was earlier the distributor before Blue Line moved into its distribution area of Northern California and Nevada. He noted that Leprino Foods was being displaced by Blue Line not because of any failures of Leprino "as our associate distributor. Rather it is part of the Little Caesar master plan to control distribution of Little Caesar brand products through its Blue Line distribution division." Lockridge Exh. 7.

In a January 17, 1989, memo from Deal to Ilitch, he again refers to the strategy for moving into the southeast through their Atlanta [\*262] warehouse to compete with PYA Monarch by denying them access to "our super-proprietary items of square dough mix, spice mix and logoed packaging."

This approach, which will require those franchisees to place twice weekly food orders in the event they choose not to give us all their business, is bound to generate some degree of resentment among certain franchisees. Over time, however, I believe that they will not begrudge us our right to totally control distribution of our proprietary items [\*\*87] and this move will put us in the best possible competitive situation.

Lockridge Exh. 9.

Plaintiffs contend it is precisely this conscious effort to leverage the sale of one product on the other that the tie-in antitrust laws were intended to prevent.

Plaintiffs' expert economists Stephen Siwek and Dr. Philip Nelson note that an anti-competitive tie-in can be accomplished through a series of actions and contracts rather than a single contract. They distinguish between "single systems distributors" that provide food services for a limited menu restaurant such as a Little Caesar franchise outlet, with a "broadline distributor" that services multiple restaurants or other food sale outlets. The economists indicate that most sales through such distributors are on a cost-plus basis, and thus the ability to buy in greater volume at lower costs or to cut transportation costs provides a substantial competitive advantage. The experts note that most systems distributors handle more than one restaurant chain, which allows them to bundle distribution deliveries to various stores run by different chains and thereby lower the unit cost of delivery. They also stress that such multi-chain [\*\*88] systems have substantial buying power by buying supplies to service different chains, allowing them to negotiate good prices.<sup>20</sup> They add, for example, that AmeriServ's sales were larger in total volume than Blue Line's. They argue that they could show impact or damages based on an analysis of a typical "market basket" full of goods necessary to operate a franchise. Based on an analysis of the varying costs, they assert that the defendants through their asserted tie-in have forced each of the franchisees to pay higher prices for Blue Line's distribution services than they would have been paying had they been able to use or to credibly solicit the services of a competing distributor. Lockridge Exh. 1 at P 41. They note that this injury to class members can

<sup>19</sup> Obviously an ultimate issue for the Court is whether defendants' strategy to limit access to the logoed products was a legal or an illegal business practice. For purposes of this motion for class certification, this Court must assume that plaintiffs' legal theory on this is correct, unless this Court wishes to invite and resolve motions for summary judgment of the issue prior to determining whether to certify a class. Compare *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1991), cert. denied, 405 U.S. 955 (1972), where it was held impermissible for the franchisor to control distribution of items needed for operation of a franchise when the criteria for those items could be set by specifications, with *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (1978), in which the court held that the franchisor could control distribution of the product when it was the ultimate product being consumed by the customer. In the present case, the logoed items are sold to the customer, but, unlike *Baskin-Robbins*, these are not the products actually consumed by the customer.

<sup>20</sup> In a June 19, 1989, letter from David Deal when he was Senior Vice-President at Blue Line to Fred Dietrick at Food Services Enterprises, Inc., in Rocky River, Ohio, Deal noted that they had compared Blue Line's cost with that of a competitive distributor, Gordon's. He noted that Blue Line was producing a comparable cost result. With regard to "lower volume food items on the list," Deal acknowledged "we are purchasing much lower volumes than our competition and I would expect [these items] to be somewhat higher" (Bates # 00064).

be proven based on overall prices charged for a market basket regularly purchased by a Little Caesar franchise. They explain further how the damages affected all of the franchisees, whether or not they would have switched to a competitive distributor, because the price competition would force Blue Line to lower its prices if they faced competition from an alternate distributor. This would benefit even the customers who stayed with [\*\*89] Blue Line.

William Burgess of AmeriServ, in his Declaration of August 3, 1994, noted that:

Without the ability to distribute logoed products as part of the full-line distribution program, it is not economically possible to compete [with Blue Line] because the food items are traditionally sold on very low margins and to achieve an economic blended profit margin, it is necessary to be able to also sell the higher profit paper and packaging.

Lockridge Exh., Burgess [\*\*90] Declaration at P 17.<sup>21</sup> He noted that they quoted Little Caesar a blended profit of 8 to 8-1/2 percent for full line distribution services. [Id. at P 19](#). He added that AmeriServ provided food services or at least delivery of food to multiple chains, and these delivery services were highly computerized allowing delivery two or [\*263] more times a week, but one time a week was most economical. [Id. at P 26](#). He stated that

the major cost to a distributor is the cost of delivering the goods by truck ... [and] independent distributors that served multiple locations like AmeriServ and its competitors, that distributor has the capability to deliver the same goods at a lower cost than a distributor which is serving only one chain. Most national chain restaurants tend to be clustered in very close proximity to each other. As a result, AmeriServ can deliver, for example, to a Wendy's, Applebees, KFB, Burger King all of which may be situated at the same intersection or within blocks of each other.

[Id. at P 28](#). In contrast, he noted that Blue Line serves only Little Caesar outlets, which tend to be spread out geographically. He also claimed that for other chains they serviced, [\*\*91] AmeriServ was allowed to distribute logoed goods, including paper and packaging. "We purchase direct from the manufacturers in those instances." [Id. at P 30](#). Finally, he asserted that AmeriServ had "greater purchasing power than Blue Line has, since the independent distributors purchase products for more than one chain." [Id. at P 33](#). He concluded that:

I am aware of the locations of Blue Line warehouses and know that there are specialty distributors and/or broadline distributors capable of serving Little Caesar restaurants anywhere in the Continental United States.

[Id. at P 34](#).

Plaintiffs have produced a document they argue suggests that defendants have admitted that facing a competitor would result in a lowering of Blue Line's profit margins and prices, not only in the competitive market, but nationwide. In the [\*\*92] April 20, 1992, Deal to Ilitch memorandum dealing with the defendants' planned response to AmeriServ's efforts to enter the market in the southeastern United States, in addition to the planned efforts to limit their access to logoed products to force two deliveries, Deal also stated that:

We must move to modestly reduce our margins on items we will be competing on. At this time, it is difficult to really know how good our pricing is. However, I do think it is high enough that we can be undercut [hand written] "and AmeriServ still operate profitably." A percent or two we could quickly respond to, but if they get really aggressive we run the risk of losing the credibility we have worked so hard to regain. To minimize the risk of this, I think we need to gradually move our margins down over the next two to three months, particularly in the Southeast. Pricing would be adjusted on the high visibility items such as cheese, meats, boards and flour. Phasing this in over several months will reduce its visibility. I am suggesting price reductions which would lower our margin by 1.0 to 1.25 percentage points out of the Atlanta, Orlando and Greensboro, with reductions of about one-half [\*\*93] that amount in other centers. This will probably not be enough to face down a competitive onslaught, but will reduce the attractiveness of our business and keep us within the credibility range.

Lockridge Exh. 11.

<sup>21</sup> In a January 21, 1993, memo from AmeriServ, it was noted that "without the logo products, it will be very difficult to make a successful program." Plaintiffs' Exh. 19.

In a supplemental declaration of October 16, 1995, from plaintiffs' experts Stephen Siwek and Philip Nelson, they assert:

The defendants in their brief have made a fundamental error by confusing the computation of damages with the antitrust impact requirement which only requires a showing of some anticompetitive effect on all class members.

Siwek and Nelson supplemental declaration of October 16, 1995.<sup>22</sup> This supplemental declaration points to P 44 of their earlier declaration, which reads as follows:

Because members of the class had the contractual right to use qualified distributors other than Blue Line, they had the right to "shop" the market for distribution services. Because of the tie, however, [\*264] Blue Line's anticompetitive conduct adversely impacted all class members by preventing franchisees from entering into lower-price contracts with third-party distributors and by undermining the credibility of threats to leave Blue Line. [\*\*94] LCE's policies thus undercut the ability of all franchisees to negotiate better prices with Blue Line. Moreover, the ability of some franchisees to negotiate better prices with Blue Line would have led to lower prices for other franchisees. For all of these reasons, Blue Line's exclusionary behavior adversely impacted all franchisees by reducing competitive pressures for system-wide price reductions.

The earlier declaration includes an appendix showing that each Blue Line Distributor had at least one nearby independent distributor that could have created a potential competitive threat.

Plaintiffs' experts also indicate in their supplemental declaration that discovery of the Deal to Ilitch April [\*\*95] 20, 1992, memo shows:

(1) that Blue Line planned on reacting to potential competition from AmeriServ by reducing prices throughout the nation and (2) that the threat of AmeriServ's serving Little Caesar's franchisees (even before it actually served any of their franchisees, or had established its relative efficiencies) led Blue Line to seriously consider cutting its prices. The memorandum also suggests that because of its anticompetitive conduct, Blue Line was maintaining supra competitive pricing.

They also note that other national class cases, such as *R & D Business Systems, Inv. v. Xerox, 150 F.R.D. 87 (E.D. Tex. 1993)*, certified a national class even though the defendant Xerox "faced different service competitors in different parts of the country."<sup>23</sup> Thus, they argue that regional differences might have an effect relating to actual damages but not to antitrust "impact" within the meaning of the standards for class certification.

[\*\*96] Plaintiffs' experts also point out that while Blue Line asserts that it can purchase at better costs than other national distributors, this is a disputed issue of fact in which plaintiffs' experts assert that Blue Line is "much smaller and thus less efficient than large systems distributors, it is doubtful it could compete on the merits for franchisee business but for its anticompetitive practices (see, e.g. paragraphs 43 and 45, Siwek and Nelson's earlier declaration) (Supplemental Declaration at P 10).

With regard to the issue whether the scope of the tying arrangement involved only logoed products or also affected other items, plaintiffs' experts assert:

The defendants in their brief also argue that the scope of the products tied by the defendants' tying arrangement is an individualized issue. That argument ignores Blue Line's own documents which show that it analyzes its pricing on a market basket basis. (See, e.g. Appendix 6 to our prior declaration.) It also ignores the structural characteristics of the food distribution industry serving large chain accounts which do operate on highly structured cost-plus market basket pricing programs. In this type of environment, [\*\*97] franchisees could not practically or economically make sustained purchases other than on a market basket program. Even

<sup>22</sup> It could be honestly said that Siwek and Nelson were stating that I had also made a similar mistake in my earlier Report and Recommendation when I suggested that impact could only be proven on a regional basis. For reasons stated in footnote 29 below, I believe I did make this mistake in my earlier Report.

<sup>23</sup> See also, *Collins v. International Dairy Queen, Inc., 168 F.R.D. 668 (M.D.Ga. 1996)* (W.L. 501867).

if the tie is only of logo products, which is the most profitable portion of the market basket of goods, the franchisees are damaged across the entire line of products. This competitive effect is common to the class, given the way this industry operates.

*Id. at P 11.*

Plaintiffs in their briefs also state that "defendants have admitted in a prior brief that the "scope of the exclusive license is a common issue." Defendants' Third Supplemental Brief Opposing Class Certification at p. 2. Accordingly, plaintiffs argue that the effect of tying logoed goods is also a common issue. Finally, while plaintiffs argue that there is more than adequate common evidence to show the jury the scope of the tie, they also note that "the determination of the scope of the tie is unquestionably a merits [**\*265**] issue relevant to damages which has no bearing on a class certification motion."

Plaintiffs, at n.9 of their brief, assert that in reaching my earlier determination I overlooked the assertion of William Burgess in his declaration and deposition that indicated AmeriServ was [**\*\*98**] willing to distribute throughout the Continental United States. Plaintiffs' Exh. 2, Burgess Declaration Exh. 1, and Plaintiffs' Exh. 13, Burgess Deposition at p. 91. Whether this assertion is true or not, plaintiffs' experts and other common evidence do suggest of some economic impact throughout the country, even though the exact measure may need to be proven region by region and depend upon the realistic availability of a viable alternate distributor to Blue Line.

Other cases have also been certified for national class treatment even though they involved regional variances and damages. *Image Technical Services, Inc. v. Eastman Kodak Co., 1994 U.S. Dist. LEXIS 12652, 1994 WL 508737 (N.D. Calif. 1994); R & D Business Systems v. Xerox Corp., 150 F.R.D. 87 (E.D. Tex. 1993)* (Lockridge Decl. Ex. 5); *Martino v. McDonald's System, Inc., 81 F.R.D. 81 (N.D. Ill. 1979); Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108 (C.D. Cal. 1978); Collins v. International Dairy Queen, Inc., 168 F.R.D. 668 (M.D.Ga. 1996), 1996 W.L. 501867.*

#### *IV. Analysis on Predominance of Common Facts:*

**HN19**[] The commonality of proofs of a tie-in is an easy issue where there is an express contractual [**\*\*99**] tie or an announced tie-in. The inability to prove a tie-in by the express or direct application of the contract or by a defendant's announcement will make the proofs far more complicated. This will often, if not generally, require use of individual proof of coercion, particularly where salesmanship, refusals, pressure, or subtle threats are involved. Yet, in evaluating whether common questions of law or fact predominate, the critical question under *Rule 23(b)(3)* is not whether the proofs are external to the contract terms,<sup>24</sup> nor whether they are complex instead of simple proofs. Rather, the critical question for *Rule 23(b)(3)* is whether the method of proving coercion involves facts -- even if complex and external to the contract -- that are predominately common to the class and not individual.

Judge Gadola notes that after *Jefferson Parish*, **HN20**[] "the important inquiry centers on the buyer's state [**\*\*100**] of mind and whether the buyer was forced or coerced into making the purchase of the tied product by the seller's conduct," *895 F. Supp. at 904*.<sup>25</sup> Yet, this does not render irrelevant the nature of the seller's action and intent. Clearly, the case law and commentators are in accord that "forcing" and "coercion" mean something less than that the buyer would not have bought from the defendant but for the alleged illegal act. Even if the buyer would have bought from the defendant without the illegal act, an act is still an illegal tie if it created an impermissible added inducement to purchase defendant's product *B*, or impermissibly altered the market and competitive

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<sup>24</sup> Again, in *Bogosian* there had to be proofs external to the contract to show its practical economic effect.

<sup>25</sup> See also, *Bogosian* (Remand) opinion, *596 F. Supp. 621 (E.D.Pa. 1984)*.

capabilities of alternate sellers to lessen or remove altogether the consumer's choice in choosing a competitor's product.<sup>26</sup>

[\*\*101] In the present case, the buyer's state of mind of proposed class members knew there were no competitors offering logoed goods or other supplies needed to operate a franchise. The reasonable franchisee with the post-mid-1990 Franchise Agreement also knew (even Gary Smith reasonably must have known) that he had contractually given up the right to seek an alternate supplier of logoed goods. All of this was because of defendants' intended acts. This Court ultimately will determine if all of these acts as used in conjunction with the Blue Line exclusive [\*266] license were legal competitive behaviors. If it determines that some were impermissible restraints on the market choice of consumers or on alternate potential distributors' ability to enter the market and compete with Blue Line, then--if this had an impact on prices franchisees paid for logoed products alone or for the entire market basket of goods needed to operate a franchise--an illegal tie-in is established even if the buyer did not know why only Blue Line distributed logoed goods or why potential alternate distributors felt inhibited or dissuaded from competing. Areeda, Hovenkamp and Elhauge make it clear that these post-mid-1990 franchisees [\*\*102] would not need to ask for relief from the limitation their Franchise Agreement imposed on them in order to state a tie-in claim. Nor does it seem they would have to ask for an alternate distributor of other products and accept two-stop shopping--from Blue Line for logoed goods and the competitor distributor for other items--if the total market basket price remained higher than would be the case if competitors could offer all products including logoed goods.

If this Court determines that for the buyers in the new proposed class the *state of mind* element necessary to establish a tie-in need only encompass the knowledge that to be an LCE franchise one must buy logoed goods from Blue Line (because they are the sole distributor) and not ask for an alternate source, those elements can be proven by facts common to the class. Other facts concerning the actions of the defendants that Areeda, Hovenkamp and Elhauge found relevant to ambiguous understood conditions can also be proven by facts common to the class.

Common proofs are also available on the use of a form franchise contract, high percentage (nearly 100%) of bundled sales, and "onerous terms" or supra-competitive prices for product [\*\*103] "B" [logoed goods or all franchise foodstuffs and supplies] again relevant evidence in an ambiguous "understood condition" case.<sup>27</sup>

Finally, whether the actions of defendants impermissibly dissuaded potential alternate distributors from entering the market or from competing as effectively with Blue Line also will involve proofs in which common questions of fact will predominate based on plaintiffs' proposed method of proceeding.<sup>28</sup> Whether the scope of the tie-in involves solely logoed goods or all products is a question that presently seems to involve a predominance of common questions of law and fact.

[\*\*104] While plaintiffs may ultimately fail to prove defendants' actions were illegal, or fail to prove any effect on prices, or fail to prove the tie-in of logoed products leveraged a larger tie-in, all of these are merit questions that should not affect the class certification question. Based on plaintiffs' present theories and proffer of proofs, I believe

<sup>26</sup> As noted by Areeda, Hovenkamp and Elhauge:

The best way to test whether buyers would otherwise have taken the defendant's tied product would be to offer the tying and tied products separately. If the best the defendant can say about an otherwise unlawful tie is that it has no effect, there is little reason to tolerate it.

(Footnote omitted.) Areeda, *supra* at 296.

<sup>27</sup> See Areeda, Hovenkamp and Elhauge, *supra*, § 1756, pp. 314-323.

<sup>28</sup> The "one-stop" v. "two-stop" preference is not a critical issue if alternate competitors cannot compete without logoed goods as part of their mix. Also, the Court need not hear from every franchisee to determine whether offering "one-stop" shopping with a full line of products is a competitive advantage over offering only the non-logoed products. If it is a competitive advantage of some significance, as defendants seem to admit in their memoranda, and if it is obtained by an impermissible means, then an illegal tie-in could be established on this by predominately common proofs.

that common questions of law and fact predominate over individual questions on the liability issue of this tie-in claim, including the issue of impact as plaintiffs presently intend to prove impact.<sup>29</sup>

**[\*267] [\*\*105]** With regard to superiority of class treatment, if for purposes of class treatment we assume that plaintiffs' allegations are correct, then all class members are victims of the defendants' illegal tying arrangement. Until it has been determined as to the size of damages resulting from this illegal tie, it is hard to determine whether the levels of damages for each individual franchisee are sufficient to support and warrant an individual cause of action. Given the uncertainty of this, as well as the monumental task of taking on a complex and enormous litigation of a franchise antitrust claim, when added to the fact that each franchisee may also be reluctant to commence an individual action against the franchisor upon whom they are so dependent, it seems that a class action is a superior method, and that no alternative method of resolving this dispute would be as fair and efficient.

Clearly, this case can be bifurcated so that issues of liability are tried separately from those of damages. The Court can then consider whether to modify or whether to treat the damage claims as a class action, or use a Special Master or other device for calculation of damages. Notwithstanding defendants' **[\*\*106]** arguments on complexity of damages, these issues need not be addressed in detail at this time. While defendants dispute its continued vitality, there is substantial case authority holding that [HN21](#)[<sup>↑</sup>] the need to compute individual damages will not prevent class certification on issues of liability.<sup>30</sup> **[\*\*107]** If some mechanical method of computing individual damages, such as using some differential in profit margins charged multiplied by gross purchases by each individual franchisee, or some other common economic theory for measuring damages is not derived with possible use of subclasses, this Court could choose not to pursue the damages phase on a class basis.<sup>31</sup>

As noted by [Newberg on Class Actions](#), § 4.26 at p. 4-90 to 4-93 (3d ed. 1992):

In most cases, the amount of damages suffered is an individual matter, but the Advisory Committee Notes expressly state that such needed individual proof of damages will not preclude a finding of predominance. Courts have substantially reduced the judicial burdens of resolving individual damage issues through various

<sup>29</sup> If one uses heuristically the Deal to Ilitch memo of April 20, 1992, to posit the hypothetical assumption that plaintiffs could prove that Blue Line would lower its profit margin by "1.0 to 1.255 percentage points" in areas faced with a potential competitor and "about one-half that amount at other [Blue Line distribution] centers," then the issue of impact could be shown nationwide with common proofs. The analysis in my earlier Report and Recommendation at pp. 55-58, on the need for regional proofs, then would be applicable only to the exact measure of damages--i.e., does the class member get damages of 1% of past purchases because there was an available alternate distributor in the region or only 1/2% of past sales as damages because there was no immediately available alternate distributor. In my earlier Report and Recommendation, I discounted plaintiffs' asserted common proofs of impact and confused them with the types of proofs needed to prove actual damages. Such fact-finding is inappropriate in a determination on class certification, and in this Report and Recommendation I do not wish to repeat this error.

<sup>30</sup> As noted by the Sixth Circuit in [Sterling v. Velsicol Chemical Corp.](#), 855 F.2d 1188, 1197 (6th Cir. 1988):

No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.

I am also familiar with [In re Consumers Power Securities Litigation](#), 105 F.R.D. 583 (E.D. Mich. 1985). In that case the damages issues involved sales on multiple dates at different prices of Consumers' various securities, which prices were allegedly inflated due to varying degrees of non-disclosure about the problems that Consumers Power was having with the development of its nuclear power facility at Midland, Michigan. The difference money calculations for each sale of security based upon an imputed actual fair market value had disclosures been made involved damages calculations of complexities at least equal to those in this case, if not far more complex.

<sup>31</sup> Plaintiffs' experts Siwek and Nelson have proposed various formulaic methods to compute damages. Even if this Court does not select a formulaic method to compute damages on a class-wide basis or by regions, it is not clear that a series of individual mini-trials would be necessary given the historical trend that many complex cases settle once the liability issues have been determined.

devices such as bifurcated trials of liability and damages issues with same or different juries; use of master or magistrates to preside over individual damages proceedings; class decertification after liability trial accompanied by notice to the class....

Thus, the potential difficulties involving damages **[\*\*108]** in this case are not insurmountable and should not preclude class treatment over alternate means of litigating this dispute of national significance.

Accordingly, for the above-stated reasons, I recommend that the Court certify the proposed [Rule 23\(b\)\(3\)](#) damages class and allow the Smith plaintiffs to serve as class representatives.<sup>32</sup>

**[\*268] V. Class Certification on Tying Claim Injunction/Declaratory Judgment Relief:**

Plaintiffs seek class certification not only for their damages claims on the mid-1990 Franchise Agreement, but they also seek declaratory and injunctive relief for the same class under [Rule 23\(b\)\(2\)](#).<sup>33</sup> **HN22** [↑] In addition to the [Rule 23\(a\)](#) requirements of numerosity, common questions, typicality, and fair and adequate representation, [Rule 23\(b\)\(2\)](#) requires the plaintiffs to show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding **[\*\*109]** declaratory relief with respect to the class as a whole." Because I have recommended that the tying claim be certified for class treatment on damages, it should be similarly treated with respect to declaratory and any injunctive relief this Court may deem appropriate if it determines that there has been a tie-in violation.

In the present case, if proven, the defendants acted on "grounds generally applicable" to all post-mid-1990 franchisees thereby satisfying [Rule 23\(b\)\(2\)](#). See [Senter v. General Motors Corp.](#), 532 F.2d 511 (6th Cir. 1974), cert. denied, 429 U.S. 870, 50 L. Ed. 2d 150, 97 S. Ct. 182 (1976); [Weathers v. Peters Realty Corp.](#), 499 F.2d 1197 (6th Cir. 1974). The Court should consider certifying a declaratory and injunctive class even if it determines the case should not be certified under [Rule 23\(b\)\(3\)](#) for the damages claim.

Newberg, Wright, Miller and Kane, and the official Committee notes to [Rule 23\(b\)\(2\)](#) all conclude that **HN23** [↑] the defendants' allegedly wrongful conduct need not be directed at or damaging to every member of the class for a [Rule 23\(b\)\(2\)](#) class action. 1 H. Newberg, [Newberg on Class Actions](#), § 4.11 (3d ed. 1992); 7A Wright, Miller & Kane, [Federal Practice and Procedure](#), § 1775 at pp. 455-56 (2d ed. 1986); 1966 Committee notes to [Rule 23\(b\)\(2\)](#).

The 1966 Committee Notes use as an example of an appropriate injunctive class a challenge to the legality of an alleged tying arrangement:

So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

**HN24** [↑] [Rule 23\(b\)\(2\)](#) requires a showing that the party opposing the class acted on grounds generally applicable to the class. Unlike [Rule 23\(b\)\(3\)](#), it does not require the Court to determine the predominance of common **[\*\*111]** questions of law and fact or the superiority of class action treatment of adjudication.

Thus, I recommend this Court certify the proposed [Rule 23\(b\)\(3\)](#) declaratory and injunctive class and allow the Smith plaintiffs to serve as class representatives.<sup>34</sup>

<sup>32</sup> See footnote 3 above and surrounding text.

<sup>33</sup> The Court may determine that injunctive relief is not necessary in light of the fact that defendants recently have approved alternate distributors and have given them access to logoed products.

<sup>34</sup> See footnote 3 above and surrounding text.

**RECOMMENDATION**

IT IS RECOMMENDED that this Court certify the proposed damages and declaratory and injunctive class and allow the Smith plaintiffs to serve as class representatives.

As with my earlier Report, because of the length of this Report and Recommendation and the complexity of the issue, the parties should have twenty (20) business days from the service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Because service is by mail, this deadline date for objecting shall be November 4, 1996. See Fed. R. Civ. P. 6(e). Failure to file specific objections constitutes a waiver of any further right of appeal. Thomas v. Arn, 474 U.S. 140, 88 L. Ed. 2d 435, [\*\*112] 106 S. Ct. 466 (1985); Howard v. Secretary of HHS, 932 F.2d 505 (6th Cir. 1991); United States v. Walters, 638 F.2d 947 (6th Cir. 1981). Filing [\*269] of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. Smith v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge. (The service copy need not include exhibits submitted on this or the earlier class certification motion.)

Within ten (10) business days of service of any objecting party's timely filed objections, the opposing party may file a response. It should also be served on the Magistrate Judge without exhibits earlier submitted.

Objections and responses shall be not more than thirty-five (35) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

STEVEN D. PEPE

UNITED STATES MAGISTRATE JUDGE

Dated: September 30, 1996

Ann Arbor, Michigan

[\*\*113] ATTACHMENT

[EDITOR'S NOTE: THIS DOCUMENT IS REPORTED AT: 1989 U.S. Dist. LEXIS 9308.]

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End of Document



## **Heritage Home Health, Inc. v. Capital Region Health Care Corp.**

United States District Court for the District of New Hampshire

October 1, 1996, Decided ; October 1, 1996, Filed

Civil No. 95-558-JD

### **Reporter**

1996 U.S. Dist. LEXIS 22387 \*; 1996-2 Trade Cas. (CCH) P71,584

Heritage Home Health, Inc. v. Capital Region Health Care Corp., et al.

**Disposition:** [\*1] Defendants' motion for summary judgment (document no. 17) granted as to the claims in count III based on [RSA § 356:2](#). Defendants' motion for judgment on the pleadings on count IV (document no. 21) denied in part and granted in part. Defendants' motion for judgment on the pleadings on count V (document no. 18) granted.

## **Core Terms**

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patients, defendants', home health care, private right of action, prospective contractual relation, tortious interference, amended complaint, plaintiff's claim, subsidiaries, pleadings, providers, contractual relationship, summary judgment motion, motion for judgment, motion to dismiss, summary judgment, contracts, referrals

## **LexisNexis® Headnotes**

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

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 > Legal Entitlement

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

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

A court may only grant a motion for summary judgment where 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\(c\)](#). The party seeking summary judgment bears the initial burden of establishing the lack of a genuine issue of material fact. The court must view the entire record in the light most favorable to the nonmoving party, indulging all reasonable inferences in that party's favor. However, once the moving party has submitted a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegation or denials of its pleading, but must set forth specific facts showing that there is a genuine issue for trial.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## **HN2** [down] **Sherman Act, Claims**

[RSA § 356:2](#) (New Hampshire) prohibits contracts, combinations, and conspiracies that restrain trade or have various anticompetitive purposes or effects. [RSA § 356:2](#) (1995). Courts interpreting the provision specifically are authorized to use the antitrust laws of the United States as a guide. § 356:13. Given the unity of interest between and among a corporation and its subsidiaries, neither the coordinated activity of the corporation and its subsidiaries nor the coordinated activity of the subsidiaries can constitute a violation of the statute. Although the New Hampshire Supreme Court has not addressed the question of whether the joint conduct of a corporation and its employees can constitute a violation of the statute, federal courts construing the federal analog of [RSA § 356:2](#), § 1 of the Sherman Act, [15 U.S.C.S. § 1](#), hold that, absent proof of divergent interests between a corporation and its employees, the Copperweld doctrine precludes an action based on such conduct.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

## **HN3** [down] **Pretrial Judgments, Judgment on Pleadings**

A motion for judgment on the pleadings will be granted if, accepting all of the plaintiff's factual averments contained in the complaint as true, and drawing every reasonable inference helpful to the plaintiff's cause, 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's inquiry is a limited one, focusing not on whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. In making its inquiry, the court must accept all of the factual averments contained in the complaint as true, and draw every reasonable inference in favor of the plaintiff.

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

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

## **HN4** [down] **Intentional Interference, Elements**

New Hampshire recognizes the torts of intentional interference with contractual relations, and intentional interference with prospective contractual relations. The contract or prospective contract need not be reduced or expected to be reduced to a formal, written instrument. Instead, all that is required is a promise, or the reasonable expectation of a promise, creating a duty recognized by law.

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

## **HN5** [down] **Intentional Interference, Elements**

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is

subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

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

#### **HN6** [down arrow] **Intentional Interference, Elements**

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the 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 or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

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

#### **HN7** [down arrow] **Intentional Interference, Elements**

To permit a cause of action for tortious interference with prospective contractual relations to proceed in the absence of any relationship whatsoever between the plaintiff and its potential customers would run afoul of the New Hampshire Supreme Court's statement that to prove either tortious interference with a prospective agreement or tortious interference with a contractual relationship, the plaintiff must prove that a plaintiff had a contractual relationship with a third party.

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

#### **HN8** [down arrow] **Intentional Interference, Elements**

One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other.

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 > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

#### **HN9** [down arrow] **Regulated Practices, Monopolies & Monopolization**

**RSA § 356:3** (New Hampshire) prohibits the establishment, maintenance or use of monopoly power, or any attempt to establish, maintain or use monopoly power over trade or commerce for the purpose of affecting competition or controlling, fixing or maintaining prices.

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

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

#### **HN10** [down arrow] **Conspiracy to Monopolize, Sherman Act**

Section 2 of the Sherman Act prohibits the monopolization, or attempted monopolization, of any part of interstate commerce. 15 U.S.C.S. § 2.

Public Health & Welfare Law > Social Security > Medicare > General Overview

Public Health & Welfare Law > ... > Medicaid > Providers > General Overview

#### **HN11** [down arrow] **Social Security, Medicare**

42 U.S.C.S. § 1395a does not provide a private right of action to parties other than patients, for whose benefit the statute was enacted. In addition, § 1395nn, which prohibits physicians from making self-interested referrals for services otherwise payable by Medicare, appears not to have been enacted for the special benefit of health care providers seeking referrals, and specifically contemplates that the Secretary of Health and Human Services may initiate a civil action to recover payments made in violation of the statute or to assess civil monetary fines. 42 U.S.C.S. §§ 1395nn(g), § 1320a-7a(c). These factors evince a lack of congressional intent to confer a private right of action on the plaintiff through § 1395nn.

Public Health & Welfare Law > Social Security > Medicare > Eligibility

Public Health & Welfare Law > ... > Medicaid > Eligibility > General Overview

#### **HN12** [down arrow] **Medicare, Eligibility**

See 42 U.S.C.S. § 1395a.

Torts > ... > Proof > Violations of Law > General Overview

Torts > ... > Proof > Violations of Law > Statutes

#### **HN13** [down arrow] **Proof, Violations of Law**

Under New Hampshire law, liability may be based on the violation of a statute if the (1) plaintiff is a member of the class protected by the statute; (2) the harm inflicted is the type intended to be protected against; and (3) the legislature expressed an intent, either explicitly or implicitly, that a violation of the statute should give rise to a cause of action.

Antitrust & Trade Law > Consumer Protection > General Overview

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

Public Health & Welfare Law > Social Security > General Overview

**HN14** [blue icon] **Antitrust & Trade Law, Consumer Protection**

Concerning the first and second prongs of the Marquay test, the statutory scheme of [RSA § 125:25-b\(III\)](#) (New Hampshire) is designed to protect patients from making uninformed decisions, and does not specifically seek to provide another remedy to health care providers claiming to be victims of anticompetitive activity. As to the third prong, the court notes that neither provision expressly provides a private right of action to a party injured as a result of violations of the statute, and that both provisions contemplate enforcement through disciplinary action against offending practitioners or entities, to be meted out under the direction of the state division of public health services. [RSA § 125:25-b\(VI\)](#) (Supp. 1995); id. [§ 125:25-c\(VIII\)](#) (Supp. 1995).

Antitrust & Trade Law > Consumer Protection > General Overview

Public Health & Welfare Law > Healthcare > General Overview

**HN15** [blue icon] **Antitrust & Trade Law, Consumer Protection**

[RSA § 125:25-b](#) (New Hampshire) requires physicians with ownership interests in the entities to which they refer patients to disclose the nature of their interests to their patients. [RSA § 125:25-c](#) requires health care practitioners and entities owned by health care practitioners to disclose such interests to the state division of public health services.

Public Health & Welfare Law > Healthcare > General Overview

**HN16** [blue icon] **Public Health & Welfare Law, Healthcare**

[RSA § 125:25-b\(III\)](#) (New Hampshire) requires practitioners having an ownership interest in an entity to which he is referring patients to include the following language conspicuously on the face of a written referral: The referring health care practitioner maintains an ownership interest in the facility to which you are being referred. You are not required to utilize the facility to which you are being referred for these services. These services may be available elsewhere in the community. This office will provide an alternate referral upon your request. [RSA § 125:25-b\(III\)](#).

**Counsel:** For HERITAGE HOME HEALTH, INC., plaintiff: Peter G. McGrath, Esq., McGrath Law Office, PA, Concord, NH.

For CAPITAL REGION HEALTH CARE CORP., CONCORD HOSPITAL, INC., CONCORD REGIONAL VISITING NURSES ASSOCIATION, DAVID WORSTER, MARY LIMOGES, defendants: Donald J. Perrault, Esq., Wadleigh, Starr, Peters, Dunn, & Chiesa, Manchester, NH.

**Judges:** Joseph A. DiClerico, Jr., Chief Judge.

**Opinion by:** Joseph A. DiClerico, Jr.

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**Opinion****ORDER**

The plaintiff, Heritage Home Health, Inc. ("Heritage") brought this action against the defendants, Capital Region Health Care Corp. ("Capital Region"); two of Capital Region's wholly owned subsidiaries, Concord Hospital and Concord Regional Visiting Nurses Association ("VNA"); and David Worster and Mary Limoges, respectively, the

current and former Director of Social Services at Concord Hospital, alleging anticompetitive conduct under various [\*2] state and federal law theories. Before the court are the defendants' motion for summary judgment on count III of the plaintiff's amended complaint (document no. 17) and the defendants' motions to dismiss counts IV and V (documents nos. 21 & 18).

### *Background*

1

Heritage is a New Hampshire corporation licensed by the state to provide nursing services to patients in their homes and as a hospice to provide services to terminally ill patients. According to Heritage, consumers for home health services generally are either patients who have been discharged from hospitals and require follow-up care, or are patients who have received referrals from physicians or social workers acting in their capacity as hospital employees. Heritage actively and aggressively solicits referrals from hospitals throughout New Hampshire, including defendant Concord Hospital, which serves and, according to Heritage, "enjoys a virtual [\*3] monopoly over the provision of acute and emergency care services in," central New Hampshire. Amended Complaint P 28.

The defendant VNA is a not-for-profit corporation also providing home health services to patients. The VNA and Concord Hospital, both wholly owned subsidiaries of Capital Region, claim the same Concord address as their principal place of business. The defendants employ a "nurse liaison" who works at Concord Hospital and visits patients in need of home health care services, including those who may already have entered into contractual relationships with home health care providers, and refers the patients exclusively to the VNA for home health care services. The nurse liaison does not inform patients that the VNA is owned by the same corporation that owns the hospital, and the defendants have made no disclosures to the state division of public health services concerning either Capital Region's ownership of the VNA or the nature of the referral process at Concord Hospital. Heritage does not have access to the medical records of patients who receive care at Concord Hospital.

The plaintiff commenced this action on November 17, 1995, filed an amended complaint on December 20, 1995, and [\*4] moved to withdraw count I of its amended complaint on May 17, 1996. Thus, it currently alleges that the defendants (1) have attempted to monopolize and have monopolized the home health care market in central New Hampshire by committing various anticompetitive acts in violation of [section 2](#) of the Sherman Act, [15 U.S.C. § 2](#) (count II); have prevented home health care providers other than the VNA from gaining access to patients at Concord Hospital in violation of the New Hampshire Combinations and Monopolies Act, N.H. Rev. Stat. Ann. ("RSA") § 356 (count III); (3) tortiously interfered with the plaintiff's contractual and prospective contractual relations (count IV); and (4) failed to disclose their ownership interests in the VNA to patients at Concord Hospital and to the state division of public health services in violation of [42 U.S.C. §§ 1395a, 1395nn](#) and [RSA §§ 125:25-b, 125:25-c](#) (count V).

### *Discussion*

#### I. *Defendants' Motion for Summary Judgment*

The defendants argue that summary judgment is warranted on the claims asserted in count III that are based on [RSA § 356:2](#)<sup>2</sup> because the defendants -- a parent company, two of its [\*5] wholly owned subsidiaries, and two individuals acting in their roles as employees of one of the subsidiaries -- legally are incapable of contracting, combining, or conspiring in restraint of trade within the meaning of the statute.

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<sup>1</sup> The facts relevant to the instant motions either have been alleged by the plaintiff or are not in dispute.

<sup>2</sup> The defendants have not moved for summary judgment on the count III claims that allege violations of [RSA § 356:3](#).

**HN1**[] The court may only grant a motion for summary judgment where 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\(c\)](#). The party seeking summary judgment bears the initial burden of establishing the lack of a genuine issue of material fact. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); [Quintero de Quintero v. Aponte-Roque](#), 974 F.2d 226, 227-28 (1st Cir. 1992). The court must view [\*6] the entire record in the light most favorable to the plaintiff, "indulging all reasonable inferences in that party's favor." [Mesnick v. General Elec. Co.](#), 950 F.2d 816, 822 (1st Cir. 1991) (quoting [Griggs-Ryan v. Smith](#), 904 F.2d 112, 115 (1st Cir. 1990)), cert. denied, 504 U.S. 985 (1992). However, once the defendant has submitted a properly supported motion for summary judgment, the plaintiff "may not rest upon mere allegation or denials of its pleading, but must set forth specific facts showing that there is a genuine issue for trial." [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (citing [Fed. R. Civ. P. 56\(e\)](#)).

**HN2**[] [RSA § 356:2](#) prohibits contracts, combinations, and conspiracies that restrain trade or have various anticompetitive purposes or effects. [RSA § 356:2](#) (1995). Courts interpreting the provision specifically are authorized to use the antitrust laws of the United States as a guide. *Id.* § 356:13. Given the unity of interest between and among a corporation and its subsidiaries, neither the coordinated activity of the corporation and its subsidiaries nor the [\*7] coordinated activity of the subsidiaries can constitute a violation of the statute. [Kenneth E. Curran, Inc. v. Auclair Transp., Inc.](#), 128 N.H. 743, 748-49, 519 A.2d 280, 284 (1986) (citing [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984); [Century Oil Tool, Inc. v. Production Specialties, Inc.](#), 737 F.2d 1316, 1317 (5th Cir. 1984)). Although the New Hampshire Supreme Court has not addressed the question of whether the joint conduct of a corporation and its employees can constitute a violation of the statute, federal courts construing the federal analog of [RSA § 356:2](#), section 1 of the Sherman Act, [15 U.S.C. § 1](#), have held that, absent proof of divergent interests between a corporation and its employees, the Copperweld doctrine precludes an action based on such conduct. See, e.g., [Okusami v. Psychiatric Inst.](#), 295 U.S. App. D.C. 58, 959 F.2d 1062, 1065 (D.C. Cir. 1992); [Odishelidze v. Aetna Life & Casualty Co.](#), 853 F.2d 21, 23 (1st Cir. 1988). In light of the statute's instruction that courts look to federal [antitrust law](#) for [\*8] guidance, the New Hampshire Supreme Court's acceptance of the Copperweld doctrine, and the absence of any allegations of divergent interests among the defendants, the court finds that the plaintiff has failed to demonstrate that the defendants were legally capable of forming a contract, combination, or conspiracy in violation of [RSA § 356:2](#).

Accordingly, the court grants summary judgment to the defendants on the plaintiff's count III claims alleging violations of [RSA § 356:2](#).

## II. Defendants' Motions Under [Rule 12](#)

The defendants have moved to dismiss counts IV and V of the amended complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim upon which relief can be granted. However, because the defendants already have filed an answer to the plaintiffs' complaint, the pleadings have closed under [Fed. R. Civ. P. 7\(a\)](#). As such, the court will treat the defendants' motions to dismiss counts IV and V as motions for judgment on the pleadings. See [Fed. R. Civ. P. 12\(c\)](#).

**HN3**[] A motion for judgment on the pleadings will be granted if, accepting all of the plaintiff's factual averments contained in the complaint as true, and drawing every reasonable inference helpful [\*9] to the plaintiff's cause, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [Rivera-Gomez v. de Castro](#), 843 F.2d 631, 635 (1st Cir. 1988). The court's inquiry is a limited one, focusing not on "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." [Scheuer v. Rhodes](#), 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974) (motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#)). In making its inquiry, the court must accept all of the factual averments contained in the complaint as true, and draw every reasonable inference in favor of the plaintiff. [Garita Hotel Ltd. Partnership v. Ponce Fed. Bank](#), 958 F.2d 15, 17 (1st Cir. 1992) ([Rule 12\(b\)\(6\)](#) motion); [Santiago de Castro v. Morales Medina](#), 943 F.2d 129, 130 (1st Cir. 1991) ([Rule 12\(c\)](#) motion).

#### A. Count IV: Tortious Interference with Contractual and Prospective Contractual Relations

The defendants argue that the plaintiff has failed to state a claim for tortious interference with contractual and prospective contractual [\*10] relations because the plaintiff has failed to identify any contracts between itself and patients that existed or were likely to exist with which the defendants interfered. They further contend that any interference with the plaintiff's contracts or prospective contracts was not, as a matter of law, improper.

**HN4**[] New Hampshire recognizes the torts of intentional interference with contractual relations, see, e.g., *Montrone v. Maxfield*, 122 N.H. 724, 726, 449 A.2d 1216, 1217 (1982) (citing *Restatement (Second) of Torts* § 766 (1979)),<sup>3</sup> and intentional interference with prospective contractual relations, see, e.g., *Baker v. Dennis Brown Realty, Inc.*, 121 N.H. 640, 644, 433 A.2d 1271, 1273-74 (1981) (citing *Restatement (Second) of Torts* § 766B (1979)).<sup>4</sup> The contract or prospective contract need not be reduced or expected to be reduced to a formal, written instrument. Instead, all that is required is a promise, or the reasonable expectation of a promise, creating a duty recognized by law. *Restatement (Second) of Torts* § 766 cmt. f (1979); *id.* § 766B cmt. c; see *Fineman v. Armstrong World Indus.*, 774 F. Supp. 225, 233-34 (D.N.J. 1991) [\*11] (interpreting *Restatement* § 766B), rev'd on other grounds, 980 F.2d 171 (3d Cir. 1992), cert. denied, 507 U.S. 921, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993).

[\*12] Here, the plaintiff has alleged that patients with whom it had established some form of business relationship "were, upon discharge [from Concord Hospital], intentionally diverted to VNA for their home health care needs," and that the defendants knew of the patients' relationships with the plaintiff. See Amended Complaint PP 45-47. These allegations provide an adequate factual basis for the plaintiff's claims of tortious interference with contractual relations.

However, to the extent the plaintiff also seeks relief based on its allegation that, given its capabilities, it had and has "prospects of contractual relations with a portion of the market of home health care patients that exists in the central New Hampshire area," *id.* P 48, it has failed to state a claim. The court has found no authority for the proposition that a plaintiff may bring an action for tortious interference with prospective contractual relations based solely on a plaintiff's potential for capturing a share of a given market. Moreover, **HN7**[] to permit such a cause of action to proceed in the absence of any relationship whatsoever between the plaintiff and its potential customers would run afoul of the New Hampshire [\*13] Supreme Court's statement that "to prove either tortious interference with a prospective agreement or tortious interference with a contractual relationship, the plaintiff must prove . . . that a plaintiff had a contractual relationship with" a third party. *Montrone*, 122 N.H. at 726, 449 A.2d at 1217. Accordingly, the court finds that the plaintiff has stated a claim for tortious interference with prospective contractual relations only to the extent it seeks relief for the defendants' interference with already existing relationships that give rise to a "reasonable expectation of economic advantage." *Fineman*, 774 F. Supp. at 234.

<sup>3</sup> *Section 766 of the Restatement* provides:

##### Intentional Interference with Performance of Contract by Third Person

**HN5**[] One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

<sup>4</sup> *Section 766B of the Restatement* provides:

##### Intentional Interference with Prospective Contractual Relation

**HN6**[] One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the 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 or continue the prospective relation or
- (b) preventing the other from acquiring or continuing the prospective relation.

As to the defendants' claim that its conduct was not, as a matter of law, improper, their argument is without merit. The Restatement provides in pertinent part:

### **Competition as Proper or Improper Interference**

**HN8** [↑] (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if

- (a) the relation concerns a matter involved in the competition [\*14] between the actor and the other and
- (b) the actor does not employ wrongful means and
- (c) his action does not create or continue an unlawful restraint of trade and
- (d) his purpose is at least in part to advance his interest in competing with the other.

*Restatement (Second) of Torts § 768* (1979). The defendants boldly assert that, based on their motion for summary judgment on count III, the plaintiff cannot show that the defendants' actions were wrongful or that their actions constituted an unlawful restraint of trade. However, as noted *supra*, the defendants have acknowledged that their motion for summary judgment on count III is directed only at the plaintiff's claims under [RSA § 356:2](#), and does not address the plaintiff's claims under **HN9** [↑] [RSA § 356:3](#), which prohibits "the establishment, maintenance or use of monopoly power, or any attempt to establish, maintain or use monopoly power over trade or commerce for the purpose of affecting competition or controlling, fixing or maintaining prices." In addition, count II of the amended complaint alleges that the defendants violated **HN10** [↑] [section 2](#) of the Sherman Act, which prohibits the monopolization, or attempted monopolization, [\*15] of any part of interstate commerce. [15 U.S.C.A. § 2 \(West Supp. 1996\)](#). The plaintiff has pleaded facts sufficient to support its claims that the defendants wrongfully and unlawfully interfered with the defendants' contractual and prospective contractual relations.

The defendants' motion for judgment on the pleadings on count IV is denied to the extent the plaintiff seeks relief for the defendants' interference with already existing relationships, and granted to the extent the plaintiff's claim is based on its potential for capturing a share of the home health care market.

### **B. Count V: Failure to Disclose Ownership Interests**

The defendants argue that dismissal is warranted on the plaintiff's failure to disclose claims under [42 U.S.C. §§ 1395a, 1395nn](#) and [RSA §§ 125:25-b, 125:25-c](#), because none of these statutory provisions confers a private right of action upon health care providers. The court considers these claims *seriatim*.

#### **1. [42 U.S.C. §§ 1395a, 1395nn](#)**

Despite the plaintiff's contention that "the plain language of [42 U.S.C. \[§\] 1395](#) allows this cause of action," Memorandum [\*16] of Law in Opposition to Motion to Dismiss at 6, the court has found no cases holding that the provisions of the statute under which the plaintiff is proceeding provide a private right of action to health care providers. In fact, both federal courts that have considered the question have concluded that **HN11** [↑] [§ 1395a](#) does not provide a private right of action to parties other than patients, for whose benefit the statute was enacted.<sup>5</sup> [Mays v. Hospital Auth.](#), 582 F. Supp. 425, 430-31 (N.D. Ga. 1984) (no private right of action for physicians); [Home Health Care Services, Inc. v. Currie](#), 531 F. Supp. 476, 478 (D.S.C. 1982) (no private right of action for home health care providers), aff'd, [706 F.2d 497 \(1983\)](#).<sup>6</sup> In addition, [§ 1395nn](#), which prohibits physicians from making self-

<sup>5</sup> The statute provides:

**HN12** [↑] Any individual entitled to insurance benefits under this subchapter may obtain health services from any institution, agency, or person qualified to participate under this subchapter if such institution, agency, or person undertakes to provide him such services.

[42 U.S.C.A. § 1395a \(West 1992\)](#).

interested referrals for services otherwise payable by Medicare, appears not to have been enacted for the special benefit of health care providers seeking referrals, and specifically contemplates that the Secretary of Health and Human Services may initiate a civil action to recover payments made in violation of the statute or to assess civil monetary fines. See [\*17] [42 U.S.C. § 1395nn\(g\) \(West Supp. 1996\)](#); *id.* [§ 1320a-7a\(c\)](#) (West Supp. 1996). These factors evince a lack of congressional intent to confer a private right of action on the plaintiff through [§ 1395nn](#). See [Cort v. Ash, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 \(1975\)](#). Accordingly, the plaintiff's claims under [42 U.S.C. § 1395](#) are dismissed.

[\*18] B. [RSA §§ 125:25-b, 125:25-c](#)

[HN13](#) [↑] Under New Hampshire law, liability may be based on the violation of a statute if the (1) plaintiff is a member of the class protected by the statute; (2) the harm inflicted is the type intended to be protected against; and (3) the legislature expressed an intent, either explicitly or implicitly, that a violation of the statute should give rise to a cause of action. [Marquay v. Eno, 139 N.H. 708, 715, 662 A.2d 272, 277-78 \(1995\)](#) (quoting [Bob Godfrey Pontiac, Inc. v. Roloff, 291 Ore. 318, 326, 630 P.2d 840, 844-45 \(1981\)](#)). After reviewing the language and structure of the disclosure requirements of [RSA §§ 125:25-b, 125:25-c](#),<sup>7</sup> [\*20] the court finds that no private right of action is available to the plaintiff under either provision. [HN14](#) [↑] Concerning the first and second prongs of the *Marquay* test, the court infers from the disclosure requirement set forth in [RSA § 125:25-b\(III\)](#)<sup>8</sup> that the statutory scheme is designed to protect patients from making uninformed decisions, and does not specifically seek to provide another remedy to health care providers claiming to be victims of anticompetitive activity. As to the third prong, [\*19] the court notes that neither provision expressly provides a private right of action to a party injured as a result of violations of the statute, and that both provisions contemplate enforcement through disciplinary action against offending practitioners or entities, to be meted out under the direction of the state division of public health services. See [RSA § 125:25-b\(VI\)](#) (Supp. 1995); *id.* [§ 125:25-c\(VIII\)](#) (Supp. 1995). Finally, the court notes that the New Hampshire Supreme Court has yet to recognize any private right of action under the statutory scheme, and that, as a general matter, "expansive reading of New Hampshire statutes and recognition of novel causes of action under those statutes is a practice best left to the New Hampshire Supreme Court." [Kelley v. City of Manchester, No. 94-358-M, slip op. at 17 \(D.N.H. Sept. 29, 1995\)](#). Accordingly, the plaintiff's claims under [RSA §§ 125:25-b, 125:25-c](#) are dismissed.

## Conclusion

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<sup>6</sup>The court pauses to note that its resolution of the instant motion has been hampered by the amoebic nature of the plaintiff's claims. Prior to specifying the provisions of [§ 1395](#) under which it is seeking relief, the plaintiff distinguished *Mays* and *Currie* on the ground that they involved provisions that were "entirely different" than those implicated by the instant action. Memorandum of Law in Opposition to Motion to Dismiss at 6. It was only after twice being ordered by the court to specify the provisions under which it was proceeding that the plaintiff made reference to [§ 1395a](#), the very provision under which *Mays* and *Currie* were decided, and [§ 1395nn](#).

<sup>7</sup>[HN15](#) [↑] [RSA § 125:25-b](#) requires physicians with ownership interests in the entities to which they refer patients to disclose the nature of their interests to their patients. [RSA § 125:25-c](#) requires health care practitioners and entities owned by health care practitioners to disclose such interests to the state division of public health services.

<sup>8</sup>[HN16](#) [↑] The statute requires practitioners having an ownership interest in an entity to which he is referring patients to include the following language conspicuously on the face of a written referral:

The referring health care practitioner maintains an ownership interest in the facility to which you are being referred. You are not required to utilize the facility to which you are being referred for these services. These services may be available elsewhere in the community. This office will provide an alternate referral upon your request.

The defendants' motion for summary judgment (document no. 17) is granted as to the claims in count III based on [RSA § 356:2](#). The defendants' motion for judgment on the pleadings on count IV (document no. 21) is denied to the extent the plaintiff seeks relief for the defendants' interference with already existing relationships, and granted to the extent the plaintiff's claim is based on its potential for capturing a share of the home health care market. The defendants' motion for judgment on the pleadings on count [\*21] V (document no. 18) is granted.

SO ORDERED.

Joseph A. DiClerico, Jr.

Chief Judge

October 1, 1996

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End of Document

## In re Citric Acid Antitrust Litig.

United States District Court for the Northern District of California

October 1, 1996, Decided ; October 2, 1996, FILED

MDL No. 95-1092 and Master File No. C-95-2963 FMS

**Reporter**

1996 U.S. Dist. LEXIS 16409 \*; 1996-2 Trade Cas. (CCH) P71,595

IN RE: CITRIC ACID ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: All Actions

**Disposition:** [\*1] Plaintiffs' motion for class certification granted.

## **Core Terms**

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citric acid, prices, class member, products, conspiracy, antitrust, class action, courts, class certification, price-fixing, predominate, purchasers, cases, certification, plaintiffs', class representative, alleged conspiracy, question of law, class-wide, unfamiliar, Bottling, lawsuit, parties

## **LexisNexis® Headnotes**

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Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### [HN1](#) [down arrow] **Class Actions, Certification of Classes**

The burden of proving that a class is appropriate rests with the proponent of the class. The party seeking to maintain the action as a class suit must, therefore, establish a prima facie showing of each of the four certification prerequisites and must demonstrate that appropriate grounds for a class action exist. The failure to carry this burden as to any one of the requirements precludes the maintenance of the lawsuit as a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### [HN2](#) [down arrow] **Prerequisites for Class Action, Numerosity**

Fed. R. Civ. P. 23(a) sets out four conjunctive requirements that must be met in all class actions: (1) the class must be so numerous that joinder of all members is impracticable, (2) there must be questions of law or fact common to the class, (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class, and (4) the representative parties must fairly and adequately protect the interests of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Criminal Law & Procedure > Trials > Verdicts > Inconsistent Verdicts

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN3** [] **Prerequisites for Class Action, Predominance**

Under [Fed. R. Civ. P. 23\(b\)](#), the trial court must find either: (1) that common questions of law or fact predominate and that a class action is superior to other available methods of adjudication, (2) that the defendant acted or refused to act on grounds generally applicable to the class, so that declaratory or injunctive relief is appropriate with respect to the entire class, (3) that the prosecution of individual actions would create a risk of inconsistent verdicts that would establish incompatible standards of conduct for defendant, or (4) that adjudication of individual claims would be dispositive of the claims of non-party class members, or substantially impede the ability of non-party class members to pursue their own claims. [Fed. R. Civ. P. 23\(b\)\(1\)-\(3\)](#).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN4** [] **Class Actions, Certification of Classes**

Before ordering that a lawsuit may proceed as a class action, the trial court must rigorously analyze whether the class action allegations meet the requirements of [Fed. R. Civ. P. 23](#). Because the early resolution of the class certification question requires some degree of speculation, however, all that is required is that the trial court form a "reasonable judgment" on each certification requirement. In formulating this judgment, the trial court may properly consider both the allegations of the class action complaint and the supplemental evidentiary submissions of the parties.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN5** [] **Class Actions, Prerequisites for Class Action**

[Fed. R. Civ. P. 23\(a\)\(1\)](#) requires that the size of the proposed class be so large that joinder of all class members is impracticable. There is no set numerical cut-off.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN6** [] **Prerequisites for Class Action, Numerosity**

A finding of numerosity may be supported by common-sense assumptions.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

#### [\*\*HN7\*\*](#) [down] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(a)(3) requires that the claims or defenses of the plaintiff seeking to be the named representative for the class be typical of those of the other members of the class for which certification is sought. The claims and defenses are typical if they stem from the same event, practice, or course of conduct that forms the basis of the claims of the class and are based on the same legal or remedial theory.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

#### [\*\*HN8\*\*](#) [down] **Class Actions, Certification of Classes**

Parties are generally considered to be adequate representatives of absent class members if there are no conflicts of interest between the representatives and class members, and if the trial court is persuaded that counsel for the representatives will vigorously pursue the action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

#### [\*\*HN9\*\*](#) [down] **Class Actions, Prerequisites for Class Action**

In determining the adequacy of representation of a class, the emphasis has been and should be placed on whether the representative's counsel is capable.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

#### [\*\*HN10\*\*](#) [down] **Class Actions, Prerequisites for Class Action**

The threshold of knowledge required to qualify a class representative is not high. A party must be familiar with the basic elements of his claim and will be deemed inadequate only if she is "startlingly unfamiliar" with the case.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

#### [\*\*HN11\*\*](#) [down] **Class Actions, Prerequisites for Class Action**

It is not necessary that a representative be intimately familiar with every factual and legal issue in the case. It is enough that the representative understand the gravamen of the claim.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

#### [\*\*HN12\*\*](#) [down] **Class Actions, Prerequisites for Class Action**

In determining adequacy of representation, the trial court must evaluate the ability of the named representatives to represent the interest of the class fairly and adequately. This inquiry focuses on whether the representative has antagonistic or conflicting interests with the unnamed class members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN13** [blue icon] Prerequisites for Class Action, Predominance

In deciding whether a class action can be maintained under [\*Fed. R. Civ. P. 23\(b\)\(3\)\*](#), the trial court must focus on liability issues.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

Civil Procedure > ... > Class Actions > Certification of Classes > Decertification

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > Judicial Officers > References

### **HN14** [blue icon] Class Actions, Certification of Classes

Courts resolve doubts in antitrust actions in favor of certifying a class. The trial court retains the authority, however, to withdraw class certification in part or in whole, should the questions of adequate representation or predominance of common issues develop so as to make a class action unwarranted. Other options short of decertification are also available to the trial court if individual issues arise but do not predominate. These include referral to a magistrate judge or creation of subclasses.

**Counsel:** For 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC., Plaintiff, (Master File No. C-95-2963 FMS): Kirk B. Hulett, Barrack Rodos & Bacine, San Diego, CA. Leonard Barrack, Steven A. Asher, Barrack Rodos & Bacine, Philadelphia, PA. Guido Saveri, Richard Saveri, Saveri & Saveri, San Francisco, CA. Joseph W. Cotchett, Bruce L. Simon, Nancy L. Fineman, Cotchett & Pitre, Burlingame, CA. Steven A. Kanner, Michael J. Freed, Michael Hyman, Much Shelist Freed Denenberg, Ament & Eiger PC, Chicago, IL.

For ARCHER DANIELS MIDLAND CO., INC., defendant, (Master File No. C-95-2963 FMS): Edward P. Sangster, Robert Brewer, Jr., McKenna & Cuneo LLP, San Francisco, CA. Aubrey M. Daniel, III, John E. Schmidlein, Steven R. Kuney, Williams & Connolly, Washington, DC.

For CARGILL INC, defendant, (Master File No. C-95-2963 FMS): Charles F. Preuss, Vernon I. Zvoleff, John J. Powers, Preuss Walker & Shanagher, San Francisco, CA. Robert E. Bloch, Mark W. Ryan, Mayer Brown & Platt, Washington, DC.

**Judges:** FERN M. SMITH, United States District Judge

**Opinion by:** FERN M. SMITH

## Opinion

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### ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

#### INTRODUCTION

The individual [\*2] and representative plaintiffs ("plaintiffs") seek certification under [Federal Rule of Civil Procedure 23\(a\)\(1\)-\(4\)](#) and [23\(b\)\(3\)](#) of the following plaintiff class ("class"):

All persons and entities in the United States (excluding governmental entities, defendants, defendants' parents, subsidiaries and affiliates, and other producers of citric acid and their subsidiaries and affiliates) who purchased citric acid directly from any of the defendants at any time during the period from January 1, 1991 to and including June 30, 1995.<sup>1</sup>

The class alleges a conspiracy among defendants to raise, fix, maintain, and stabilize prices of citric acid throughout the United States, and to allocate their major customers or accounts among themselves for the purpose of selling citric acid in violation of section one of the Sherman Act, [15 U.S.C. § 1](#), and sections four and sixteen of the Clayton Act, [15 U.S.C. § 15, 26](#).

#### BACKGROUND

Citric acid is an amino acid derived from corn. It comes in a [\*3] variety of forms, including crystal, powder, and liquid, and has a wide range of uses. It is used as a preservative and flavoring agent in food; as a phosphate substitute in cleaning products; as a flavoring and stabilizing agent in pharmaceuticals; for industrial cleaning and finishing; and in agriculture. Defendants in this lawsuit are major manufacturers, sellers, and/or distributors of citric acid in the United States.

In June 1995, the Department of Justice began an investigation into possible antitrust violations in the citric acid industry. In August 1995, plaintiffs, who are purchasers of citric acid, began to file claims against defendants.

Plaintiffs allege a conspiracy among defendants to raise, fix, maintain, and stabilize prices of citric acid throughout the United States, and to allocate their major customers or accounts among themselves. Defendants allegedly effected the conspiracy by discussing and agreeing on general price increases; approving and issuing general price increases to reflect their agreements; and monitoring and enforcing adherence to those prices. As a result, plaintiffs allege, purchasers of citric acid paid artificially high and non-competitive prices [\*4] for the product. Plaintiffs seek declaratory and injunctive relief, as well as treble damages under [antitrust law](#).

Plaintiffs proffer six class representatives. Trans-Packers Services Corp., of New York, is a contract packaging firm that prepares dry food and beverages for the Department of Defense and large private companies. Varni Brothers Corp., of California, manufactures, bottles, cans, and distributes soft-drinks and other beverages. The 7-Up Bottling Company of Philadelphia was, until a recent asset sale, a major soft-drink bottling company in the mid-Atlantic region. Southeastern Specialty Foods, of Mississippi, was a manufacturer and bottler of fruit beverages until the fall of 1994. Gangi Brothers, of California, is a processor of tomato products. The 7-Up Bottling Company of San Francisco is a major soft-drink bottling company in the western region.

#### DISCUSSION

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<sup>1</sup> Plaintiffs seek to interpret this definition as including those who purchased citric acid outside the United States, as well. The definition is not susceptible to this interpretation.

## I. Evidentiary Burden and Standard for Class Certification

**HN1**[] The burden of proving that a class is appropriate rests with the proponent of the class. *In re Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982); *Shields v. Smith*, [1992 Transfer Binder] [\*5] Fed. Sec. L. Rep. (CCH) P 97,001, 94,376 (N.D. Cal. 1992). The party seeking to maintain the action as a class suit must, therefore, establish a *prima facie* showing of each of the four certification prerequisites and must demonstrate that appropriate grounds for a class action exist. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975), cert. denied, 429 U.S. 816, 50 L. Ed. 2d 75, 97 S. Ct. 57 (1976). The failure to carry this burden as to any one of the requirements precludes the maintenance of the lawsuit as a class action. *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975).

Class certification is governed by *Federal Rule of Civil Procedure 23*, which provides for a two-step procedure. First, **HN2**[] subsection (a) of *Rule 23* sets out four conjunctive requirements that must be met in all class actions:

- (1) the class [must be] so numerous that joinder of all members is impracticable,
- (2) there [must be] questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class, and
- (4) the representative parties [must] fairly and adequately protect the [\*6] interests of the class.

If these requirements are met, the proponent must also show that it has met one of the four disjunctive prerequisites of subsection (b) of *Rule 23*. **HN3**[] Under this subsection, the Court must find either: (1) that common questions of law or fact predominate and that a class action is superior to other available methods of adjudication; (2) that the defendant acted or refused to act on grounds generally applicable to the class, so that declaratory or injunctive relief is appropriate with respect to the entire class; (3) that the prosecution of individual actions would create a risk of inconsistent verdicts that would establish incompatible standards of conduct for defendant; or (4) that adjudication of individual claims would be dispositive of the claims of non-party class members, or substantially impede the ability of non-party class members to pursue their own claims. *Fed. R. Civ. P. 23(b)(1)-(3)*.

**HN4**[] Before ordering that a lawsuit may proceed as a class action, the trial court must rigorously analyze whether the class action allegations meet the requirements of *Rule 23*. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. [\*7] 2364 (1982); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992). Because the early resolution of the class certification question requires some degree of speculation, however, all that is required is that the Court form a "reasonable judgment" on each certification requirement. In formulating this judgment, the Court may properly consider both the allegations of the class action complaint and the supplemental evidentiary submissions of the parties. *Blackie*, 524 F.2d at 900-01 & n.17.

## II. Analysis

### A. *Rule 23(a)* Requirements

#### 1. Numerosity

**HN5**[] *Rule 23(a)(1)* requires that the size of the proposed class be so large that joinder of all class members is impracticable. There is no set numerical cut-off. *Welling v. Alexy*, 155 F.R.D. 654, 656 (N.D. Cal. 1994) (citing example of approved class with fourteen members, and case in which certification was denied for class of more than 300).

Plaintiffs are unable to give a precise number of class members at this stage; however, they maintain that based on the nature of the citric acid market and the allegation of a nationwide conspiracy, the total number of class members will be in the thousands. [\*8] Pls.' Mem. at 8. **HN6**[] A finding of numerosity may be supported by such common-sense assumptions. *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 184 (N.D. Ill. 1992). Defendants do not dispute that this first requirement is met.

## 2. Common Questions of Law or Fact

Rule 23(a)(2) requires that there be questions of law or fact common to the members of the proposed class. Plaintiffs argue that their antitrust claims against defendants involve common legal and factual questions regarding the existence, scope, and effect of the alleged price-fixing conspiracy. In deciding to transfer this litigation to the Court, the Judicial Panel on Multidistrict Litigation expressly found that the actions present common questions of fact. *In re Citric Acid Antitrust Litig.*, MDL-1092, at 4-5 (J.P.M.L. 1995). Defendants do not dispute that this requirement is met.

## 3. Typicality

HN7 [Rule 23\(a\)\(3\)](#) requires that the claims or defenses of the plaintiff seeking to be the named representative for the class be typical of those of the other members of the class for which certification is sought. The claims and defenses are typical if they stem from the same event, practice, or course of conduct [\*9] that forms the basis of the claims of the class and are based on the same legal or remedial theory. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1321 (9th Cir. 1982), vacated on other grounds, 459 U.S. 810 (1982).

The alleged underlying course of conduct in this case is defendants' conspiracy to fix the price of citric acid and to allocate customers among themselves during the period from January 1, 1991 through June 30, 1995. The legal theory that plaintiffs rely on is antitrust liability. Because plaintiffs and all class members share these claims and this theory, the representatives' claims are typical of all. See *In re Amino Acid Lysine Antitrust Litig.*, No. 95 C 7679, MDL-1083, at 16 (1996). Defendants do not dispute that this requirement is met.

## 4. Adequacy of Representation

Rule 23(a)(4) requires that the plaintiff seeking to certify a class demonstrate that as the representative of the class she will fairly and adequately protect the interests of the class. HN8 [Parties](#) are generally considered to be adequate representatives of absent class members if there are no conflicts of interest between the representatives and class members, and if the Court is persuaded [\*10] that counsel for the representatives will vigorously pursue the action. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. at 157 n.13.

Defendants contend that the proffered representatives are inadequate because (1) they are unfamiliar with the case, and (2) they are not truly representative of the class.

### a. Familiarity With the Case

HN9 [In](#) determining the adequacy of representation of a class, "the emphasis has been and should be placed on whether the representative's counsel is capable." *Shields v. Smith*, [1992 Transfer Binder]Fed. Sec. L. Rep. (CCH) P 97,001, at 94,377 (ND. Cal. 1992); [Weinberger v. Jackson](#), 102 F.R.D. 839, 845 (N.D. Cal. 1984). Defendants do not contest the qualifications of plaintiffs' counsel. They do contest the named plaintiffs' familiarity with the case, however, and that is also a factor that courts consider in determining adequacy.

HN10 [The](#) threshold of knowledge required to qualify a class representative is not high; a party must be familiar with the basic elements of his claim, [Burkhalter Travel Agency v. MacFarms Int'l, Inc.](#), 141 F.R.D. 144, 153-54 (N.D. Cal. 1991), and will be deemed inadequate only if she is "startlingly unfamiliar" [\*11] with the case. [Greenspan v. Brassler](#), 78 F.R.D. 130, 133-34 (S.D.N.Y. 1978); see also [Welling v. Alexy](#), 155 F.R.D. at 659 (plaintiff inadequate because he showed a "complete lack of interest in the conduct of the case"); [Koenig v. Benson](#), 117 F.R.D. 330, 337 (E.D.N.Y. 1987) (plaintiff inadequate because of "alarming unfamiliarity" with lawsuit).

HN11 [It](#) is not necessary that a representative "be intimately familiar with every factual and legal issue in the case." *In re Worlds of Wonder Sec. Litig.*, [1989-1990 Transfer Binder]Fed. Sec. L. Rep. (CCH) P 95,004, 95,627

(N.D. Cal. 1990). It is enough that the representative understand the gravamen of the claim. *Id.* Those courts that have found representatives inadequate have done so because plaintiffs knew nothing about the case and completely relied on counsel to direct the litigation. E.g., [\*Rolex Employees Retirement Trust v. Mentor Graphics Corp.\*, 136 F.R.D. 658, 665-66 \(D. Or. 1991\)](#).

Defendants make a series of arguments regarding the familiarity of each representative with the litigation. They contend that plaintiffs are unfamiliar with the parties and counsel in the case, the procedural history of the case, [\*12] the market for citric acid, and their responsibilities as class representatives. See Defs.' Mem. at 6-11. Defendants also assert that plaintiffs have no personal knowledge of any price-fixing. *Id.*

Based on a review of the deposition testimony presented by plaintiffs and defendants,<sup>2</sup> the Court finds that plaintiffs have a basic understanding of the contours of the case, their own purchase and use of citric acid, and the role of class representatives in general. Plaintiffs' corporate representatives do not have comprehensive knowledge of the litigation; however, the inability to name all defendants, to explain the strategy underlying the complaint, or to understand how antitrust damages are calculated does not amount to startling unfamiliarity.<sup>3</sup>

[\*13] This case is distinguishable from authority cited by defendants. For example, in *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, the court deemed the plaintiff an inadequate representative because its executives did not understand who the defendants in the action were, did not know the composition of the class, and did not understand purchasing and pricing policies in their own firm or in the industry. [141 F.R.D. at 154](#). In *Rolex Employees Retirement Trust v. Mentor Graphics*, the representative could not describe the allegations of the complaint. [136 F.R.D. at 666](#). In *Welling v. Alexy*, the representative was a frequent filer, who stated that his only role was to alert his lawyers that there was a possible case. [155 F.R.D. at 658](#).

In this case, the proposed representatives all know that defendants were manufacturers, sellers, and distributors of citric acid; are able to identify the major defendants; understand that the class is made up of purchasers of citric acid who may have been the victims of price-fixing; and demonstrate an understanding of the purchase and use of citric acid in their own businesses.

Regarding defendants' argument that plaintiffs have no [\*14] personal knowledge of price-fixing, defendants do not cite, nor is the Court aware of, any authority requiring personal knowledge to establish familiarity with a class action. Moreover, it defies common sense that plaintiffs alleging a conspiracy would have personal knowledge of it, unless they were involved. Presumably, if plaintiffs had been involved as beneficiaries of the conspiracy, they would not need to bring this lawsuit.

For these reasons, the Court finds the proffered representatives to be sufficiently familiar with the litigation.

## b. Representativeness

**HN12** In determining adequacy of representation, the Court must evaluate the ability of the named representatives to represent the interest of the class fairly and adequately. [\*In re Diasonics Sec. Litig.\*, 599 F. Supp. 447, 452 \(N.D. Cal. 1984\)](#). This inquiry focuses on whether the representative has antagonistic or conflicting interests with the unnamed class members. [\*Weinberger v. Jackson\*, 102 F.R.D. at 844-855](#).

Defendants argue that plaintiffs do not adequately represent the broader class for a number of reasons:

<sup>2</sup>The Court's analysis is hindered by the failure of either side to provide complete deposition transcripts. This evaluation is therefore based only on review of selected excerpts.

<sup>3</sup>Moreover, defendants' allegations of unfamiliarity frequently overstate the case. For example, defendants suggest that Daniel Weiss, corporate representative for Trans-Packers Services, had "no idea" about Trans-Packers' purchase volume in recent years. Def. Mem. at 7. In fact, the deposition transcript reveals that Mr. Weiss characterized the volume as small, and merely stated that he could not give precise percentages. Weiss Dep. at 17. Read in context, the testimony of the corporate representatives does not demonstrate startling unfamiliarity.

- . All except 7-Up, San Francisco purchased citric acid only sporadically during the class period;
- . [\*15] Southeastern Specialty and 7-Up, Philadelphia are no longer involved in businesses that use citric acid;
- . Trans-Packers Services and Gangi Brothers have not purchased from defendants recently;
- . 7-Up, San Francisco and Varni Brothers both purchased from cooperatives; and
- . None of the plaintiffs purchased any non-food grade citric acid.

The Court finds that the variety among plaintiffs with regard to frequency, continuity, recency, and mode of purchase actually contributes to their representativeness because there will likely be similar diversity among members of the class. Having representatives who were small or sporadic purchasers, who have since stopped using citric acid, or who bought from cooperatives assures that class members in similar circumstances will have their interests protected.<sup>4</sup>

[\*16] Defendants' argument that the named plaintiffs will not adequately represent the interests of class members who purchased different kinds of citric acid raises a more serious concern. The inquiry here, however, is not how many kinds of citric acid plaintiffs purchased, but rather whether each representative has sufficient incentive to present evidence that will establish the existence of the alleged conspiracy and its effect on the prices of all of the products purchased by the class members. See *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 1996 WL 380234, \*5 (S.D.N.Y. 1996).

In cases in which plaintiffs allege that defendants conspired to set an artificially inflated base price for products, courts consistently certify classes because the complaints themselves provide sufficient incentive--individual plaintiffs cannot prove their own claims without proving the class claims. See *id.* at \*8 (citing seven such cases). This case presents exactly that situation. The Court therefore finds the Proffered plaintiffs to be adequate class representatives.

## B. Rule 23(b) Requirements

Plaintiffs argue that this class action can be maintained under Federal Rule of Civil Procedure [\*17] 23(b)(3) because common questions of law or fact in the case predominate over questions affecting only individual members. HN13<sup>↑</sup> In deciding this question, the Court must focus on liability issues. *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 345 (E.D. Pa. 1976).

To succeed in this action, plaintiffs will have to prove (1) that there was a conspiracy to fix prices in violation of the antitrust laws; (2) that prices were fixed pursuant to the conspiracy; and (3) that plaintiffs purchased products at prices that, as a result of the conspiracy, were higher than they should have been. See, e.g., *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-41, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). On a motion for class certification, "plaintiffs' burden is to establish that common or 'generalized proof' will predominate at trial with respect to these three essential elements of their antitrust claim." *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 1996 WL 380234, \*6 (S.D.N.Y. 1996) (quoting *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 685 (N.D. Ga. 1991)). Defendants do not dispute that the existence of the conspiracy and the alleged price-fixing are [\*18] common to the litigation. They contend, however, that plaintiffs cannot show common impact, and therefore individual issues of fact and law will predominate.

Defendants argue that because citric acid comes in many forms and is used for many purposes, the pricing varies between products, making common proof of impact impossible. Diversity of products and pricing does not necessarily mean that plaintiffs cannot show class-wide impact, however. "Contentions of infinite diversity of

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<sup>4</sup> Defendants assert that purchasing through a cooperative is not the norm. This fact actually supports the need for class representatives who used cooperatives to assure that their interests do not go unheard in the litigation.

product, marketing practices, and pricing have been made in numerous cases and rejected." *In re Folding Carton Antitrust Litig.*, 75 F.R.D. 727, 734 (N.D. Ill. 1977).

Some courts find as a matter of law that impact can be shown on a class-wide basis in antitrust cases because "as a general rule, an illegal price fixing scheme presumptively impacts upon all purchasers of a price-fixed product in a conspiratorially affected market." E.g., *In re Alcoholic Beverages Antitrust Litig.*, 95 F.R.D. 321, 327 (E.D.N.Y. 1982). A smaller number of courts carefully examine the facts of each case in order to determine whether common proof of impact is possible. E.g., *Windham v. American Brands, Inc.* 565 F.2d \*191 59 (4th Cir. 1977). Even those courts that require plaintiffs to make a showing that common impact can be proven only require that plaintiffs "come forward with seemingly realistic methodologies," as plaintiffs have done in this case. *In re Brand Name Prescription Drug Antitrust Litig.*, 1996 WL 478547, at \*5 (N.D. Ill. 1994); see also *In re Industrial Gas Antitrust Litig.*, 100 F.R.D. 280, 289 (N.D. Ill. 1983).

Those cases in which courts have denied class certification for inability to prove common impact have involved additional complications; for example, different market conditions, *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 154 (N.D. Cal. 1992), and individualized pricing and credit negotiation. *American Custom Homes v. Detroit Lumberman's Ass'n*, 91 F.R.D. 548, 551 (E.D. Mich. 1981). See also *In re Hotel Telephone Charges*, 500 F.2d 86, 89 (9th Cir. 1974) (forty million plaintiffs stayed in 600 different hotels).

This case seems more akin to *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 1996 WL 380234 (S.D.N.Y. 1996), and other cases in which plaintiffs have alleged that defendants conspired to set list prices for a variety of products. [\*20] See also *In re Potash Antitrust Litig.*, 159 F.R.D. 682 (D. Minn. 1995); *In re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302 (E.D. Pa. 1980). Because plaintiffs planned to prove at trial that defendants set artificially high list prices for their products, those courts certified the classes. The high list prices proved the fact of impact, even if the degree of impact differed between products and purchasers.

Plaintiffs have submitted the declaration of Robert G. Harris, an economist, who avers that he has identified at least three formulae to measure the class-wide impact of price-fixing in this case: one that compares the list prices for citric acid products before, during, and after the alleged conspiracy; one that analyzes the economic rate of return in the industry; and one that compares industry capacity utilization and citric acid prices. Harris Decl. at 15-16. Dr. Harris expresses the most confidence in the "before and after" approach because of defendants detailed financial reporting, which he says will make it possible to calculate competitive benchmark prices for citric acid products and therefore measure overcharge. Harris Decl. at 14-15. This submission [\*21] is sufficient to show that means exist for proving impact on a class-wide basis, which is all that is required under the authority cited by defendants. See, e.g., *Klein*, 94 F.R.D. at 660-661 (certification denied because data essential to methodology for calculating impact did not exist).<sup>5</sup>

Even if common impact cannot be proven, the Court may certify the class. The great weight of authority suggests that the dominant issues in cases like this are whether the charged conspiracy existed and whether price-fixing occurred. See, e.g., *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693-96 (D. Minn. 1995); *In re Folding Carton Antitrust Litig.*, 75 F.R.D. 727, 734-35 ("courts have consistently [\*22] found the conspiracy issue the overriding, predominate question") (N.D. Ill. 1977); *In re Sugar Indus. Antitrust Litig.* 73 F.R.D. at 342-355. Moreover, class certification does not require that the common questions be completely dispositive of the litigation. *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. at 344.

Because plaintiffs have presented a method for proving common impact, and because even without proof of class-wide impact, common issues predominate, the Court finds that plaintiffs have satisfied the requirements of *Rule 23(b)*.

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<sup>5</sup> Defendants correctly identify shortcomings with plaintiffs' other proposed methodologies; Dr. Harris does not suggest an industry to which citric acid can be compared for purposes of evaluating economic rate of return, and he cannot "confidently recommend" the capacity utilization approach. Harris Decl. at 16.

### C. Court's Authority to Reconsider

Class actions play an important role in the private enforcement of antitrust actions. For this reason, [HN14](#) courts resolve doubts in these actions in favor of certifying the class. *In re Potash Antitrust Litis.*, 159 F.R.D. at 688-69. The Court retains the authority, however, to withdraw class certification in part or in whole, should the questions of adequate representation or predominance of common issues develop so as to make a class action unwarranted. *Social Serv. Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 948-49 (9th Cir. 1979). Other options short of decertification are also [\*23] available to the Court if individual issues arise but do not predominate. These include referral to a magistrate judge or creation of subclasses. *In re Brand Name Prescription Drugs Antitrust Litig.*, 1994 WL 663590, at \*5 (N.D. Ill. 1994). The Court will not hesitate to exercise these authorities if the circumstances warrant it.

### CONCLUSION

For the reasons discussed above, the Court hereby grants plaintiffs' motion for class certification.

SO ORDERED.

Dated: October 1, 1996

FERN M. SMITH

United States District Judge

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End of Document

## **United States v. Delta Dental**

United States District Court for the District of Rhode Island  
October 2, 1996, Decided ; October 2, 1996, OPINION FILED  
C.A. No. 96-113/P

**Reporter**

943 F. Supp. 172 \*; 1996 U.S. Dist. LEXIS 14868 \*\*; 1996-2 Trade Cas. (CCH) P71,609

UNITED STATES OF AMERICA, Plaintiff, v. DELTA DENTAL OF RHODE ISLAND, Defendant.

**Subsequent History:** [\[\\*\\*1\]](#) As Corrected October 10, 1996.

**Prior History:** Adopting Magistrate's Document of July 12, 1996, Reported at: [1996 U.S. Dist. LEXIS 14873](#).

**Disposition:** Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted denied.

## **Core Terms**

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Buyer, Prudent, Recommendation, Dental, dentists, effects, anticompetitive, Sherman Act, participating, clauses, prices, cases, savings, alleges, purchaser, rule of reason, market power, competitor, unilateral, motion to dismiss, monopoly power, reasons, legitimate business, consumer price, matter of law, consumers, practices, courts, restraint of trade, concerted action

## **LexisNexis® Headnotes**

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

Antitrust & Trade Law > Sherman Act > General Overview

### **[HN1](#)[**

According to [§ 1](#) of the Sherman Act, every contract, combination, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared illegal. [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

### **[HN2](#)[**

Sherman Act [§ 1](#), [15 U.S.C.S. 21](#) 1, plaintiffs must prove the existence of two elements: 1) a contract, combination, or conspiracy among two or more parties, that (2) unreasonably restrains trade.

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

### **HN3** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The second element of a Sherman Act [§ 1, 15 U.S.C.S. § 1](#), cause of action, proof of an unreasonable restraint of trade, can be further divided into two categories of cases. Courts consider whether a restraint on trade is either: (1) a per se violation; or (2) a restraint subject to the "rule of reason" analysis, under which the fact finder weighs all 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 > Per Se Rule & Rule of Reason > General Overview

### **HN4** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason analysis requires courts to conduct a highly fact-specific inquiry.

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

### **HN5** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

### **HN6** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the

court must ordinarily consider facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effects, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant factors.

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

### **HN7** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

According to the "rule of reason" analysis, in an antitrust case the Government has the burden of showing that the anti-competitive effects of the agreement outweigh their legitimate business justifications.

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 > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

### **HN8** Conspiracy to Monopolize, Elements

Whereas Sherman Act [§ 1, 15 U.S.C.S. § 1](#), requires the existence of a contract, combination, or conspiracy, and thus requires the involvement of two or more entities, [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#) regulates the unilateral conduct of a single entity when it threatens actual monopolization.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

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

### **HN9** Scope, Monopolization Offenses

A Sherman Act 2 plaintiff establishes a violation by showing two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

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

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

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Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

#### [HN10](#) [down] Attempts to Monopolize, Elements

The second element of a Sherman Act [§ 2, 15 U.S.C.S. § 2](#), claim is the use of monopoly power to foreclose competition, or to destroy a competitor. In other words, the second element involves proving a scheme of willful acquisition or maintenance of monopoly power.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

#### [HN11](#) [down] Sherman Act, Claims

The Supreme Court has recognized that Sherman Act [§ 1, 15 U.S.C.S. § 1](#), does not reach conduct that is "wholly unilateral."

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

#### [HN12](#) [down] Conspiracy to Monopolize, Elements

Concerted action may be amply demonstrated by an express agreement.

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

#### [HN13](#) [down] Cartels & Horizontal Restraints, Price Fixing

Coercion is not a required element of a violation of Sherman Act [§ 1, 15 U.S.C.S. § 1](#). Rather, the cases hold that coercion is just one factor in the [§ 1](#) inquiry, and other factors may be relevant to finding a [§ 1](#) violation.

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

Antitrust & Trade Law > General Overview

#### [HN14](#) [down] Attempts to Monopolize, Elements

The desire to crush a competitor, standing alone, is insufficient to make out a violation of antitrust laws.

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**Judges:** Raymond J. Pettine, Senior U.S. District Judge

**Opinion by:** Raymond J. Pettine

## Opinion

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### [\*173] ORDER AND MEMORANDUM

The Report and Recommendation of United States Magistrate Judge, Robert W. Lovegreen filed on July 12, 1996 in the above-captioned matter is hereby accepted pursuant to [28 U.S.C. § 636\(b\)\(1\)](#).

Delta Dental of Rhode Island ("Delta") objects to the Magistrate Judge's ("Magistrate") Report and Recommendation, which recommended a denial of Delta's [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss for failure to state a claim upon which relief can be granted. Accordingly, [\*2] I must make a *de novo* "determination of those portions of the report ... to which objection is made." [28 U.S.C. § 636\(b\)\(1\)\(B\)](#). After carefully considering the Magistrate's Report and Recommendation, Delta's objections, and the United States of America's ("Government")'s Opposition to Defendant's Objections to the Magistrate's Report and Recommendation, for the following reasons, I fully accept the Magistrate Judge's Report and Recommendation. In so doing, I incorporate in whole, and without discussion, the Magistrate's statement of facts as well as the Magistrate's discussion of [Fed. R. Civ. Proc. 12\(b\)\(6\)](#) standards, and, for reasons of clarity, I attach in full the Magistrate's Report and Recommendation.

### DISCUSSION

#### 1. Sherman Antitrust Act, [§ 1](#) and [§ 2](#): General Principles

To fully understand Delta's objections to the Magistrate's Report and Recommendation, it is important to understand [§§ 1](#) and [2](#) of the Sherman Act.

**HN1** According to [§ 1](#) of the Sherman Act ("[§ 1](#)"), "every contract, combination .. or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal." [15 U.S.C. § 1](#). **HN2** [§ 1](#) plaintiffs must prove the existence [\*3] of two elements: 1) a contract, combination, or conspiracy among two or more parties, that (2) unreasonably restrains trade.<sup>1</sup> [Standard Oil Co. v. United States, 221 U.S. 1, 59-60, 55 L. Ed. 619, 31 S. Ct. 502 \(1911\)](#). **HN3** The second element, unreasonable restraint of trade, can be further divided into two categories of cases. Courts consider whether a restraint on trade is either: (1) a *per se* violation;<sup>2</sup> [\*4] or (2) a restraint subject to the "rule of reason" analysis. "Under this rule, the fact finder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on

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<sup>1</sup> Under [§ 1](#), plaintiff also must show that the restraint affects interstate or foreign commerce. However, since there is no dispute that Delta's alleged conduct affects interstate commerce, I do not discuss this element here.

<sup>2</sup> "**HN5** [Per se](#) rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." [Continental T.V., Inc. v. Sylvania, Inc., 433 U.S. 36, 49-50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#).

competition." *Continental T.V., Inc. v. Sylvania, Inc.*, 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). Thus, [HN4](#)<sup>1</sup> the rule of reason analysis [[\\*174](#)] requires courts to conduct a highly fact-specific inquiry.<sup>3</sup>

In the case at hand, the Government does not allege that Delta's Prudent Buyer clause (also referred [[\\*\\*5](#)] to as "Most Favored Nation" or "MFN" clause) is a per se violation of [§ 1](#). Therefore, I must apply the "rule of reason" analysis. [HN7](#)<sup>1</sup> According to this analysis, the Government has the burden of showing "that the anti-competitive effects of the agreement outweigh their legitimate business justifications." *Monahan's Marine Inc. v. Boston Whaler Inc.*, 866 F.2d 525, 526-7 (1st Cir. 1989).

[HN8](#)<sup>1</sup> Whereas [§ 1](#) requires the existence of a "contract, combination ... or conspiracy" and thus requires the involvement of two or more entities, [§ 2](#) of the Sherman Act, ("[§ 2](#)") regulates the unilateral conduct of a single entity "when it threatens actual monopolization." *Copperweld Corporation v. Independence Tube Corporation*, 467 U.S. 752, 767, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984). [HN9](#)<sup>1</sup> A [§ 2](#) plaintiff establishes a violation by showing two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 480, 119 L. Ed. 2d 265, 112 S. Ct. 2072 [[\\*\\*61](#) (1992)], quoting, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). Plaintiffs generally have more difficulty establishing the second element. [HN10](#)<sup>1</sup> The second element of a [§ 2](#) claim is the use of monopoly power 'to foreclose competition, or to destroy a competitor.'" *Eastman Kodak, supra, at 482*, quoting, *United States v. Griffith*, 334 U.S. 100, 107, 92 L. Ed. 1236, 68 S. Ct. 941 (1948). In other words, the second element involves proving "a scheme of willful acquisition or maintenance of monopoly power." *Eastman Kodak, supra, at 483*.

In sum, [§ 1](#) primarily regulates anticompetitive agreements between two or more entities, while [§ 2](#) typically regulates the unilateral action of a single entity. Further, the relevant inquiries under [§ 1](#) and [§ 2](#) are distinct.

## 2. Discussion Of Delta's Objections To The Magistrate's Report and Recommendation.

Delta raises a number of objections to the Magistrate's Report and Recommendation. I will discuss these objections in the context of [§ 1](#)'s two required elements.

### a. The Magistrate Properly Concluded That Delta's Prudent Buyer Clause Is Sufficient to [[\\*\\*7](#)] Satisfy the "Concerted Action" Requirement of [§ 1](#)

In its Motion to Dismiss, Delta argued that the Government's "complaint challenges a contractual provision which is automatically included in all contracts between Delta Dental and its participating dentists as a matter of a *unilateral policy*, and thus fails to allege conspiratorial action sufficient to state a claim under [§ 1](#) of the Sherman Act." Defendant Delta Dental of Rhode Island's Motion to Dismiss [emphasis added]. The Magistrate, in his Report and Recommendation, rejected this argument stating:

<sup>3</sup>The *Continental T.V.* Court took note of the fact-intensive inquiry the rule of reason analysis requires, stating:

One of the most frequently cited statements of the rule of reason is that of Mr. Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918):

"[HN6](#)<sup>1</sup> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effects, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant factors."

*Continental T.V.*, *supra*, at 49.

Although [HN11](#)<sup>1</sup> the Supreme Court has recognized that [§ 1](#) does not reach conduct that is "wholly unilateral," [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 767-68, [\[\\*175\] 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#), [HN12](#)<sup>1</sup> concerted action may be amply demonstrated by an express agreement. [Addyston Pipe & Steel Co. v. United States](#), 175 U.S. 211, 213-218, [44 L. Ed. 136, 20 S. Ct. 96 \(1899\)](#). Here, there is no dispute that each participating dentist agrees explicitly to comply with Delta's Participating Dentist's Agreement, which incorporates by reference Delta's Rules and Regulations, including the MFN clause at issue. [\[\\*\\*8\]](#) Thus, every contract between Delta and a participating dentist contains the MFN clause at issue. As a result, the requisite concerted action has been alleged.

Magistrate's Report and Recommendation, at 9-10. Delta objects to the Magistrate's reasoning, arguing that "since the United States Supreme Court's decision in [Monsanto Co. v. Spray Rite Service Corp.](#), 465 U.S. 752, 761, [79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#), the threshold for vertical restraint cases under [Section 1](#) has become considerably higher than the Report and Recommendation would suggest." Memorandum of Defendant Delta Dental of Rhode Island in Support of Its Objections to Magistrate's Report and Recommendation, at 58. According to Delta, under *Monsanto*, a [§ 1](#) conspiracy requires a "meeting of the minds" between the supplier and purchaser. Delta contends that the Prudent Buyer clause does not manifest this required "meeting of the minds," but rather merely constitutes a unilateral policy on the part of Delta and unilateral acceptance of the policy by participating dentists.

With this objection, Delta is merely reiterating its position that the Prudent Buyer clause is nothing more than a unilateral [\[\\*\\*9\]](#) policy. Accordingly, because the Magistrate adequately responded to this argument in his Report and Recommendation, and because Delta raises no additional arguments in its objection, I must reject Delta's objection.

Moreover, Delta's argument is disingenuous. The Government has averred that it is clear to all dentists participating in Delta that they must comply with the Prudent Buyer policy, and it is just as clear that if they receive fees lower than Delta's set fee schedule, they run the risk of Delta lowering their reimbursement fees. To highlight this allegation, the Government cites a January 1994 letter Delta allegedly wrote to participating dentists to discourage them from participating in Dental PPO of Rhode Island. The letter states in relevant part:

Your profile reflects certain adjustments necessitated by our reimbursement policy. We understand that you have agreed to accept these fees from the Dental Blue PPO. As a result, your Delta Dental of Rhode Island reimbursement has been limited to these levels.

Complaint, P 23. Through this letter, Delta makes it abundantly clear to participating dentists that the only way to avoid the risk of lower Delta fees [\[\\*\\*10\]](#) is to refuse to accept any fees lower than Delta's fee schedule. Thus, despite Delta's contentions otherwise, its Prudent Buyer clause is not merely a unilateral policy on the part of Delta. Rather, it is a contractual clause to which Delta dentists expressly agree to comply. Further, pursuant to this contractual clause, Delta dentists are well aware that charging lower fees may result in Delta lowering their reimbursement rate.

Delta also argues that the Government did not allege that Delta Dental "coerced" the participating dentists. Memorandum of Defendant Delta Dental of Rhode Island in Support of Its Objections To Magistrate's Report and Recommendation, at 64. According to Delta, "cases which have inferred 'concerted action,' have done so only where there were threats of termination or other forms of retaliation," [Id. at 65](#). But the cases upon which Delta relies constitute a narrow line of case law, all involving resale agreements wherein suppliers control the resale price of goods sold to resalers. This resale relationship is substantially different from Delta's relationship with participating dentists.

Further, the cases cited by Delta do not hold that [HN13](#)<sup>1</sup> coercion is a required [\[\\*\\*11\]](#) element of a [§ 1](#) violation. Rather, these cases hold that coercion is just one factor in the [§ 1](#) inquiry, and other factors may be relevant to finding a [§ 1](#) violation. In fact, in [FTC v. Beech-Nut Packing Co.](#), 257 U.S. 441, 66 L. Ed. 307, [42 S. Ct. 150 \(1922\)](#), cited by Delta, the Supreme Court relied on a number of factors in [\[\\*176\]](#) determining that Beech-Nut's pricing policy amounted to an illegal conspiracy, including Beech-Nut's practice of actively surveying prices resalers

charged for Beech-Nut products. *Id. at 454*; see also, *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 54 (2d Cir. 1980) ("The coercive atmosphere may have been enhanced by a policy of price surveillance."). The Government alleges, and Delta does not deny, that Delta monitors the fees participating dentists receive. "Rule 7 of Delta's Rules and Regulations further allows Delta to audit the records of any participating dentist." Complaint, P 14. <sup>4</sup> Thus, Delta's careful monitoring of its participating dentists's fees may suggest that Delta's Prudent Buyer clause is anticompetitive.

[\*\*12] In sum, for the reasons set forth in the Magistrate's Report and Recommendation, and for the reasons I have given, I find that the Government's complaint sets forth facts sufficient to withstand a motion for dismissal with regard to "concerted action" under § 1 of the Sherman Act.

*b. The Magistrate Properly Concluded That The First Circuit Cases, Kartell and Ocean State, Do Not Establish A Rule That Prudent Buyer Clauses Are Competitive As A Matter Of Law Absent Pricing That is Predatory Or Below Incremental Costs*

The gravamen of Delta's objections to the Magistrate's Report and Recommendation is that the Magistrate failed to follow the rule of law set down in the First Circuit cases, *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1st Cir. 1984), cert. den., 471 U.S. 1029, 85 L. Ed. 2d 322, 105 S. Ct. 2040, 105 S. Ct. 2049 and *Ocean State Physicians Health Plan v. Blue Cross and Blue Shield of Rhode Island*, 883 F.2d 1101 (1st Cir. 1989), cert. den., 494 U.S. 1027, 108 L. Ed. 2d 610, 110 S. Ct. 1473. However, I find that the Magistrate properly concluded that:

despite *Kartell* and *Ocean State*'s broad language, these decisions, properly construed, fail to establish [\*\*13] a *per se* validation of the MFN clauses in all cases where pricing is not predatory or below incremental costs. Such a blanket condonation of MFN clauses would ignore the context *Kartell* and *Ocean State* were decided in, run counter to the Sherman Act's preference for fact-specific inquiries, implausibly reject the premise that MFN clauses produce substantial anticompetitive effects in particular circumstances and contradict the Sherman Act's animating concern for low consumer prices.

Magistrate's Report and Recommendation, at 20. Key to the Magistrate's conclusion that courts must not read *Kartell* and *Ocean State* as establishing a *per se* rule regarding Prudent Buyer clauses are the facts that: (1) both *Kartell* and *Ocean State* arose in contexts different from the one here; and (2) *Kartell* and *Ocean State* both involved low consumer prices, while here the Government alleges higher consumer prices. I fully agree with the Magistrate that these two distinctions militate against reading *Kartell* and *Ocean State* as resolving the case at hand, and I add the following points to the Magistrate's Report and Recommendation.

Delta argues that [\*\*14] *Kartell* and *Ocean State* establish that Prudent Buyer clauses, absent predatory pricing or incremental costs, are competitive as a matter of law. The Government concedes that these cases validate the clause on its face, but asserts that this Court must look behind the face of the clause to its *effects*. According to the Government, the clause has anticompetitive effects, which *Kartell* and *Ocean State* do not validate. A careful examination of the the two First Circuit decisions reveals that the Government has the better position.

The First Circuit in *Kartell* upheld Blue Shield's "ban on balanced billing" policy against a § 1 of the Sherman Act challenge. The court found that Blue Shield's policy [\*177] could not be anticompetitive unless Blue Shield was viewed as a "'third force,' intervening in the marketplace in a manner that prevents willing buyers and sellers from independently coming together to strike price/quality agreements." *Id. at 924*. The court found, however, that Blue Shield must be viewed:

<sup>4</sup> Rule 7 provides:

*Verification program.* Delta Dental at all times reserves the right to review services rendered and fees charged by participating and nonparticipating dentists or group practices with respect to which benefits are sought. Such review may encompass, without limitation verification of ... fees charges and collections made with respect to non-subscriber patients...

not as an inhibitory 'third force,' but as itself the purchaser of the doctors' services... **Antitrust law** rarely stops the buyer of a service from trying [\*\*15] to determine the price or characteristics of the product that will be sold. Thus, the more closely Blue Shield's activities resemble, in essence, those of the purchaser, the less likely that they are unlawful.

*Id. at 924-5.* The First Circuit went on to emphasize Blue Shield's role as purchaser on behalf of its enrollees. "Once one accepts the fact that, from a commercial perspective, Blue Shield in essence 'buys' medical services *for the account of others* [it becomes apparent] that the ban on balance billing is permissible." *Id. at 925* [emphasis added]. The court illustrated the point with examples:

Suppose a father buys toys for his son - toys the son picks out. Or suppose a landlord hires a painter to paint his tenant's apartment, to the tenant's specifications. Is it not obviously lawful for the father (the landlord) to make clear to the seller that the father (the landlord) is in charge and will pay the bill? Why can he not then forbid the seller to charge the child (the tenant) anything over and above what the father (the landlord) pays - at least if the seller wants the buyer's business?... In each of these instances, to refuse to allow the condition [\*\*16] would disable the buyer from holding the seller to the price of the contract. Yet, if it is lawful for the buyer to buy for the third party in the first place, how can it be unlawful to bargain for a price term that will stick?

*Id.* These examples highlight the First Circuit's reliance on the concept that Blue Shield was acting as a purchaser when it purchased, on behalf of its enrollees, services from doctors at the lowest possible prices.

On its face, Delta's Prudent Buyer clause is indistinguishable from Blue Shield's ban on balanced billing. Delta's Prudent Buyer clause appears to guarantee that Delta purchases dental services for its enrollees for the lowest fee that the dentists are willing to receive. However, as stated earlier, the Government contends that it is important to look at the effects of Delta's Prudent Buyer clause, and not merely the clause as written. According to the Government, the Prudent Buyer clause has the effect of "excluding potential rivals, retarding expansion by existing competitors, and substantially increasing the costs to Rhode Island consumers of dental insurance and dental services." Complaint, at 1. Viewed in this light, Delta looks [\*\*17] less like the ideal purchaser that the *Kartell* court portrayed.<sup>5</sup> *Kartell* is distinguishable from this case because the ban on balanced billing at issue in *Kartell* resulted in low prices for Blue Shield's enrollees, while the Government alleges that Delta's Prudent Buyer policy at issue here ultimately results in higher prices for Rhode Island dental service consumers.

[\*\*18] The *Kartell* court itself underscored the importance of this low consumer price versus high consumer price distinction:

The Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too high, not too low... And, *the relevant economic considerations may be very different when low prices, rather than high prices, are at issue*. These facts suggest that courts at least should be cautious - reluctant to condemn too speedily - an arrangement that, [\*178] on its face, appears to bring low price benefits to the consumer.

*Id. at 931.*

Similarly, *Ocean State* does not resolve the issue presented here, not only because *Ocean State*, like *Kartell*, involved lower consumer prices, but also because the context of *Ocean State* is different from the context here.

<sup>5</sup>This point is highlighted by the difference in postures between *Kartell* and the case here. In *Kartell*, the plaintiff represented a group of physicians challenging Blue Shield's policy, in large part because Blue Shield's reimbursement rates were so low that they reduced physician profits. These low prices, however, benefitted Blue Shield enrollees through lower premium rates. Here, plaintiff is the United States. Rhode Island dentists apparently do not disapprove of Delta's Prudent Buyer clause. In fact, the chair of Rhode Island Dental Association's Council on Dental Programs supports Delta's Prudent Buyer policy because he feels that the policy sets a floor on dentists' fees. Memorandum of the United States in Opposition to the Defendant's Objections to the Magistrate's Report and Recommendation, at 9; Complaint, P22.

Ocean State plaintiffs, Ocean State Physicians Health Plan ("Ocean State"), sued Blue Cross/Blue Shield of Rhode Island ("Blue Cross") under § 2 of the Sherman Act, alleging that Blue Cross "had acted unlawfully to exclude Ocean State from the health care insurance marketplace." *Id.* at 1102. Among other claims, Ocean State alleged that Blue Cross adopted [\*\*19] its "Prudent Buyer policy not in order to save money, but rather to induce physicians to resign from Ocean State." *Id.* at 1104. The jury found that Blue Cross had violated § 2 of the Sherman Act, but the District Court granted Blue Cross' motion for a judgment notwithstanding the verdict. On appeal, the First Circuit agreed "with the district court ... that the Prudent Buyer policy - through which Blue Cross ensured that it would not pay a provider physician any more for any particular service than she was accepting from Ocean State or any other health care purchaser - is, as a matter of law, not violative of section 2 of the Sherman Act." *Id.* at 1110.

As stated above, allegations of a § 2 violation invoke consideration of two elements: (1) existence of monopoly power; 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., supra, at 480*. On appeal, Blue Cross conceded the first prong, and did not dispute its monopoly power; Ocean State conceded that Blue Cross legitimately acquired its market power. *Id.* at 1110. [\*\*20] Thus, the very narrow issue before the First Circuit was "whether Blue Cross maintained its monopoly power through improper means." *Id.* In fact, the First Circuit described its inquiry as follows:

We must ask whether Blue Cross' conduct "went beyond the needs of ordinary business dealings, beyond the ambit of ordinary business skill, and 'unnecessarily excluded competition' from the health care insurance market. *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983)*.

*Ocean State, supra, at 1110.*

In contrast, the issue presented here is an alleged violation of § 1 of the Sherman Act, which requires a showing of: 1) concerted activity which 2) unreasonably restrains trade. *Standard Oil Co. v. United States, 221 U.S. 1, 59-60, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*. As discussed earlier, the Government's allegations, if true, establish the first element. Moreover, the Government has not alleged a per se violation. Accordingly, the rule of reason analysis applies to the second element. *Continental T.V., Inc. v. Sylvania, Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. As stated above, under the "rule of reason" [\*\*21] analysis, the Government must establish "that the anticompetitive effects of [Delta's Prudent Buyer clause] outweigh [the] legitimate business justifications." *Monahan's Marine Inc. v. Boston Whaler Inc., 866 F.2d 525, 526-7 (1st Cir. 1989)*. This analysis is fact-specific, requiring an examination of the anticompetitive effects of Delta's Prudent Buyer clause as compared to the clause's legitimate business benefits. This inquiry is more fact-intensive than the inquiry the First Circuit conducted in *Ocean State*. Because of the different inquiries involved, the First Circuit's decision in *Ocean State* does not necessarily control the decision here.

Moreover, here the Government has alleged that the effects of Delta's Prudent Buyer clause are anticompetitive. As the Magistrate noted in his Report and Recommendation, the *Ocean State* court may have canvassed the effects of Blue Cross' Prudent Buyer clause, but the "court did not undertake a searching inquiry into their severity, as would be appropriate under a § 1 rule of reason analysis, as such a claim was simply not before it." Magistrate's Report and Recommendation, at 21-22.

For example, in touching upon one alleged [\*\*22] "effect" of Blue Cross' Prudent Buyer clause, the First Circuit noted Ocean State's assertion [\*179] that evidence on the record showed that Blue Cross' Prudent Buyer clause would have the effect of weakening or eliminating Ocean State. Ocean State pointed to evidence that Blue Cross directors expressed hopes of "emasculating Ocean State." *Ocean State, supra, at 1113*. The First Circuit responded that "HN14" the desire to crush a competitor, standing alone, is insufficient to make out a violation of antitrust laws." *Id. at 1113*.

Here, however, the Government alleges that Delta's Prudent Buyer policy adversely affects not just one existing competitor, but numerous existing and potential competitors. The Government further alleges that Delta's Prudent Buyer clause prevents many Rhode Island dentists from participating in lower cost programs, which pay dentists

lower fees than Delta, because dentists fear that accepting lower fees from these programs will result in Delta reimbursing them at a lower rate. According to the Government:

Faced with enforcement of Delta's MFN clause and the prospect of substantially lower payments for all of their Delta patients if they participate in **[\*\*23]** a lower-cost plan, Delta participating dentists have either withdrawn from - or refused to join - lower-cost dental plans, or insisted as a condition of their participation that payments be increased to Delta's levels.

Memorandum of the United States in Opposition to Defendant's Objections to Report and Recommendation, at 8. The Government alleges that the ultimate effects of Delta's Prudent Buyer clause are threefold: (1) exclusion of potential competitors from the dental insurance market; (2) prevention of existing competitors from expanding their insurance programs; and (3) substantial increase in the costs of dental insurance and services to all Rhode Island consumers. Complaint P 35. The Government, in its complaint, lists examples of these alleged negative effects. Complaint PP 19-29.

From this it is clear that the Government is not merely alleging that the effect of the Delta's Prudent Buyer clause is to eliminate one competitor, as was the case in *Ocean State*. Rather, the Government alleges that Delta's Prudent Buyer clause has a negative impact on all existing and potential competing plans, and ultimately, the consumer. Because *Ocean State* was decided pursuant **[\*\*24]** to § 2 of the Sherman Act, and not § 1, the *Ocean State* court simply was not presented with, nor did the court assess, any allegations or evidence that Blue Cross' Prudent Buyer policy had the same anticompetitive effects as those alleged here.

*Ocean State* is distinguishable from the case here for another reason. In upholding Blue Cross' Prudent Buyer clause, the First Circuit noted that Blue Cross would save an estimated \$ 1,900,000 through its policy. These estimated savings supported Blue Cross' contention that the Prudent Buyer policy was exactly what it was called - a policy prudently designed to save Blue Cross money by reducing the price it paid dentists for their services. Blue Cross's estimated savings from the Prudent Buyer clause suggested that the clause was procompetitive and not anticompetitive. Moreover, these estimated savings undermined Ocean States' claim that the Prudent Buyer policy was willfully employed by Blue Cross to maintain its monopoly power.

In the case at hand, however, the Government has alleged that:

the MFN clause, by Delta's own admissions, has not generated any meaningful savings or other procompetitive benefits. Delta has not **[\*\*25]** considered the MFN clause a cost-savings device, has not sought to calculate any savings from its application, and has not factored any such savings into determining the premiums it charges customers.

Complaint, P 32. The lack of savings associated with Delta's Prudent Buyer clause suggests that it is not procompetitive. Further, the lack of savings suggests Delta's inability to assert any "legitimate business justifications" to outweigh any findings that the clause has "anti-competitive effects," as required under a "rule of reason" analysis. Monahan's Marine, Inc. v. Boston Whaler Inc., 866 F.2d 525, 526-7 (1st Cir. 1989).

In sum, for the reasons set forth in the Magistrate's Report and Recommendation, as well as the reasons stated above, I find that the Government has alleged facts sufficient **[\*180]** to overcome a Rule 12(b)(6) motion to dismiss regarding the "unreasonable restraint" on trade arising from Delta's Prudent Buyer clause.

#### *c. Delta's Remaining Objections To The Magistrate's Report And Recommendation Have No Merit*

As stated above, the gravamen of Delta's objections to the Magistrate's Report and Recommendation concern the applicability of the First Circuit **[\*\*26]** decisions *Kartell* and *Ocean State*. Having discussed these objections fully, I need address Delta's remaining objections only briefly.

Delta argues that the Magistrate's Report and Recommendation "erroneously concludes that Delta Dental's alleged 'market power' permits the Government to avoid dismissal under Rule 12(b)(6)," contrary to the First Circuit's opinion in *Kartell*. True, the First Circuit in *Kartell* found that Blue Cross' alleged market power did not make a

"significant difference" to the outcome of the case. *Kartell, supra, at 926*. But in *Kartell*, the court found that market power was irrelevant because Blue Shield was doing nothing more than using its market power to obtain a low price for its enrollees. *Id. at 928*.

In this case, however, Delta's alleged market power is one important factor in assessing the effects of Delta's Prudent Buyer clause. As the Magistrate correctly noted in his Report and Recommendation, "the relevant focus in the present case turns precisely on the severity of the alleged anticompetitive effects flowing from the application of Delta's MFN clause juxtaposed against any competitive benefits." Magistrate's Report [\*\*27] and Recommendation, at 22. The Magistrate also correctly concluded that a "generous reading of the government's Complaint reveals a plausible allegation that Delta possesses significant market power. Armed with this power, Delta applies its MFN clause selectively to block alternative reduced-fee plans from the dental insurance market, but has gained no discernible cost savings." Magistrate's Report and Recommendation, at 23. In sum, unlike the situation in *Kartell*, the extent of Delta's market power is relevant here in discerning the effects that Delta's Prudent Buyer clause has on the dental insurance market.

Delta also objects to the Magistrate's Report and Recommendation on the grounds that the Magistrate "fails to disclose that its conclusions are inconsistent with the unanimous weight of authority on this issue elsewhere." Defendant Delta Dental of Rhode Island's Objections to the Magistrate's Report and Recommendation, at 3. Certainly, some of the cases Delta cites lend support to its argument. But for purposes of a *Rule 12(b)(6)* motion to dismiss, Delta's cases simply do not resolve the issue at hand.

For example, Delta cites *Blue Cross & Blue Shield of Michigan v. Michigan Association of Psychotherapy Clinics, et al.*, 502 F. Supp. 751, 1980 WL 1848 (E.D. Mich.) to support their position. In *Michigan Association*, defendants brought a Sherman Act counterclaim against plaintiffs alleging that plaintiffs' "non-discrimination clause"<sup>6</sup> constituted a per se violation of § 1 of the Sherman Act. The court held that the clause did not amount to illegal price fixing, noting that:

practices that are not per se violative of the Sherman Act may be struck down under the rule of reason standard if they unduly restrain commerce... However, the only antitrust violation alleged in the counterclaim is that the contracts between plaintiff and participating [providers] constituted price-fixing agreements; defendants assert no other effect on price formation, or other type of restraint of trade, independent of what the contractual terms discussed above require.

*Id. at \*3*. Here, the Government has not alleged a per se violation of the Sherman Act. More importantly, the Government has alleged that Delta's Prudent Buyer clause has significant other effects on "price formation," and that the clause has the effect of restraining trade. *Michigan Association* [\*\*29] defendants simply did not make the same allegations [\*181] that the Government has made here. Therefore, *Michigan Association* is not directly on point, and simply does not resolve the issue presented here.

Delta also cites *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 139-140 (2d Cir. 1984) as standing for the proposition that "use of MFN clauses is a legitimate business practice." Defendant Delta Dental of Rhode Island's Memorandum in Support of Its Objections to Magistrate's Report and Recommendation, at 52. In *DuPont*, petitioners DuPont and Ethyl challenged the Federal Trade Commission's finding that DuPont's and Ethyl's business practices, including their respective MFN policies, were anticompetitive. Again, however, the *DuPont* court resolved an issue different from the one presented here. According [\*\*30] to the *DuPont* court, "the essential question is whether, given the characteristics of the [specific] industry, the Commission erred in holding that the challenged business practices constitute 'unfair methods of competition' in violation of § 5 [of the Federal Trade Commission Act] simply because they 'facilitate' consciously parallel pricing at identical levels." *Id. at 135-6*. Further, before rendering its decision, the court thoroughly reviewed the Commission's findings and the evidence upon which the Commission relied, concluding that, "we do not find substantial evidence on this record, as a whole

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<sup>6</sup> Plaintiff's non-discrimination clause, as Delta notes in its memorandum in support of their objections to the Magistrate's Report and Recommendation, is similar to Delta's Prudent Buyer clause.

that the challenged practices significantly lessened competition ... or that the elimination of those practices would improve competition." *Id. at 141*. Thus, the court did not find that, as a matter of law, that the use of MFN clauses is a legitimate business practice. In fact, its decision suggests that a motion to dismiss in the case at hand would be improper, as courts must conduct a fact-specific inquiry to assess any anticompetitive effects of challenged business practices. Thus, *DuPont*, like *Michigan Association*, simply does not resolve the issue presented [\*\*31] here.

Similarly, while *Kitsap Physicians Service v. Washington Dental Service*, 671 F. Supp. 1267 (W.D. Wash. 1987), also cited by Delta, lends support to Delta's position, it is not controlling. In *Kitsap*, the court held that plaintiffs were not entitled to *preliminary injunctive relief* - finding that plaintiff did not "have a 'fair chance' of prevailing on the merits." *Id. at 1269*. Here, however, I do not consider whether the Government has a chance of succeeding on the merits, rather, I only decide whether "the allegations of the complaint permit relief to be granted on any theory..." *O'Neil v. O.L.C.R.I.*, 750 F. Supp. 551, 553 (D.R.I. 1990).

*Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), cited by Delta, also fails to resolve the issue at hand. True, as Delta argues, in *Marshfield Clinic*, Chief Judge Posner came out strongly in favor of MFN clauses. But Posner did not hold, that as a matter of law, MFN clauses are valid absent predatory pricing. In fact, Posner conceded that, "perhaps, as the Department of Justice believes, these clauses are misused to anticompetitive ends in some cases; but there [\*\*32] is no evidence of that in this case." *Id. at 1415* [emphasis added.] Here, the Government alleges facts to support the contention that Delta's Prudent Buyer clause is "misused to anticompetitive ends."

Finally, Delta cites *Willamette Dental Group, P.C. v. Oregon Dental Service Corporation*, 130 Ore. App. 487, 882 P.2d 637 (Ct.App.Or. 1994) to support its argument. *Oregon Dental* is factually similar to *Ocean State*; *Oregon Dental* plaintiffs brought claims against dental service providers, claiming that defendants' MFN clause violated state antitrust laws almost identical to § 2 of the Sherman Act.<sup>7</sup> The *Oregon Dental* court rejected defendant's argument that "as a matter of law, enforcement of a most favored nations clause can never constitute predatory pricing." *Id. at 642*. In so doing, the court criticized *Ocean State*, noting that the *Ocean State* court invoked an efficiency rationale, and finding that *Ocean State*'s:

consideration of economic efficiency, although accurate in many respects, is hardly conclusive. In this context, preoccupation with economic efficiency is almost tautological. A purchaser's enforcement [\*182] of a most favored [\*\*33] nations clause will always be "efficient" in the sense that the purchaser will pay less for good or services than it would have otherwise. *We note, moreover, the possibility that, in some circumstances, the enforcement of most favored nations clauses can have severe anticompetitive effects.* Such clauses may

"(1) eliminate a dynamic mechanism by which prices are ratcheted down to the competitive level; (2) reduce [output of medical services]; and (3) prevent the market from rewarding more efficient distribution systems." Celnicker, "A Competitive Analysis of Most Favored Nations Clauses in Contracts Between Health Care Providers and Insurers," 69 NCLRev 863, 884 (1991)."

*Id., at 642-3* [emphasis added]. Thus, *Oregon Dental* undermines Delta's position, and stands for the proposition that courts should not adopt a per se rule regarding MFN clauses, but should carefully examine the alleged anticompetitive effects of each challenged clause.

[\*\*34] It is true, as Delta argues, that the *Oregon Dental* court subsequently upheld the validity of the challenged MFN clause, noting that there "is no evidence in the record that defendant's enforcement of [the MFN clause] has unreasonably excluded competition." *Id.* It is also true, as Delta points out, that the court found that "there was no meaningful distinction between the facts of [Ocean State] and this case." *Id. at 642*. However, as discussed earlier, there are notable distinctions between the case at hand and *Ocean State*. Thus, the fact that the *Oregon Dental* court upheld a Prudent Buyer clause in a case factually similar to *Ocean State* does not mean that the *Oregon*

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<sup>7</sup> In fact, the *Oregon Dental* court "looked to federal decisions interpreting *section 2* of the Sherman Act for persuasive ... guidance." *Oregon Dental, supra, at 640*.

*Dental* court would uphold Delta's Prudent Buyer clause based on the facts alleged here. Delta simply cannot rely on *Oregon Dental* to control the matter here, and, in fact, *Oregon Dental* favors the Government's position.

#### CONCLUSION

For all the reasons set forth in the Magistrate's Report and Recommendation, in addition to the reasons set forth above, I fully accept the Magistrate's Report and Recommendation. Accordingly, I deny defendant's Motion to Dismiss for failure [\*\*35] to state a claim upon which relief can be granted.

SO ORDERED:

Raymond J. Pettine

Senior U.S. District Judge

October 2, 1996

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## **Winston v. American Medical Int'l**

Court of Appeals of Texas, First District, Houston

October 3, 1996, rendered and delivered ; October 3, 1996, Opinion filed

NO. 01-91-01441-CV

### **Reporter**

930 S.W.2d 945 \*; 1996 Tex. App. LEXIS 4548 \*\*

DONALD S. WINSTON, M.D., DONALD S. WINSTON, M.D., P.A., AND GALLERIA MEDICAL CENTER, INC., Appellants v. AMERICAN MEDICAL INTERNATIONAL, INC., TWELVE OAKS HOSPITAL, VICTORRINO G. CUMAGUN, M.D., R. ANDREW JACKSON, M.D., RONALD F. NORRIS, M.D., AND NORBORNE B. POWELL, M.D., Appellees

**Subsequent History:** Writ denied by, 06/12/1997

**Disposition:** [\*\*1] Judgment affirmed in part and reversed in part

### **Core Terms**

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staff privileges, cause of action, patients, Antitrust, business relationship, tortious interference, summary judgment, federal court, limitations, privileges, federal suit, private hospital, state court, trial court, pled, summary judgment motion, grant summary judgment, statute of limitations, no writ, contractual, temporary, lawsuit, tolling, clinic, hired, collateral estoppel, executive committee, plaintiffs', termination, grounds

### **LexisNexis® Headnotes**

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

Civil Procedure > Judgments > Summary Judgment > General Overview

#### **HN1[] Summary Judgment, Entitlement as Matter of Law**

The court will consider the summary judgment evidence in the light most favorable to the nonmovants and indulge every reasonable inference in their favor. The court will affirm if any theory in the summary judgment was meritorious. Plaintiffs must show that each of the independent grounds alleged in the motion is insufficient to support the order.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

## **HN2** [down arrow] **Estoppel, Collateral Estoppel**

Collateral estoppel precludes the relitigation of identical issues of fact or law that were already litigated and essential to the judgment in a prior lawsuit where the parties were cast as adversaries. There are three requirements which must be met for the federal doctrine of collateral estoppel to apply to a subsequent, related state court proceeding: (1) the prior federal decision must have resulted in a judgment on the merits; (2) the same fact issues sought to be concluded must have been actually litigated in the 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 > Public Enforcement > State Civil Actions

## **HN3** [down arrow] **Antitrust & Trade Law, Sherman Act**

Tex. Bus. & Com. Code Ann. § 15.05(a) (1987), of the Texas Antitrust Act is comparable to, and indeed taken from 15 U.S.C.S. § 1 (1988), Section 1 of the Sherman Antitrust Act. Accordingly, the court look to federal judicial interpretations of Section 1 of the Sherman Act in applying section 15.05(a) of the Texas antitrust law.

Antitrust & Trade Law > Sherman Act > Claims

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

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

To establish a violation of section one of 15 U.S.C.S. § 1 (1988), the Sherman Antitrust Act or Tex. Bus. & Com. Code Ann. § 15.05(a) (1987), a plaintiff must prove the challenged restraint of trade is unreasonable and has an adverse effect on competition in the relevant market.

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

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

## **HN5** [down arrow] **Intentional Interference, Elements**

The elements of a cause of action for tortious interference with contractual relations are: (1) there was a contract subject to interference; (2) the act of interference was willful and intentional; (3) such intentional act was a proximate cause of a plaintiff's damages; and (4) actual damage or loss occurred. Texas law protects existing and prospective contracts from interference.

Real Property Law > Landlord & Tenant > Lease Agreements > Subleases

930 S.W.2d 945, \*945L 1996 Tex. App. LEXIS 4548, \*\*1

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

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

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

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

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

#### **HN6** [down] **Lease Agreements, Subleases**

Interference with a business relationship is similar to the tort of contract interference. It is not necessary to establish the existence of a valid contract, but interference with a general business relationship is actionable only if a defendant's interference is motivated by malice. To recover on a cause of action for tortious interference with a prospective business relationship, a plaintiff must show: (1) there was a reasonable probability he would have entered into a business relationship; (2) the defendant acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming the plaintiff; (3) the defendant was not privileged or justified in his actions; and (4) actual harm or damage occurred to the plaintiff as a result.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Civil Procedure > ... > Pleadings > Complaints > General Overview

#### **HN7** [down] **Defenses, Demurrsers & Objections, Affirmative Defenses**

See [Tex. Civ. Prac. & Rem. Code Ann. § 16.064](#) (1986).

Governments > Legislation > Statute of Limitations > General Overview

#### **HN8** [down] **Legislation, Statute of Limitations**

The tolling provisions are remedial in nature and are to be liberally construed.

Governments > Legislation > Statute of Limitations > General Overview

#### **HN9** [down] **Legislation, Statute of Limitations**

[Tex. Civ. Prac. & Rem. Code Ann. §§ 16.064](#) and [16.068](#) should be interpreted together so as to achieve the clear purpose of the statutes, which is to toll limitations for a certain period when a case is dismissed for lack of jurisdiction and to allow adding to a petition additional theories of liability or defenses after the lawsuit has been filed if those new theories or defenses are not wholly based on a new, distinct, or different transaction or occurrence.

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

930 S.W.2d 945, \*945L 1996 Tex. App. LEXIS 4548, \*\*1

Governments > Legislation > Statute of Limitations > General Overview

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

#### **HN10** [blue icon] **Burdens of Proof, Movant Persuasion & Proof**

When summary judgment is sought on the ground that limitations has expired, it is the movant's burden to conclusively establish the limitations bar, including the negation of a tolling or suspension statute raised by the nonmovant.

Governments > Legislation > Statute of Limitations > General Overview

#### **HN11** [blue icon] **Legislation, Statute of Limitations**

The absence from the state of Texas of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence under [Tex. Civ. Prac. & Rem. Code Ann. § 16.063](#) (1986).

Healthcare Law > Business Administration & Organization > Judicial Review > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

#### **HN12** [blue icon] **Business Administration & Organization, Judicial Review**

The decision of a governing board of a private hospital with regard to staff privileges is not subject to judicial review.

**Counsel:** For Appellant: MIKE O'BRIEN, HOUSTON.

For Appellee: DAN MCCLURE, DANIEL HEDGES, HOUSTON, RICHARD ZOOK, HOUSTON, BEN TAYLOR, DALLAS.

**Judges:** Sam H. Bass.<sup>7</sup> Justices Mirabal and Wilson also sitting.

**Opinion by:** Sam H. Bass

## **Opinion**

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### **[\*947] OPINION**

In the trial court, Donald S. Winston, M.D., Donald S. Winston, M.D., P.A., and Galleria Medical Center, Inc. (plaintiffs), sued American Medical International, Inc. (AMI), Twelve Oaks Hospital, and various doctors (defendants). Fundamentally, this is a dispute between doctors over two intertwined issues: (1) the business end of their medical practices; and (2) the denial of Dr. Winston's application for staff privileges. The trial judge granted defendants' joint motion for summary judgment, and plaintiffs appeal challenging the adverse ruling. We affirm in part, and reverse and remand in part.

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<sup>7</sup> Justice Bass, who retired on May 31, 1993, continues to sit by assignment for the disposition of this case, which was submitted prior to that date.

*I. Undisputed Facts*

In 1981, Dr. Winston opened an industrial medicine practice in the Galleria shopping mall [\*\*2] known as Galleria Clinic, Inc., since renamed Galleria Medical Center, Inc. (GMC). In late 1981 and early 1982, and pursuant to the Hospital's by-laws, Dr. Winston applied <sup>1</sup> for, and then received, temporary staff privileges <sup>2</sup> at Twelve Oaks Hospital, a private hospital owned by Twelve Oaks Medical Center, Inc., corporate affiliate of AMI. During the time Dr. Winston held privileges, approximately 15 patients per month were referred from his Galleria office [\*948] to the Twelve Oaks Hospital for admission and/or treatment.

[\*\*3] By letter dated November 4, 1982, Twelve Oaks notified Dr. Winston that the committee examining his application for permanent staff privileges would recommend to the Board of Directors that his request for staff privileges be denied, and that his temporary privileges were suspended pending the Board's decision. A few days later, Dr. Winston was informed by subsequent letter of the charts reviewed by the relevant committee in making its recommendations and of his right to a hearing before the Judicial Review Committee. By letter of November 15, Dr. Winston informed Mr. John Sielert, executive director of the Hospital, that he withdrew his "pending application for active staff privileges at Twelve Oaks Hospital."

Dr. Winston reapplied to Twelve Oaks in March of 1983. The application was referred to the Hospital's credentials committee for consideration, and it in turn appointed an ad hoc committee to review the medical charts of the patients treated by Dr. Winston in 1982. The ad hoc committee's findings were then presented back to the Hospital's credentials committee, of which Dr. Ronald Norris, a defendant, was a member. The credentials committee voted to recommend denial of Dr. [\*\*4] Winston's application.

The executive committee, including Dr. Cumagun and Dr. Jackson, also defendants, next considered the matter. The executive committee accepted the decision of the credentials committee and voted to deny the application. The executive committee notified Dr. Winston by letter dated August 4, 1983, of the decision to deny him medical staff privileges.

Dr. Winston then requested the findings of the executive committee be reviewed by the judicial review committee, a committee of five doctors chaired by Dr. Norborne Powell, also a defendant. The judicial review committee met with Dr. Winston on August 30, 1983, and subsequently voted September 7, 1983, to uphold denial of staff privileges as recommended by the executive committee.

The appellate review committee of the board of directors of the Hospital, which included doctors Norris and Powell, met on October 19, 1983, to consider Dr. Winston's appeal of the judicial review committee's decision. The board reaffirmed the denial of Dr. Winston's request for staff privileges and sent him notice by certified mail dated October 24, 1983.

*II. Dr. Winston's Factual Contentions*

Fundamentally, Dr. Winston claims [\*\*5] to have uncovered an illicit scheme by certain Twelve Oaks doctors to allocate industrial medicine patients among themselves to his professional and financial injury. The objective of the alleged conspiracy was the suppression of competition which in turn would enhance profits subsequently shared by members of the scheme. Dr. Winston claims they achieved their objective by denying him staff privileges in the Hospital, not because of any lack of professional competence, but in furtherance of their malicious plan.

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<sup>1</sup> The defendants describe Dr. Winston as having received temporary staff privileges while his application for permanent staff privileges was being considered. This application for permanent status was what was later denied and then withdrawn. Dr. Winston notes that he was not unknown to the Hospital when he filed the '81 application. While Dr. Winston was completing his medical residency, he received privileges beginning in April 1979 limited to the Department of Emergency Medicine.

<sup>2</sup> The type of staff privileges sought by Dr. Winston would allow him to admit patients, provide care, and perform certain general types of medical and surgical procedures at the hospital.

Plaintiffs allege each defendant doctor would send a list of companies that the doctor claimed were his clients to the emergency room nurses at Twelve Oaks. If an employee from a listed company came to the emergency room, the doctor who claimed a relationship with that company was called. The patients had no knowledge of this alleged arrangement. Dr. Winston says the doctors had no agreements with these companies, and that these companies, in fact, had never even heard of these doctors.

Dr. Winston states Dr. Cumagun, chief of surgery at Twelve Oaks, was appointed to ad hoc physician review committees to remove potential competitors from the staff. Dr. Winston claims he ran [\*\*6] afoul of the scheme when he contracted with many of the companies and became a competitor of Dr. Cumagun. Dr. Winston asserts that after he started competing for patients, the Hospital initiated a malicious peer review process against him.

Dr. Winston claims Twelve Oaks did not follow proper procedures in the review and [\*949] appeal process according to the Hospital's bylaws. Dr. Winston avers he was not allowed to appear before the ad hoc committee to discuss his medical charts. Further, Dr. Winston says there was no independent review by the credentials or the executive committees, also in violation of hospital bylaws. Although the judicial review committee allowed Dr. Winston to appear, in contrast to other committees, Dr. Winston states he was told he could not be represented by an attorney, even though the sole purpose of the judicial review committee was to ensure that the bylaws were fairly applied.

Dr. Winston asserts he did not learn of the decision of the appellate review committee of the board of directors until November 1983. Dr. Winston also claims corporate counsel for AMI instructed the executive director of Twelve Oaks to alter the minutes of the October 19, [\*\*7] 1983, meeting, and that he was unaware of the alleged alteration until after he initiated his federal suit.

Dr. Winston avers that as a result of the denial of his applications for privileges at Twelve Oaks, he cannot get privileges at any other hospital. Due to the damage to his reputation from the events at the Hospital, Dr. Winston states he was unable to obtain staff privileges or admit patients at other hospitals and was forced to close his practice.

He also asserts that in 1984 or 1985, the defendants set up a competing practice in the Galleria area, "The Doctors at the Galleria," and hired his former office manager, who then recruited his former patients.

In summary, Dr. Winston claims that:

- 1) defendants conspired to "eliminate competition for emergency room patients and to prevent the entry of new physicians into the market at [the Hospital]";
- 2) he discovered this conspiracy after he obtained his temporary staff privileges;
- 3) on November 4, 1982, his temporary staff privileges were terminated, and it was recommended that permanent staff privileges be denied because he did not condone the conspiracy;
- 4) the manner in which his applications for [\*\*8] staff privileges were denied, and his temporary staff privileges were terminated, violated the Hospital "bylaws and various contractual agreements between [the Hospital], AMI and [himself]";
- 5) the denial of staff privileges made it impossible for him to practice medicine, and resulted in his patients going to the Hospital to be treated by defendants;
- 6) he was unable to obtain "admitting privileges" at other hospitals because of the manner in which he lost his staff privileges at the Hospital;
- 7) defendants "sought to obtain [his] proprietary information, to confuse [his] patients as to the clinic's identity and to interfere with [his] business relationships by implying that [he] and his clinic had gone out of business";
- 8) his ex-employee took confidential business information with her when hired by the defendants which was used to, in effect, take over his medical practice; and
- 9) he discovered the plan to take over his medical practice on January 26, 1987, during a deposition taken during the pendency of the federal lawsuit discussed below.

### *III. The Appellees' Factual Contentions*

The defendants assert Dr. Winston's initial staff [\*\*9] privileges were merely temporary. When Dr. Winston reapplied, the ad hoc committee appointed to evaluate his charts criticized them for: (1) inappropriate evaluation of patients; (2) frequent cases of inadequate and inconsistent medical records; (3) repeated examples of inappropriate surgical judgment; and (4) frequent inappropriate preoperative evaluation of patients. The defendants maintain this was the basis for the denial of Dr. Winston's privileges. They assert a total of 31 doctors on various peer review committees participated in the review of Dr. Winston's charts before his staff privileges were denied on October 19, 1983.

### *IV. Procedural History*

Dr. Winston initially sued the defendants in federal court in November 1985, seeking [\*950] liability under the following statutes and theories:

- (1) Sherman Antitrust Act, [15 U.S.C. §§ 1, 15](#), and [22](#), and [28 U.S.C. § 1337](#);
- (2) Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C. § 1961, et seq.](#);
- (3) Texas Antitrust laws, [TEX. BUS. & COM. CODE ANN. § 15.01 et seq.](#) (Vernon 1987); and
- (4) tortious interference with present and prospective contractual and business relationships [\*\*10] and prospective advantage.

On May 8, 1990, the federal trial court granted defendants' motion for summary judgment regarding causes of actions pled under the Sherman and RICO acts. Because the only remaining claims were based on state law, the federal court exercised its discretion to dismiss the state claims without prejudice at the time it granted defendants' motion for summary judgment. The federal court clarified by amended order signed July 23, 1990, that its dismissal of the state claims was without prejudice to the state claims being refiled.

Plaintiffs filed suit in state court on July 6, 1990, based on the same facts, asserting the pendent state claims dismissed by the federal court and numerous additional claims. The state suit was based on the following statutes and theories of recovery:

#### CAUSES OF ACTION IN FEDERAL SUIT RETAINED

- (1) Texas Antitrust laws, [TEX. BUS. & COM. CODE ANN. § 15.01 et seq.](#) (Vernon 1987);
- (2) tortious interference with present and prospective contractual and business relationships and prospective advantage; and

#### CAUSES OF ACTION ADDED IN STATE COURT

- (3) fraud;
- (4) negligence;
- (5) breach of good faith and fair dealing;
- [\*\*11] (6) promissory estoppel;
- (7) defamation and business disparagement;

- (8) negligent misrepresentation;
- (9) breach of fiduciary duty;
- (10) Texas Deceptive Trade Practice Act;
- (11) civil conspiracy;
- (12) statutory commercial bribery;
- (13) unjust enrichment;
- (14) ratification; and

(15) breach of contract. Defendants filed a joint motion for summary judgment on five distinct grounds: (1) the denial of Dr. Winston's staff privileges was not actionable under Texas law regardless of the cause of action asserted; (2) the conduct of the defendant doctors relative to the rejection of Dr. Winston's application for privileges was statutorily privileged; (3) the actions filed were barred by the applicable statute of limitations; (4) the claims were barred by collateral estoppel; and (5) Dr. Winston failed to state necessary elements of the various causes of action pled. The motion was granted in whole by the trial court on August 19, 1991, without stating the specific grounds upon which it was based.

#### *V. Standard of Review on Appeal from Summary Judgment*

Plaintiffs bring five points of error attacking each of the grounds asserted by defendants as a basis for granting of the **[\*\*12]** summary judgment. Accordingly, [HN1](#)<sup>↑</sup> we will consider the summary judgment evidence in the light most favorable to the nonmovants and indulge every reasonable inference in their favor. [Reilly v. Rangers Management, Inc., 727 S.W.2d 527, 529 \(Tex. 1987\)](#); [Holbrook v. Guynes, 827 S.W.2d 487, 489 \(Tex. App.--Houston \[1st Dist.\] 1992\), aff'd sub nom, Guynes v. Galveston County, 861 S.W.2d 861 \(Tex. 1993\)](#). We will affirm if any theory in **[\*951]** the summary judgment was meritorious. [Fontenot v. NL Industries, 877 S.W.2d 339, 340 \(Tex. App.--Houston \[1st Dist.\] 1993, writ denied\)](#). Plaintiffs must show that each of the independent grounds alleged in the motion is insufficient to support the order. [Crowder v. Tri-C Resources, 821 S.W.2d 393, 396 \(Tex. App.--Houston \[1st Dist.\] 1991, no writ\)](#).

#### *VI. The Claims Contained in the Federal Complaint*

Although we decide below that the statute of limitations does not bar any claim brought by plaintiffs, we consider the claims asserted in the federal suit apart from the "new" allegations first brought in the state petition.

##### *A. The State Antitrust Claim*

Defendants contend plaintiffs are collaterally estopped **[\*\*13]** from maintaining the Texas Antitrust Act claim because the federal court decided the merits of that claim. [HN2](#)<sup>↑</sup> Collateral estoppel precludes the relitigation of identical issues of fact or law that were already litigated and essential to the judgment in a prior lawsuit where the parties were cast as adversaries. [Eagle Properties, Ltd. v. Scharbauer, 807 S.W.2d 714, 721 \(Tex. 1990\); State v. Approximately \\$ 2,000,000 in United States Currency, 822 S.W.2d 721, 725 \(Tex. App.--Houston \[1st Dist.\] 1991, no writ\)](#). There are three requirements which must be met for the federal doctrine of collateral estoppel to apply to a subsequent, related state court proceeding:

- (1) the prior federal decision must have resulted in a judgment on the merits;
- (2) the same fact issues sought to be concluded must have been actually litigated in the federal court; and

(3) the disposition of those issues must have been necessary to the outcome of the prior federal litigation.

*Shell Pipeline Corp. v. Coastal States Trading, Inc.*, 788 S.W.2d 837, 843 (Tex. App.--Houston [1st Dist.] 1990, writ denied). When an issue of fact or law is actually litigated and determined by [\*\*14] a valid final judgment, and the determination is essential to the judgment, that determination is conclusive in a subsequent action between the parties, whether on the same or a different cause of action. See *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984).

Plaintiffs' Texas Antitrust Act claim is brought under [section 15.05\(a\)](#) of the Texas Antitrust Act. *TEX. BUS. & COM. CODE ANN. § 15.05(a)* (Vernon 1987). The Texas Supreme Court has noted:

**HN3** [↑] [Section 15.05\(a\)](#) [of the Texas Antitrust Act] is comparable to, and indeed taken from, [section 1](#) of the Sherman Antitrust Act, [15 U.S.C. § 1 \(1988\)](#). Accordingly, we look to federal judicial interpretations of [section 1](#) of the Sherman Act in applying [section 15.05\(a\)](#) of our state **antitrust law**.

*DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 687 (Tex. 1990) (footnote omitted). In addition, [section 15.04](#) of the Texas Antitrust Act provides that its provisions "shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes" to an extent consistent with maintaining and promoting economic competition in trade and commerce within Texas. *TEX. BUS. & COM. CODE* [\*\*15] [ANN. § 15.04](#) (Vernon 1987). See also *Red Wing Shoe Co. v. Shearer's, Inc.*, 769 S.W.2d 339, 343 (Tex. App.--Houston [1st Dist.] 1989, no writ) ("The Texas legislature not only used language tracking that of the federal statute . . . but it also included a clause [[section 15.04](#)] specifying uniformity of construction between the federal and Texas statutes."); *Nafrawi v. Hendrick Medical Ctr.*, 676 F. Supp. 770, 774 (N.D. Tex. 1987) ("Establishing a violation of the [Texas Antitrust Act], then, requires the same elements as are required to establish the comparable violation of the Sherman Antitrust Act, [15 U.S.C. § 1](#).").

**HN4** [↑] To establish a violation of section one of the Sherman Antitrust Act or [section 15.05\(a\)](#) of the Texas Antitrust Act, a plaintiff must prove the challenged restraint of trade is unreasonable and has an "adverse effect on [\*952] competition" in the relevant market. *DeSantis*, 793 S.W.2d at 688; see also *MJR Corp. v. B & B Vending Co.*, 760 S.W.2d 4, 22-23 (Tex. App.--Dallas 1988, writ denied) ("Without a showing of actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws.").

Here, the federal [\*\*16] court considered the merits of plaintiffs' federal antitrust act claim when it granted the motion for summary judgment. In its memorandum opinion, the federal court held that the claim of conspiracy to purloin patient admissions and referrals (1) could not fall under the "per se rule" of illegality, but must be examined under the "rule of reason,"<sup>3</sup> and (2) under the "rule of reason" analysis, it "could not have had an adverse effect on competition" as a matter of law because Twelve Oaks Hospital dealt with a very small share of the patient market.

Plaintiffs advance the same factual allegations as a basis for the Texas Antitrust Act claim as were advanced in the federal antitrust act claim. Accordingly, we conclude the plaintiffs are collaterally estopped from relitigating the state antitrust [\*\*17] act claim in state court. We hold the trial court properly granted summary judgment on the state antitrust act claim on the basis of collateral estoppel.

#### b. Tortious Interference

Plaintiffs contend the trial court also committed error in granting summary judgment for defendants regarding the claim against AMI and other defendants for tortious interference with the business relations of Dr. Winston, P.A. and GMC. In their federal complaint, plaintiffs claimed defendants tortiously interfered with their actual and prospective

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<sup>3</sup> See *National Soc'y of Professional Eng'r's v. United States*, 435 U.S. 679, 688-92, 98 S. Ct. 1355, 1363-65, 55 L. Ed. 2d 637 (1978), for an analysis of the distinction between these types of trade restraints.

contractual and business relationships, made wrongful use of confidential information, and breached a confidential relationship. The first amended complaint filed in federal court alleged AMI used bribes and illegal inducements to establish a physician group, defendants sought and did obtain Dr. Winston's proprietary information, confused Dr. Winston's patients as to the identity of this physician group, and implied that Dr. Winston and GMC had gone out of business.

The original petition filed in state court alleged that AMI used bribes, and other illegal inducements to establish a physician group in the Galleria, and "this group sought to obtain Dr. [\*\*18] Winston's proprietary information, to confuse Dr. Winston's patients as to their identity, and to interfere with Dr. Winston's business relationship by implying that Dr. Winston and his clinic had gone out of business." The second amended petition filed in state court more specifically alleged that in the summer of 1984, AMI hired Dr. Winston's GMC office manager, Nelda Barrera, to assist in establishing its medical office at The Doctors at the Galleria. The petition also states that when Barrera left to work for defendants, she took Dr. Winston's rolodex, confidential information concerning price lists and fee agreements, and the names of Dr. Winston's patients. In response to the defendants' motion for summary judgment, plaintiffs submitted Dr. Winston's affidavit setting out these allegations.

The state court summary judgment record also includes excerpts of deposition testimony from Randy Winograd, the head of AMI's physician relations department. The Doctors at the Galleria was funded by AMI. Winograd stated he was involved in recruiting Barrera to work at The Doctors at the Galleria and knew she was working for Dr. Winston at GMC at that time. Winograd also stated he did not [\*\*19] ask Barrera to bring patient lists from GMC and Barrera told him she would not consider bringing confidential information to AMI if she was hired by The Doctors at the Galleria. Barrera was hired as office manager for The Doctors at the Galleria.

[\*953] Excerpts from the deposition of Patricia Claiborne, another employee of GMC, also appear in the record. Claiborne stated Barrera told her she had been hired to work at The Doctors at the Galleria. Claiborne also stated she saw Barrera take the rolodex with names of contact persons, price lists, vendor lists, and other information from GMC, and Barrera told her she was taking such items so that when she left GMC, she would have "everything she needed." Claiborne further stated that after The Doctors at the Galleria opened, patients would arrive at GMC with forms from the other clinic, unaware they were at the wrong clinic.

**HN5** The elements of a cause of action for tortious interference with contractual relations are: (1) there was a contract subject to interference; (2) the act of interference was willful and intentional; (3) such intentional act was a proximate cause of a plaintiff's damages; and (4) actual damage or loss occurred. [\*\*20] *Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 926 (Tex. 1993); John Masek Corp. v. Davis, 848 S.W.2d 170, 175* (Tex. App.--Houston [1st Dist.] 1992, writ denied). Texas law protects existing and prospective contracts from interference. *Davis, 848 S.W.2d at 175.*

**HN6** Interference with a business relationship is similar to the tort of contract interference. It is not necessary to establish the existence of a valid contract, but interference with a general business relationship is actionable only if a defendant's interference is motivated by malice. *CF & I Steel Corp. v. Pete Sublett & Co., 623 S.W.2d 709, 715* (Tex. Civ. App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.). To recover on a cause of action for tortious interference with a *prospective* business relationship, a plaintiff must show: (1) there was a reasonable probability he would have entered into a business relationship; (2) the defendant acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming the plaintiff; (3) the defendant was not privileged or justified in his actions; and (4) actual harm or damage occurred to the plaintiff as a result. *American [\*\*21] Medical Int'l, Inc. v. Giurintano, 821 S.W.2d 331, 337* (Tex. App.--Houston [14th Dist.] 1991, no writ).

In their motion for summary judgment, defendants argue plaintiffs' claim of tortious interference against AMI is barred by limitations. We disagree. The tortious interference claims against defendants are alleged to have arisen in 1984, when defendants established its clinic and hired Barrera. The plaintiffs filed their federal complaint in 1985, within the two-year limitations period. Although the plaintiffs do not specify the business relationships or actual or prospective contracts of GMC and Dr. Winston, P.A. that were subjected to interference by defendants, such is not their burden to defeat a motion for summary judgment based on limitations. The defendants argued all the plaintiffs' causes of action accrued in October 1983, when Dr. Winston's staff privileges were denied, and so did not present

argument or summary judgment evidence sufficient to defeat the claims against defendants for their actions in 1984 as a matter of law. Because of the tolling provisions discussed below, we determine that the trial court could not have properly granted summary judgment on the basis [\*\*22] of limitations as to the tortious interference causes of action originally pled in the federal suit.

## VII. Statute of Limitations

Next, we consider the question of whether the trial court could have correctly granted summary judgment in part because a portion of the remainder of Dr. Winston's claims were filed outside the applicable statutes of limitations.

Dr. Winston reapplied for staff privileges at Twelve Oaks in March of 1983. He was sent formal notification of the Hospital's denial of his reapplication by certified mail on or about October 25, 1983, however, there was evidence he did not receive the notice until mid-November, 1983. The federal lawsuit was filed on November 4, 1985, and the amended order of dismissal was signed July 23, 1990. The state court lawsuit was filed July 6, 1990.

[\*954] Notwithstanding that the state lawsuit was filed nearly seven years after the events that predicated Dr. Winston's complaints, plaintiffs argue that the respective statutes of limitations were tolled while their case was pending in federal court, based on [TEX. CIV. PRAC. & REM. CODE ANN. § 16.064](#) (Vernon 1986). Plaintiffs further claim that they could add additional [\*\*23] causes of action that were not included in their federal lawsuit pursuant to [TEX. CIV. PRAC. & REM. CODE ANN. § 16.068](#) (Vernon 1986), provided that any new theories of recovery were based on the same facts alleged as a basis for the federal suit.

Defendants respond by arguing that (1) plaintiffs have not complied with the procedural requirements of 16.064; (2) that in any event, plaintiffs could not "save" any causes of action other than those specifically pled in the federal suit; and (3) that certain of the state law claims now pled were barred by the relevant statute of limitations before the federal suit was filed. [HN7](#) [TEX. CIV. PRAC. & REM. CODE ANN. § 16.064](#) (Vernon 1986), provides in part:

(a) The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:

(1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and

(2) not later than the 60th day after the date the dismissal or other disposition [\*\*24] becomes final, the action is commenced in a court of proper jurisdiction.

### a. Procedural Requirements of 16.064

Defendants first note plaintiffs filed the state suit (July 6, 1990) before the federal dismissal became final (July 20, 1990) and thus violated section (a)(2). Defendants argue the statute requires that the state suit can only be filed in a window of 60 days after the federal suit becomes final. Therefore, the defendants claim the state suit was filed too soon to take advantage of the statute. Finally, defendants state that Dr. Winston's construction of the statute "would encourage the filing of a second suit anytime during the pendency of the first suit and lead to an undesirable deluge of simultaneous parallel state and federal litigation." (Emphasis in original.)

However, under the facts of this case, we disagree. Here, the state suit was not filed at anytime, but only after a putative final judgment was signed on May 8, 1990, in the federal case. [HN8](#) The tolling provisions are remedial in nature and are to be liberally construed. [Vale v. Ryan, 809 S.W.2d 324, 326](#) (Tex. App.--Austin 1991, no writ.). Although defendants are correct that the precise question [\*\*25] before us was not answered in the Vale opinion, we do not find the construction of the language in the statute urged on us by defendants independently persuasive, nor consistent with the many cases mandating a liberal construction of the statute. Further, we do not find the filing of the state suit in this case so premature, if it was so filed, as to be devoid of any meaningful relationship with the

signing of the final judgment. Accordingly, we do not find the trial judge could have granted the summary judgment because of the plaintiffs' alleged failure to comply with the procedural requirements of 16.064.<sup>4</sup>

#### b. "Saving" statute

Next, defendants [\*\*26] argue that if the state suit was filed consistent with the timeliness requirements of the statute, the only causes of action that can be saved are the ones asserted in the federal suit. Defendants [\*955] state that the "same action" language of 16.064(a) limits what plaintiffs can file in the state court to exactly what was filed in the federal court. If defendants are correct, then plaintiffs would have a state suit under the Texas Antitrust laws and for tortious interference with present and prospective contractual and business relationships. The remaining causes of action contained in plaintiffs' state pleadings would have been properly dismissed by the trial judge.

Plaintiffs argue that [TEX. CIV. PRAC. & REM. CODE ANN. § 16.068](#) (Vernon 1986) allows Dr. Winston to add additional theories of recovery if the new claims are not grounded in new, distinct, or different transactions or occurrences. Defendants present us with no Texas authority that prohibits litigants from taking advantage of the amending provisions of 16.068 to causes of action saved under 16.064. Defendants do cite us to authority from other states construing statutes similar to 16.064, but not to any authority [\*\*27] involving the interaction between statutes like 16.064 and 16.068.

We find that [HN9\[!\[\]\(827454e5bf9d65bde2ee50ccc5bca8a5\_img.jpg\)\]](#) [sections 16.064](#) and [16.068](#) should be interpreted together so as to achieve the clear purpose of the statutes, which is to toll limitations for a certain period when a case is dismissed for lack of jurisdiction and to allow adding to a petition additional theories of liability or defenses after the lawsuit has been filed if those new theories or defenses are not wholly based on a new, distinct, or different transaction or occurrence. Accordingly, we hold the trial judge could not have granted the summary judgment and eliminated the "new" causes of action pled based on the inapplicability of 16.068 to causes of action "saved" under 16.064.

#### c. Claims Barred before Federal Suit Filed

[HN10\[!\[\]\(3d03aa9edebfde4d4b507bebd61a6cf8\_img.jpg\)\]](#) When summary judgment is sought on the ground that limitations has expired, it is the movant's burden to conclusively establish the limitations bar, including the negation of a tolling or suspension statute raised by the nonmovant. [Zale Corp. v. Rosenbaum, 520 S.W.2d 889, 891 \(Tex. 1975\)](#); [Ardila v. Saavedra, 808 S.W.2d 645, 647 \(Tex. App.--Corpus Christi 1991, no writ\)](#). Dr. Winston pled in his second amended [\*\*28] petition that "the individual Defendants were absent from the state for several days during the two years following the denial of staff privileges; thereby, tolling the statute of limitations on the tort claims."

[HN11\[!\[\]\(6942ce8a0b35c97a36484ee9cc23f476\_img.jpg\)\]](#) The absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence. [TEX. CIV. PRAC. & REM. CODE ANN. § 16.063](#) (Vernon 1986); [Ardila, 808 S.W.2d at 646](#); [Hooper v. Torres, 790 S.W.2d 757, 758-59 \(Tex. App.--El Paso 1990, writ denied\)](#). Because defendants moved for summary judgment, it was their burden to conclusively negate Dr. Winston's reliance on 16.063 and prove the individual defendants were not out of the state as alleged. [Ardila, 808 S.W.2d at 647](#). We find no evidence in the record from the defendants on this issue; thus, the defendants have failed to carry their burden. Therefore, we conclude the trial judge could not have granted summary judgment based on the running of any statute of limitations.<sup>5</sup>

<sup>4</sup> Defendants also urge our consideration of [Gutierrez v. Lee, 812 S.W.2d 388, 392](#) (Tex. App.--Austin 1991, writ denied). In Gutierrez, the Austin Court found 16.064 inapplicable to the facts of the case before it for substantive reasons. We are not bound by the court's suggestion of how 16.064 would have been unhelpful to the Lees even if it did apply.

<sup>5</sup> Because we resolve the case as to all parties later in the opinion with regard to the causes of action arising from the denial of Dr. Winston's application for staff privileges, it is unnecessary here to distinguish between the corporate and individual defendants relative to application of the tolling statute. Obviously, the corporate defendant had not left the state.

[\*\*29] We note that both sides to the litigation have discussed the statute of limitations issue in the context of a suit "for denial of staff privileges." The parties generally agree that the cause of action accrued sometime between late October and late November of 1983 with the receipt by Dr. Winston of the final denial letter sent to him by Sielert, the Hospital's chief administrator. The parties dispute the precise date on which Dr. Winston received the letter. We do not decide whether an accrual date can be determined as a matter of law because plaintiffs pled a [\*956] tolling statute, which brings into issue when the limitations period ended as distinguished from when it started. Because we cannot determine as a matter of law on what day limitations ran, it is not necessary for the resolution of the limitations questions presented to address or resolve on what day it started.<sup>6</sup>

[\*\*30] *VIII. Private Hospital Action*

The first grounds for summary judgment urged by the defendants was that in 1982 and 1983, the denial of staff privileges at a *private hospital* was not actionable under Texas law, regardless of the cause of action asserted. It is uncontested that Twelve Oaks Hospital is a *private* hospital. Numerous Texas cases have drawn a distinction between private and public hospitals, consistently holding that [HN12](#)<sup>7</sup> the decision of a governing board of a private hospital with regard to staff privileges is not subject to judicial review. [\*Armintor v. Community Hosp. of Brazosport\*, 659 S.W.2d 86, 88-89](#) (Tex. App.--Houston [14th Dist.] 1983, no writ); [\*Tigua Gen. Hosp. v. Feuerberg\*, 645 S.W.2d 575, 578](#) (Tex. App.--El Paso 1982, writ dism'd w.o.j.); [\*Hodges v. Arlington Neuropsychiatric Ctr., Inc.\*, 628 S.W.2d 536, 538](#) (Tex. App.--Fort Worth 1982, writ ref'd n.r.e.); [\*Charter Medical Corp. v. Miller\*, 605 S.W.2d 943, 951](#) (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.). See also [\*Grossling v. Ford Memorial Hosp.\*, 614 F. Supp. 1051, 1058 \(E.D. Tex. 1985\)](#). The court in *Tigua* stated the controlling principles as follows:

Where [\*\*31] a hospital excludes or discriminates against a physician or surgeon applying for or seeking to maintain staff membership, the subsequent treatment of the problem by the courts depends primarily upon whether the hospital involved is a public or private institution and it is generally held that a private hospital acts at its own discretion and that its decisions are not subject to judicial review . . . . Texas follows the rule that the exclusion of a physician from staff privileges is a matter which ordinarily rests with the discretion of the management authorities and is not subject to judicial review. In summary, in the area of private hospitals those cases have held that the doctor in this State has no cause of action against a private hospital for the termination of staff privileges even where the action of the hospital was arbitrary and capricious or where common law rights to procedural or substantive due process were violated. In this situation, the final authority to terminate a doctor-staff privilege rests with the Board of Governors.

[645 S.W.2d at 578](#) (citations omitted).

We agree with defendants that at the relevant time, 1982-1983, Texas law did not permit recovery [\*\*32] by a physician against a private hospital or its staff for denial or termination of physician staff privileges, regardless of the name given to the cause of action. Dr. Winston has not cited to this court a single Texas decision to the contrary, and we have found none.

Accordingly, we affirm the summary judgment against Dr. Winston as to all of his causes of action based on certain defendants' denial of Dr. Winston's application for staff privileges and the termination of his temporary privileges.

We reverse the summary judgment as to Dr. Winston's claim of tortious interference with present and prospective contractual and business relationships based on defendant's establishment of a competing practice in the Galleria area, and we remand that portion of the case to the trial court.

/s/ Sam H. Bass<sup>7</sup>

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<sup>6</sup> We note that under Dr. Winston's theory of the case, the denial of staff privileges was not an end in itself, but evidence of a broader illegal objective, the taking of his medical business. We have not been asked to discuss other acts allegedly taken in furtherance of the alleged conspiracy, such as the hiring of Dr. Winston's office manager, as they might impact our consideration of the limitations issues.

930 S.W.2d 945, \*956L<sup>1</sup>996 Tex. App. LEXIS 4548, \*\*32

Justices Mirabal and Wilson also sitting.

Judgment [**\*\*33**] rendered and opinion delivered OCT 3 1996

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<sup>7</sup> Justice Bass, who retired on May 31, 1993, continues to sit by assignment for the disposition of this case, which was submitted prior to that date.

## Trugman-Nash, Inc. v. New Zealand Dairy Bd.

United States District Court for the Southern District of New York

October 8, 1996, Decided ; October 9, 1996, FILED

93 Civ. 8321 (CSH), 93 Civ. 8329 (CSH)

**Reporter**

942 F. Supp. 905 \*; 1996 U.S. Dist. LEXIS 14933 \*\*; 1996-2 Trade Cas. (CCH) P71,588

TRUGMAN-NASH, INC. and TRIO CHEESE IMPORTS, INC., Plaintiff, -against- NEW ZEALAND DAIRY BOARD, MIL PRODUCTS HOLDINGS (NORTH AMERICA) INC. and WESTERN DAIRY PRODUCTS, INC., Defendants. WESTERN DAIRY PRODUCTS, INC., Plaintiffs, -against- TRUGMAN-NASH, INC. and TRIO CHEESE, INC., Defendants.

**Disposition:** [\*\*1] Defendants' motions in 93 Civ. 8321 denied in their entirety. Western Dairy's motion for partial summary judgment in 93 Civ. 8329 denied. Stay of discovery vacated.

## **Core Terms**

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Dairy, cheese, cooperatives, export, allegations, amended complaint, plaintiffs', importation, defendants', Sherman Act, marketing, licenses, conspirators, monopolize, motion to dismiss, antitrust claim, conspiracy, entities, farmers, electricity, fraudulent, reinsurers, antitrust, Holdings, quota, act of state doctrine, summary judgment, relevant market, district court, circumstances

## **LexisNexis® Headnotes**

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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

### **HN1[] International Aspects, International Application of US Law**

In deciding whether claims should be dismissed as improper applications of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), to foreign conduct, the only substantial question is whether there is in fact a true conflict between domestic and foreign law.

International Law > Authority to Regulate > Anticompetitive Activities

### **HN2[] Authority to Regulate, Anticompetitive Activities**

942 F. Supp. 905, \*905LÁ996 U.S. Dist. LEXIS 14933, \*\*1

The lawfulness of a foreign defendant's conduct under foreign law is not dispositive on the issue of conflict vel non with American law; and that is so even where the foreign state has a strong policy to permit or encourage such conduct. No conflict exists where a person subject to regulation by two states can comply with the laws of both.

Antitrust & Trade Law > Sherman Act > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

### **HN3** [] **Antitrust & Trade Law, Sherman Act**

In the absence of any demonstrated conflict between American **antitrust law** and foreign law, the foreign conduct of foreign defendants is subject to district court antitrust scrutiny.

Antitrust & Trade Law > Sherman Act > Defenses

International Law > Dispute Resolution > Act of State Doctrine

### **HN4** [] **Sherman Act, Defenses**

It is a necessary factual predicate for application of the act of state doctrine that the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory.

Civil Procedure > ... > Justiciability > Political Questions > General Overview

### **HN5** [] **Justiciability, Political Questions**

The political question doctrine excludes from judicial review those controversies that revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.

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

### **HN6** [] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss under **Fed. R. Civ. P. 12(b)(6)**, the trial court's function is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence that might be offered in support thereof. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. The district court should grant a **Rule 12(b)(6)** motion 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 > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

### **HN7** [] **Defenses, Demurrers & Objections, Motions to Dismiss**

942 F. Supp. 905, \*905L<sup>A</sup>996 U.S. Dist. LEXIS 14933, \*\*1

Except in certain circumstances, consideration of a motion to dismiss the complaint must focus on the allegations contained on the face of the complaint.

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

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

#### **HN8** [down] **Defenses, Demurrs & Objections, Motions to Dismiss**

On a motion to dismiss, a district court must accept plaintiff's well-pleaded factual allegations as true, and the allegations must be construed favorably to the plaintiff.

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

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > General Overview

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

#### **HN9** [down] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss under [\*Fed. R. Civ. P. 12\(b\)\(6\)\*](#) need not be granted nor denied in toto but may be granted as to part of a complaint and denied as to the remainder.

Antitrust & Trade Law > Sherman Act > General Overview

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

#### **HN10** [down] **Antitrust & Trade Law, Sherman Act**

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. 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 > Sherman Act > General Overview

#### **HN11** [down] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

942 F. Supp. 905, \*905L 1996 U.S. Dist. LEXIS 14933, \*\*1

Antitrust & Trade Law > Sherman Act > General Overview

## **HN12** [blue icon] International Aspects, International Application of US Law

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#), applies to foreign conduct that was meant to produce and did produce some substantial effect in the United States.

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

International Trade Law > 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 > Sherman Act > General Overview

## **HN13** [blue icon] Monopolies & Monopolization, Actual Monopolization

While the conduct of a single firm can violate Sherman Act [§ 2](#), [15 U.S.C.S. § 2](#), if it threatens actual monopolization, Sherman Act [§ 1](#), [15 U.S.C.S. § 1](#), in contrast, reaches unreasonable restraints of trade effected by a "contract, combination or conspiracy" between separate entities. An agreement between two or more persons is fundamental to any Sherman Act [§ 1](#) claim.

Antitrust & Trade Law > Sherman Act > General Overview

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

## **HN14** [blue icon] Antitrust & Trade Law, Sherman Act

The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of single enterprise for purposes of Sherman Act [§ 1](#), [15 U.S.C.S. § 1](#), so that a corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of that section.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

## **HN15** [blue icon] Antitrust & Trade Law, Sherman Act

There is no requirement that an antitrust plaintiff name all co-conspirators, as long as their existence is set forth in the complaint.

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN16\*\*](#) [blue document icon] **Regulated Practices, Price Fixing & Restraints of Trade**

Economic reality, not corporate form, should control the decision of whether related entities can conspire.

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN17\*\*](#) [blue document icon] **Regulated Practices, Price Fixing & Restraints of Trade**

The requisite plurality of conspirators under Sherman Act [§ 1, 15 U.S.C.S. § 1](#), does not exist unless cooperatives or the individuals who make up those cooperatives pursued diverse interests.

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

## [\*\*HN18\*\*](#) [blue document icon] **Per Se Rule & Rule of Reason, Per Se Violations**

A horizontal price-fixing conspiracy, if proved, constitutes a per se violation of Sherman Act [§ 1, 15 U.S.C.S. § 1](#); to sustain that claim, a plaintiff need not plead or prove a relevant market, nor demonstrate that defendant's conduct was economically reasonable.

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

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

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN19\*\*](#) [blue document icon] **Conspiracy to Monopolize, Sherman Act**

[15 U.S.C.S. § 2](#), condemns the conduct of 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.

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

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > 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 > Regulated Practices > Price Fixing & Restraints of Trade > 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

## [HN20](#) [] **Monopolies & Monopolization, Attempts to Monopolize**

Monopolization without conspiracy is unlawful under Sherman Act [§ 2, 15 U.S.C.S. § 2](#), but restraint of trade without a conspiracy or combination is not unlawful under Sherman Act [§ 1, 15 U.S.C.S. §2](#).

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

Antitrust & Trade Law > Sherman Act > General Overview

## [HN21](#) [] **Monopolies & Monopolization, Actual Monopolization**

The offense of monopoly under Sherman Act [§ 2, 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 > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

## [HN22](#) [] **Regulated Practices, Market Definition**

Market analysis turns upon the identity of and options available to the consumers whose interests the antitrust laws are intended to protect.

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

## **HN23** [blue icon] **Monopolies & Monopolization, Actual Monopolization**

Industrial activities cannot be confined to trim categories. Illegal monopolies under Sherman Act [§ 2, 15 U.S.C.S. § 2](#), may well exist over limited products in narrow fields where competition is eliminated.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## **HN24** [blue icon] **Business Torts, Fraud & Misrepresentation**

An action for fraud requires proof of a representation of fact which is false and known to be false when made, which is offered to deceive another and with the intention to induce the other to act or refrain from acting, and proof of reliance upon the representation which causes injury.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## **HN25** [blue icon] **Pleadings, Heightened Pleading Requirements**

See [Fed. R. Civ. P. 9\(b\)](#).

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

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

## **HN26** [blue icon] **Pleadings, Heightened Pleading Requirements**

[Fed. R. Civ. P. 9\(b\)](#) must be read together with [Fed. R. Civ. P. 8\(a\)](#), which requires only a "short and plain statement" of the claims for relief.

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

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

## **HN27** [blue icon] **Defenses, Demurrs & Objections, Motions to Dismiss**

On a motion to dismiss, the court assumes the truth of plaintiff's factual allegations, reads the complaint generously, and draws all inferences in favor of the pleader.

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Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

## **HN28**[] **Pleadings, Heightened Pleading Requirements**

Fed. R. Civ. P. 9(b) must be enforced so as to accomplish its three goals: (1) providing a defendant fair notice of plaintiff's claim, to enable preparation of his defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## **HN29**[] **Pleadings, Heightened Pleading Requirements**

To satisfy the particularity requirement of Fed. R. Civ. P. 9(b), a complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements. Where multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud. However, no specific connection between fraudulent representations or omissions need be pleaded as to defendants who are insiders or affiliates personally participating in the statements at issue.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## **HN30**[] **Pleadings, Heightened Pleading Requirements**

A complaint may adequately identify the statements alleged to be misrepresentations and properly indicate when, where and by whom they were made, yet still fail Fed. R. Civ. P. 9(b) scrutiny if the complaint does not allege circumstances giving rise to a strong inference that defendant knew the statements to be false, and intended to defraud plaintiff.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## **HN31**[] **Pleadings, Heightened Pleading Requirements**

While Fed. R. Civ. P. 9(b) permits conditions of mind to be averred generally, the rule also requires that allegations of scienter be supported by facts giving rise to a "strong inference" of fraudulent intent.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## [\*\*HN32\*\*](#) [blue document icon] **Pleadings, Heightened Pleading Requirements**

Knowledge of falsity cannot be alleged in conclusory terms. Plaintiff must be able to allege particulars regarding a defendant's awareness or discovery of the facts upon which plaintiff relies for the claim of fraud.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Criminal Law & Procedure > ... > Eyewitness Identification > Due Process Protections > Fair Identification Requirement

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## [\*\*HN33\*\*](#) [blue document icon] **Pleadings, Heightened Pleading Requirements**

To satisfy the scienter requirement, a plaintiff need not allege facts which show a defendant had a motive for committing fraud, so long as plaintiff adequately identifies circumstances indicating "conscious behavior" by the defendant from which an intent to defraud may fairly be inferred. However, where a particular defendant's motive to defraud is not apparent, the strength of the circumstantial allegations must be correspondingly greater.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

## [\*\*HN34\*\*](#) [blue document icon] **Heightened Pleading Requirements, Fraud Claims**

Allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge. However, that exception to [Fed. R. Civ. P. 9\(b\)](#)'s general requirement of particularized pleading does not constitute a license to base claims of fraud on speculation or 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 a relaxed pleading standard.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Civil Procedure > Remedies > Damages > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

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

## [\*\*HN35\*\*](#) [blue document icon] **Damages, Punitive Damages**

Under New York law, punitive damages may be awarded for gross, wanton, or willful fraud, or other morally culpable conduct.

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**Judges:** CHARLES S. HAIGHT, JR., UNITED STATES SENIOR DISTRICT JUDGE

**Opinion by:** CHARLES S. HAIGHT, JR.

## Opinion

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### [\*908] MEMORANDUM OPINION

*HAIGHT, Senior District Judge:*

These consolidated cases arise out of the importation of New Zealand cheese into the United States. The factual background and the nature of certain pending motions are described in the Court's opinion dated February 21, 1996. Subsequently the Court heard oral argument. This opinion resolves the pending motions.

Familiarity with the prior opinion is presumed. For present purposes, it is sufficient to say that plaintiffs in 93 Civ. 8321 are domestic [\*2] importers of New Zealand cheese under licenses issued by the United States Department of Agriculture ("USDA"). Defendants in that action consist of the New Zealand Dairy Board ("the NZDB" or "the Board") and two Delaware corporations closely related to NZDB and each other. Plaintiffs complain of defendants' failure to deliver a contracted-for quantity of cheese. Their claims sound in breach of contract, *quantum meruit*, common law fraud, and antitrust. Defendants move to dismiss the fraud and antitrust claims. In 93 Civ. 8329, Western Dairy Products, Inc. ("Western Dairy"), a defendant in the other case with [\*909] whom plaintiffs dealt directly, moves for partial summary judgment to recover an allegedly undisputed amount due.

I

In 93 Civ. 8321, defendants move to dismiss plaintiffs' fourth and fifth claims. Those claims, as set forth in an amended complaint, allege that defendants violated the antitrust laws of the United States. The fourth claim alleges that defendants entered into a conspiracy in restraint of trade, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. The fifth claim alleges that defendants monopolized the importation, distribution and sale in the United [\*3] States of New Zealand cheese, in violation of section 2 of the Sherman Act, 15 U.S.C. § 2.

Defendants make two arguments in support of their motion. First, they contend that this Court lacks jurisdiction to adjudicate plaintiffs' antitrust claims, or that it should refrain from exercising any jurisdiction that might exist. Second, defendants contend that the fourth and fifth claims fail to state claims upon which relief can be granted.

A

Defendants' jurisdictional arguments are founded primarily upon the manner in which the New Zealand Dairy Board Act of 1961, as amended, created and governs the conduct of the NZDB. On that aspect of the case, defendants invoke the doctrines of act of state, foreign sovereign compulsion, and international comity. These doctrines, while separately briefed and argued, overlap to a large degree. I think that the applicability of all three doctrines to the case at bar depends upon the answer to the same question: whether New Zealand law compels defendants to conduct their affairs in the manner described in the amended complaint, which plaintiffs say violate American antitrust law.<sup>1</sup> If that question be answered in the negative, then there is no apparent [\*4] impediment to

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<sup>1</sup> For purposes of this motion, I treat plaintiffs' factual allegations as true.

defendants' compliance with the laws of both countries, and no basis for immunizing defendants from the consequences of American antitrust violations.

These conclusions follow from the Supreme Court's decision in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993). Plaintiffs alleged that domestic primary insurers and reinsurers, brokers, and trade associations, together with British reinsurers based in London, violated the Sherman Act by engaging in various conspiracies aimed at forcing American primary insurers to change the terms of their liability policies to conform with policies the defendants wished to sell. I am concerned in the case at bar only with the Court's holding with respect to the British reinsurers.

The British reinsurers argued that the principle of international comity precluded District Court jurisdiction over the foreign conduct alleged, a contention [\*\*5] that the District Court accepted. The Ninth Circuit reversed. *In re Insurance Antitrust Litigation*, 938 F.2d 919, 932-34 (9th Cir. 1991).<sup>2</sup> The Court of Appeals applied the six factors enumerated in its prior decisions in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (*Timberlane I*), and 749 F.2d 1378 (9th Cir. 1984) (*Timberlane II*). The balancing of those factors, the Ninth Circuit concluded in *Hartford*, militated in favor of District Court jurisdiction over plaintiffs' antitrust claims against the British reinsurers. The *Timberlane* case reached the opposite conclusion, which defendants at bar understandably stress; but the Court of Appeals explained the different result in *Hartford* by saying at 938 F.2d at 933:

The comparison led to the ultimate dismissal of the *Timberlane* suit in *Timberlane II*: the effects of the conduct charged were substantial in Honduras and minimal in the United States. *Timberlane II*, 749 F.2d at 1385. The case here is just the reverse. The effects are minimal, or at any rate not large in England, and they are, as implicitly found by the district court, "direct, substantial, and reasonably [\*910] foreseeable" [\*\*6] in the United States, as to which Lloyds does at least half of its casualty underwriting. Accepting as true the plaintiffs' allegations, the actions of the foreign defendants have had the kind of "real economic consequences" for the American economy that strongly weigh in favor of the exercise of jurisdiction.

The Supreme Court affirmed the Ninth Circuit, but I think it fair to say that its analysis was more sharply focused. *HN1*[<sup>↑</sup>] In deciding whether "certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct," 509 U.S. at 794-95, the Court identified as "the only substantial question in this litigation . . . whether there is in fact a true conflict between domestic and foreign law." *Id. at 798* (citations and internal quotation marks omitted). Answering that question in the negative, the Court accepted [\*\*7] the British reinsurers' assertion "that Parliament has established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy." *Id. at 798-99*. "But," the Court continued, "this is not to state a conflict." *HN2*[<sup>↑</sup>] The lawfulness of a foreign defendant's conduct under foreign law is not dispositive on the issue of conflict *vel non* with American law; and that is so, "even where the foreign state has a strong policy to permit or encourage such conduct." *Id. at 799*. No conflict exists "where a person subject to regulation by two states can comply with the laws of both"; and that circumstance obtained in *Hartford*, "since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the law of both countries is otherwise impossible." *Id.* (citations and interior quotation marks omitted). *HN3*[<sup>↑</sup>] In the absence of any demonstrated conflict between American **antitrust law** and British law, the foreign conduct of the British reinsurers was subject to District Court antitrust scrutiny.

Accordingly, [\*\*8] I conceive the threshold question in the case at bar to be whether New Zealand law requires defendants to engage in the conduct which plaintiffs allege violates the Sherman Act.

B

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<sup>2</sup> I will hereafter refer to the Ninth Circuit's decision as "*Hartford*", to conform to the title of the case in the Supreme Court.

On August 30, 1961, the New Zealand Parliament enacted the Dairy Board Act of 1961 (hereinafter "the Act"), which came into force on September 1 of that year.<sup>3</sup> Act, [§ 1](#). The Act established "a Board, to be called the New Zealand Dairy Board," § 3(1), which "is a body corporate, with perpetual succession and a common seal." § 3(4).

The Board is comprised of two directors appointed by the Minister, a government official, and eleven directors appointed or elected by 15 cooperative companies in the dairy industry. Act, § 3AA. The Board elects its Chairman. § 5(1).

§ 14 of the Act is captioned "General functions of the Board." That section provides in part:

- (1) The general functions of the Board shall be--
- (a) Repealed
- (b) **[\*\*9]** To acquire, pay for, and market such export produce as the Board may from time to time determine;
- (c) To control the export of dairy produce other than dairy produce acquired and marketed by the Board. . ."

§ 15 is captioned "Board to comply with general trade policy of Government." That section provides:

In the exercise of its functions and powers under this Act the Board shall comply with the general trade policy of the Government of New Zealand, and shall comply with any general or special directions given by the Minister pursuant to the policy of the Government in relation thereto.

Part II of the Act is captioned generally "Marketing of Export Produce." [§ 17](#) of the **[\*911]** Act falls within Part II. [§ 17](#) provides in part:

- 17. Powers of Board as to acquisition and marketing of export produce
  - (1) Without limiting any of the powers conferred on the Board by this Act or otherwise howsoever, the Board shall have full authority to make and carry out such arrangements as it thinks proper for any of the following purposes:
    - (a) For the acquisition and marketing by the Board of export produce;
    - (b) For the handling, pooling, transport, and storage of **[\*\*10]** export produce;
    - (c) For the consignment of export produce on such terms and in such quantities as it thinks fit;
    - (d) For the insurance against loss of export produce;
    - (e) For the establishment of a fund for the purpose of meeting any loss of or damage to export produce acquired by the Board or for the taking of such other steps as the Board thinks fit for that purpose;
    - (f) For the further treatment, processing, or packing of export produce;
    - (g) For furthering the sale or export of dairy produce;
    - (h) Subject to subsections (1A) to (1F) of this section, for prohibiting, restricting, and controlling the export of any export produce other than by the Board;
    - (i) Generally for all such matters as are necessary for the exercise of the functions and powers of the Board under this Part of this Act.
  - (1A) Any person who wishes to export dairy produce of any kind or description may apply to the Board for permission to do so, specifying the markets where the produce is intended to be sold; and, having had regard to --
    - (a) The extent to which the markets are in states that do not impose quantitative restrictions on the importation of dairy produce; and
    - (b) **[\*\*11]** The extent to which the export of the produce to the markets might result in a direct or indirect reduction of the overall returns to the New Zealand dairy industry; and
    - (c) Any other relevant guidelines for the time being established by the Board for the purposes of this section and published by the Board, -- the Board shall grant or refuse permission.

The manner in which the NZDB has structured the exportation of New Zealand cheese to the United States is described in the amended complaint and the motion papers. There appears to be no dispute on that subject.

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<sup>3</sup>The text of the Act submitted with the motion papers includes all amendments as of June 30, 1993.

As noted, New Zealand's thousands of dairy farmers were formed into 15 cooperatives. The Board formed defendant Milk Products Holdings (North America) Inc. ("MP Holdings"), a Delaware corporation, as its wholly owned subsidiary, for the purpose of holding the stock of other United States corporations. Amended Complaint, P 4. The Board also caused the creation of defendant Western Dairy, a Delaware corporation and a wholly owned subsidiary of MP Holdings, to act as the Board's agent in the distribution and sale of New Zealand dairy products in the United States. *Id.*, P 5. Western Dairy, like the plaintiffs, holds [\*\*\*12] licenses from the USDA to import New Zealand cheese into the United States. Pursuant to USDA regulations, Western Dairy has been designated as the "preferred" importer of New Zealand cheese, which entitles it to receive a specific portion of the quota amount of cheeses allotted to New Zealand for importation, together with any other amounts to which Western Dairy might be entitled by other licenses it holds. Honeyfield Affidavit, P 7.

Plaintiffs say, and defendants do not appear to question, that the NZDB has exercised the powers conferred upon it by the Act to become "the *de facto* exclusive purchaser and exporter of New Zealand dairy produce, including cheese." Amended Complaint, P 13. And American importers such as plaintiffs may purchase New Zealand cheese only from Western Dairy. In defendants' phrasing, the NZDB utilizes Western Dairy "as its conduit for all New Zealand cheeses sold to import licensees in the United States." Honeyfield Affidavit, P 9. Plaintiffs state the proposition in less genteel [\*912] terms. "United States importers, such as the plaintiffs, have no alternative but to procure New Zealand dairy produce, including cheese, from the monolithic export cartel created [\*\*\*13] by the Board, its Directors, and co-conspirators." Amended Complaint, P 13.

The market price of cheese in the United States is set at weekly intervals by the National Cheese Exchange, also known as the Green Bay Cheese Exchange ("the Exchange"). Plaintiffs purchase New Zealand cheese from Western Dairy at prices slightly discounted from the most recent Exchange quotes. Thus, the two purchase orders giving rise to this litigation were based upon prices quoted by Western Dairy at, respectively, 6 cents and 8 cents below the Exchange quotes in effect on the Friday before the preparation of entry documents for the cheese covered by the purchase orders. Amended Complaint, P 17.

Plaintiffs do not suggest that defendants control or influence in any way the price quotations on the Green Bay Cheese Exchange. The gravamen of plaintiffs' antitrust charges is that they cannot deal directly and individually with New Zealand dairy farmers or cooperatives, in an effort to obtain a greater discount from the Exchange rate, which is to say, to pay a lower price for the cheese plaintiffs then resell in the American market. Counsel for plaintiffs put it this way at the oral argument:

The point [\*\*\*14] is that if this were a free market, if these 15 combines weren't cooperating through the dairy board in this price cartel and we could go to one or the other, we wouldn't be getting a rate 6 cents off of the floating market rate, we would be getting 10, 20, 30 cents cheaper.

Tr. 35.

Moreover, plaintiffs argue, defendants are practicing a form of price control that is not mandated by the New Zealand Dairy Board Act:

What we are complaining about is that just because the New Zealand government said, poof, there is a dairy board and that has broad discretion to control the market, the New Zealand government didn't say, Dairy board create a price cartel, you sell every gram of cheese, you set the price.

Tr. 36-37.

Plaintiffs are correct. I do not find any language in the Act that mandates the pricing and selling structure that the Board devised and implemented. The Act created the Board; defines the Board's "general functions" in language that is general indeed; commands the Board, in comparable language, to "comply with the general trade policy of the Government of New Zealand," an unsurprising directive for the Parliament to include.

§ 17 of the Act confers [\*\*\*15] broad powers upon the Board, and defendants rely primarily upon that section to show that the statute compelled the conduct of which plaintiffs complain. But I do not think that the language bears that interpretation. § 17(1) gives the Board "full authority to make and carry out such arrangements as it thinks proper" for, *inter alia*, "the acquisition and marketing by the Board of export produce," § 17(1)(a), and "the

consignment of export produce on such terms and in such quantities as it thinks fit," [§ 17\(1\)\(c\)](#). Those provisions certainly authorize the Board to market all export produce itself, and consequently to funnel all cheese exports to the United States through Western Dairy, as indeed it has done. However, the Act does not require that all export produce be marketed by or through the Board; [§ 17\(1A\)](#) permits "any person who wishes to export dairy produce" to "apply to the Board for permission to do so," in which event "the Board shall grant or refuse permission." In evaluating such a request, the Act commands the Board to "give regard," *inter alia*, to "the extent to which the export of the produce to the markets might result in a direct or indirect reduction of [\*\*16] the overall returns to the New Zealand dairy industry," [§ 17\(1A\)\(b\)](#). That particular provision no doubt reflects Parliament's unexceptionable policy of maximizing New Zealand's dairy product income; but the statute falls well short of compelling any particular commercial arrangements to carry that policy out.

Accordingly the most that can be said for the defendant Board is that the New Zealand [\[\\*913\]](#) Parliament established a statutory scheme conferring comprehensive powers upon it, and that the Board's conduct alleged here is perfectly consistent with New Zealand law and policy. That is the showing made by the English reinsurers in *Hartford*; but, as that case holds, it is not sufficient to create a conflict with American [antitrust law](#).

## C

Accordingly the present defendants' invocation of international comity avails them nothing; and the same result necessarily follows with respect to the doctrine of foreign sovereign compulsion, since the Act cannot be read to compel the particular conduct alleged in the amended complaint.

But defendants make an additional argument with respect to the act of state doctrine. They contend that "the issue of compulsion is irrelevant to the act of state [\[\\*\\*17\]](#) doctrine analysis," which focuses instead upon the validity of the foreign state's legislative enactment. Defendants' Reply Brief at 14. In defendants' view, "the act of state doctrine is properly invoked when the validity of a sovereign act, taken within the territory of that sovereign, is necessarily at issue"; in such a circumstance, the argument concludes, "the Court should apply the act of state doctrine to hold that Act valid and refrain from adjudicating [plaintiffs'] challenge to it." *Id.*

The act of state doctrine has no application to this case. Notwithstanding defendants' characterization of the action in their briefs, plaintiffs are not challenging the validity of the New Zealand Dairy Board Act. Rather, plaintiffs challenge the particular conduct indulged in by the defendants pursuant to powers conferred by that statute. [HN4](#) It is a necessary factual predicate for application of the act of state doctrine that "the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." [W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International, \[\\[\\\*181\\] 493 U.S. 400, 405, 107 L. Ed. 2d 816, 110 S. Ct. 701 \\(1990\\)\]\(#\)](#). I need not declare the Dairy Board Act invalid in order to conclude that the defendants' conduct thereunder violated the Sherman Act. The case at bar may be contrasted with [Hunt v. Mobil Oil Corp., 550 F.2d 68 \(2d Cir. 1977\)](#), in which an independent American oil producer holding a Libyan oil concession asserted an antitrust claim against major American oil companies for conspiring successfully to obtain a Libyan government decree nationalizing plaintiff's Libyan interests. Although plaintiff did not name the Libyan government as a party defendant, the Second Circuit observed that "its claim is admittedly not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity." [550 F.2d at 77](#). In that circumstance, the act of state doctrine was applied to bar the antitrust claim. The case at bar does not involve the motivation of a foreign state's nationalization of property within its territory. The New Zealand Parliament's motivation in enacting the Dairy Board Act is manifest, and plaintiffs do not challenge the validity of New Zealand's conduct in enacting it.

[\[\\*\\*19\]](#) My conclusion that the act of state doctrine does not apply to this case is reinforced by certain declarations made on behalf of defendants in a different setting. In March 1995, the United States Department of Agriculture was conducting public hearings to consider revisions to USDA regulations governing the importation of certain cheese and noncheese dairy products. Representatives of plaintiffs and defendants participated, taking positions opposed to each other. It is not necessary to recount the issues in detail. The significance of the hearings for present purposes lies in descriptive statements made by NZDB representatives about the Board and its functions.

Specifically, Graeme Honeyfield, president of Western Dairy, appeared at a hearing on March 10, 1995 "on behalf of Western Dairy Products and its parent, the New Zealand Dairy Board, in response to the Department's invitation to present views on the possible changes in the regulation of dairy product imports." Tr. 100. A time came when Mr. Honeyfield was moved to say:

I think it's fair to comment, and I'd like to put on the record, that the New Zealand **[\*914]** Dairy Board is an entity that is owned by the cooperative dairy **[\*\*20]** farmers in New Zealand. It is not controlled by any other organization other than the 14,000 dairy farmers and the dairy Board operates as that marketing arm with the full consent of those farmers. And in fact, a recent survey in New Zealand of those farmers reported that 93 percent of those farmers wanted to maintain the current system. So it is certainly not what might be traditional [sic] termed the "state trading organization." There is not government involved in the operation, of New Zealand Diary Board and its marketing.

Tr. 109-110.

On March 17, 1995, counsel for the NZDB and Western Dairy submitted to the USDA a written "rebuttal statement," which states in part:

The Board is a cooperatively structured organization which operates as the export marketing arm of the New Zealand dairy industry. It is owned by the supplying Co-operatives, which in turn are owned by New Zealand's dairy farmers, whose milk is processed by the Co-operatives for export by the Dairy Board. Thus, the Board is a commercial organization operating as an independent entity, funded entirely by the farmer owners without taxpayer assistance. It is the industry's choice, which is to say the **[\*\*21]** desire of New Zealand dairy farmers, to structure their business in this way, with the common objective of maximizing returns from export marketings. An independent survey recently conducted resulted in 89% of dairy farmers supporting the Board's marketing of NZ dairy exports.

These declarations, admissible against defendants under [Rule 801\(d\)\(2\), Fed. R. Evid.](#), are inconsistent with their litigation position that the act of state doctrine shields the Board's conduct from an American court's scrutiny.<sup>4</sup>

In sum, the doctrines of international comity, foreign sovereign compulsion, and act of state, viewed separately or together, do not preclude this Court from exercising jurisdiction over plaintiffs' antitrust claims.

## II

Defendants also argue that plaintiffs' antitrust claims raise nonjusticiable political questions. This is urged as an alternative basis for dismissal.

**[\*\*22]** Defendants' argument necessarily focuses upon the actions of the United States government, not the government of New Zealand. That is because [HNS](#)<sup>↑</sup> "the political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." [Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 230, 92 L. Ed. 2d 166, 106 S. Ct. 2860 \(1986\)](#). The Judiciary is regarded as "particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *Id.* (citation and quotation marks omitted).

Defendants say that these considerations are implicated in the case at bar because plaintiffs' complaint "attack[s] the entire statutory and regulatory scheme that governs the importation of foreign cheese into the U.S." Defendants' Main Brief at 17. But the amended complaint cannot reasonably be read in that manner. As the allegations that defendants themselves summarize in their brief reveal, plaintiffs are attacking the **[\*\*23]** conduct of defendants and its effect upon the prices plaintiffs must pay for New Zealand cheese. While these economic consequences occur within the context of an import quota system fashioned by the Congress and Executive Branch of the United States

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<sup>4</sup> These statements run equally counter to defendants' invocation of the doctrines of international comity and foreign sovereign compulsion.

government, it is far too much of a stretch to say that the amended complaint "challenges the substance" of that statutory and regulatory authority. *Id.* at 22. In this action at least, plaintiffs do not challenge the acts of the [\*915] Congress, expressed in statutes or treaties, or the acts of the Executive, expressed in regulations. On the contrary: plaintiffs proclaim and celebrate the existence of a licensed quota system which endows the licenses they hold with commercial value. The gravamen of their antitrust claims is that defendants' conduct deprives them of the full benefit of import licenses generated under domestic law.

It follows that the political question doctrine does not preclude this Court's exercise of jurisdiction over plaintiffs' antitrust claims.

Having dealt with these objections to the Court's jurisdiction over those antitrust claims, I now turn to their legal sufficiency.

### III

Defendants move to dismiss plaintiffs' **\*\*24]** antitrust claims under *Rule 12(b)(6)*, *Fed. R. Civ. P.*, for failure to state a claim.

**HN6[]** On a motion to dismiss under *Rule 12(b)(6)*, the trial court's function "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980); see *Ricciuti v. N.Y.C. Transit Authority*, 941 F.2d 119, 124 (2d Cir. 1991). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). The district court should grant a *Rule 12(b)(6)* motion "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) (*citing Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

**HN7[]** Except in certain circumstances, consideration of a motion to dismiss the complaint must focus on the allegations contained on the face of the complaint. See *Cortec Industries*, **\*\*25]** *Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47 (2d Cir. 1991), cert. denied, 112 S. Ct. 1561 (1992); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). **HN8[]** On a motion to dismiss, a district court must accept plaintiff's well-pleaded factual allegations as true, *Papasan v. Allain*, 478 U.S. 265, 283, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986), and the allegations must be "construed favorably to the plaintiff." *LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991). **HN9[]** "[A] *Rule 12(b)(6)* motion to dismiss need not be granted nor denied in toto but may be granted as to part of a complaint and denied as to the remainder." *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 115 (2d Cir. 1982).

These strictures apply with particular force to antitrust claims. In *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976), the Supreme Court said:

We have held that **HN10[]** "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, **\*\*26]** 78 S. Ct. 99 (1957) (footnote omitted). And in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

The question is whether plaintiffs' complaint, read in the light required by these authorities, "states a claim upon which relief can be granted under the Sherman Act." *425 U.S. at 747* (footnote omitted).

### A

Plaintiffs' fourth claim alleges that defendants violated § 1 of the Sherman Act, 15 U.S.C. § 1. That section forbids **HN11[]** "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several

States." It is now well established "that [HN12](#)[<sup>↑</sup>] the Sherman Act applies to foreign conduct that was meant to produce and did produce some substantial effect in the United [\[\\*916\]](#) States." [Hartford, 509 U.S. at 796](#).<sup>5</sup>

**[\*\*27]** Plaintiffs' amended complaint alleges that the NDZB and its co-conspirators have created an "export cartel" setting "export prices for New Zealand dairy products, including cheese, higher than those that would have prevailed if New Zealand dairy manufacturers had sold independently in a free and open competitive market." As a result, "plaintiffs and other American importers of New Zealand dairy produce, including cheese, have been forced to pay higher prices" than they would otherwise have had to pay. Amended Complaint, PP 47, 48, 49(c), 50(b). It follows, plaintiffs argue, that they have sufficiently alleged a price-fixing cartel which is unlawful *per se*, thereby relieving them of the necessity of pleading or proving the reasonableness of the price as fixed, or the relevant market. Plaintiffs' Brief at 29.

Defendants argue that plaintiffs have not adequately alleged a [§ 1](#) conspiracy. Their first contention is that the amended complaint does not plead the requisite plurality of conspirators.

"The Sherman Act contains a basic distinction between concerted and independent action." [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, 81 L. Ed. 2d 628, 104 S. Ct. 2731](#) [\[\\*\\*28\]](#) (1984) (citation and internal quotation marks omitted). [HN13](#)[<sup>↑</sup>] While the conduct of a single firm can violate [§ 2](#) of the statute if it threatens actual monopolization, [§ 1](#), "in contrast, reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities." [Id. at 767-68](#) (emphasis in original). "An agreement between two or more persons is fundamental to any [§ 1](#) claim." [Volvo North America Corp. v. Men's International Professional Tennis Council, 857 F.2d 55, 70 \(2d Cir. 1988\)](#).

*Copperweld* holds that [HN14](#)[<sup>↑</sup>] "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of single enterprise for purposes of [§ 1](#) of the Sherman Act," so that a corporation "and its wholly owned subsidiary . . . are incapable of conspiring with each other for purposes of [§ 1](#) of the Sherman Act." [467 U.S. at 771, 777](#). It follows that in the case at bar, the NZDB, MP Holdings and Western Dairy must be regarded as a single enterprise, insufficient to satisfy [§ 1](#)'s requirement that there be at least two conspirators. I do not understand plaintiffs to contend otherwise.

Plaintiffs profess to find the requisite plurality [\[\\*\\*29\]](#) of conspirators among the dairy farmers of New Zealand. Thus P 47 of the amended complaint alleges:

This claim is asserted against New Zealand Diary Board for injuries to plaintiffs' business and property caused by the inflation of export prices on New Zealand cheese that has resulted from the unlawful combination and conspiracy among the New Zealand Dairy Board and New Zealand dairy manufacturers that have collectively refused to sell dairy produce, including cheese, to United States importers in a free and open competitive market but have instead combined and conspired to create an export cartel.

In briefs and oral argument, counsel for plaintiffs further refine this concept to consist of the 15 dairy cooperatives formed to act in concert with the Board. It appears from the record that plaintiff may have first learned of the cooperatives from affidavits submitted by defendants in support of their motion to dismiss the antitrust claims.

Defendants say that plaintiffs' references, in briefs and argument, introduce a new factual allegation which can properly be asserted only in the form of a further amended complaint. But I do not think it is necessary to require plaintiffs [\[\\*\\*30\]](#) to engage in further Rule 15 practice before the Court addresses the substantive issues involved. On a [Rule 12\(b\)\(6\)](#) motion, a complaint's factual allegations must be construed favorably to the plaintiff, and the

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<sup>5</sup> Whatever limitations on this principle may arise from § 402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), [15 U.S.C. § 6a](#), do not apply to the case at bar, since the FTAIA specifically excludes from its coverage "import trade or import commerce."

description of collective conduct alleged in P 47 is broad enough to embrace [\*917] the concept of the 15 cooperatives as Sherman Act § 1 co-conspirators.<sup>6</sup>

[\*\*31] However, that conclusion on a point of procedure does not resolve the question of substance, which is whether the Board, MP Holdings, Western Dairy, and the cooperatives should be regarded as a single economic enterprise under the rationale of *Copperweld*.

The parties' research and that of the Court reveals three cases which consider cooperatives or trade associations in the context of antitrust single enterprise analysis. These are *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 8 L. Ed. 2d 305, 82 S. Ct. 1130 (1962); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972); and *City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc.*, 838 F.2d 268 (8th Cir. 1988), an Eighth Circuit opinion by Judge Arnold which discusses both *Sunkist* and *Topco*.

In *Sunkist*, 12,000 growers of citrus fruits in California and Arizona organized into local associations which operated packing houses. The associations in turn were grouped into district exchanges, and representatives from those exchanges made up the governing board of Sunkist, a nonstock membership corporation, which served the members [\*\*32] as an organization for marketing their fresh produce, all its net revenues being distributed to the members. Subsequently, several member associations created a separate corporation to develop by-products for lemons in order to create a market for produce not salable as fresh fruit. [370 U.S. at 21](#).

These entities were sued for Sherman Act § 1 conspiracy and § 2 monopolization. The Court, reversing a jury verdict in plaintiffs' favor, held that these entities could not "be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act." [Id. at 27](#). The Court reasoned that if the 12,000 growers had done no more than form a single collective association, the immunity from antitrust prosecution conferred by § 6 of the Clayton Act, [15 U.S.C. § 17](#), and § 1 of the Capper-Volstead Act, [7 U.S.C. § 291](#), would clearly apply. [Id. at 27-29](#). But plaintiffs argued that the growers' creation of several separate organizations, as described above, took the conduct of the growers and these entities out of the protection of the Clayton and Capper-Volstead Acts.

The Court disagreed, saying at [370 U.S. at 29](#):

. . . the 12,000 growers here [\*\*33] involved are in practical effect and in the contemplation of the statutes one "organization" or "association" even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts. There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations. That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association for purpose of the Clayton and Capper-Volstead Acts.

In *Topco*, the Court considered an action for injunctive relief against Topco, a cooperative association of approximately 25 small [\*918] and medium-sized regional supermarket chains operating stores in 33 states.

<sup>6</sup>While the amended complaint does not name the cooperatives or make them parties defendant, that does not render the pleading defective. [HN15↑](#) There is "no requirement that a plaintiff name . . . all co-conspirators as long as their existence is set forth in the complaint." *Eye Encounter, Inc. v. Contour Art, Ltd.*, 81 F.R.D. 521, 524 (S.D.N.Y. 1981). The pleading's reference to collective conduct on the part of New Zealand dairy farmers is sufficient to implicate the cooperatives, and of course defendants know who they are. See also *Volvo North America Corp.*, 857 F.2d at 71 (requisite plurality of conspirators sufficiently pleaded where named association consisted of multiple entities acting as joint venturers, although those entities were not named or made parties defendant).

[\*\*34] Each of the member chains operated independently, without pooling of earnings, profits, capital, management, or advertising resources. Topco did not conduct grocery business under its own name. Its basic function was to serve as a purchasing agent for its members. [405 U.S. at 598](#). Over time, Topco "developed into a purchasing association wholly owned and operated by member chains, which possess much economic muscle, individually as well as cooperatively." [Id. at 600](#).

The government charged Topco with violating [§ 1](#) of the Sherman Act by allocating marketing territories among its members. Clearly regarding the Topco members as competitors *inter se* and hence with interests diverse from the cooperative, the Court said that "one of the classic examples of a *per se* violation of [§ 1](#) is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition . . . . We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a *per se* violation of [§ 1](#)." [405 U.S. at 608](#).

Analyzing *Topco* in *Mt. Pleasant*, Judge Arnold observed that while the fact that "Topco's members had [\*\*35] interests diverse from the cooperatives was not made explicit in the Court's opinion, it was in the District Court's findings of fact in that case." [838 F.2d at 276 n.6](#). The District Court in *Topco* found, *inter alia*, that "there have been a number of instances where Topco members have expanded into new territories without using Topco-branded products, including areas already licensed to another Topco member." [United States v. Topco Associates, Inc., 319 F. Supp. 1031, 1037 \(N.D. Ill. 1970\)](#).

In *Mt. Pleasant*, the defendants charged with being Sherman Act [§ 1](#) conspirators were separate corporations comprising part of a rural electric cooperative organized in Missouri and Iowa. The Court of Appeals' opinion describes the structure of the cooperative as follows:

This organization has three tiers. At the top of the organizational chart is Associated Electric Cooperative, Inc., which owns all but a fraction of the cooperative's electrical-generating capacity, and all of the larger power lines in the cooperative's transmission grid; it controls all of the production and distribution of electricity for the organization. J.A. 197-200. At the next level are six generation-and-transmission [\*\*36] cooperatives (G & Ts), including defendants Central Electric Power Cooperative and Northeast Missouri Electric Power Cooperative, each of which owns a portion of the transmission grid, and which are responsible for transporting and selling wholesale electricity. *Id.* The third tier contains 43 local retain-distribution cooperatives, which buy wholesale power from the G & Ts and sell it to the cooperative's consumer-members in their service areas. *Id.*

#### [838 F.2d at 271](#).

Plaintiff City of Mt. Pleasant owned an electric utility that sold electricity at retail to industrial, commercial and residential customers. The city found it less expensive to buy electricity wholesale from other utilities rather than produce its own, and accordingly entered into purchase agreements with the cooperative. Thereafter the city brought an antitrust action against certain of the entities involved in the cooperative structure previously described, alleging *inter alia* that these defendants "participated in a price-squeeze conspiracy" in violation of [§ 1](#) of the Sherman act. [838 F.2d at 270](#). Upon completion of discovery, defendants moved for summary judgment. The District Court dismissed [\*\*37] the [§ 1](#) claim on the authority of *Copperweld*. The Eighth Circuit affirmed.

Judge Arnold's opinion summarizes *Copperweld* as holding "that [HN16](#) economic reality, not corporate form, should control the decision of whether related entities can conspire," and expresses the view that the *Copperweld* Court's "approving citation" of *Sunkist* "illustrates the point." [838 F.2d at 275](#). In *Mt. Pleasant* the Eighth Circuit went on to say of *Sunkist*:

It is true that *Sunkist* was decided under statutes granting immunity from antitrust liability, but we see no reason why, in the absence of a statutory immunity, similar [\*919] considerations should not guide the determination of whether related entities are a single enterprise for purposes of the conspiracy statute. In either case, a holding that the separate cooperatives are of separate organizations or can conspire together would "impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." *Id.*

The *Mt. Pleasant* court distinguished *Topco* in these words:

The critical distinction between this case and *Topco* is that here there is no evidence that any [\*\*38] defendant ever pursued interests antithetical to those of the cooperative as a whole, while in *Topco* the members were actual or potential competitors of each other, and therefore had pursued interests antithetical to the Association's.

[838 F.2d at 276](#). The court held that the record developed on discovery "bears out defendants' claim that the cooperative organization is a single enterprise pursuing a common goal -- the provision of low-cost electricity to its rural consumer-members." That holding placed the burden on plaintiff city, resisting summary judgment, to show specific facts presenting a triable issue "as to whether any of the defendants has pursued interests diverse from those of the cooperative itself," a concept which the court defined as interests "which tend to show that any two of the defendants are, or have been, actual or potential conspirators, . . . or, at the very least, interests which are sufficiently divergent so that a reasonable juror could conclude that the entities have not always worked together for a common cause." [838 F.2d at 276](#). The Eighth Circuit concluded its analysis by returning to *Copperweld*:

In the language of *Copperweld*, [\*\*39] the City must show facts that could lead a reasonable juror to find the coordination between any two defendants to be a "joining of two independent sources of economic power previously pursuing separate interests." [467 U.S. at 771, 104 S. Ct. at 2741](#).

*Id.*

The city argued that the record contained such evidence, but the Court of Appeals rejected the effort, concluding that *au fond* "[the cooperatives'] power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent." [838 F.2d at 277](#).

In these circumstances, the plaintiff in *Mt. Pleasant* failed to demonstrate the requisite plurality of conspirators, and defendants obtained summary judgment dismissing the [§ 1](#) claim.

So far as the research efforts of counsel and my own reveal, the Second Circuit does not appear to have considered the antitrust implications of cooperatives of thousands of citrus growers or associations of rural producers of electricity. Perhaps the demographics of the states of New York, Connecticut and Vermont explain why that is so. But I find Judge Arnold's analysis in *Mt. Pleasant* persuasive, and will apply it to the case at bar.

It [\*\*40] follows that [HN17](#) the requisite plurality of [§ 1](#) conspirators does not exist in this case unless the 15 New Zealand dairy cooperatives or the dairy farmers who make up those cooperatives pursued "diverse interests," as that phrase is defined in *Mt. Pleasant*.

While the present record makes that appear unlikely, the question is not appropriate for resolution on a motion to dismiss under [Rule 12\(b\)\(6\)](#). It is important to recall that *Sunkist* and *Topco* were decided after plenary trials, and *Mt. Pleasant* on a motion for summary judgment after full discovery. Discovery in the instant case has been stayed; and it is not clear that no relief could be granted on this claim under any set of facts that could be proved consistent with the amended complaint's allegations, that being the touchstone of [Rule 12\(b\)\(6\)](#) practice.

Accordingly defendants' motion to dismiss plaintiff's Sherman Act [§ 1](#) claim is denied. Defendants may, if so advised, move for summary judgment on the claim after the pertinent facts have been developed by discovery.<sup>7</sup>

[\*\*41] [\*920] B

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<sup>7</sup> Defendants' brief also challenges the sufficiency of plaintiff's Sherman Act [§ 1](#) claim for failing to allege the relevant market or the factors involved in rule of reason analysis. But the amended complaint clearly alleges [HN18](#) a horizontal price-fixing conspiracy which, if proved, constitutes a *per se* violation; to sustain that claim, plaintiffs need not plead or prove a relevant market, 7 Areeda, *Antitrust* § 1510 at 415, nor demonstrate that defendants' conduct was economically reasonable, [Topco, 405 U.S. at 608-12; United States v. Trenton Potteries Co., 273 U.S. 392, 397-98, 71 L. Ed. 700, 47 S. Ct. 377 \(1927\)](#).

Plaintiff's fifth claim alleges that defendants violated § 2 of the Sherman Act, 15 U.S.C. § 2, which HN19<sup>↑</sup> condemns the conduct of "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 . . .".

If plaintiff's § 2 claim was limited to an alleged conspiracy to monopolize, the plurality of conspirators requirement present in the § 1 claim would also apply, and I would approach the issue in the same way. But "the conduct of a single firm" may violate § 2, if that conduct "pose[s] a danger of monopolization." Copperweld, 467 U.S. at 767-68. HN20<sup>↑</sup> "Monopolization without conspiracy is unlawful under § 2, but restraint of trade without a conspiracy or combination is not unlawful under § 1." Id. at 767 n.13.

HN21<sup>↑</sup> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [\*\*42] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (citing and quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)). The present question is whether plaintiffs' amended complaint, evaluated by the criteria governing Rule 12(b)(6) practice, sufficiently alleges these elements against defendants.

As plaintiffs acknowledge in their brief at 30, § 2 requires them "to allege the existence of monopoly power in a relevant market." Plaintiffs say they have done so. Specifically, the amended complaint alleges that "the defendants and their co-conspirators<sup>8</sup> have . . . created an export cartel in New Zealand" giving them "a monopoly of the exportation of New Zealand dairy products, including cheese, to the United States," P 56(a), and "created a price squeeze by establishing export prices for New Zealand cheese that enable NZDB and the co-conspirator manufacturers to earn monopolistic profits while limiting the ability of the plaintiffs and other competitors of Western Dairy to purchase and resell New Zealand cheese on a profitable basis," P 56(d).

[[\*\*43]] While the amended complaint contains other charges, I think that these are sufficient to describe anticompetitive activities implicating § 2 of the Sherman Act, assuming that plaintiffs have adequately identified the relevant market. "It is, of course, a basic principle in the law of monopolization that the first step in a court's analysis must be a definition of the relevant markets." Berkey Photo., Inc. v. Eastman Kodak Co., 603 F.2d 263, 268 (2d Cir. 1979), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980).

HN22<sup>↑</sup> Market analysis turns upon the identity of and options available to the consumers whose interests the antitrust laws are intended to protect. The amended complaint alleges that defendants acted with the intent "of monopolizing the market for the importation, distribution, and sale in the United States of New Zealand cheese." P 57. In plaintiff's view, the competitors in that market are those American commercial entities holding USDA-granted quota licenses for the importation of New Zealand cheese, including plaintiffs and Western Dairy. Plaintiffs contend that "for United States customers desiring to use their New Zealand import licenses, no other [[\*\*44]] products are interchangeable with New Zealand cheese." Brief at 37. That \*921 brings the case at bar, plaintiffs contend, squarely within the ruling of Eastman Kodak Co. v. Image Technical Services, Inc., where the Court said that "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 *only* of those companies that service Kodak machines." 504 U.S. at 482 (emphasis added).

Defendants say that the United States' statutory and regulatory scheme limiting the importation of cheese "precludes the existence of any economically viable 'market' for cheese imports from any particular country, let alone from New Zealand." Reply Brief at 39. I am unable to perceive the basis for that conclusion. It is quite true

<sup>8</sup> I construe the phrase "co-conspirators" to mean the 15 dairy cooperatives. Even if the named defendants and the cooperatives should be regarded as a single economic entity so that they could not conspire together, see discussion under Point III-A *supra*, their joint conduct may constitute the possession and exercise of monopoly power in violation of § 2 of the Sherman Act.

that the statutory and regulatory quota and licensing scheme limits (a) the amount of cheese that can be imported from New Zealand, and (b) the number of authorized importers. In short, the licensed New Zealand cheese importers' non-interchangeable New Zealand cheese market is a creation of American law. But that does not prevent an identifiable market [\*\*45] from being a market. Markets come into being as the result of a broad spectrum of human behavior. Here, that behavior takes the form of governmental action; but I think that the genesis of the market is not so important as the conduct of the market players. [HN23](#)[<sup>14</sup>] "Industrial activities cannot be confined to trim categories. Illegal monopolies under [§ 2](#) may well exist over limited products in narrow fields where competition is eliminated." *United States v. du Pont & Co.*, 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956).

I agree with plaintiffs at bar that New Zealand cheese imported into the United States is the relevant market for [§ 2](#) analysis, and that *Eastman Kodak* supports their position. For the quota-licensed New Zealand cheese importer, desirous of deriving maximum profit from its license, New Zealand cheese is no more interchangeable with other cheeses than were non-Kodak parts for servicers of Kodak equipment. Defendants' reliance upon the regulations, [7 CFR § 6.30](#), is misplaced. That section provides only that if a licensee submits "proof satisfactory to the Licensing Authority that said licensee will be unable to enter during a quota year his or her quota share [\*\*46] of an article from the country of origin specified in his or her license," application may be made "to obtain the unfilled portion of their quota shares" from another country. The regulation focuses upon supply, not upon price, and is not implicated in the case at bar. Plaintiffs are quite prepared to enter their full quota shares of New Zealand cheese; but they complain of defendants' allegedly monopolistic practices in respect of the price they must pay for it.

Defendants profess to find comfort in [Spectrum Sports, Inc. v. McQuillan](#), 506 U.S. 447, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993), but I do not think the case assists them. In *Spectrum* the Ninth Circuit affirmed a judgment in plaintiff's favor after jury trial, on the theory that the evidence supported a finding of attempt to monopolize in violation of [§ 2](#). The Supreme Court reversed, holding that the defendants "may not be liable for attempted monopolization under [§ 2](#) of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." [506 U.S. at 459](#). Plaintiffs' verdict in *Spectrum* could not stand because the trial court's instructions, [\*\*47] contrary to those principles, "allowed the jury to infer specific intent and dangerous probability of success from the defendants' predatory conduct, without any proof of the relevant market or of a realistic probability that the defendants could achieve monopoly power in that market." *Id.* In the case at bar, the amended complaint sufficiently alleges the existence of the relevant market, and conduct by defendants that not only could achieve monopoly power in that market, but in fact has done so.

For these reasons, I conclude that the present plaintiffs' Sherman Act [§ 2](#) claim survives [Rule 12\(b\)\(6\)](#) challenge, and deny defendants' motion to dismiss the claim.

#### IV

Plaintiffs' third claim is for common law fraud. The following allegations in the [\*922] amended complaint are pertinent to that claim.

For many years the NZDB has followed the practice of sending written communications of all holders of New Zealand cheese licenses offering to sell cheese against the licensees' annual entitlement. These offers are made in the name of Western Dairy, acting as agent for NZDB, and are sent to the licensees shortly before the start of the calendar year. Amended complaint, P 16.

Consistent with [\*\*48] that practice, the Board and Western Dairy made their annual offer for New Zealand's 1993 cheese quotas by a letter dated December 30, 1992, which set forth the conditions of sale "and invited orders for New Zealand cheese against 1993 license entitlement through May 31, 1993." The prices quoted by Western Dairy to the licensees were 6 cents and 8 cents "below the Green Bay Cheese Exchange quotes in effect on the Friday before preparation of entry documents for the cheese. The only condition placed on the offer was 'subject to availability.'" *Id.* P 17. Plaintiffs, as New Zealand cheese licensees, received that communication from Western Dairy and shortly thereafter responded to it. Specifically, Mel Persily, a representative of plaintiffs, telephoned Western Dairy and accepted the latter's offer for "large orders" of New Zealand cheese "to be delivered in January

and February of 1993. A Western Dairy employee then falsely informed Persily that no cheese was available for delivery at the time specified by Persily" [Id. P 19.](#)

*Faut de mieux* and "under protest," Persily then placed orders with Western Dairy on behalf of plaintiffs for delivery of New Zealand Cheese by vessels [\\*\\*49](#) scheduled to arrive in the United States in mid-May, "the earliest time when the Western employee represented that cheese would be available." Plaintiffs were compelled to place that order because they had "purchased sufficient inventory to meet orders taken and to be taken from domestic customers of plaintiff." [Id. P 20.](#) But as the result of a sharp increase in the exchange quotes between late February and late May, alleged in P 23 of the amended complaint, plaintiffs were eventually billed for the cheese they received on the basis of the April 30, 1993 Exchange quote. This caused plaintiffs to pay more for the cheese than they would have if defendants had delivered the cheese earlier, in response to plaintiff's acceptance of Western Dairy's offer to sell.

Plaintiffs characterize defendants' conduct as fraudulent, resulting in the economic loss described above.

These are well-pleaded factual allegations. I accept them as true within the [Rule 12\(b\)\(6\)](#) context.

Defendants make two arguments in support of their motion to dismiss this claim. First, defendants say that these allegations show no more than defendants' refusal to deal with plaintiffs at the time plaintiffs wished to [\\*\\*50](#) do so, and that a refusal to deal cannot constitute fraud as a matter of law. Second, and in the alternative, defendants contend that plaintiffs have not pleaded fraud with the specificity required by [Rule 9\(b\), F.R.Civ.P.](#)

A

In support of their "refusal to deal" contention, defendants cite three cases whose facts bear no useful resemblance to the facts alleged in the amended complaint.

I do not think that those allegations spell out a refusal by defendants to deal with plaintiffs. On the contrary, defendants followed the practice of prior years and offered to deal with plaintiffs by selling New Zealand cheese to them. Plaintiffs accepted that offer and requested delivery in early 1993. The amended complaint alleges not a refusal to deal on the part of defendants, but rather the defendants' fraudulent protestation of an inability to deal at the time plaintiffs requested. That protestation of inability to deal was fraudulent because, accepting the truth of plaintiffs' allegations, New Zealand cheese was available to defendants for delivery to plaintiffs in early 1993, and a Western Dairy employee lied when he told plaintiffs' representative that no cheese was then available, and would [\\*\\*51](#) not be until several months later.

This alleged conduct, if proven, is certainly commercially dishonorable; and it comes with ill grace from defendants to contend [\\*923](#) that it cannot be characterized in law as fraudulent.

I think that the amended complaint sufficiently pleads [HN24](#)<sup>↑</sup> an action for fraud, which "requires proof of a representation of fact which is false and known to be false when made, which is offered to deceive another and with the intention to induce the other to act or refrain from acting, and proof of reliance upon the representation which causes injury." [Chase Manhattan Bank, N.A. v. Perla, 65 A.D.2d 207, 411 N.Y.S.2d 66, 68 \(4th Dept. 1978\).](#)

Plaintiffs at bar sufficiently allege these elements. The amended complaint alleges that a Western Dairy representative falsely told plaintiffs that there was no New Zealand cheese then available for delivery when in fact he knew that there was. It is hard to imagine why the Western Dairy representative lied to plaintiffs' representative unless he intended to deceive plaintiff. The deceiver's intention was apparently to persuade plaintiffs to accept a later delivery of cheese. Plaintiffs relied upon Western Dairy's [\\*\\*52](#) disclaimer of present cheese availability and, confronted with their own economic necessities, agreed to accept delivery at a later time, thereby subjecting themselves to market volatility which in fact caused them monetary loss. If (accepting the accuracy of plaintiffs' allegations as I must) the Western Dairy representative had told plaintiffs' representative the truth in early January 1993 -- that defendants had plenty of cheese available but had decided not to fill plaintiffs' order -- plaintiffs could

have sought administrative relief, or declaratory or injunctive relief from a court in the form of an order to show cause.

I conclude that the amended complaint alleges conduct on the part of defendants which, if proved, would constitute fraud as a matter of law.

B

Rule 9(b) provides: [HN25](#) "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." [Rule 9\(b\)](#) [HN26](#) must be read together with [Rule 8\(a\)](#) which requires only a "short and plain statement" of the claims for relief." [Quaknine v. MacFarlane](#), 897 F.2d 75, 79 (2d Cir. 1990); [\\*\\*53](#) [DiVittorio v. Equidyne Extractive Industries, Inc.](#), 822 F.2d 1242, 1247 (2d Cir. 1987). [HN27](#) On a motion to dismiss, the court assumes the truth of plaintiff's factual allegations, [Quaknine at 78](#), reads the complaint generously, and draws all inferences in favor of the pleader. [Cosmas v. Hassett](#), 886 F.2d 8, 11 (2d Cir. 1989); [Yoder v. Orthomolecular Nutrition Institute, Inc.](#), 751 F.2d 555, 562 (2d Cir. 1985). But [Rule 9\(b\)](#) [HN28](#) must be enforced so as to accomplish its three goals: (1) providing a defendant fair notice of plaintiff's claim, to enable preparation of his defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits. [O'Brien v. National Property Analysts Partners](#), 936 F.2d 674, 676 (2d Cir. 1991); [DiVittorio at 1247](#).

[HN29](#) To satisfy the particularity requirement of [Rule 9\(b\)](#), a complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements. [Cosmas at 11](#). Where multiple defendants are asked to [\\*\\*54](#) respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud. [DiVittorio at 1247](#). However, no specific connection between fraudulent representations or omissions need be pleaded as to defendants who are insiders or affiliates personally participating in the statements at issue. [DiVittorio at 1247](#) (offering memorandum); [Luce v. Edelstein](#), 802 F.2d 49, 55 (2d Cir. 1986) (same).

[HN30](#) A complaint may adequately identify the statements alleged to be misrepresentations and properly indicate when, where and by whom they were made, yet still fail [Rule 9\(b\)](#) scrutiny if the complaint does not allege circumstances giving rise to a strong inference that defendant knew the statements to be false, [Wexner v. First Manhattan Co.](#), 902 F.2d 169, 173 (2d Cir. 1990), and intended to [\\*924](#) defraud plaintiff, [Quaknine at 80](#); [Beck v. Manufacturers Hanover Trust Co.](#), 820 F.2d 46, 50 (2d Cir. 1987), cert. denied, 484 U.S. 1005, 98 L. Ed. 2d 650, 108 S. Ct. 698 (1988).

Knowledge is a state of mind. So is intent to defraud, or "scienter." [HN31](#) While [Rule 9\(b\)](#) permits conditions of mind to be averred generally, the rule also [\\*\\*55](#) requires that allegations of scienter be supported by facts giving rise to a "strong inference" of fraudulent intent. [Quaknine at 80](#); [Beck at 50](#); [Connecticut National Bank v. Fluor Corp.](#), 808 F.2d 957, 962 (2d Cir. 1987).

[HN32](#) Knowledge of falsity cannot be alleged in conclusory terms. Plaintiff must be able to allege particulars regarding a defendant's awareness or discovery of the facts upon which plaintiff relies for the claim of fraud. [O'Brien at 677](#).

Allegations supporting an inference of fraudulent intent frequently include defendant's statement that a fact exists or an event will come to pass coupled with allegations that the fact did not exist or the event did not occur, and circumstances indicating that the statement was false when made. See, e.g., [Luce at 56](#) (alleged misrepresentation in offering memorandum that general partners would make an initial capital contribution of \$ 385,000 and guarantee a \$ 4.5 million construction loan accompanied by allegations that general partners contributed only \$ 80,000 and did not guarantee the loan); [DiVittorio at 1248](#) (offering memorandum's statement that proceeds of offering would be expended as quickly as [\\*\\*56](#) possible accompanied by allegation that proceeds were never so applied, and estimate that property contained approximately 9,260,000 tons of coal accompanied by allegation that mines did not contain nearly that much). See [Quaknine at 81](#) for a comparable analysis.

**HN33**[] To satisfy the scienter requirement, a plaintiff need not allege facts which show a defendant had a motive for committing fraud, so long as plaintiff adequately identifies circumstances indicating "conscious behavior" by the defendant from which an intent to defraud may fairly be inferred. *Cosmas at 13*. However, where a particular defendant's motive to defraud is not apparent, the strength of the circumstantial allegations must be correspondingly greater. *Beck at 50*.

**HN34**[] Allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge. *Luce at 54 n 1*; *DiVittorio at 1247-48*. However, that exception to *Rule 9(b)*'s general requirement of particularized pleading does not constitute a license to base claims of fraud on speculation or conclusory allegations. Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting [\*\*57] a strong inference of fraud or it will not satisfy a relaxed pleading standard. *Wexner at 172*.

Applying these principles to the case at bar, I conclude that the amended complaint complies with the requirements of *Rule 9(b)*. While plaintiffs do not identify the allegedly mendacious Western Dairy employee by name, the identity of the representative speaking with plaintiffs' Mr. Persily is peculiarly within Western Dairy's knowledge. The circumstances giving rise to an inference of fraudulent intent are sufficiently pleaded in P 27 of the amended complaint, which alleges:

Further investigation revealed to Trugman and Trio that Western had itself taken delivery of huge shipments of cheese from NZDB for its own account during the very periods for which Western had falsely represented that no cheese was available. Upon information and belief, even after Western took delivery of its cheese, there was still cheese available to fulfill Trugman's and Trio's orders for early 1993 arrival.

The other pleading requirements are also fulfilled. Given Western Dairy's alleged role as agent for the NZDB, the amended complaint adequately alleges claims for fraud against the Board and [\*\*58] MP Holdings, since a principal is liable for the fraudulent acts of its agent committed within the scope of the agent's authority. *Chase Manhattan Bank, N.A. v. Perla, supra, 411 N.Y.S.2d at 69*.

Defendant's motion to dismiss plaintiff's third claim for common law fraud is denied.

[\*925] V

Defendants also move to dismiss plaintiffs' claim for punitive damages. I deny that motion. **HN35**[] Under New York law, punitive damages may be awarded for "gross, wanton, or willful fraud or other morally culpable conduct," *Borkowski v. Borkowski, 39 N.Y.2d 982, 983, 387 N.Y.S.2d 233, 355 N.E.2d 287 (Ct.App. 1976)*. Given the allegations of the amended complaint with respect to defendants' fraudulent conduct, I am not prepared to say that they cannot prove circumstances that would justify an award of punitive damages.

Lastly, Western Dairy as plaintiff in 93 Civ. 8329 moves for partial summary judgment in the amount of \$ 1,873,505.64, an amount that, in Western Dairy's view, "Trugman concedes it owes [Western Dairy] for the cheese." Defendants' main brief at 55. However, defendants face the possibility -- prior to discovery and trial, I put it no higher than that -- of significant liability which [\*\*59] would exceed this amount. In those circumstances, I do not think that defendants can establish a present right to partial summary judgment for the amount indicated. The net obligations and rights of the parties must await resolution by trial.

For the foregoing reasons, the defendants' motions in 93 Civ. 8321 are denied in their entirety. Western Dairy's motion for partial summary judgment in 93 Civ. 8329 is denied. The stay of discovery is vacated. Counsel for the parties are directed to attend a status conference in Room 17C, 500 Pearl Street at 2:00 p.m. on October 18, 1996 for the purpose of settling an appropriate scheduling order.

It is SO ORDERED.

DATED: New York, New York

October 8, 1996

942 F. Supp. 905, \*925L<sup>A</sup> 996 U.S. Dist. LEXIS 14933, \*\*59

CHARLES S. HAIGHT, JR.

UNITED STATES SENIOR DISTRICT JUDGE

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## Tower Air v. Federal Express Corp.

United States District Court for the Eastern District of New York

October 15, 1996, Decided

94-CV-5677 (JS)

**Reporter**

956 F. Supp. 270 \*; 1996 U.S. Dist. LEXIS 20645 \*\*; 1997-1 Trade Cas. (CCH) P71,676

TOWER AIR, INC., Plaintiff, -against- FEDERAL EXPRESS CORPORATION, Defendant.

**Disposition:** [\*\*1] Federal Express's motion for summary judgment as to Claims XII through XV denied and Federal Express's motion to dismiss Claims I through XI denied.

### **Core Terms**

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flights, joint venture, relevant market, supplemental agreement, anti-competitive, antitrust, Air, government contract, parties, summary judgment, passenger, motion to dismiss, state law claim, contractor, contracts, carriers, cargo, antitrust claim, district court, matter of law, anti trust law, monopoly power, rule of reason, passenger service, allegations, competitors, submarkets, argues, Sherman Act, Regulations

### **LexisNexis® Headnotes**

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

#### [HN1](#) [blue icon] **Defenses, Demurrsers & Objections, Motions to Dismiss**

A district court should grant a motion to dismiss under [\*Fed. R. Civ. P. 12\(b\)\*](#) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. In applying this standard, a district court must read the facts alleged in the complaint in the light most favorable to the plaintiff, and accept these allegations as true.

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

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

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

## [HN2](#) Summary Judgment, Opposing Materials

According to [Fed. R. Civ. P. 12\(b\)](#), if, on a motion asserting failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [Fed. R. Civ. P. 56](#), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by [Fed. R. Civ. P. 56](#). A district court may not convert a motion under [Fed. R. Civ. P. 12\(b\)\(6\)](#) into a [Fed. R. Civ. P. 56](#) motion for summary judgment without sufficient notice to the opposing party to respond. The essential inquiry is whether the plaintiff should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings.

[Business & Corporate Compliance > ... > Enforcement > Duties & Liabilities of Parties > Conversion of Instruments](#)

[Civil Procedure > Judgments > Summary Judgment > General Overview](#)

[Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss](#)

[Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview](#)

## [HN3](#) Duties & Liabilities of Parties, Conversion of Instruments

In deciding whether to convert a motion to dismiss into one for summary judgment, the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. When a plaintiff chooses not to attach to the complaint or incorporate by reference a document upon which it solely relies and which is integral to the complaint, the court may under certain circumstances take the document into consideration in deciding the defendant's motion to dismiss without converting the proceeding to one for summary judgment. In addition, the court may consider documents annexed to the movant's papers which, although not annexed to the complaint, plaintiff either had in his possession or had knowledge of and upon which he relied in bringing suit. It is error to consider factual allegations contained in legal briefs or memoranda without converting the motion to one for summary judgment.

[Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition](#)

[Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss](#)

[Civil Procedure > Pleading & Practice > Motion Practice > General Overview](#)

[Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda](#)

[Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement](#)

[Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview](#)

## [HN4](#) Opposing Materials, Memoranda in Opposition

When a non-movant of a motion to dismiss offers supplemental submissions, and the court wishes to consider them, conversion to a motion for summary judgment is only inappropriate if the movant did not have adequate notice that the motion might be treated as one for summary judgment.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

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

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

#### **HN5** Entitlement as Matter of Law, Appropriateness

Summary judgment may not be granted unless 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)*. Under the law of the Second Circuit, a district court must weigh several considerations in evaluating whether to grant a motion for summary judgment with respect to a particular claim. First, the moving party carries the burden to demonstrate that no genuine issue respecting any material fact exists. Second, all ambiguities and inferences must be resolved in favor of the non-moving party. Third, the moving party may obtain summary judgment by showing that no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight. Finally, the trial court's duty is confined to issue-finding and does not extend to issue-resolution.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

#### **HN6** Summary Judgment, Entitlement as Matter of Law

In evaluating the considerations whether to grant a motion for summary judgment, a court must be mindful of whether the purported factual dispute is material, because only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles.

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 > Regulated Practices > Market Definition > Relevant Market

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 > General Overview

#### **HN7** Clayton Act, Claims

Section 4, 15 U.S.C.S. § 15, of the Clayton Act provides that any person injured in their business by reason of a violation of antitrust law may sue for treble damages. To obtain this relief, a plaintiff must show (1) that the alleged loss is the type of injury the antitrust laws were intended to prevent and (2) that the antitrust violation was the cause in fact of such injury. Lack of causation in fact between antitrust injury and alleged antitrust violation is fatal to the merits of any antitrust claim. The injury, however, must reflect the anti-competitive effects of either the alleged violation or of anti-competitive acts made possible by the violation in the relevant market. The determination of whether a plaintiff has standing and injury, therefore, necessitates a finding as to the relevant market.

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

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

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

#### **HN8** Monopolies & Monopolization, Actual Monopolization

To make out a claim for monopoly, a plaintiff must show that the defendant had monopoly power in a relevant market. Likewise, in its claim of attempted monopoly, a plaintiff must show that the defendant had a "dangerous probability" of achieving monopoly power. To evaluate this element, the court must define the relevant market.

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

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

#### **HN9** Relevant Market, Product Market Definition

A market is composed of products that have reasonable interchangeability for the purpose for which they are produced, and a court must consider price, use and qualities. Because a relevant market includes all products which are reasonably interchangeable, plaintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal.

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

#### **HN10** Regulated Practices, Market Definition

A market may be composed of various well-defined submarkets for antitrust purposes, based on various practical indicia, including, *inter alia*, industry or customer recognition of the submarket as a separate economic market, the products' peculiar circumstances and uses, and distinct prices. In these indicia are evidentiary proxies for direct proof of substitutability.

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

### **HN11** [blue document icon] **Regulated Practices, Market Definition**

The fact the government is the sole domestic purchaser and regulates a sale does not mean that no market exists. Moreover, the Federal Acquisition Regulations protect against anti-competitive conduct in government procurement.

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

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

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

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

Antitrust & Trade Law > Sherman Act > General Overview

### **HN12** [blue document icon] **Conspiracy to Monopolize, Sherman Act**

A plaintiff alleging a violation of § 1 of the Sherman Act must allege concerted action by two or more persons that unreasonably restrains interstate or foreign trade or commerce. Thus, a complaint alleging a conspiracy in violation of the Sherman Act must identify co-conspirators and describe the nature and effects of the alleged conspiracy or combination.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

### **HN13** [blue document icon] **Sherman Act, Claims**

A plaintiff claiming an antitrust conspiracy must first establish either a combination or some form of concerted action between at least two legally distinct economic entities. It is essential to any claim in restraint of trade to establish the existence of an agreement between two or more independent entities. A unilateral or independent act does not create conspiratorial liability under the Sherman Act.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Mergers & Acquisitions Law > Merger Guidelines

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > General Overview

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

### **HN14** [blue document icon] **Types of Contracts, Joint Contracts**

Joint ventures may operate lawfully if there is sufficient economic integration among the members. Competitors who form a joint venture must pool resources and capital, as well as share in the risks of profit and loss. In addition, the Federal Acquisition Regulations set out the various types of economic interests that are acceptable in such arrangements, including the ability to complement each other's unique capabilities and to offer the government the best combination of performance, cost, and delivery for the product being acquired and provide that contractor team arrangements may not exist in violation of antitrust statutes. [48 C.F.R. § 9.602](#).

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

Mergers & Acquisitions Law > Merger Guidelines

#### [HN15](#) Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Restraints imposed by an agreement between competitors are denominated as horizontal restraints, while those imposed by agreement between firms at different levels of distribution are vertical restraints. Competitors at the same level can lawfully combine if there is sufficient economic integration.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Mergers & Acquisitions Law > Merger Guidelines

Business & Corporate Law > Joint Ventures > Formation

Business & Corporate Law > Joint Ventures > General Overview

#### [HN16](#) Types of Contracts, Joint Contracts

Side agreements to joint ventures can operate lawfully as well. Restraints collateral to but necessary for the implementation of a lawful agreement, and which are no broader in scope than necessary to accomplish the purpose of the agreement, are termed "ancillary."

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

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

#### [HN17](#) Types of Contracts, Covenants

No conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract. To be lawful, the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. Thus, to be lawful, the ancillary restraint must be subordinate to a separate, legitimate transaction and serve to make the main transaction more effective in accomplishing its purpose.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

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

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Business & Corporate Law > Joint Ventures > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

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

Mergers & Acquisitions Law > Antitrust > Joint Ventures

#### **HN18** [ ] Types of Contracts, Joint Contracts

Joint ventures and their ancillary agreements, however, are not exempt from antitrust review. The mere label of "joint venture" is not enough to immunize such combinations from illegal restraint of trade. These activities, as combinations among horizontal competitors, can be deemed unreasonable restraints on trade.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

#### **HN19** [ ] Antitrust & Trade Law, Sherman Act

There are two rules courts use to assess whether a horizontal agreement constitutes an unreasonable restraint on trade. A court will apply the rule of per se liability when the agreement or practice at issue appears on its face to be one that would almost always act to restrict competition within the market. When a practice or agreement is not plainly anti-competitive, courts apply the traditional rule of reason, which requires the defendant to demonstrate that the pro-competitive aspects of the challenged agreement outweigh any anti-competitive aspects. In determining whether particular concerted action violates § 1 of the Sherman Act, there is a presumption in favor of the rule of reason standard and departure from that standard must be justified by demonstrable economic effect, rather than formalistic distinctions.

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

The per se rule is only used in the relatively narrow circumstances where courts have had sufficient experience with the activity to recognize that it is plainly anti-competitive and lacks any redeeming value.

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

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

## [\*\*HN21\*\*](#) [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

When the alleged restraint of trade is not plainly anti-competitive, the court must apply the rule of reason and determine whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. Under the rule of reason, the court must weigh all circumstances of the case in deciding whether the restrictive practice should be prohibited as an unreasonable restraint on competition. In this respect, the court must balance the pro-competitive and anti-competitive effects of any restraint; it is not sufficient that plaintiff prove either anti-competitive intent or effect.

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market](#)

## [\*\*HN22\*\*](#) [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A party claiming unreasonable restraint of trade under the rule of reason must prove more than an injury to itself; it must prove that competition in the relevant market was harmed.

[Antitrust & Trade Law > Sherman Act > Claims](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual 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](#)

## [\*\*HN23\*\*](#) [blue icon] Sherman Act, Claims

Monopoly in and of itself is not unlawful. To make out claim of monopolization under the Sherman Act, a plaintiff must establish that the defendant had monopoly power in a relevant market, that the defendant engaged in anti-competitive conduct, and that its injury was, in fact, caused by the defendant's violation of antitrust laws. The defendant's activities must consist of willful acquisition or maintenance of monopoly power, as distinguished from growth or development as a consequence of superior product, business acumen or historic accident. To prove a monopolist willfully acquired monopoly power, a plaintiff must prove that the alleged monopolist used or attempted to use monopoly power to foreclose competition, gain competitive advantage, or destroy competitors; this element requires proof of exclusionary or anti-competitive intent and effect.

[Antitrust & Trade Law > Sherman Act > Claims](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

## [HN24](#) [blue document icon] Sherman Act, Claims

In order to establish an attempted monopolization claim under § 2 of the Sherman Act, a plaintiff must prove: (1) that the defendant engaged in predatory or anticompetitive conduct (2) with the specific intent to monopolize (3) and a dangerous possibility of achieving monopoly power exists. Proof of the first element may be used to infer second element and, when coupled with proof of monopoly power, may demonstrate a dangerous probability of success.

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

## [HN25](#) [blue document icon] Relevant Market, Product Market Definition

As noted when discussing the relevant market, a dangerous probability of success may exist where the defendant possesses a significant market share when it undertakes the challenged anti-competitive conduct. To make this finding, however, it is necessary for the court to define the relevant product market.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Governments > Courts > Judicial Comity

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

## [HN26](#) [blue document icon] Jurisdiction, Jurisdictional Sources

A district court may exercise supplemental jurisdiction over state law claims whenever federal law claims and state law claims in a case derive from a common nucleus of operative fact and are such that plaintiff would ordinarily be expected to try them all in one judicial proceeding. The decision whether to exercise such jurisdiction is entirely within the discretion of the district court. Among the factors a district court will consider are judicial economy, convenience, fairness and federal-state comity.

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

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

## [HN27](#) [blue document icon] Subject Matter Jurisdiction, Supplemental Jurisdiction

[28 U.S.C.S. § 1337\(c\)\(2\)](#) provides that a district court may decline to exercise supplemental jurisdiction over a claim if the state claim substantially predominates over the federal claims.

**Counsel:** Appearances:

For Plaintiff: Howard J. August, Esq., Colamarine & Sohns, New York, New York. C. Alexander Hewes, Jr., Esq., Hewes, Morella, Gelband & Lamberton, Washington, D.C.

For Defendant: Lawrence Mentz, Esq., Biedermann, Hoenig, Massamillo & Ruff, New York, New York. Colby S. Morgan, Esq., Federal Express Corporation, Memphis, Tennessee.

**Judges:** Joanna Seybert, U.S.D.J.

**Opinion by:** Joanna Seybert

## Opinion

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### [\*273] MEMORANDUM AND ORDER

#### INTRODUCTION

Plaintiff Tower Air, Inc. ("Tower") brings this action against defendant Federal Express Corporation ("Federal Express") asserting a number of causes of action arising from the participation of Tower Air and Federal Express in a joint venture to provide civilian air support to the Military Air Command ("MAC") in times of national emergency. Federal Express now moves to dismiss Tower's Claims XII through XV for failure to state a cause of action under the Sherman Act. Federal Express further moves to dismiss Claims I through XI of Tower's complaint on the basis of lack of subject matter jurisdiction, [\*2] or in the alternative, that this Court should decline to extend supplemental jurisdiction over these claims. Finally, Federal Express also moves to dismiss Claims I through XI on the grounds that Tower failed to assert these claims as compulsory counterclaims in a prior related litigation instituted in Tennessee state court by Federal Express against Tower.

For the following reasons, the Court hereby converts Federal Express's motion to dismiss as to Claims XII through XV into one for summary judgment and denies that motion. The Court further denies Federal Express's motion to dismiss as to Claims I through XI.

#### FACTUAL BACKGROUND

##### A. The CRAF Program and the MAC Contract

In 1950, Congress established the "Civil Reserve Air Fleet" or "CRAF Program," [\*274] under which the Department of Defense ("DOD") could call upon private air carriers to supply airlift resources in times of national emergency to augment existing military capabilities. Private carriers participating in the CRAF Program were required to provide committed air support during various phases of military activation. The operation of the CRAF Program was managed by the then-named Military Air Command ("MAC").

The Government, [\*3] in contracting for air support under the CRAF Program, engaged a number of contractors to provide these services. The government ordered service from all MAC airlift service contractors on an equitable pro rata basis, giving consideration, among other things, to each contractor's aircraft commitment to the requirements of the CRAF stage which had been activated. Once a contractor participated in the CRAF Program, it was then eligible to compete for MAC peacetime annual airlift services contracts. These peacetime flights were only offered to carriers that were CRAF participants or agreed to become CRAF participants.

In 1989, the government issued a solicitation for bids on a MAC contract to provide private air service to the government for guaranteed fixed-schedule flights, CRAF activation and expansion-peacetime operations (the "MAC Contract"). As per the solicitation, otherwise known as a "Request for Proposal" or "RFP," prices to be paid for all fixed and expansion services would be determined at the MAC negotiated uniform rates and in accordance with a Memorandum of Understanding issued by the Air Force. The government intended the contract to be an award of a multi-year indefinite [\*4] quantity fixed unit price contract.

The RFP provided that joint ventures could participate as a single contractor to provide the air services required under the MAC Contract. Because the MAC Contract required both passenger and freighter air service, such joint ventures enabled carriers who provided primarily one type of service to join together and present a more attractive package to MAC. The MAC Contract required, however, that if a contractor was a joint venture, the terms of the joint venture agreements had to correspond to the terms of the MAC Contract and had to provide for one designated and authorized party to bind the joint venture in dealings with the government. In addition, the joint venture agreement had to provide for (1) joint and several liability among the members, (2) one member to act as the sole payee for all revenues earned by members of the joint venture and (3) a statement of unity of purpose among the members. Moreover, the MAC Contract prohibited any member of a joint venture participating under the MAC Contract from competing on an individual basis for the same awards.

In deciding whether or not to make an award under the MAC Contract, the government would [\*\*5] consider: (1) the number of aircraft by type that the contractor was making available for CRAF activation purposes and (2) the mobilization value of the committed aircraft. As a separate incentive to induce airlines to participate in the CRAF Program, the DOD conferred mobilization value points ("MV Points") to each participant. These MV Points allowed airlines the opportunity to operate routine MAC operational and training flights during peacetime, for which the airlines earned agreed-upon revenues.

#### B. *The Joint Venture Agreement*

To be able to successfully compete for the MAC Contract, on May 10, 1989, Tower and Federal Express entered into a joint venture agreement (the "JV Agreement"), along with the Flying Tiger Line Inc., Northwest Airlines, Inc. ("Northwest"), United Parcel Service Co. and its parent United Parcel Service of America, Inc. (collectively, "UPS"), and Pan American World Airways, Inc. ("Pan Am"). The stated purpose of the JV Agreement was to form a joint venture: (1) to contract with MAC as a single entity in order to satisfy military requirements for CRAF participation, (2) to obtain eligibility for MAC fixed contract flights and (3) to obtain eligibility for [\*\*6] peacetime expansion flights. JV Agreement, Exhibit A to Complaint, at 1.

Under the JV agreement, each participant pledged the use of specified aircraft to the joint venture for use in the CRAF Program for the 1990-1992 CRAF Cycle as per the MAC Contract. The parties further agreed [\*275] that Federal Express would represent and bind the JV in its dealings with MAC. JV Agreement P 6. Invoices for services provided to MAC were to be billed directly to MAC, which would then pay Federal Express, as the sole payee for the JV. *Id.* P 7. Federal Express would then remit payment to the appropriate carrier "for MAC flights operated by the Joint Venture." Moreover, the terms of the JV Agreement were not to be modified unless in writing and signed by authorized representatives of the parties. *Id.* P 12(b). Tennessee law governed the JV agreement.

#### C. *The Supplemental Agreements*

In addition, on May 10, 1989, Federal Express and Tower entered into a separate supplemental agreement to the JV Agreement. MAC would, from time to time, offer to the JV additional passenger flights not included in the fixed flights under the MAC Contract. These additional flights were termed "Expansion Flights." [\*\*7] Under the Tower Supplemental Agreement, when either Federal Express or Northwest did not have aircraft available to meet MAC's needs for these Expansion Flights, Federal Express promised to refer the Expansion Flights to Tower. If Tower then operated these flights, it would pay Federal Express a 2 1/2% commission of the gross revenues payable by MAC.

Federal Express also entered into supplemental agreements with Northwest, UPS and Pan Am. On May 12, 1989, Federal Express and Northwest entered into an agreement supplemental to the JV Agreement and the JV Operating Agreement (the "Northwest Supplemental Agreement"). According to Tower, the terms of the Northwest Supplemental Agreement provided for:

- (a) the division of the market for MAC Program flights for Category Y and B Passengers and Category B Cargo flights by allocating
  - (i) all Pacific Category Y passenger service flights and all North Atlantic Category Y passenger service flights originating in Boston, Detroit and Minneapolis to Northwest;
  - (ii) all North Atlantic Category Y passenger service flights except for those originating in Boston, Detroit and Minneapolis to other JV participants;

- (iii) all Category **[\*\*8]** B cargo flights to Federal Express;
- (iv) Category B passenger service to Federal Express and Northwest according to an agreed upon formula, with Northwest having a right of first refusal on all Atlantic flights not flown by Federal Express and on all Expansion Flights not flown by Federal Express; and
- (v) Category B passenger Expansion Flights not operated by Federal Express or Northwest to Tower Air.
- (b) Division between Federal Express and Northwest of the JV participants entitlement benefits under the MAC Contract to fly the most desirable flights, i.e. fixed contract passenger and cargo flights, such that Federal Express received all of the entitlements of UPS and Tower Air, and Federal Express and Northwest split the entitlements of Pan Am.
- (c) Allocation of commissions received from Tower Air and Pan Am to Federal Express and Northwest; and
- (d) Covenants to take no action which could adversely affect the aforesaid division of the market and revenues therefrom.

Complaint, P 89.

On May 11, 1989, Federal Express and Pan Am entered into an agreement to supplement the JV Agreement and the JV Operating Agreement (the "Pan Am Supplemental Agreement"). **[\*\*9]** According to Tower, this agreement provides for:

- (a) the division of the market for MAC Program flights for Category Y and B Passenger flights and Category B Cargo flights by allocating
  - (i) all North Atlantic Category Y passenger service flights except for those originating in Boston, Detroit and Minneapolis to Pan Am;
  - (ii) all Pacific Category Y passenger service flights and all North Atlantic Category Y passenger service flights originating in Boston, Detroit and Minneapolis to Northwest;
- [\*276]** (iii) all Category B cargo flights to Federal Express;
- (iv) Category B passenger service to Federal Express and Northwest, with some Category B Expansion Service to be assigned to Tower Air by Federal Express; and
- (b) payment of commissions by Pan Am to Federal Express on compensation paid to Pan Am by MAC for Category Y passengers carried by Pan Am as a result of Pan Am's participation in the Joint Venture.

Complaint, P 90.

On May 12, 1989, Federal Express and UPS entered into a supplemental agreement to the JV Agreement (the "UPS Supplemental Agreement"), which provided that:

- (a) Federal Express would pay UPS a fixed percentage of the value **[\*\*10]** of the MAC Contract, paid monthly and a percentage of revenues received by Federal Express as a result of Northwest's, Pan Am's and Tower Air's participation in the Joint Venture;
- (b) UPS would give Federal Express all of its entitlement flights and to undertake flights under the MAC Contract only if Federal Express was unable to do so.

Complaint, P 91.

In its complaint, Tower also claims that Federal Express made similar agreements with Delta Airlines ("Delta"), Trans World Airlines, Inc. ("TWA") and United Airlines, Inc. ("United"), who were not parties to the JV Agreement, under which Federal Express collected commissions for flights awarded by MAC to the joint venture. Complaint, P 92.

#### D. *The Gulf War*

MAC first made use of the services available under the JV Agreement beginning in 1990 with the outbreak of the war in the Persian Gulf. On August 17, 1990, MAC ordered a Stage I CRAF activation with the commencement of Operation Desert Shield. By January 17, 1991, MAC elevated its requirements to Stage II CRAF activation with the start of Operation Desert Storm. By May 17, 1991, MAC reclassified activation to Stage I, and by May 24, 1991, all activation stages **[\*\*11]** were terminated.

From January 1, 1990 to December 31, 1992, MAC dealt directly with Tower to arrange military flights on Tower's aircraft. Although payment was exchanged solely between Federal Express and MAC, MAC would communicate directly with each air carrier to schedule missions under the CRAF Program under MACR 55-8, Section 3-4. In accordance with the JV Agreement, Tower then billed MAC directly for services relating to the use of its aircraft. MAC then remitted payment to Federal Express for payment to Tower. Tower claims that Federal Express unjustly withheld \$ 4,029,689 from the payment sent by MAC as a commission of 2 1/2% due under an agreement between Tower and Federal Express. Tower also claims that other carriers were paid directly by MAC for services under the JV Agreement.

#### E. Litigation History

In February, 1993, Tower filed a complaint against Federal Express in the Eastern District of New York, through diversity jurisdiction, regarding the state law claims arising out an alleged breach of the JV Agreement or the Tower Supplemental Agreement. Having discovered that no diversity existed, Judge Dearie dismissed the action.

In August, 1994, Federal Express filed [\*\*12] a complaint against Tower in Tennessee state court based on state law claims arising out of the same contracts. The state case is currently pending.

In December, 1994, Tower refiled the instant federal case with this Court, adding its antitrust claims and asserting federal question jurisdiction under [28 U.S.C. § 1331](#) and pendent jurisdiction for its state law claims under [15 U.S.C. § 4](#).

### DISCUSSION

#### I. STANDARDS GOVERNING THIS MOTION

##### A. Conversion into a Motion for Summary Judgment

**HN1** A district court should grant a motion to dismiss under [Rule 12\(b\) of the Federal Rules of Civil Procedure](#) only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with" [\*277] the allegations. [H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50, 109 S. Ct. 2893, 2906, 106 L. Ed. 2d 195 \(1989\)](#) (quoting [Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 \(1984\)](#)). In applying this standard, a district court must "read the facts alleged in the complaint in the light most favorable" to the plaintiff, and accept these allegations as true. [Id. at 249, 109 S. Ct. at 2906](#); see [Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 \(1974\)](#); see also [Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S. Ct. 1160, 1163, 122 L. Ed. 2d 517 \(1993\)](#) (citing [Fed. R. Civ. P. 8\(a\)\(2\)](#) to demonstrate liberal system of 'notice pleading' employed by the Federal Rules of Civil Procedure).

**HN2** According to [Rule 12\(b\)](#), however, if, on a motion asserting failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [Rule 56](#), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by [Rule 56](#). A district court may not convert a motion under [Fed. R. Civ. P. 12\(b\)\(6\)](#) into a [Rule 56](#) motion for summary judgment without sufficient notice to the opposing party to respond. [Groden v. Random House, Inc., 61 F.3d 1045 \(2d Cir. 1993\)](#). The essential inquiry is whether the plaintiff should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of [\*\*14] a reasonable opportunity to meet facts outside the pleadings. [In re G&A Books, Inc., 770 F.2d 288, 294-95 \(2d Cir. 1985\)](#), cert. denied sub. nom M.J.M. Exhibitors v. Stern, 475 U.S. 1015, 106 S. Ct. 1195, 89 L. Ed. 2d 310 (1986).

**HN3** In deciding whether to convert a motion to dismiss into one for summary judgment, the Court recognizes that the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. [Cortec Indust. Inc. v. Sum Holding, L.P., 949 F.2d 42, 47 \(2d Cir. 1991\)](#), cert. denied, 503 U.S. 960, 112 S. Ct. 1561, 118 L. Ed. 2d 208 (1992). When a plaintiff chooses not to attach to the complaint or incorporate by reference a document upon which it solely relies and which is integral to the complaint,

the court may under certain circumstances take the document into consideration in deciding the defendant's motion to dismiss without converting the proceeding to one for summary judgment. *Id. at 47-48; International Audiotext Network, Inc. v. AT&T, 62 F.3d 69, 72 (2d Cir. 1995)*. In addition, the Court may consider documents annexed to the movant's papers which, although not annexed [\*\*15] to the complaint, plaintiff either had in his possession or had knowledge of and upon which he relied in bringing suit. *Rouccchio v. Coughlin, 923 F. Supp. 360, 366 (E.D.N.Y. 1996)* (Seybert, J.) (citing *Cortec, 949 F.2d at 48*). The Second Circuit has warned, however, that it is error to consider factual allegations contained in legal briefs or memoranda without converting the motion to one for summary judgment. *Fonte v. Board of Managers of Continental Towers Condo., 848 F.2d 24, 25 (2d Cir. 1988)*.

Tower's complaint in this action only attaches the JV Agreement and the Tower Supplemental Agreement, yet refers to various secret supplemental agreements between Federal Express and other air carrier partners and non-partners to the joint venture. In opposing defendant's motion, however, Tower submitted additional documentation to counter Federal Express' arguments. Among the exhibits were a deposition extract, correspondence, MAC rates and regulations, and the Joint Venture Operating Agreement for the JV. Federal Express also provided additional documents for the Court's consideration, including an affidavit, correspondence regarding the Tower Supplemental Agreement, excerpts [\*\*16] from the RFP, a Memorandum of Understanding and pleadings from the prior litigations. Moreover, Tower's reply papers rely on outside matters and supply facts that go beyond those alleged in the complaint, including more in-depth analysis of the payment mechanisms under the MAC Contract. See Tower's Memorandum in Opposition to Federal Express's Motion to Dismiss, at 5 8.

[\*278] **HN4** When a non-movant offers supplemental submissions, and the Court wishes to consider them, conversion is only inappropriate if the movant did not have adequate notice that the motion might be treated as one for summary judgment. *B.V. Optische Industrie de Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 167 (S.D.N.Y. 1995)*. In their moving papers, both parties have acknowledged the possibility that the Court would convert this motion into summary judgment. Tower's Memorandum in Opposition to Federal Express's Motion to Dismiss, at 4-5; Federal Express's Reply Memorandum in Support of its Motion to Dismiss, at 2-3. Federal Express's motion goes as far as to provide a section dedicated to "Undisputed Facts Relevant to Determination of Motion." Federal Express's Reply Memorandum in Support of its Motion to Dismiss, [\*\*17] at 11-15.

Because of the complexity of the factual allegations in this action and of the fact-intensive nature of antitrust analysis, the Court finds it necessary to consider matters outside the complaint to assess the claims in this case. As noted above, both parties were on notice of the potential for converting this motion. The Court will therefore proceed to treat this motion as one for summary judgment, and apply that standard accordingly.

#### B. Standard for Summary Judgment

**HN5** Summary judgment may not be granted unless "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)*. Under the law of the Second Circuit, a district court must weigh several considerations in evaluating whether to grant a motion for summary judgment with respect to a particular claim. *Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1223 (2d Cir. 1994)* (internal case citations omitted). First, the moving party carries the burden to demonstrate that no genuine issue respecting [\*\*18] any material fact exists. *Id.* (citations omitted). Second, all ambiguities and inferences must be resolved in favor of the non-moving party. *Id.* Third, the moving party may obtain summary judgment by showing that no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight. *Id.* Finally, the trial court's duty is confined to issue-finding and does not extend to issue-resolution. *Id.*

**HN6** In evaluating the above considerations, a court must be mindful of whether the purported factual dispute is material, because "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, 2510, 91 L. Ed. 2d 202 (1986)*.

In this action, the Court also heeds the words of the Supreme Court in *Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962)* that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles."

## II. ANTITRUST CLAIMS

This case presents unique and complex issues [\*\*19] regarding the application of **antitrust law** to government contracting. The issues presented here are further complicated because we are not dealing with single entities bidding on a government contract. Rather, the Court is faced with a dispute between two members of a joint venture that was formed specifically to meet the needs of a specified government contract. The joint venture was formed ostensibly to pool resources and complement each other's capabilities to make their proposal more attractive to the government purchasing agency. For these reasons, complex issues arise not only regarding the application of **antitrust law** to government contracts, but the application to joint ventures as well.

In light of these complexities, the Court will first address some of the special considerations in assessing antitrust claims arising in connection with government contracts. This includes ascertaining the relevant market under a government contract. Second, the Court will analyze the applicability of **antitrust law** to joint ventures and agreements ancillary to those combinations.

### [\*279] A. **Antitrust Law** and Government Contracts

Government contractors are not strangers to antitrust scrutiny. [\*\*20] The courts have been called upon to assess the antitrust implications of bid-rigging to obtain contracts, price-fixing among competitors for public contracts and agreements to refrain from bidding. See *United States v. Koppers Co., 652 F.2d 290* (2d Cir.), cert. denied, 454 U.S. 1083, 70 L. Ed. 2d 617, 102 S. Ct. 639 (1981); *United States v. Champion Int'l Corp., 557 F.2d 1270* (9th Cir.), cert. denied, 434 U.S. 938, 54 L. Ed. 2d 298, 98 S. Ct. 428, 98 S. Ct. 429 (1977); *COMPACT v. Metropolitan Government of Nashville & Davidson County, 594 F. Supp. 1567 (M.D. Tenn. 1984)*. Markets created by the government, therefore, are ripe for predatory and anti-competitive conduct just as in other commercial markets. The government contracting arena, however, provides certain special circumstances that do not exist in general commercial purchasing.

#### 1. The Government as Monopsonist

First and foremost, in a market created by a government contract, there is only one purchaser - a specific department of the government on one proposed sale, i.e., one request for proposal. Charles L. Eger, *Contractor Team Arrangements Under the Antitrust Laws*, 17 Pub. Con. L.J. 595, 616 (1988). [\*\*21] As a sole purchaser or "monopsonist," the government enjoys considerable economic power and can prescribe certain procedures and safety nets prior to awarding a contract to a joint venture. Peter B. Work, *Antitrust Issues Relating to Arrangements and Practices of Government Contractors and Procuring Agencies in Markets for Specialized Government Products*, 57 Antitrust L.J. 543, 545 (1988). For example, the government can require contractors (1) to sign certificates stating that their prices are based on current, accurate and complete cost data, (2) to accept fixed-price contracts and (3) to limit profits under cost-type contracts. *Id.* at 544-545. In this case, for instance, Federal Express asserts that the government negotiated uniform rates in accordance with a Memorandum of Understanding between the participating carriers and the government. Deft's Mem. in Support of its Motion to Dismiss, at 15.

Simply because the government enjoys this power, however, does not mean that no anti-competitive conduct can occur. Indeed, the fact that the Federal Acquisition Regulations specifically require joint venture bidders to comply with antitrust laws suggests that the government itself [\*\*22] perceives a market in which anti-competitive acts can occur each time a government contract is issued. *48 C.F.R. § 9.604 (1995)*.

#### 2. The Relevant Market Under a Government Contract

Determining the relevant product market under a government contract is a substantial obstacle. Assuming that the government creates a market for a certain product or system when it issues a Request for Proposal, this market is very narrow and specific, based upon detailed specifications and requirements.

The definition of the relevant market, however, is critical to Tower's antitrust claims under the Clayton Act and the Sherman Act. First, Tower seeks a private remedy for its antitrust claims under [HN7](#) § 4 of the Clayton Act, [15 U.S.C. § 15](#), which provides that any person injured in their business by reason of a violation of antitrust law may sue for treble damages. To obtain this relief, Tower must show (1) that the alleged loss is the type of injury the antitrust laws were intended to prevent and (2) that the antitrust violation was the cause in fact of such injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, [429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 \(1977\)](#); *Disenos Artisticos e Industriales*, [\[\\*23\] S.A. v. Work, 676 F. Supp. 1254, 1276 \(E.D.N.Y. 1987\)](#). Lack of causation in fact between antitrust injury and alleged antitrust violation is fatal to the merits of any antitrust claim. *Argus, Inc. v. Eastman Kodak Co.*, [801 F.2d 38, 41 \(2d Cir.\), cert. denied, 479 U.S. 1088, 94 L. Ed. 2d 151, 107 S. Ct. 1295 \(1987\)](#). The injury, however, must reflect the anti-competitive effects of either the alleged violation or of anti-competitive acts made possible by the violation in the relevant market. *Brunswick Corp.*, [429 U.S. at 489, 97 S. Ct. at 697](#). The determination of whether Tower has standing and injury, [\[\\*280\]](#) therefore, necessitates a finding as to the relevant market.

Second, Tower's claims under § 1 of the Sherman Act alleging illegal restraint of trade cannot be assessed without determining the relevant market. For the reasons set forth *infra*, the Court will apply the "rule of reason" analysis in assessing the restraints imposed under the JV Agreement and the Supplemental Agreements. A threshold issue in analysis under the rule of reason, however, is the appropriate definition of the relevant market. *Disenos*, [676 F. Supp. at 1283](#).

Third, analysis of Tower's remaining [\[\\*24\]](#) monopoly claims under § 2 of the Sherman Act also requires a determination of the relevant market. [HN8](#) To make out a claim for monopoly, Tower will have to show that Federal Express had monopoly power in a *relevant market*. *Irvin Indus., Inc. v. Goodyear Aerospace Corp.*, [974 F.2d 241, 244 \(2d Cir. 1992\)](#). Likewise, in its claim of attempted monopoly, Tower will have to show that Federal Express had a "dangerous probability" of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, [506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 \(1993\)](#). To evaluate this element, the court must define the relevant market. *Id.* [113 S. Ct. at 891](#).

The essential inquiry for this Court, therefore, is the definition of the relevant market under the facts presented. As a motion for summary judgment, the Court must find that the undisputed facts support its conclusion as a matter of law.

In the general realm of antitrust law, the Supreme Court articulated the traditional test for determining the product market in *United States v. E.I. DuPont de Nemours & Co.*, [351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 \(1956\)](#). The Court stated that [HN9](#) a market is composed of products that have reasonable interchangeability [\[\\*25\]](#) for the purpose for which they are produced, and a court must consider price, use and qualities. *Id. at 404, 76 S. Ct. at 1012*; see also *State of New York v. Anheuser-Busch, Inc.*, [811 F. Supp. 848, 871 \(E.D.N.Y. 1993\)](#). The Court emphasized the importance of the purchaser's willingness to substitute one commodity for another. *DuPont*, [351 U.S. at 393, 76 S. Ct. at 1003](#). Because a relevant market includes all products which are reasonably interchangeable, plaintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal. *E&G Gabriel v. Gabriel Bros., Inc.*, [1994 WL 369147, at \\*3 \(S.D.N.Y. July 13, 1994\)](#).

Moreover, in *Brown Shoe Co. v. United States*, [370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 \(1962\)](#), the Supreme Court found that [HN10](#) a market may be composed of various well-defined submarkets for antitrust purposes, based on various practical indicia, including, *inter alia*, industry or customer recognition of the submarket as a separate economic market, the products' peculiar circumstances and uses, and distinct prices. *Id. at 325*, S. Ct. at 1524; see also *Grumman Corp. v. LTV Corp.*, [\[\\*26\] 527 F. Supp. 86, 89 \(E.D.N.Y. 1981\), aff'd, 665 F.2d 10 \(2d Cir. 1981\)](#). In *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, [253 U.S. App. D.C. 142, 792 F.2d 210, 218 \(D.C. Cir. 1986\)](#), cert. denied, [479 U.S. 1033, 93 L. Ed. 2d 834, 107 S. Ct. 880 \(1987\)](#), Judge Bork noted that in that these indicia are evidentiary proxies for direct proof of substitutability.

As noted above, however, in the context of a complex government contract calling for a number of different services and providing detailed requirements and specifications, the traditional analysis of "interchangeability" is difficult to

apply. Indeed, the "relevant market" for antitrust analysis is hotly debated between the parties in this case. The inquiry is further complicated by the complexity of facts and the disputed interpretation of those facts by the parties.

Tower argues that there are essentially four relevant markets for the Court to consider. First, there is the market for air passenger and cargo transportation services under the MAC Program and the CRAF Program. Second, there is the submarket for Expansion Flights under these programs. Third, there is the market for international trans-Atlantic and [\*\*27] trans-Pacific air service under the MAC Program and the CRAF Program. Fourth, there is the market for trans-Atlantic and trans-Pacific Expansion [\*281] Flights under these programs. Tower claims that these relevant markets are discrete submarkets of the overall market for sale of air passenger and cargo transportation services to the U.S. government. Compl. P 84.

Federal Express, on the other hand, contends that a single government contract cannot create a market for antitrust purposes. Deft's Reply Mem., at 6. Even if it could, Federal Express argues that its limited duration of only 33 months does not impact antitrust concerns. *Id.* Furthermore, Federal Express claims that under Tower's analysis, the Court would have to find the following factual and legal premises:

- (1) discrete portions of a single government contract can be submarkets;
- (2) the MAC Contract with the JV is a separate market, despite contracts with other carriers and joint ventures;
- (3) the 1990 to 1992 CRAF Program cycle is distinct from the market consisting of the government's continuing demand for air transport services.

Deft's Reply Mem., at 5.

Finally, Federal Express concedes that if [\*\*28] any market exists, it can only be the CRAF Program, but strenuously argues that there cannot, as a matter of law, be submarkets for fixed and Expansion Flights under the MAC Contract because they were never separately offered or contracted for by the Government. Reply Mem. at 6.

Tower counters these arguments by asserting that a discrete submarket for expansion flights did exist. First, the parties to the joint venture were free to compete with each other and with other CRAF Program participants based on the variable cost factors for Expansion Flights. Second, MAC reserved the right to select any carrier for a given Expansion Flight. Third, only the price per passenger mile and the number of nautical miles for flight routes were fixed; all other components of the pricing formula specified in the MAC Contract for Expansion Flights, including ferrying costs and allowable cabin load, were variable and subject to free competition among carriers.

Tower also argues that there are discrete submarkets for fixed and Expansion Flights because they are not interchangeable or substitutable. First, Expansion Flights are unscheduled flights added on short notice in addition to regularly scheduled [\*\*29] fixed flights. Second, the market for Expansion Flights is competitive, whereas the market for fixed flights was not. Moreover, both CRAF air carriers and MAC treated the market for Expansion Flights as a separate submarket with respect to how flights were awarded, priced and administered.

Finally, Tower asserts that the fact that the government contract had a limited and finite term did not mean there could not be any market. Even a single market can be a relevant market. Plt's Opp. Mem. (citing [F. Buddie Contracting, Inc. v. Seawright, 595 F. Supp. 422, 438 \(N.D. Ohio 1984\)](#)).

The Court rejects Federal Express's argument that no market can exist under a single government contract. In other cases involving antitrust allegations in connection with the award of government contracts, the courts have found or assumed that the contract itself can be the relevant market. [Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1055 \(9th Cir. 1983\)](#), cert. denied, 464 U.S. 849, 78 L. Ed. 2d 144, 104 S. Ct. 156 (1983); [COMPACT, 594 F. Supp. at 1571](#); [Grumman Corp., 527 F. Supp. at 89](#). HN11[] The fact the Government is the sole domestic purchaser and regulates this sale does not [\*\*30] mean that no market exists. [Northrop, 705 F.2d at 1055](#). Moreover, as noted earlier, the Federal Acquisition Regulations protect against anti-competitive conduct in government procurement.

Accepting that there can be a relevant market to define, the difficult issue is which market is relevant. Both Tower and Federal Express have made arguments relying on the interpretation of the MAC Contract. Their arguments have also raised numerous disputed facts, including the ability of individual carriers to bid for Expansion Flights

within the MAC Contract, the variability of the price for such flights and the factors that MAC considers in awarding such flights. The Court can hardly find, therefore, that the undisputed facts point to a particular relevant market. Without a relevant [\*282] market in which to assess the alleged anti-competitive acts, the Court cannot rule as a matter of law as to any of Tower's claims. For this reason, the Court must deny Federal Express's motion, considered here as a motion for summary judgment.

Even if the Court could resolve the facts and rule as to the relevant market, however, a significant number of disputed facts exist as to the other elements of Tower's [\*\*31] claim that would preclude granting Federal Express's motion.

#### B. *Claim XII and Claim XIII-Restraint of Trade*

**HN12** [↑] A plaintiff alleging a § 1 violation must allege concerted action by two or more persons that unreasonably restrains interstate or foreign trade or commerce. *In re NASDAQ Market-Makers Antitrust Litig.*, 894 F. Supp. 703, 710 (S.D.N.Y. 1995). Thus, a complaint alleging a conspiracy in violation of the Sherman Act must identify co-conspirators and describe the nature and effects of the alleged conspiracy or combination. *Reiter's Beer Distrib. v. Christian Schmidt Brewing*, 657 F. Supp. 136, 142 (E.D.N.Y. 1987); *International Television Prods. Ltd. v. Twentieth Century-Fox Television Div. of Twentieth Century-Fox Film Corp.*, 622 F. Supp. 1532, 1537 (S.D.N.Y. 1985).

##### 1. Concerted Action

**HN13** [↑] A plaintiff claiming an antitrust conspiracy must first establish either a combination or some form of concerted action between at least two legally distinct economic entities. It is essential to any claim in restraint of trade to establish the existence of an agreement between two or more independent entities. *Disenos*, 676 F. Supp. at 1280. A unilateral or independent act does [\*\*32] not create conspiratorial liability under the Sherman Act. *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 257 (2d Cir.), cert. denied, 484 U.S. 977 (1987); *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 542 (2d Cir.), cert. denied, 510 U.S. 947, 126 L. Ed. 2d 337, 114 S. Ct. 388 (1993).

Although the parties do not dispute the existence of either the JV Agreement or the Supplemental Agreements, Federal Express claims that Tower has failed to meet this requirement because it only identified Federal Express as a conspirator. Deft's Motion at 18. In *International Television Prods.*, however, the district court found that where the complaint named the two parties to an agreement and specified the content of the agreement, there could be no question that there was sufficient notice as to the identity of the co-conspirators. *622 F. Supp. at 1537*. In the present case, the complaint sets forth at least three potential co-conspirators along with Federal Express. Tower refers to and provides excerpts from alleged "secret" agreements between Federal Express and Northwest (Compl. P 89), Pan Am (Compl. P 90) and UPS (Compl. P 91). Tower also alleges that Federal [\*\*33] Express made secret agreements with Delta, TWA and United (Compl. P 92).

The Second Circuit has found, however, circumstances with respect to an alleged conspiracy to restrain trade must be such as to warrant a finding that conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. *Int'l Dist. Ctrs. 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) (citations omitted). In its opposition papers, Tower suggests that "Northwest appears to have knowingly aided in and accepted the benefits of the Federal Express's web of secret agreements, as evidenced by the terms of its secret agreement with Federal Express where the two carriers agreed to divide the CRAF market, mobilization value points, and Pan Am commissions." Pl's Opposition and Compl. P 89. At this point, however, the Court cannot rule as a matter of law on the undisputed facts that any of the other parties had the requisite intent to achieve an unlawful objective.

Federal Express also contends that the other joint venturers cannot be considered co-conspirators where they function as a single [\*\*34] economic unit.<sup>1</sup> Deft's Motion in Support of [\*283] Its Motion to Dismiss, at 20 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)). **HN14**[] Joint ventures may operate lawfully if there is sufficient economic integration among the members. The Supreme Court in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982) suggested that competitors who form a joint venture must pool resources and capital, as well as share in the risks of profit and loss. *457 U.S. at 356, 102 S. Ct. at 2479*. In addition, the Federal Acquisition Regulations set out the various types of economic interests that are acceptable in such arrangements, including the ability to complement each other's unique capabilities and to offer the government the best combination of performance, cost, and delivery for the product being acquired and provide that contractor team arrangements may not exist in violation of antitrust statutes. *48 C.F.R. § 9.602*.

[\*\*35] Tower asserts that the joint venture here did not form a single economic unit and therefore the members could be considered co-conspirators and violate the antitrust laws. First, the JV Agreement, and an operating agreement related to the JV Agreement, prohibited the pooling of capital and sharing of the risks of profit or loss. Each party was required to indemnify the other parties, to be solely liable for claims arising from its performance under the MAC Contract and to obtain at its own expense insurance to cover such liabilities.

As to the element of concerted action, therefore, the Court finds that there continues to be disputed issues of material fact that preclude ruling as a matter of law on this issue.

## 2. The Agreement Unreasonably Restrained Trade

**HN15**[] Restraints imposed by an agreement between competitors are denominated as horizontal restraints, while those imposed by agreement between firms at different levels of distribution are vertical restraints. *Business Electronics Corp. v. Sharp Elecs.*, 485 U.S. 717, 730, 108 S. Ct. 1515, 1522-23, 99 L. Ed. 2d 808 (1988). As noted above, competitors at the same level can lawfully combine if there is sufficient economic integration. [\*\*36] In this case, "contractor team arrangements" are specifically provided for in the Federal Acquisition Regulations and under the solicitation for the MAC Contract. See *48 C.F.R. § 9.601*.

Moreover, **HN16**[] side agreements to joint ventures can operate lawfully as well. Restraints collateral to but necessary for the implementation of a lawful agreement, and which are no broader in scope than necessary to accomplish the purpose of the agreement, are termed "ancillary." Eger, *supra*, at 613. This doctrine was first advanced nearly a hundred years ago in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (9th Cir. 1898), aff'd, *175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96 (1899)*. Then Circuit Judge Taft found that:

**HN17**[] no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract . . . . [To be lawful,] the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary.

*85 F. 271 at 282*. Thus, to be lawful, the ancillary restraint [\*\*37] must be subordinate to a separate, legitimate transaction and serve to make the main transaction more effective in accomplishing its purpose. *Rothery Storage*, 792 F.2d at 229.

**HN18**[] Joint ventures and their ancillary agreements, however, are not exempt from antitrust review. In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951), the Supreme Court ruled

<sup>1</sup> Federal Express argues that neither MAC nor any other federal government instrumentality are a "person" within the meaning of the Sherman Act. Deft's Motion at 19 (citing *United States v. Cooper Corp.*, 312 U.S. 600, 85 L. Ed. 1071, 61 S. Ct. 742 (1941)).

that the mere label of "joint venture" is not enough to immunize such combinations from illegal restraint of trade. [341 U.S. at 597, 71 S. Ct. at 974](#). These activities, as combinations among horizontal competitors, can be deemed unreasonable restraints on trade.

[\*284] [HN19](#) There are two rules courts use to assess whether a horizontal agreement constitutes an unreasonable restraint on trade. A court will apply the rule of *per se* liability when the agreement or practice at issue appears on its face to be one that would almost always act to restrict competition within the market. [Gregoris Motors v. Nissan Motor Corp., 630 F. Supp. 902, 906 \(E.D.N.Y. 1986\)](#). When a practice or agreement is not plainly anti-competitive, courts apply the traditional rule of reason, which requires the defendant to [\*\*38] demonstrate that the pro-competitive aspects of the challenged agreement outweigh any anti-competitive aspects. [Hertz Corp. v. City of New York, 1 F.3d 121, 130 \(2d Cir. 1993\)](#), cert denied, 510 U.S. 1111, 127 L. Ed. 2d 375, 114 S. Ct. 1054, 114 S. Ct. 1055 (1994). In determining whether particular concerted action violates § 1 of the Sherman Act, there is a presumption in favor of the rule of reason standard and departure from that standard must be justified by demonstrable economic effect, rather than formalistic distinctions. [Business Elecs. Corp., 485 U.S. at 724, 108 S. Ct. at 1519](#).

[HN20](#) The *per se* rule is only used in the relatively narrow circumstances where courts have had sufficient experience with the activity to recognize that it is plainly anti-competitive and lacks any redeeming value. [Hertz Corp., 1 F.3d at 129](#); [Gregoris Motors, 630 F. Supp. at 906](#). In these circumstances, the defendant's actions must be so obviously harmful to competition and so clearly lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination. [Capital Imaging, 996 F.2d at 543](#).

[HN21](#) When the alleged restraint of trade is [\*\*39] not plainly anti-competitive, the court must apply the rule of reason and determine whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. [Clorox Co. v. Winthrop, 836 F. Supp. 983, 989 \(E.D.N.Y. 1993\)](#). Under the rule of reason, the court must weigh all circumstances of the case in deciding whether the restrictive practice should be prohibited as an unreasonable restraint on competition. [Anheuser-Busch, 673 F. Supp. 664, 666-667](#). In this respect, the court must balance the pro-competitive and anti-competitive effects of any restraint; it is not sufficient that plaintiff prove either anti-competitive intent or effect. [U.S. Football League v. National Football League, 842 F.2d 1335, 1360 \(2d Cir. 1988\)](#).

In this action, the Court will apply the rule of reason to analyze these claims. The Court finds that in this context, there is not "sufficient experience with the activity to recognize that it is plainly anti-competitive and lacks any redeeming value." [Hertz Corp., 1 F.3d 121 at 129](#). This Court distinguishes the cases that applied *per se* liability to joint [\*\*40] ventures and ancillary agreements in other contexts. In [COMPACT v. The Metropolitan Government of Nashville and Davidson County, Tennessee, 594 F. Supp. 1567 \(M.D. Tenn. 1984\)](#), the district court held that:

Federal courts will not hesitate to apply the *per se* rule to impose Section 1 liability upon a finding of some intrusive or ancillary aspect of the joint venture agreement which falls within the well-defined parameters of the *per se* rule.

[594 F. Supp. at 1575](#) (citing [Timken Roller Bearing, 341 U.S. at 598, 71 S. Ct. at 974](#)). In that case, however, the district court found that because the joint venture had a blanket prohibition on its individual members rights to compete for the public contract at issue, competition was preempted between COMPACT and its members and between the individual COMPACT members themselves. [594 F. Supp. at 1577-78](#). This case is inapplicable because here, the restriction from bidding individually comes from the MAC contract itself.

Tower also cites [Yamaha Motor Corp. v. FTC, 657 F.2d 971, 981 \(8th Cir. 1981\)](#), cert. denied, 456 U.S. 915 (1982), to support its contention that side agreements among joint venturers can still [\*\*41] rise to the level of *per se* antitrust violations. In *Yamaha*, the 8th Circuit found that side agreements to a joint venture that divided the geographical and product markets and restrained the members from competing with each other in shared markets were *per se* illegal. [657 F.2d at 980](#). Again, this case can be distinguished from the present [\*285] facts. In *Yamaha*, the collateral agreements at issue banned the members of the joint venture from producing or selling

outboard motors outside the joint venture. In this case, however, it is MAC that prohibits independent efforts by the joint venturers from providing air services, not the agreements between Federal Express and any of the other members. Moreover, the court in *Yamaha* noted that the portions of the agreements that gave each member of the joint venture an exclusive territory was arguably valid. *Id. at 981*.

The Court will also apply the rule of reason rather than the *per se* rule because the anti-competitive aspects of the joint venture and the supplemental agreement in this case are not plainly apparent.<sup>2</sup> On the one hand, the joint venture provides a method of organization which enables air carriers involved [\*\*42] to join together to produce a combined product of passenger and cargo transport that is beyond the capacity the individual members. On the other hand, the supplemental agreements set a precise scheme of how Expansion Flights will be allocated if awarded, which may raise costs to the government.

Tower further claims that Federal Express' actions were *per se* violations because the supplemental agreements divided the market for air passenger services sold to MAC pursuant to the MAC Program. The supplemental agreements, however, merely allocated which members of the joint venture would operate certain flights, if awarded to the joint venture. It is unclear what effect this territorial restriction had on [\*\*43] competition for the joint venture to obtain such Expansion Flights. As noted again and again, MAC required that air carriers give up their rights to compete independently for awards once the joint venture was accepted as a participant in the CRAF Program.

Finally, Tower alleges a *per se* violation in that Federal Express fixed, stabilized and maintained the cost to MAC for such services. Compl. P 96. Federal Express disputes this fact and argues that it simply could not fix the prices. The MAC Contract contained detailed formulas for rates, regulations and price determination and the parties signed a Certificate of Independent Price Determination.

Because of the disputed facts, which preclude a finding as a matter of law that the *per se* rule applies, the Court will proceed to analyze the undisputed facts under the rule of reason test. [HN22](#)[]. A party claiming unreasonable restraint of trade under the rule of reason must prove more than an injury to itself; it must prove that competition in the relevant market was harmed. *Disenos*, 676 F. Supp. at 1283. As noted earlier, the relevant market for purposes of this analysis cannot be determined as a matter of law because of the disputed [\*\*44] facts among the parties.

Even if the market could be defined as a matter of law, however, the court must assess whether competition in that market has been harmed. Under the rule of reason analysis, a plaintiff must demonstrate a precise harm which is a restraint on competition, not merely a harm to a competitor. *Gregoris Motors*; [630 F. Supp. at 906](#). Tower must demonstrate therefore that the injury it suffered causes a lessening of competition in the market as a whole. *Id.*

Tower alleges that the supplemental agreements unreasonably restrained trade by creating preferential payment and workshares among the joint venturers. Furthermore, it claims that these agreements created a horizontal division of markets among competitors and imposed duties on the parties to refrain from bidding against each other on CRAF Expansion Flights. Plt's Opposition, at 13. As such, these restrictions were so broad they suppressed competition without creating any efficiencies. *Id.*

Federal Express, on the other hand, claims that these agreements do not exclude any JV member from obtaining benefits under the MAC Contract. Deft's Reply Mem., at 8. Rather, they are reasonable efforts to prevent [\*\*45] [\*286] "free riding" on the part of participants in the Joint Venture. *Id.* (citing [Rothery Storage, 792 F.2d at 212-13](#)). A free ride can pose a serious threat to the efficiency of a joint venture because the partner that provides capital and resources without receiving compensation has a strong incentive to provide less, thus rendering the common enterprise less effective. [792 F.2d at 212-13](#).

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<sup>2</sup> Joint ventures present a difficult concept for antitrust analysis, defying neat classification and precise definition and, by extension, well established rules for evaluating their competitive impact. [COMPACT v. Metropolitan Govt. of Nashville & Davidson Cty., 594 F. Supp. 1567, 1574 \(M.D. Tenn. 1984\)](#).

Federal Express also argues that the work share allocation and preferences in the supplemental agreements were reasonable to achieve the purposes of the JV because it reflected the number of aircraft committed by each carrier. Through the JV Agreement, Federal Express committed 16 DC-10 cargo planes, Northwest committed 29 747 passenger planes, 20 DC-10 passenger planes and 8 747 cargo planes. Tower, on the other hand, committed overall 3 747 passenger planes. Moreover, the JV could be eligible for higher MV Points the more cargo planes committed. Northwest and Federal Express together committed 24 cargo planes, whereas Tower committed none.

Again, the material facts are disputed as to whether the alleged restraints in the Supplemental Agreements are unreasonable. The Court cannot, therefore, [\*\*46] rule as a matter of law on Tower's § 1 claim. As discussed below, factual disputes are also prevalent in Tower's § 2 claims.

#### C. Claim XIV-Monopoly

HN23 [↑] Monopoly in and of itself is not unlawful. [National Ass'n of Pharmaceutical Mfrs. v. Ayerst Labs., 850 F.2d 904, 915 \(2d Cir. 1988\)](#). To make out claim of monopolization under the Sherman Act, a plaintiff must establish that the defendant had monopoly power in a relevant market, that the defendant engaged in anti-competitive conduct, and that its injury was, in fact, caused by the defendant's violation of antitrust laws. [Irvin Indus., 974 F.2d at 244](#). The defendant's activities must consist of willful acquisition or maintenance of monopoly power, as distinguished from growth or development as a consequence of superior product, business acumen or historic accident. [Ayerst Labs., 850 F.2d at 915](#). To prove a monopolist willfully acquired monopoly power, a plaintiff must prove that the alleged monopolist used or attempted to use monopoly power to foreclose competition, gain competitive advantage, or destroy competitors; this element requires proof of exclusionary or anti-competitive intent and effect. [Clorox, 836 F. Supp. I\\*\\*47I at 993](#).

In the present case, to meet the first prong of the test, Tower claims that by means of obtaining separate, secret agreements from potential competitors, which agreements Federal Express characterized as supplemental to the JV Agreement, Federal Express placed itself in a position to ensure that it had a preferential opportunity to operate all Category B Expansion Flights, to control the referral and distribution of Expansion Flights, to charge other air carriers a fee for referral of such flights, and to control all competitive price negotiations between MAC and the other participants in the Joint Venture so as to ensure that the price of Expansion Flights would be stabilized at non-competitive levels higher than what MAC would have been required to pay if there were free competition.

In addition, Tower asserts that it need not specify a precise percentage of the market share controlled by Federal Express to meet this aspect of the cause of action. Plaintiff's Opp. (citing [General Elec. Co. v. Bucyrus-Erie Col., 563 F. Supp. 970, 977 \(S.D.N.Y. 1983\); Phone Programs III. v. National Jockey Club, Inc., 692 F. Supp. 879 \(N.D. Ill. 1988\)](#)). In this respect, Tower contends [\*\*48] that further discovery is needed to ascertain market share.

Tower does assert, however, that Federal Express achieved a 72% share of all MV points, which entitled Federal Express to dominance in the market for peacetime Fixed Flights. Tower argues that although the MAC Contract provided that MV points would only be a secondary factor in awarding Expansion Flights, Federal Express sought to obtain monopoly leverage over the competitive market for Expansion Flights by "enforcing an interpretation of the secret agreements calculated to guarantee its control over the same dominant 72 share of that market." Pltf's Opp. Mem. (citing [Virgin \[\\*287\] Atlantic Airways, Ltd. v. British Airways, PLC, 872 F. Supp. 52 \(S.D.N.Y. 1994\)](#)).

Federal Express, on the other hand, claims that it was factually impossible for it to undertake any of these anti-competitive activities under any market that Tower could define. First, the agreement and JV were only limited to a 33 month period. Second, none of its activities had any impact on any other joint venturers or individual bidders or participants. Supp. Mem. at 5. Third, its acts did not affect entry in any way into the market, as defined by Tower. Id. Fourth, [\*\*49] Federal Express did not have the power to set prices or exclude competition from this market because the government set the prices and picked which joint venture would satisfy its needs for this market. Fifth, any monopoly power was conferred by the government through MV points, calculated on the basis of the government's preferences and needs.

These arguments make clear that the facts underlying Tower's allegations of monopoly are contested. For this reason, the Court finds that it cannot rule as a matter of law that Federal Express did or did not have monopoly power. The disputed facts also preclude granting summary judgment as to the issue of attempted monopoly, as discussed below.

#### D. Claim XV-Attempt to Monopolize

**HN24** [↑] In order to establish a § 2 attempted monopolization claim, plaintiff must prove: (1) that the defendant engaged in predatory or anticompetitive conduct (2) with the specific intent to monopolize (3) and a dangerous possibility of achieving monopoly power exists. *B.V. Optische Industrie de Oude Delft v. Hologic*, 909 F. Supp. 162, 171 (S.D.N.Y. 1995) (citing *Spectrum Sports*, 506 U.S. at 456, 113 S. Ct. at 890-91). Proof of the first element may be used [\*\*50] to infer second element and, when coupled with proof of monopoly power, may demonstrate a dangerous probability of success. *Volvo N. Am. v. Men's Int'l Prof. Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988).

**HN25** [↑] As noted when discussing the relevant market, a dangerous probability of success may exist where the defendant possesses a significant market share when it undertakes the challenged anti-competitive conduct. See *H.L. Hayden Co. v. Siemens Medical Systems*, 879 F.2d 1005, 1018 (2d Cir. 1989). To make this finding, however, it is necessary for the court to define the relevant product market. *Spectrum Sports*, 506 U.S. at 456, 113 S. Ct. at 890. Because the Court cannot determine the relevant market at this point, it is unable to reach a conclusion as to this issue on the basis of undisputed facts.

For the foregoing reasons, the Court denies Federal Express's motion for summary judgment as to all of Tower's antitrust claims. The Court now turns to assessing its jurisdiction over Tower's state law claims.

### III. DISMISSAL OF CLAIMS I TO XI

#### A. Supplemental Jurisdiction

**HN26** [↑] A district court may exercise supplemental jurisdiction over state law claims whenever federal law claims [\*\*51] and state law claims in a case derive from a common nucleus of operative fact and are such that plaintiff would ordinarily be expected to try them all in one judicial proceeding. *Block v. First Blood Assocs.*, 988 F.2d 344, 351 (2d Cir. 1993) (citation omitted). The decision whether to exercise such jurisdiction is entirely within the discretion of the district court. *Id.* Among the factors a district court will consider are judicial economy, convenience, fairness and federal-state comity. *Id.*

Federal Express argues that in the event the Court denies its motion as to the antitrust claims, it should nevertheless decline to exercise any supplemental jurisdiction over the state law claims under 28 U.S.C. § 1337(c)(2). **HN27** [↑] Section 1337(c)(2) provides that a district court may decline to exercise supplemental jurisdiction over a claim if the state claim substantially predominates over the federal claims.

In this action, Tower has raised state law claims based on contract, tort and fiduciary duty. Each one of these claims arises out of alleged violations of the JV Agreement, the JV Operating Agreement and the Supplemental Agreements, which are at [\*288] issue in the antitrust portion of [\*\*52] this case. Indeed, any finding as to the validity of Tower's antitrust claims may directly implicate the legality of these agreements. For this reason, the Court will continue to exercise supplemental jurisdiction over these state law claims.

#### B. State Compulsory Counterclaims

Federal Express argues in the alternative that Tower's state law claims should be dismissed because they must be raised as compulsory counterclaims in the Tennessee litigation.

Federal Express cites *Adam v. Jacobs*, 950 F.2d 89 (2d Cir. 1991) to support its argument that Tower's claims should be dismissed. In *Jacobs*, however, the Second Circuit noted that at least in the context of the federal rule pertaining to compulsory counterclaims, the rule was "directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint." *Id. at 93* (citing *Southern Constr. Co. v. Pickard*, 371 U.S. 57, 60, 83 S. Ct. 108, 110, 9 L. Ed. 2d 31 (1962)). What

Federal Express failed to note about that case, however, was the only grounds for federal jurisdiction was diversity of citizenship. In this case, federal antitrust [\*\*53] claims are involved that will bear on the validity of the state law claims. Moreover, Federal Express seems to have conveniently forgotten that Tower filed the first action in the Eastern District of New York, which Judge Dearie dismissed without prejudice. In the interim before Tower had the opportunity to refile, Federal Express instituted action in Tennessee state court based on the same contracts in issue in the first action, fully aware that Tower would be raising antitrust claims on those same activities.

For these reasons, and the reasons stated above with respect to supplemental jurisdiction, the Court will retain jurisdiction over Tower's state law claims.

#### **CONCLUSION**

For the foregoing reasons, Federal Express's motion for summary judgment as to Claims XII through XV is denied and Federal Express's motion to dismiss Claims I through XI is denied.

SO ORDERED.

Joanna Seybert, U.S.D.J.

Dated: Uniondale, New York

October 15, 1996

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## Jackson v. W. Indian Co.

United States District Court for the District of the Virgin Islands, Division of St. Thomas and St. John

October 16, 1996, Decided

Civil No. 1995-151

**Reporter**

944 F. Supp. 423 \*; 1996 U.S. Dist. LEXIS 15969 \*\*; 35 V.I. 269 \*\*\*

DAVID JACKSON, DUNCAN CONNOR, ALBERT BENJAMIN, and NARVEL FLEMING, for themselves and others similarly situated, Plaintiffs, v. THE WEST INDIAN COMPANY, LTD., a corporation; VIRGIN ISLANDS TAXI ASSOCIATION, an unincorporated association, Defendants.

**Disposition:** [\*\*1] WICO's motion for summary judgment as to Counts One through Five of plaintiff's complaint DENIED; and WICO's motion for summary judgment as to Count Seven (Violation of the [Commerce Clause](#)) GRANTED; and WICO's motion to dismiss Count Eight (Violation of [Fourteenth Amendment](#)) GRANTED; and WICO's motion for summary judgment as to Count Six (Tortious Interference with Business Relations) and Count Nine (Violation of [31 V.I.C. § 235](#)) DENIED without prejudice.

## Core Terms

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Islands, instrumentalities, passengers, immune, territorial, anti-trust, interstate commerce, pickup, taxi, unincorporated territory, taxi driver, dock, regulations, agencies, court of appeals, liberty interest, anti trust law, state action, cruise ship, plaintiffs', commerce, Revised, powers, preliminary injunction, summary judgment, exclusive right, out-of-state, articulated, in-state, pre-paid

## LexisNexis® Headnotes

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Antitrust & Trade Law > Sherman Act > Scope > Exemptions

### [HN1](#) Scope, Exemptions

All government instrumentalities, whether state or federal, enjoy some level of immunity from anti-trust suits under the Sherman Act, [15 U.S.C.S. §§ 1 - 7](#). Federal instrumentalities enjoy absolute immunity from anti-trust suits. Instrumentalities of a state or municipal government are immune where the challenged conduct is undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

### [HN2](#) Scope, Exemptions

A finding that a defendant is immune from federal anti-trust liability means that the defendant is also immune from liability under the local statute. [11 V.I.C. § 1518](#) (Virgin Islands). When the language of Chapter 11 is the same or

944 F. Supp. 423, \*423L<sup>A</sup> 996 U.S. Dist. LEXIS 15969, \*\*1L<sup>A</sup> 265 V.I. 269, \*\*\*269

similar to the language of a federal **antitrust law**, a district court in construing the chapter shall follow the construction given the federal law by the federal courts.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

#### **HN3**[ **Scope, Exemptions**

The United States may not be sued for antitrust violations under the Sherman Act.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

#### **HN4**[ **Sherman Act, Scope**

The Sherman Act, [15 U.S.C.S. §§ 1 -7](#), prohibits contracts, combinations, or conspiracies in restraint of trade or commerce and monopolization or attempts or conspiracies to monopolize trade or commerce by any "persons." [15 U.S.C.S. §§ 1, 2](#).

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

#### **HN5**[ **Scope, Exemptions**

Federal instrumentalities are outside the scope of the anti-trust laws and are absolutely immune from suit.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

#### **HN6**[ **Scope, Exemptions**

States, unlike the federal government, are considered "persons" for purposes of the anti-trust laws. Nevertheless, the United States Supreme Court holds that the anticompetitive actions of states acting as sovereigns are not prohibited by the anti-trust laws.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

#### **HN7**[ **Scope, Exemptions**

Parker immunity, does not automatically extend to the actions of state or municipal instrumentalities. Municipal and state agencies are immune from the antitrust laws only if the actions taken were pursuant to a "clearly articulated" state policy. It is not necessary that the state statute granting power to a municipal or state agency expressly state that the legislature intends for the delegated action to have anticompetitive effects. An agency is acting pursuant to a clearly articulated state policy so long as the anticompetitive conduct is a foreseeable result of the authority granted by the state.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

#### **HN8**[ **Scope, Exemptions**

In the case of the unincorporated territories of the Virgin Islands and Guam, some courts have concluded that agencies created by the territorial governments should be treated as federal instrumentalities and thus accorded absolute immunity from antitrust liability. However, in the case of the District of Columbia and the unincorporated territory of Puerto Rico, agencies created by those governments are treated as state-created agencies and subject to the limitations of state-action immunity.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

#### [HN9](#) [blue download icon] **Scope, Exemptions**

The Virgin Islands is more analogous to a state government than to an appendage of the federal government. The Virgin Islands should at the least be afforded the same type of treatment as the District of Columbia and another unincorporated territory, Puerto Rico, which are also not states of the Union. Because the Virgin Islands enjoys many of the trappings of a sovereign governmental entity, even if that sovereignty is a creation of Congress, the Virgin Islands should be treated in the same way as a state when analyzing the applicability of antitrust laws.

Constitutional Law > Relations Among Governments > Federal Territory & New States

Governments > State & Territorial Governments > General Overview

#### [HN10](#) [blue download icon] **Relations Among Governments, Federal Territory & New States**

Congress has sovereignty over the territories of the United States and accordingly has power to legislate for a territory with respect to all subjects upon which the legislature of a state might legislate within the state. Congress may delegate to a territory such of these powers as it sees fit. And the right of Congress to revise, alter and revoke these delegated powers does not diminish the powers while they reside in the territory. The aim of Congress is to give the territory full power of local self-determination. The local laws enacted under the legislative power granted by Congress are accordingly territorial laws, not laws of the United States. These principles apply to the unincorporated territories, such as the Virgin Islands. Congress may create a territorial government for an unincorporated territory and may confer upon it an autonomy similar to that of the states. And the territorial body politic thus created may be endowed with attributes of sovereignty, such as nonliability to suit without its consent.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

#### [HN11](#) [blue download icon] **Commerce Clause, Dormant Commerce Clause**

The [Commerce Clause, U.S. Const. art. 1, § 8](#), grants Congress the power to regulate Commerce with foreign Nations, and among the several States. While the [Commerce Clause](#) is an affirmative grant of power to Congress, it has also been interpreted as a limitation on the power of the States to impede interstate commerce. The negative implications of the [Commerce Clause](#) are referred to as the dormant [commerce clause](#).

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Constitutional Law > Relations Among Governments > Federal Territory & New States

#### [HN12](#) [blue download icon] **Commerce Clause, Dormant Commerce Clause**

944 F. Supp. 423, \*423L<sup>1</sup> 996 U.S. Dist. LEXIS 15969, \*\*1L<sup>2</sup> 265 V.I. 269, \*\*\*269

Although the [Commerce Clause](#) has not been made applicable to the Virgin Islands by Congress in § 3 of the Revised Organic Act, the limitations implied in the [Commerce Clause](#) have been held to be applicable to the Virgin Islands through the Territorial Clause. Congress has comprehensive power to regulate territories under the Territorial Clause, [U.S. Const. Art. IV, § 3, cl. 2](#), and Congress' [Commerce Clause](#) powers are implicit in that clause. Accordingly, when territorial enactments affect interstate or foreign commerce--a subject over which Congress has supreme control--those enactments must be scrutinized under Dormant [Commerce Clause](#) principles. Any other conclusion would mean that an unincorporated territory would have more power over commerce than the states possess.

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

#### [HN13](#) [blue] **Congressional Duties & Powers, Commerce Clause**

A state action that constitutes simple economic protectionism and discriminates against out-of-state interests or in favor of in-state interests is subject to a heightened level of scrutiny under the [Commerce Clause](#) and is most likely to be declared unconstitutional. However, actions which do not discriminate against, but rather have only an incidental effect on, interstate commerce, are governed by a balancing test, under which the state conduct is invalid only if the incidental burden on interstate commerce is clearly excessive in relation to the putative local benefits.

Constitutional Law > Equal Protection > Nature & Scope of Protection

#### [HN14](#) [blue] **Equal Protection, Nature & Scope of Protection**

When neither a fundamental right nor a suspect class is involved, a state's action is constitutional so long as it is rationally related to a legitimate state interest.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

#### [HN15](#) [blue] **Constitutional Law, Substantive Due Process**

In order for plaintiffs to state a claim under the Due Process Clause, they must establish that some protected property or liberty interest is implicated by the challenged action.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

#### [HN16](#) [blue] **Procedural Due Process, Scope of Protection**

The [Fourteenth Amendment](#) guarantees that no person may be deprived of life, liberty or property without due process of law. U.S. Const. amend. XIV, § 1. A person may acquire a property interest in a government entitlement or benefit which may not be taken away absent due process. Whether a benefit constitutes a property interest is a question of state or local law.

Constitutional Law > Substantive Due Process > Scope

**HN17** [blue icon] Constitutional Law, Substantive Due Process

Liberty interests are also protected by the *Fourteenth Amendment*. The opportunity to pursue one's livelihood is a constitutionally protected liberty interest that may not be arbitrarily denied.

**Counsel:** ATTORNEYS: James Derr, Esq., St. Thomas, U.S.V.I., For the plaintiffs.

Maria Tankenohn Hodge, Hodge & Francois, St. Thomas, U.S.V.I., For defendant West Indian Company Ltd.

Rhys S. Hodge, Esq., St. Thomas, U.S.V.I., For defendant Virgin Islands Taxi Association.

**Judges:** Thomas K. Moore, Chief Judge

**Opinion by:** Thomas K. Moore

## Opinion

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### [\*424] [\*\*\*270] MEMORANDUM

**Moore, C.J.**

This matter is before the Court on a motion to dismiss or in the alternative for summary judgment filed by defendant West Indian [\*\*\*271] Company, Ltd. ["WICO"]. For the following reasons WICO's motion is granted in part and denied in part.

#### I. FACTUAL AND PROCEDURAL BACKGROUND

This suit arises from a Taxi Concession Agreement ["the 1995 Agreement"], entered into [\*2] on August 3, 1995 by WICO and the Virgin Islands Taxi Association ["VITA"], which grants to VITA members the exclusive right to pick up all "independent" cruise- ship passengers from WICO's dock. Taxi drivers who are not members of VITA retain the right to pick up passengers who have arranged for pre-paid tours operated by various independent tour operators. Under the agreement, VITA is responsible for providing dispatchers and assuring that all the taxi drivers comply with the rules and regulations concerning orderly conduct, proof of insurance coverage, etc. Before the 1995 Agreement, the Taxi Concession agreements between WICO and VITA allowed all licensed taxi drivers to pick up both independent and pre-paid tour passengers.

David Jackson, Duncan Connor, Albert Benjamin and Narvel Fleming ["plaintiffs"], licensed taxi drivers who are not members of VITA, brought this suit on September 11, 1995. The complaint alleges that the 1995 Agreement violates the Sherman anti-trust laws ([15 U.S.C. §§ 1 - 7](#)), as well as the Virgin Islands anti-monopoly law (V. I. CODE ANN., tit. 11, §§ 1501-1518). Plaintiffs also allege "restraint of trade in violation of public policy," "tortious interference [\*\*3] with business relations" and violation of the *Fourteenth Amendment*. Finally, plaintiffs allege, against WICO only, violation of the Virgin Islands competitive bidding statute ([31 V.I.C. § 235](#)), and violation of the *Commerce Clause of the United States Constitution* ([U.S. CONST. art. I, § 8, cl. 3](#)). This Court has jurisdiction pursuant to [28 U.S.C. § 1331](#) (federal question), and [28 U.S.C. § 1337\(a\)](#) (commerce and antitrust regulations), as authorized by section 22(a) of the Revised Organic Act of 1954, [16 U.S.C. § 1612\(a\)](#).<sup>1</sup>

Plaintiffs moved for a preliminary injunction on October 25, 1995 to enjoin enforcement of the new agreement, which had not gone [\*\*\*272] into effect as scheduled on October 1, 1995 due to the arrival of Hurricane Marilyn on

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<sup>1</sup>The Revised Organic Act of 1954 is found at [48 U.S.C §§ 1541-1645 \(1995\)](#), reprinted in V.I. CODE ANN., Historical Documents, 73-177 (codified as amended) (1995) ["Revised Organic Act"].

September 15, 1995 which caused the cancellation of all cruise ships calls to St. [\*\*4] Thomas. Plaintiffs prayed for an injunction before the expected return of cruise ships in the beginning of November. Because a hearing could not be scheduled until November 20, 1995, the new agreement had been in effect for approximately two weeks at the time of the hearing. The Court denied plaintiffs' motion for a preliminary injunction at the end of the presentation of evidence after considering (1) the extent to which the movant would suffer irreparable harm if the injunction were denied, (2) the extent to which the nonmovant would suffer if the injunction were issued, (3) the likelihood of success on the merits by the movant, and (4) the public interest. *Opticians Ass'n v. Independent Opticians*, 920 F.2d 187, 191-192 (3d Cir. 1990). A key factor in the ruling was the Court's finding that the plaintiffs would not likely succeed on the merits of their claim because WICO and VITA were most likely immune from anti-trust liability. After the hearing, WICO filed the instant motion to dismiss or in the alternative for summary judgment.

## II. DISCUSSION

### A. Anti-trust claims

In their first through fifth causes of action, plaintiffs allege that the defendants' actions [\*\*5] constitute an unlawful restraint of trade in violation of both federal and Virgin Islands anti-trust laws. It is well established that **HN1**[<sup>↑</sup>] all government instrumentalities, whether state or federal, enjoy some level of immunity from anti-trust suits under the Sherman Act. Federal instrumentalities enjoy absolute immunity from anti-trust suits. See, e.g. *Sea Land Service v. Alaska Railroad*, 212 U.S. App. D.C. 197, 659 F.2d 243 (D.C. Cir. 1981), cert. denied 455 U.S. 919, 71 L. Ed. 2d 459, 102 S. Ct. 1274 (1982). Instrumentalities of a state or municipal government are immune where the challenged conduct is undertaken pursuant to a "clearly articulated and affirmatively expressed state policy to displace competition with regulation." *Hallie v. City of Eau Claire*, 471 U.S. 34, 40, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985). **HN2**[<sup>↑</sup>] A finding that WICO is immune from federal anti-trust liability means that WICO is also immune from liability under the local statute. See 11 V.I.C. § 1518 [\*\*\*273] ("when the language of this Chapter is the same or similar to the language of a Federal **Antitrust Law**, the District Court in construing this chapter shall follow the construction given the Federal Law [\*\*6] by the Federal courts."); *Sea Air Shuttle Corporation v. Virgin Islands Port Authority*, 782 F. Supp. 1070, 1077 (D.V.I. 1991).

This Court concludes that the more appropriate immunity doctrine is the one applicable to state governments and state governmental entities rather than the immunity doctrine applied to federal instrumentalities. This conclusion contrasts with Judge Huyett's reasoning in *Sea Air Shuttle*, which held that the Virgin Islands Port Authority was immune from anti-trust suit under both federal immunity and state action immunity doctrines. While *Sea Air Shuttle* rested its holding alternatively on the state action theory, Judge Huyett stated that "we do not believe that state action doctrine should be applied to the Government of the Virgin Islands . . ." *782 F. Supp. at 1076, n. 10*. We respectfully disagree.

#### 1. Federal Immunity v. State Action Immunity

It is well established that **HN3**[<sup>↑</sup>] the United States may not be sued for antitrust violations under the Sherman Act. *United States v. Cooper Corp.* 312 U.S. 600, 85 L. Ed. 1071, 61 S. Ct. 742 (1941). In *Cooper*, the Supreme [\*426] Court noted that **HN4**[<sup>↑</sup>] the Sherman Act prohibits contracts, combinations or conspiracies [\*\*7] in restraint of trade or commerce and monopolization or attempts or conspiracies to monopolize trade or commerce by any "persons." *15 U.S.C. §§ 1, 2*. The Court held that Congress did not intend for the Sherman Act to expose the United States to liability and that the United States was not included in the term "persons."<sup>2</sup>

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<sup>2</sup> The issue in *United States v. Cooper*, 312 U.S. 600, 85 L. Ed. 1071, 61 S. Ct. 742 (1941), was whether the United States could bring treble damage civil actions against antitrust violators. *Cooper* held that United States was not a "person" under the antitrust laws. In 1955 Congress responded to issue raised in *Cooper* by adding section 4(a) to the Clayton Act, which authorizes the United States to sue alleged antitrust violators for actual, but not treble, damages. See *Sea-Land Service, Inc. v. Alaska R.R.*, 212 U.S. App. D.C. 197, 659 F.2d 243, 245 (1981). The congressional action did not disturb *Cooper*'s holding that the United States is not a "person."

The prohibition [\*\*8] against suits against the United States has been expanded to federal instrumentalities. The leading case espousing the doctrine of anti-trust immunity for federal instrumentalities is [\*\*\*274] [Sea-Land Service, Inc. v. Alaska R.R.](#), 212 U.S. App. D.C. 197, 659 F.2d 243 (D.C. Cir. 1981). In *Sea-Land*, the court of appeals, relying on the Supreme Court's analysis in *Cooper*, held that since the Alaska Railroad was owned and operated by the federal government, it too could not be considered a "person" under the antitrust laws. The *Sea-Land* court thus established that [HNS](#) [\*\*8] federal instrumentalities are outside the scope of the anti-trust laws and are absolutely immune from suit.

The absolute immunity afforded federal instrumentalities contrasts with the limited immunity of state and municipal instrumentalities. [HN6](#) [\*\*8] States, unlike the federal government, are considered "persons" for purposes of the anti-trust laws. [Georgia v. Evans](#), 316 U.S. 159, 86 L. Ed. 1346, 62 S. Ct. 972 (1942). Nevertheless, the Supreme Court has held that the anticompetitive actions of states acting as sovereigns are not prohibited by the anti-trust laws. [Parker v. Brown](#), 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 1\*\*91 307 (1943). The Court reasoned that the statutory history and language of the Sherman Act demonstrates that the Act was mainly concerned with business combinations of private individuals, and that state directed actions did not seem to fit the statutory requirement that there be a "contract, combination or conspiracy" in restraint of trade. *Id. at 351*. The Court was also concerned with federalism and adopted a rule of statutory construction that

in a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

*Id.* For these reasons, state governments may not be held liable for the anticompetitive actions it may take.

[HN7](#) [\*\*8] *Parker* immunity, however, does not automatically extend to the actions of state or municipal instrumentalities. [City of Lafayette v. Louisiana Power & Light Co.](#), 435 U.S. 389, 394, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978). Municipal and state agencies are immune from the antitrust laws only if the actions taken were [\*\*10] pursuant to a [\*\*\*275] "clearly articulated" state policy. [Hallie v. City of Eau Claire](#), 471 U.S. at 39. It is not necessary that the state statute granting power to a municipal or state agency "expressly state . . . that the legislature intends for the delegated action to have anticompetitive effects." *Id. at 43*. An agency is acting pursuant to a clearly articulated state policy so long as the anticompetitive conduct is a foreseeable result of the authority granted by the state. *Id. at 44*.

## 2. Territorial Government Instrumentalities

Since agencies and instrumentalities of territorial governments are neither state-created agencies, nor are they federal instrumentalities in the same sense as the Alaska Railroad, we must determine what immunity, if any, from antitrust laws such entities should possess. [HN8](#) [\*\*8] In the case of the unincorporated territories of the Virgin Islands [\*427] and Guam, some courts have concluded that agencies created by the territorial governments should be treated as federal instrumentalities and thus accorded absolute immunity from antitrust liability. See, e.g. [Sakamoto v. Duty Free Shoppers, Ltd.](#), 764 F.2d 1285 (9th Cir. 1985); [Sea Air Shuttle Corporation v. \[\\*\\*11\] Virgin Islands Port Authority](#), 782 F. Supp. 1070 (D.V.I. 1991); [IT & E Overseas, Inc. v. RCA Global Communications, Inc.](#), 747 F. Supp. 6 (D.D.C. 1990). However, in the case of the District of Columbia<sup>3</sup> [\*\*12] and the unincorporated territory of Puerto Rico,<sup>4</sup> agencies created by those governments are treated as state-created agencies and

<sup>3</sup>The District of Columbia is governed by Congress under [art. I, § 8, cl. 17 of the Constitution](#), whereas Congress derives its authority over the territories under Article IV, Section 3, Clause 2. The two constitutional grants of power to Congress often have been considered together and treated as having similar parameters. See, e.g., [O'Donoghue v. United States](#), 289 U.S. 516, 541-42, 77 L. Ed. 1356, 53 S. Ct. 740 (1933).

<sup>4</sup>Puerto Rico is fundamentally an unincorporated territory, still subject to [art. IV, § 3, cl. 2 of the Constitution](#), even though the people of Puerto Rico have entered into a compact with the Congress by which Puerto Rico has its own 'constitution' and is called a 'commonwealth'. See Statement of the Hon. Elton Gallegly, June 26, 1996, available in WESTLAW, UTESTIMONY library, 1996 WL 374770 (during committee markup of H.R. 3024, the United States-Puerto Rico Status Act, Gallegly stated,

[\*\*\*276] subject to the limitations of state-action immunity. See, e.g. [Hecht v. Pro-Football, 144 U.S. App. D.C. 56, 444 F.2d 931 \(D.C. Cir. 1971\)](#); [Zapata Gulf Marine Corp. v. Puerto Rico Maritime Ship. Auth., 682 F. Supp. 1345 \(E.D.La. 1988\)](#); [Caribe Trailer Systems v. Puerto Rico Maritime Ship. Co., 475 F. Supp. 711 \(D.D.C. 1979\)](#); [Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157 \(1978\)](#).

[\*\*13] The court in *Sakamoto* reasoned that "since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by Congress in the Organic Act of Guam, . . . the government of Guam is in essence an instrumentality of the federal government." [764 F.2d at 1286](#). The court of appeals cited Congress' plenary power over the territories and the fact that Congress retained the right to annul any act of Guam's legislature as supporting its characterization of the territory of Guam and by extension the Guam Airport Authority, an agency of the Guam government, as mere federal instrumentalities. *Id.* This reasoning was followed by the District Court for the District of Columbia when faced with a factually indistinguishable case relating to the telephone company in Guam. [IT & E Overseas, Inc. v. RCA Global Communications, Inc., 747 F. Supp. 6](#). Relying on *Sakamoto*, the *IT & E Overseas* court held that the Guam Telephone Authority ["GTA"], a not-for-profit public corporation, was a federal instrumentality for purposes of antitrust immunity. The opinion noted, however, that "were this a case of first impression, the Court may well have determined that because [\*\*14] Guam is more closely analogous to a state, GTA is not entitled to absolute immunity . . . , but rather to the qualified immunity afforded to state and local governments." [Id. at 11-12](#). *Sakamoto* and *IT & E Overseas* were also followed by Judge Huyett in *Sea Air*, which found that the Virgin Islands Port Authority ("VIPA") was a federal instrumentality for the same reasons that the GTA was a federal instrumentality.

Assuming that the Virgin Islands were to be considered merely a federal instrumentality as the above line of cases might suggest, then WICO would also have to be characterized as a federal instrumentality. WICO is similar in nature to VIPA, which was created by the Virgin Islands legislature as a "body corporate and politic constituting a public corporation and autonomous governmental instrumentality for the Government of the Virgin Islands [\*\*\*277] . . ." [29 V.I.C. § 541\(a\); Sea Air, 782 F. Supp. at 1073](#). The West Indian [\[\\*428\]](#) Company, Ltd. was purchased by the Government of the Virgin Islands in 1993 under Act. No. 5826, and was "granted the status and authority of a public corporation and governmental instrumentality of the Government of the Virgin Islands of the [\*\*15] United States and shall be deemed to be a public entity operating on behalf of the Government . . ." Act. No. 5826, § 8 (attached as Exh. A to WICO's Mem. in Opp'n to Mot. for Prel. Inj.). Thus WICO, as a government entity, would also be entitled to be absolutely shielded from operation of the antitrust laws, assuming federal action immunity applies to the Virgin Islands.

This Court, however, does not agree that unincorporated territories, specifically the Virgin Islands, and their agencies should be held to be mere instrumentalities of the federal government. [HN9](#) The Virgin Islands is more analogous to a state government than to an appendage of the federal government. The Virgin Islands should at the least be afforded the same type of treatment as the District of Columbia and another unincorporated territory, Puerto Rico, which are also not states of the Union. This Court concludes that because the Virgin Islands enjoys many of the "trappings of a sovereign governmental entity,"<sup>5</sup> even if that sovereignty is a creation of Congress, the Virgin Islands should be treated in the same way as a state when analyzing the applicability of antitrust laws.

[\*\*16] This analysis is founded on the well-reasoned opinion of the United States Court of Appeals for the Third Circuit, grounded solidly upon Supreme Court precedent, which held that the Virgin Islands is not a mere federal instrumentality and that the laws passed by our Legislature are not laws of the United States. [Harris v. Boreham](#).

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"The 'Commonwealth' choice in the bill now accurately describes the current Commonwealth status as a territory, which is not permanent, and cannot guarantee equal benefits and rights for the people of Puerto Rico. Congress retains discretion under the Constitution's Territory Clause as to what laws apply to Puerto Rico."); compare [United States v. Sanchez, 992 F.2d 1143, 1151 \(11th Cir. 1993\)](#) (Puerto Rico is still constitutionally a territory and not a separate sovereign); with [United States v. Andino, 831 F.2d 1164, 1168 \(1st Cir. 1987\)](#) (holding that for double jeopardy purposes Puerto Rico is a separate sovereign like a state).

<sup>5</sup> See [Ngiraingas v. Sanchez, 858 F.2d 1368, 1371 \(9th Cir. 1988\)](#), aff'd, [495 U.S. 182, 110 S. Ct. 1737, 109 L. Ed. 2d 163 \(1990\)](#).

233 F.2d 110 (3d Cir. 1956) (Maris, J.). In holding that the government of the Virgin Islands is not a "federal agency" within the meaning of the Federal Tort Claims Act, the Court of Appeals concluded that it was

clear that the [government set up by Congress] in the unincorporated territory of the Virgin Islands [is] a body [\*\*\*278] politic quite distinct from the Government of the United States and that it [has] attributes of sovereignty which [have] been delegated to it by the Government of the United States but which [are] distinct from the powers of that government.

Id. at 114. The Court reasoned as follows:

It is settled that HN10[<sup>1</sup>] Congress has sovereignty over the territories of the United States and accordingly has power to legislate for a territory with respect to all subjects upon which the legislature of a state might [\*\*17] legislate within the state. Simms v. Simms, 175 U.S. 162, 168, 44 L. Ed. 115, 20 S. Ct. 58 (1899). It is also settled that Congress may delegate to a territory such of these powers as it sees fit. Binns v. United States, 194 U.S. 486, 491-92, 48 L. Ed. 1087, 24 S. Ct. 816 (1904); Christianson v. King County, 239 U.S. 356, 364-66, 60 L. Ed. 327, 36 S. Ct. 114 (1915). And the right of Congress to revise, alter and revoke these delegated powers does not diminish the powers while they reside in the territory. Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 655-56, 21 L. Ed. 966 (1873); District of Columbia v. John R. Thompson Co., 346 U.S. 100, 106, 97 L. Ed. 1480, 73 S. Ct. 1007 (1953). The aim of Congress is to give the territory full power of local self-determination. The local laws enacted under the legislative power granted by Congress are accordingly territorial laws, not laws of the United States. People of Puerto Rico v. Shell Co., 302 U.S. 253, 82 L. Ed. 235, 58 S. Ct. 167 (1937); People of Puerto Rico v. Rubert Hermanos, Inc., 309 U.S. 543, 84 L. Ed. 916, 60 S. Ct. 699 (1940); Arroyo v. Puerto Rico Transp. Authority, 164 F.2d 748 (1st Cir. 1947). [\*\*18]

These principles apply to the unincorporated territories, such as the Virgin Islands. For it has been held that Congress may create a territorial government for an unincorporated territory and may confer upon it an autonomy similar to that of the states. Gromer v. Standard Dredging Co., <sup>1</sup>\*4291 224 U.S. 362, 370, 56 L. Ed. 801, 32 S. Ct. 499 (1912); People of Puerto Rico v. Shell Co., 302 U.S. 253, 260-62, <sup>1</sup>\*\*2791 82 L. Ed. 235, 58 S. Ct. 167 (1937). And the territorial body politic thus created may be endowed with attributes of sovereignty, such as nonliability to suit without its consent. People of Porto Rico. v. Rosaly Y. Castillo, 227 U.S. 270, 57 L. Ed. 507, 33 S. Ct. 352 (1913). In the Rosaly case the Supreme Court held that Congress by the Foraker Act of 1900, had conferred such sovereignty upon what was then the unincorporated territory of Puerto Rico.

....

As the Supreme Court said with respect to the Organic Act of Puerto Rico, "the purpose of Congress . . . was to follow the plan applied from the beginning to the organized territories by creating a government conforming to the American system with defined and divided powers, -- legislative, executive and judicial . . . [\*\*19] ." People of Porto Rico v. Rosaly Y Castillo, 227 U.S. 270, 276-77, 57 L. Ed. 507, 33 S. Ct. 352 (1913).

346 U.S. at 113-14.<sup>6</sup> Although the facts of *Boreham* arose under the 1936 Organic Act, the court noted that its ruling would be no different under the Revised Organic Act of 1954 ["Revised Organic Act"]. Id. at 113 n.1. In fact, the reasoning of *Boreham* applies with even more force under the Revised Organic Act, as amended, which has established an elected governor and legislature, as well as a territorial judiciary independent of the District Court of the Virgin Islands. Revised Organic Act § 22; 48 U.S.C. § 1612.

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<sup>6</sup> Since the Government of the Virgin Islands has an autonomy similar to that of a state, including such attributes as sovereign immunity, the statutory construction for our dual system of government is as appropriate for the Virgin Islands as it is for a state. See Parker v. Brown, 317 U.S. 341 at 346, 351, 87 L. Ed. 315, 63 S. Ct. 307 (1943).

Under the state action [\*\*20] immunity doctrine which the Court finds applicable to this case, WICO is only immune from liability for its action in granting an exclusive contract to VITA for the pickup of 'independent' passengers if it takes such action pursuant to a clearly articulated policy of the Virgin Islands legislature. Therefore, WICO is immune from liability under both federal and local **antitrust law** if the 1995 Agreement was a foreseeable result of the authority granted by the Legislature.

[\*\*280] WICO argues that its 1995 Agreement is a foreseeable result of the Legislature's authorization for WICO to "enter into contracts with any person, firm or corporation for the operation and maintenance of the Facilities . . ." Act No. 5826, § 5. However, this legislative authorization to enter into contracts does not necessarily contemplate that WICO would enter into such an exclusive contract as the 1995 Agreement.<sup>7</sup> While at the time of the Government's purchase of the West Indian Company WICO and VITA were parties to a taxi concession agreement which regulated how passengers were to be picked up at WICO's dock, that agreement did not exclude any taxi drivers from picking up 'independent' passengers. The failure [\*\*21] of the Legislature to include more specific language in section 5 is not necessarily to be taken as ratification of such a preexisting concession contract. Moreover, even if it were to be so taken, the general language of section 5 cannot be taken as giving advance approval of such a more restrictive contract. We thus cannot find that the type of contract at issue here, which grants VITA the exclusive right to pick up 'independent' passengers, was the type of contract that the legislature would reasonably foresee WICO would enter into. Since WICO has not met the "clearly articulated state policy" test, it is not [\*430] immune from anti-trust liability under either federal or Virgin Islands law.

## [\*\*22] B. **Commerce Clause** Claim

In their complaint, plaintiffs also allege that WICO's actions constitute a violation of the **Commerce Clause. U.S. Const. art. 1, § 8.** HN11[<sup>↑</sup>] The **Commerce Clause** grants Congress the power "to regulate Commerce with foreign Nations, and among the several States [\*\*281] . . ." While the **Commerce Clause** is an affirmative grant of power to Congress, it has also been interpreted as a limitation on the power of the States to impede interstate commerce. E.g., *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534-35, 93 L. Ed. 865, 69 S. Ct. 657 (1949); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851). The negative implications of the **Commerce Clause** are referred to as the 'dormant **commerce clause**'.

HN12[<sup>↑</sup>] Although the **Commerce Clause** has not been made applicable to the Virgin Islands by Congress in section 3 of the Revised Organic Act,<sup>8</sup> the limitations implied in the **Commerce Clause** have been held to be applicable to the Virgin Islands through the Territorial Clause. *Polychrome Intern. Corp. v. Krigger*, 5 F.3d 1522, 1534 (1993). The Court of Appeals noted that "Congress has comprehensive power to regulate territories under the Territorial [\*\*23] Clause, Art. IV, § 3, cl. 2, and that Congress' **Commerce Clause** powers 'are implicit' in that clause." *Id.* Accordingly, the court held that "when territorial enactments affect interstate or foreign commerce--a subject over which Congress has supreme control--those enactments must be scrutinized under Dormant **Commerce Clause** principles. Any other conclusion would mean that an unincorporated territory would have more power over commerce than the states possess." *Id.* (internal quotations and citation omitted).

<sup>7</sup> WICO cites a fifth circuit case to support its contention that the clear articulation test has been met. *Independent Taxicab Drivers' v. Greater Houston Transportation*, 760 F.2d 607 (1985). *Independent Taxicab Drivers* involved a challenge to a city's grant of an exclusive contract to one taxicab company for the transportation of passengers from the city's airport. Like WICO the city was authorized to operate the airport and "enter into contracts, leases and other arrangements . . ." Unlike WICO, however, the city was also authorized to "regulate, license and fix the charges and fares made by any person" who owns or operates taxicabs. Thus the state empowered the city with broad authority to regulate the taxicab industry and the airport. Here, WICO is simply vested with authority to enter into contracts; it is not vested with broad authority to regulate the taxicab industry.

<sup>8</sup> Such "non-fundamental" provisions of the Constitution are applicable to an unincorporated territory only to the extent Congress makes them applicable. *Downes v. Bidwell*, 182 U.S. 244, 266-67, 45 L. Ed. 1088, 21 S. Ct. 770; *Balzac v. Porto Rico*, 258 U.S. 298, 312-13, 66 L. Ed. 627, 42 S. Ct. 343; cf. *Dorr v. United States*, 195 U.S. 138, 145, 149, 49 L. Ed. 128, 24 S. Ct. 808.

Applying dormant [commerce clause](#) principles to WICO's actions demonstrates that WICO has not violated the [Commerce Clause](#).<sup>\*\*24</sup> "The primary purpose behind the [Commerce Clause](#) is to ensure that 'our economic unit is the Nation' rather than individual states." *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 399 (3d Cir. 1987) (citation omitted). [HN13](#)[<sup>13</sup>] A state action that constitutes "simple economic protectionism" and discriminates against out-of-state interests or in favor of in-state interests is subject to a heightened level of scrutiny under the [Commerce Clause](#) and is most likely to be declared unconstitutional. *Id.* at 399-400. However, actions [\*\*\*282] which do not discriminate against, but rather have only an incidental effect on, interstate commerce, are governed by a balancing test, under which the state conduct is "invalid only if the incidental burden on interstate commerce is clearly excessive in relation to the putative local benefits." *Id.* at 399.

There is no burden on interstate commerce when the challenged action affects in-state as well as out-of-state interests equally. As the Court of Appeals stated,

the "incidental burden on interstate commerce" appropriately considered in [Commerce Clause](#) balancing is the degree to which the state action incidentally discriminates against interstate [\*\*25] commerce relative to intrastate commerce. It is a comparative measure. There conceivably is language suggesting that any increased costs imposed on out-of-state interests, in an absolute sense, are relevant burdens regardless of whether the same costs are imposed on in-state interests. However, we find that the holdings of the Supreme Court case law, consistent with the anti-protectionism purpose of the [Commerce Clause](#), apply the much narrower comparative burden concept. As earlier noted, virtually all state regulation involves increased costs for those doing business with the state, including out-of-state interests doing business in the state as well as in-state interests. . . . Where the "burden" on out-of-state interests is no different from that placed on competing in-state interests, [\*\*431] however, it is a burden on commerce rather than a burden on interstate commerce.

*Id.* at 406.

WICO's 1995 Agreement granting VITA the exclusive right to pick up 'independent' cruise-ship passengers at WICO's dock is a nondiscriminatory burden affecting all taxi operators, whether those operators are Virgin Islands businesses or not. This case is similar to one decided in Pennsylvania. [\*\*26] [Pa. Coach Lines, Inc. v. Port Authority of Allegheny](#), 874 F. Supp. 666 (W.D.Pa. 1994). In *Pa. Coach Lines*, a transportation carrier sued the port authority for granting to another company the exclusive right to transfer passengers from [\*\*\*283] the airport to certain locations. The court noted that this burden affected all carriers regardless of state affiliation, and thus did not violate the [commerce clause](#). *Id.* at 670. Similarly, the burden on taxi cab operators under the 1995 Agreement is a burden on all taxi cab operators regardless of whether the operators are Virgin Island operators or non-Virgin Island operators.

While the 1995 Agreement is not a burden on interstate commerce with respect to taxicab operators, it may be argued that it results in burdening interstate and foreign travelers. The court in *Pa. Coach Lines* noted that "even if plaintiff construed defendant's resolution [the grant of the exclusive right] as a burden on out-of-state travelers--assuming plaintiff has standing to argue this point--the burden would still be nondiscriminatory because in-state travelers would also 'suffer' from the resolution." *Id.* at 670 n.4. In the context of picking up cruise [\*\*27] ship passengers, it is difficult to distinguish between intrastate and interstate commerce given that passengers' visits to St. Thomas are just one stop on interstate - even international - journeys. However, even assuming the 1995 Agreement represents a burden on interstate commerce because of the impact on interstate travelers, and assuming that plaintiffs have standing to argue such a point, that burden is not so substantial and unreasonable that it violates the [Commerce Clause](#). There is precedent for the proposition that an exclusive agreement for the provision of taxicab services in the Virgin Islands is a substantial and unreasonable burden on interstate commerce and thus violative of the [Commerce Clause](#). [Southerland v. St. Croix Taxicab Association](#), 315 F.2d 364 (3d Cir. 1963). The facts of the case before us, however, differ significantly from those in *Southerland* and do not violate the rule of that case.

In *Southerland* the Government of the Virgin Islands granted one taxicab association the exclusive right to pick up passengers at the St. Croix airport. As a result, the plaintiff was prohibited from picking up passengers whom he had contracted to transport to [\*\*28] their hotels, pursuant to a prearranged package tour. The Court of Appeals

held that such an agreement unduly burdened interstate commerce and was in violation of the Commerce Clause. Significantly, the agreement between WICO and VITA does not prohibit those taxicab drivers who work for tour operators from picking up [\*\*\*284] those passengers who have signed up for the tours. Indeed, the amount of business generated by pre-paid package tours constitutes a majority of the business generated by the cruise ship arrivals. Edward E. Thomas, the president and chief executive officer of WICO, testified at his deposition that the number of passengers traveling on pre-paid package tours versus passengers hiring taxi drivers independently increased from 20 percent in 1991 to over 50 percent in 1994. (Dep. Tr. at 14). Moreover, uncontradicted testimony at the preliminary injunction hearing indicated that for some ships that arrive, over 70 percent of the passengers have signed up for pre-paid tours. Edward Thomas also noted that at times taxis who waited in the feeder lines to pick up independent passengers would end up receiving no fares. This was corroborated by testimony of plaintiff's witnesses at [\*\*29] the hearing. Accordingly, the fact that the 1995 Agreement restricts who can pick up independent passengers does not unduly burden interstate commerce under these circumstances, as a matter of law.

#### C. Fourteenth Amendment Claim

In plaintiffs' eighth cause of action, they allege that "the actions of WICO were and [\*432] are arbitrary, capricious and unlawful, are not rationally related to any legitimate state interest and constitute a deprivation of Plaintiffs' rights to substantive and procedural due process and to equal protection of the law in violation of the Fourteenth Amendment . . . ." <sup>9</sup> WICO asserts that plaintiffs should be deemed as having abandoned that claim, because plaintiffs did not argue or rely on it at the hearing on the motion for preliminary injunction. In the alternative, WICO argues that plaintiffs have not been denied any due process of law or equal protection. This Court does not agree that plaintiffs have abandoned this claim, as they do discuss it briefly in their memorandum [\*\*\*285] of points and authorities in support of the motion for preliminary injunction. However, we agree with WICO that plaintiffs have not been denied any procedural or substantive due process [\*\*30] or equal protection of the law.

##### 1. Equal Protection Claim

Plaintiffs allege that WICO's actions represent a violation of plaintiffs' right to equal protection of the laws. HN14<sup>↑</sup> When neither a fundamental right nor a suspect class is involved, a state's action is constitutional so long as it is rationally related to a legitimate state interest. City of New Orleans v. Dukes, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976). Plaintiffs do not allege either that they are a suspect class or [\*\*31] that a fundamental right is involved.

Under this rational basis test, WICO has clearly shown that there were legitimate reasons underlying the adoption of the 1995 Agreement. Evidence presented at the preliminary injunction hearing demonstrated that, before the agreement, there were several problems with discipline and compliance with WICO's rules and regulations by the taxi cab drivers. Although the evidence did not demonstrate whether the problems were primarily caused by the non-VITA member taxi drivers or by VITA member taxi drivers, it is clear that substantial problems existed. The evidence at the hearing, as well as from Edward Thomas' deposition, indicated that since the new agreement had gone into effect until the time of the hearing, WICO had had no difficulties with taxi drivers complying with their rules and regulations. Thomas testified that since the agreement went into effect, "it is the best this dock has ever operated." (Tr. Dep. at 20.) WICO noted that tourism is vital to St. Thomas' economy and that it is therefore in the public interest to ensure that tourists have a pleasant experience when greeted by taxi drivers upon exiting the cruise ships. We agree that ensuring [\*\*32] orderly and efficient taxi service at the cruise docks is a legitimate goal

<sup>9</sup> The second sentence of section one of the Fourteenth Amendment is applicable to the Virgin Islands. Revised Organic Act § 3; 48 U.S.C. § 1561. That sentence reads in full:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

that the 1995 Agreement is rationally related to, and thus any claim premised upon the [Equal Protection Clause of the Fourteenth Amendment](#) must fail.

## 2. Substantive or Procedural Due Process

**HN15** [+] In order for the plaintiffs to state a claim under the Due Process Clause, [\*\*\*286] they must establish that some protected property or liberty interest is implicated by the challenged action. Plaintiffs do not specify what constitutional property or liberty interest is at stake. The only interest at issue in the complaint is plaintiffs' interest in being able to pick up 'independent' cruise ship passengers from WICO's dock. However, this interest does not rise to a constitutional right that is protected by the [Fourteenth Amendment](#).

**HN16** [+] The [Fourteenth Amendment](#) guarantees that no person may be deprived of life, liberty or property without due process of law. U.S. CONST. amend. XIV, [§ 1](#). A person may acquire a property interest in a government entitlement or benefit which may not be taken away absent due process. [Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 \(1972\)](#); [Molloy v. Monsanto, 30 V.I. 164, I\\*\\*33I 173 \(D.V.I. 1994\)](#). Whether a benefit constitutes a property interest [\*433] is a question of state or local law. [408 U.S. at 577](#). In this case, plaintiffs cannot point to any local law or regulation which grants them a protected right to pick up passengers at WICO's dock. Simply because it was the past practice of WICO to allow all taxi cab operators to pick up all passengers does not convert the plaintiffs' expectation that such a practice would continue into a protected property interest. As the Supreme Court in Roth noted, "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it." *Id.* The plaintiffs have alleged nothing more than a desire for WICO's past practice to continue, and cannot allege that such a wish rises to the level of a property interest.

**HN17** [+] Liberty interests are also protected by the [Fourteenth Amendment](#). The opportunity to pursue one's livelihood is a constitutionally protected liberty interest that may not be arbitrarily denied. [Piecknick v. Com. of Pennsylvania, 36 F.3d 1250, 1259 \(3d Cir. 1994\)](#) ("The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental [\*\*34] interference comes within both the 'liberty' and 'property' concepts of the [Fifth](#) and [Fourteenth Amendments](#)."); [Cowan v. Corley, 814 F.2d 223, 227 \(5th Cir. 1987\)](#). Plaintiffs' complaint could be construed as alleging a deprivation of their liberty interest in pursuing their chosen profession.

Viewing the complaint as alleging a liberty interest and viewing the alleged facts in a light most favorable to the plaintiffs, we [\*\*\*287] conclude that the 1995 Agreement does not deprive plaintiffs of their right to follow their chosen profession. As discussed above, the 1995 Agreement allows plaintiffs to pick up pre-paid tour passengers, a significant portion of taxicab business at the dock. Furthermore, the 1995 Agreement only concerns taxi service at the WICO dock and has no impact on taxicab operators' ability to pursue fares at other locations on the island. This case is similar to *Piecknick* where the Court of Appeals held that allowing another towing company to provide towing services in the zone previously serviced exclusively by the plaintiff was not "an unreasonable interference with [plaintiff's] right to pursue its chosen occupation." [36 F.3d at 1261](#). See also [Durham v. Jones, I\\*\\*35I 698 F.2d 1179, 1181 \(11th Cir. 1983\)](#)(per curiam)(sheriff did not affect towing company's right to operate towing service or ability to perform towing for other law enforcement agencies where it refused to place towing service on call list). "It is the liberty to pursue a particular calling or occupation and not the right to a specific job that is protected by the [Fourteenth Amendment](#)." [36 F.3d at 1262](#).

## III. CONCLUSION

In summary, this Court finds that WICO is not immune from antitrust liability because WICO's actions cannot be said to have been taken pursuant to a clearly articulated policy of the Virgin Islands legislature and WICO's motion to dismiss Counts one through five of the plaintiff's complaint will be denied. Regarding the plaintiff's [Commerce Clause](#) claim, there are no factual issues of genuine material dispute and WICO is entitled to judgment as a matter of law. This Court will also dismiss plaintiff's eighth cause of action premised on the [Fourteenth Amendment](#), because plaintiffs have not asserted any deprivation of any constitutionally protected property or liberty interests or denial of equal protection of the laws. Finally, this Court will deny without [\*\*36] prejudice WICO's motion for

944 F. Supp. 423, \*433L 1996 U.S. Dist. LEXIS 15969, \*\*36L 35 V.I. 269, \*\*\*287

summary judgment with respect to plaintiff's claim for "tortious interference with business relations" and for violation of the Virgin Islands bidding statute as such claims have not been fully argued or briefed.

**ENTERED this 16 day of October, 1996**

**Thomas K. Moore**

**Chief Judge**

**[\*\*\*288] ORDER**

For the reasons set forth in the accompanying memorandum, it is hereby

ORDERED that WICO's motion for summary judgment as to Counts One through Five of plaintiff's complaint is DENIED; and it is further

ORDERED that WICO's motion for summary judgment as to Count Seven (Violation of the *Commerce Clause*) is GRANTED; and it is further

ORDERED that WICO's motion to dismiss Count Eight (Violation of *Fourteenth Amendment*) is hereby GRANTED; and it is further

ORDERED that WICO's motion for summary judgment as to Count Six (Tortious Interference with Business Relations) and Count Nine (Violation of [31 V.I.C. § 235](#)) is DENIED without prejudice.

**ENTERED this 16th day of October, 1996**

**Thomas K. Moore**

**Chief Judge**

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## Duke v. Browning-Ferris Indus.

United States District Court for the Western District of Tennessee, Western Division

October 22, 1996, Decided ; October 22, 1996, FILED; October 23, 1996, entered on docket

NO. 96-2859-TUA

### **Reporter**

1996 U.S. Dist. LEXIS 20769 \*; 1996 WL 33415134

JERRY DUKE, doing business as MOSCOW MANOR APARTMENTS, on behalf of itself and all other entities similarly situated in the Counties of Shelby and Fayette, in the State of Tennessee; and in the Counties of DeSoto, Tate, and Tunica, in the State of Mississippi, Plaintiff, VS. BROWNING-FERRIS INDUSTRIES OF TENNESSEE, INC. and BROWNING-FERRIS INDUSTRIES, INC., Defendants.

**Disposition:** [\*1] Plaintiff's Motion for Remand of Proceedings to State Court granted and action remanded.

## **Core Terms**

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interstate commerce, antitrust, Sherman Act, intrastate, federal claim, predominantly, interstate, alleges, garbage

## **LexisNexis® Headnotes**

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Administrative Law > Separation of Powers > Jurisdiction

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

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

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

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Removal > Elements for Removal > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Constitutional Law > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

**HN1**[] Separation of Powers, Jurisdiction

28 U.S.C.S. § 1441(b) provides that any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. The "arising under" language requires that the federal question be present on the face of a plaintiff's complaint and not as a defense raised by defendants or anticipated by plaintiff. This "well-pleaded complaint" rule applies to determinations of removal jurisdiction as well as to determinations of original federal question jurisdiction.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

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

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Substantial Questions

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Well Pleaded Complaint Rule

## [HN2](#) Removal, Specific Cases Removed

An exception to the well pleaded complaint rule exists when plaintiffs "artificially plead" their complaint in order to avoid federal jurisdiction of claims that are federal in nature. If it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims or if plaintiff's claim is really one of federal law, then the matter is properly in federal court.

Antitrust & Trade Law > Sherman Act > Claims

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

## [HN3](#) Sherman Act, Claims

The Sherman Act encompasses far more than restraints on trade that are motivated by a desire to limit interstate commerce or that have their sole impact on interstate commerce. Wholly local business restraints can produce the effects condemned by the Sherman Act. There are two established tests for interstate commerce. First, the interstate commerce element of the Sherman Act is established if the product market itself is interstate in nature. However, even if this "in commerce" test is not met, a claim can still fall under the Sherman Act if a local business substantially affects interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

## [HN4](#) Antitrust & Trade Law, Sherman Act

The mere existence of a multi-state market for what otherwise appear to be local activities does not suffice to establish per se the interstate nexus which is a necessary factor of a federal court's subject matter jurisdiction.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

## **HN5** Removal, Specific Cases Removed

Defendants who seek to force a plaintiff from his state claim to a federal claim bear the burden of establishing their right to remove.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

## **HN6** Removal, Specific Cases Removed

The fact that a plaintiff has both state and federal remedies does not mean that he must state his federal claim.

**Counsel:** For JERRY DUKE, Jerry Duke, doing business as Moscow Manor Apartments, on behalf of itself and all other entities similarly situated in the Counties of Shelby and Fayette, in the State of Tennessee; and in the Counties of DeSoto, Tate and Tunica, in the State of Mississippi dba Moscow Manor Apartments: James F. Goodwin, WILDR CRONE JOHNSTON MASON & GOODWIN, Somerville, TN. Andrew S. Johnston, Esq., JOHN S. WILDER & ASSOCIATES, Somerville, TN. Steve W. Berman, Esq., George Sampson, HAGENS & GERMAN, Seattle, WA. Michael Hausfeld, Gary Mason, COHEN MILSTEIN HAUSFELD & TOLL, Washington, DC. Gordon Ball, BALL LAW FIRM, Knowville, TN. Don Barrett, BARRETT LAW FIRM, Lexington, MS. Patrick Pendley, PENDLEY LAW FIRM, Plaquemine, LA. Howard Sedran, LEVINE FISHBEIN SEDRAN & BENNAN, Philadelphia, PA.

For BROWNING-FERRIS INDUSTRIES OF TENNESSEE, INC., BROWNING-FERRIS INDUSTRIES, INC., defendants: Michael F. Rafferty, Esq., James R. Garts, Jr., Esq., HARRIS SHELTON DUNLAP & COBB, Memphis, TN. Stephen D. Susman, Vineet Ghatia, SUSMAN GODREY, L.L.P., Houston, TX.

**Judges:** JEROME TURNER, UNITED STATES DISTRICT JUDGE

**Opinion by:** JEROME TURNER

## **Opinion**

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### ORDER ON PLAINTIFF'S MOTION TO REMAND

Plaintiff filed this class action in the Tennessee Circuit Court for Fayette County alleging defendants violated the antitrust laws of Tennessee.<sup>1</sup> Plaintiff received a dual-state class certification from the Tennessee Circuit Court. On August 13, 1996, defendants removed the claim to this court. Plaintiff now moves this court to remand these proceedings to the Circuit Court. Plaintiff claims that the complaint alleges only violations of state laws and that, therefore, this court lacks subject matter jurisdiction over the case. Defendants, however, assert that while plaintiff's claim does not specifically indicate that he is suing under federal **antitrust law**, the claim is really a disguised complaint under Section 2 of the Sherman Act. Thus, this action invokes federal question jurisdiction and this court may properly hear the case.

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<sup>1</sup> Plaintiff also alleges that defendants violated the Tennessee Consumer Protection Act, breach of duty of good faith and fair dealing, unjust enrichment, and Mississippi laws.

**[\*2] I. Facts**

This action was filed by Jerry Duke, a Tennessee resident, doing business as Moscow Manor Apartments against Browning-Ferris Industries, Inc. ("BFI") and Browning-Ferris of Tennessee, Inc. ("BFIT") for alleged violations of Tennessee and Mississippi antitrust laws.<sup>2</sup> BFIT is a waste-hauling company incorporated in Tennessee with its principal place of business in Tennessee. BFIT is engaged in waste-hauling in the Memphis market, which plaintiff has defined as Shelby and Fayette Counties of Tennessee and DeSoto, Tate, and Tunica Counties of Mississippi. One of the services BFIT provides is small containerized solid waste hauling. Small containerized solid waste hauling is a service used by apartment buildings and small businesses whereby trash is placed into receptacles of one to ten cubic meters for collection and disposal by the waste hauling company.

**[\*3]** BFIT entered into contracts with several clients in the Memphis market. BFIT generally used the same contract with all its clients which required an initial contract term of three years, automatic renewal terms of three years unless BFIT was given six months notice, and a liquidated damages clause equalling the most recent monthly charge times six or the number of months remaining on the contract if less than six months remained.

The United States brought an action against BFI, BFIT, and another BFI subsidiary charging that the defendants had violated federal antitrust laws by engaging in anti-competitive behavior designed to acquire and maintain monopoly power in the Memphis market and to shutout any competitors. On February 15, 1996, the United States and BFI (including its subsidiaries) entered into a consent final judgment which enjoined BFI from using the aforementioned contracts and required BFI to set initial terms and renewal terms of no more than two years with substantially less liquidated damages. The Competitive Impact Statement filed with the final judgment provided that it neither helps nor hinders private parties who bring subsequent actions against BFI.

Plaintiff, [\*4] who had entered into a contract with BFI, then filed this action on behalf of himself and any other persons in Shelby and Fayette Counties of Tennessee and DeSoto, Tate, and Tunica Counties of Mississippi, who are similarly situated. The action was originally filed in the Circuit Court of Tennessee for the Twenty-Fifth Judicial District at Somerville. The Circuit Court judge certified the class based on documents filed with the complaint. Defendants removed the action to this court based on federal question jurisdiction. Plaintiff then filed a motion to remand this proceeding to state court. Oral arguments were heard on this motion on September 25, 1996.

**II. Removal Jurisdiction and the Well-Pleaded Complaint Rule**

**HN1** [↑] [28 U.S.C. § 1441\(b\)](#) provides that "any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." The Supreme Court has interpreted this "arising under" language as requiring that the federal question be present on the face of a plaintiff's complaint and not as a defense raised [\*5] by defendants or anticipated by plaintiff. [Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 153-54, 53 L.Ed. 126, 29 S.Ct. 42 \(1908\)](#). This "well-pleaded complaint" rule applies to determinations of removal jurisdiction as well as to determinations of original federal question jurisdiction. [Franchise Tax Board v. Contr. Laborers Vacation Trust, 463 U.S. 1, 10, 77 L.Ed. 2d 420, 103 S.Ct. 2841 \(1983\)](#).

**III. Artful Pleading Exception**

The Supreme Court has adopted an exception to the well-pleaded complaint rule which permits a defendant to remove a case if the real nature of the claim is federal, regardless of the law under which the plaintiff alleges the claim arises. [Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2, 69 L.Ed. 2d 103, 101 S.Ct. 2424 \(1981\)](#); [Striff v. Mason, 849 F.2d 240 \(6th Cir. 1988\)](#) (finding a claim was actually federal because it challenged a promotion scheme implemented through settlement of a federal claim). The Sixth Circuit Court of Appeals explained

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<sup>2</sup>BFI is a Delaware holding company of BFIT and other subsidiary companies with its principal place of business in Texas. Plaintiff has acknowledged that BFIT is the principal defendant.

this exception in *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989):

**HN2**[<sup>↑</sup>] An exception to the well pleaded [\*6] complaint rule exists when plaintiffs 'artificially plead' their complaint in order to avoid federal jurisdiction of claims that are federal in nature. . . . If it appears 'that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims' or if plaintiff's claim is 'really one of federal law,' then the matter is properly in federal court.

(citations omitted). The Supreme Court implicitly applied this exception in *Avco Corp. v. Aero Lodge Int'l Assoc. of Machinists & Aerospace Workers*, 390 U.S. 557, 560, 20 L. Ed. 2d 126, 88 S. Ct. 1235 (1968). In that case, the Supreme Court denied a plaintiff's motion to remand a case seeking an injunction under state law to prevent a union from striking. The Court found that the action actually arose under the Labor Management Relations Act, and the district court had therefore properly exercised jurisdiction over the case.

#### V. Applicable Antitrust Statutes

In the present case, the complaint alleges that "defendants have engaged in anti-competitive conduct, and have willfully acquired or maintained, and/or attempted to acquire and maintain, monopoly power in the Memphis market." (Compl. P 2). Plaintiff asserts [\*7] this antitrust claim under *Tenn. Code Ann. § 47-25-101* and *Miss. Code Ann. § 75-21-9*. The claim is essentially the same as the one the United States filed against defendants in a separate action under Section 2 of the Sherman Act.<sup>3</sup> *United States v. Browning-Ferris Indus. of Iowa, Inc.*, Civil Action No. 96-CV-00297 (D.D.C. 1996).<sup>4</sup> The main distinction between claims under the Tennessee and the federal statutes is that the Sherman Act prohibits monopolization in interstate commerce, while the Tennessee statute only applies if the action is predominantly intrastate. *United States v. Yellow Cab Co.*, 332 U.S. 218, 225, 91 L. Ed. 2d 1010, 67 S. Ct. 1560 (1947) (explaining that some interstate commerce must be present for the Sherman Act to apply); *Valley Products Co., Inc. v. Landmark*, 877 F. Supp. 1087, 1094-95 (W.D. Tenn. 1994) (holding that the Tennessee antitrust statute pertains to transactions that are predominantly intrastate); *Lynch Display v. Nat'l Souvenir Center*, 640 S.W.2d 837 (Tenn. App. 1982) (holding that the Tennessee antitrust statute applied to transactions that were predominantly, but not necessarily exclusively, intrastate). Hence, this court, [\*8] in determining if plaintiff has pleaded a cause of action under the Sherman Act rather than the Tennessee antitrust statute, must decide if the complaint alleges monopolization in interstate or predominantly intrastate commerce.

#### IV. Monopolization

In *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976), the Supreme Court addressed the issue of the necessary nexus to interstate commerce that a plaintiff must allege to establish a claim under the Sherman Act. The court stated, "it is settled that **HN3**[<sup>↑</sup>] the Act encompasses far more than restraints on trade that are motivated by a desire [\*9] to limit interstate commerce or that have their sole impact on interstate commerce. 'Wholly local business restraints can produce the effects condemned by the Sherman Act.'" *Id.* at 743 (quoting *United States v. Employing Plasterers Assn.*, 347 U.S. 186, 98 L. Ed. 618, 74 S. Ct. 452 (1954)).

The *Hospital Bldg.* case established two tests for interstate commerce. First, the interstate commerce element of the Sherman Act is established if the product market itself is interstate in nature. *Id.*; *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 241-42, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980). However, even if this "in commerce" test is not met, a claim can still fall under the Sherman Act if a local business substantially affects interstate commerce. *Hospital Bldg.*, 425 U.S. at 743; *McClain*, 444 U.S. at 242; *United States v. Women's Sportswear Ass'n*,

<sup>3</sup> 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, . . ."

<sup>4</sup> This action was ended by a consent injunctive decree and it does not appear that federal jurisdiction (interstate commerce) was questioned.

336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.")

The Seventh Circuit, facing a case factually similar to the one before this court, found both of these tests were met for purposes [\*10] of defendant's motion for summary judgment. Tiger Trash v. Browning-Ferris Indus., Inc., 560 F.2d 818, 825 (7th Cir. 1977), cert. denied, 434 U.S. 1034, 54 L. Ed. 2d 782, 98 S. Ct. 768 (1978). *Tiger Trash* involved Browning-Ferris Industries of Indiana ("BFII"), another subsidiary of Browning-Ferris, Inc., which operated in a market area encompassing Evansville, Indiana and Henderson, Kentucky. The court found that plaintiff's claim had sufficiently alleged that BFII had engaged in a monopoly affecting interstate commerce and: "At this state, plaintiff has adequately charged that a sufficient part of interstate commerce, namely the Evansville-Henderson market for refuse disposal, was affected." Id. 560 F.2d at 826. The court pointed out that BFII was an Indiana company collecting garbage in Kentucky, using garbage trucks in Kentucky, and having clients in Kentucky as well as Indiana. Id. at 825. Similarly, BFIT is a Tennessee company which collects garbage in Mississippi, uses garbage trucks in Mississippi, and has clients in Mississippi as well as Tennessee.

Duke's complaint has, however, been drawn with a clear purpose to avoid asserting a federal cause of action. There [\*11] are no facts alleged to show that BFIT engaged in commerce, not that its activities affected commerce. Nor does the record otherwise reflect how the collection and disposal of garbage, be it in Tennessee or Mississippi, affects interstate commerce. On the other hand, it is arguable that such intrastate collection and disposal of garbage is predominantly intrastate activity.

It is true that plaintiff asserts a geographic market composed of two states and alleges that it was this multi-state market where the attempted monopolization has occurred. But HN4[<sup>↑</sup>] the mere existence of a multi-state market for what otherwise appear to be local activities does not suffice to establish per se the interstate nexus which is a necessary factor of this court's subject matter jurisdiction. *But see Id. at 824*.

The mere fact that plaintiff might have otherwise chosen to prove an interstate nexus relative to the alleged monopoly does not mean that he must do so. Like most, plaintiff is entitled to limit his claim to predominantly intrastate activity and cannot be forced to pursue a federal claim based on interstate activity.<sup>5</sup>

[\*12] This is not a case where plaintiff's allegations of an interstate nexus are being tested for sufficiency. It is one in which HN5[<sup>↑</sup>] defendants, who seek to force plaintiff from his state claim to a federal claim, bear the burden of establishing their right to remove. *Her Majesty the Queen v. City of Detroit*, 874 F.2d at 339. To do so they must at least establish that plaintiff does not have a state antitrust claim but only a federal claim. But if this is so, then plaintiff suffers the peril of dismissal in the state court.

It is not enough to show that plaintiff has both claims. As noted by Judges Milburn and Jordan: HN6[<sup>↑</sup>] "The fact that a plaintiff has both state and federal remedies does not mean that he must state his federal claim." Magic Chef, Inc. v. Int'l Molders & Allied Workers Union, 581 F. Supp. 772, 776 (E.D. Tenn. 1983); Blake v. Abbott Laboratories, Inc., 894 F. Supp. 327 (E.D. Tenn. 1995).

The court concludes that defendants have failed to establish that the claim asserted by plaintiff is a federal claim subject to the jurisdiction of this court.

For these reasons, the Plaintiff's Motion for Remand of Proceedings to State Court is granted and this action is remanded [\*13] to the Circuit Court of Tennessee for the Twenty-Fifth Judicial District at Somerville.

IT IS SO ORDERED this 22nd day of October, 1996.

JEROME TURNER

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<sup>5</sup> Indeed, if plaintiff is unable to establish the necessary predominantly intrastate activity there is no basis for a state antitrust claim.

UNITED STATES DISTRICT JUDGE

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## **Cost Mgmt. Servs. v. Washington Natural Gas Co.**

United States Court of Appeals for the Ninth Circuit

August 8, 1996, Argued, Submitted, Seattle, Washington ; November 7, 1996, Filed

No. 95-35566

### **Reporter**

99 F.3d 937 \*; 1996 U.S. App. LEXIS 29016 \*\*; 1996-2 Trade Cas. (CCH) P71,613; 96 Cal. Daily Op. Service 8111; 96 Daily Journal DAR 13466

COST MANAGEMENT SERVICES, INC., Plaintiff-Appellant, v. WASHINGTON NATURAL GAS COMPANY, Defendant-Appellee.

**Prior History:** **[\*\*1]** Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-94-01318-CRD. Carolyn R. Dimmick, District Judge, Presiding.

**Disposition:** REVERSED and REMANDED.

## **Core Terms**

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pricing, tariff, customers, competitors, antitrust, rates, monopoly, monopolize, regulated, off-tariff, predatory, Sherman Act, shipper, monopoly power, leveraging, district court, anti trust law, market share, suits, Concrete, allegations, anticompetitive, supervision, argues, Interstate, Commerce, damages, anticompetitive conduct, motion to dismiss, delivery

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

### **HN1 [blue icon] Exemptions & Immunities, Parker State Action Doctrine**

The state action immunity doctrine exempts qualifying state and local government regulation from federal antitrust, even if the regulation at issue compels an otherwise clear violation of the federal antitrust laws.

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

## [\*\*HN2\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

Courts apply a two-part test when determining whether alleged anticompetitive conduct is immunized under the state action immunity doctrine. A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the state has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the state provides active supervision of anticompetitive conduct undertaken by private actors.

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

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

## [\*\*HN3\*\*](#) Exemptions & Immunities, Filed Rate Doctrine

An anti-competitive practice embodied in a tariff may violate the antitrust laws if it impacts upon competitors as opposed to customers.

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

## [\*\*HN4\*\*](#) Exemptions & Immunities, Filed Rate Doctrine

Activities which come under the jurisdiction of a regulatory agency may be subject to scrutiny under the antitrust laws.

Administrative Law > Separation of Powers > Primary Jurisdiction

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

## [\*\*HN5\*\*](#) Separation of Powers, Primary Jurisdiction

When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved under the doctrine of primary jurisdiction. The doctrine applies when protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN6\*\*](#) Sherman Act, Claims

The Sherman Act, [15 U.S.C.S. § 2](#) provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce, commits a felony. In order to state a claim for monopolization under this provision, a plaintiff must prove 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 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 > Sherman Act > General Overview

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

#### [HN7](#) Antitrust & Trade Law, Sherman Act

In order to survive a motion to dismiss under [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

#### [HN8](#) Antitrust & Trade Law, Sherman Act

To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive 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 > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

#### [HN9](#) Actual Monopolization, Anticompetitive & Predatory Practices

A mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price.

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

#### [HN10](#) Monopolies & Monopolization, Attempts to Monopolize

If there is a dangerous probability that a monopoly will be created by leveraging conduct, then the conduct will be reached under the doctrine of attempted monopoly.

**Counsel:** Paul R. Taylor, Byrnes & Keller, Seattle, Washington, for the plaintiff-appellant.

Howard A. Coleman, Riddell, Williams, Bullitt & Walkinshaw, Seattle, Washington, for the defendant-appellee.

**Judges:** Before: William A. Norris and Diarmuid F. O'Scannlain, Circuit Judges; William D. Browning, \* District Judge. Opinion by Judge O'Scannlain.

**Opinion by:** O'SCANNLAIN

## Opinion

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### [\*940] OPINION

O'SCANNLAIN, Circuit Judge:

In this action brought under the Sherman Act by an unregulated competitor against a natural gas distributor, we must explore the interplay between state public utility regulation and federal antitrust law.

I

Cost Management Services, Inc. ("CMS") is a Seattle-based company that purchases natural gas on the open market and sells it to various commercial and industrial consumers. In the trade area in which CMS sells gas, Washington Natural Gas Company ("WNG") owns the only delivery [\*2] facilities capable of transporting gas from the interstate pipeline to end users. Accordingly, customers who buy gas from CMS must obtain delivery of that gas through WNG's delivery facilities. WNG charges those customers, who are known as "transporters," a "transport charge" for the use of its facilities. Customers who purchase gas from WNG are known as "system sales" customers.

WNG is subject to regulation by the Washington Utilities and Transportation Commission ("WUTC"). The WUTC has approved two tariffs which are relevant to this case.<sup>1</sup> The first, Tariff 57, applies when customers purchase gas from a source other than WNG. According to CMS, Tariff 57 dictates the terms and conditions which WNG must follow when it charges CMS's customers for the use of WNG's delivery facilities. The second tariff, Tariff 87, applies when system sales customers purchase gas directly from WNG. CMS alleges that a customer's actual or anticipated gas usage must meet a particular minimum volume threshold in order to be eligible for the pricing set forth in Tariff 87.

[\*\*3] In September 1994, CMS filed a complaint against WNG in federal district court alleging that in the relevant market for sale of gas, WNG has a market share of over 90 percent. The complaint also alleged that WNG has engaged in a variety of practices in an attempt to monopolize that market, and that WNG has indeed monopolized that market.<sup>2</sup> In particular, the complaint sought recovery based on four alleged violations of section 2 of the Sherman Act, 15 U.S.C. § 2 (1994).

First, CMS alleged that WNG has violated Tariff 87 by offering gas at the apparently low rates specified in that tariff to customers who do not meet the mandatory minimum volume requirements in the tariff. CMS alleged that WNG's "off-tariff pricing" has made it impossible for others to compete for the sale of gas to those [\*4] particular customers, and that competition in the market has been injured as a result.

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\* The Honorable William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

<sup>1</sup> "A 'tariff' is a document that a regulated firm files with its regulatory agency, requesting that it be required to charge certain prices, offer certain prices, offer certain packages of services, have certain policies respecting treatment of customers, and the like. Once the tariff has been approved by the agency, the firm is legally obliged to follow the tariff." H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* § 20.3 at 677 n.5 (West 1994).

<sup>2</sup> The complaint alleges that the "relevant market" includes "a geographic area extending from approximately Everett, Washington, to the north, to Chehalis, Washington, to the south, and east as far as Monroe, Washington."

Second, CMS alleged that WNG has engaged in what CMS calls "monopoly leveraging." More specifically, CMS alleged that WNG has used its monopoly over gas delivery facilities in an unlawful attempt to monopolize the market for gas sales.<sup>3</sup> CMS claimed that WNG has enhanced its monopoly over gas sales by including anticompetitive provisions in Tariff 57 which are designed to make it economically inefficient for consumers to purchase gas from anyone other than WNG. CMS alleges, for example, that WNG has forced customers who purchase gas from sellers other than WNG to install expensive telemetry equipment which monitors the customer's gas usage. Customers who purchase gas from WNG are not required to install similar equipment. In addition, CMS alleges that customers who purchase gas from sellers other than WNG must pay a monthly customer charge and are subject to a minimum monthly bill, while customers who purchase [\*941] gas from WNG pay no customer charge and a lower monthly minimum. CMS alleges that WNG has "no valid business reason" for including these provisions in the tariff. CMS further argues that [\*\*5] WNG was able to obtain WUTC approval for the tariff only by repeatedly refusing to provide the WUTC with critical documents which CMS alleges that the WUTC admitted it needed in order to make an intelligent decision on whether to approve the tariff.

Third, CMS alleged that WNG violated Tariff 57 in an attempt to encourage customers not to purchase gas from CMS. More specifically, CMS alleged that under the express provisions of Tariff 57, customers who desired to convert from "system sales" (purchasing gas from WNG) to "transport sales" (purchasing gas from CMS) were only allowed to do so on October 1, 1994, and were required to commit to purchasing transport services from WNG for a period of one year. According to CMS, customers wishing to convert were required to notify WNG in writing no later than July 1, 1994. On June 28, 1994, CMS provided WNG with a list of customers who wished to convert. CMS alleged that immediately thereafter, WNG extended the [\*\*6] switching deadline from July 1, 1994, to August 1, 1994, and then attempted to persuade customers who had given notice of their intent to convert to remain with WNG.

Fourth and finally, CMS alleged that WNG has interfered with CMS's relationship with its customers. In particular, CMS alleged that certain customers have agreed to purchase gas from CMS and have asked CMS to represent them in their dealings with WNG, but that WNG has unlawfully refused to permit the customers to be represented by CMS. CMS alleged that this conduct constituted an additional attempt by WNG to eliminate competition.<sup>4</sup>

WNG moved to dismiss CMS's Sherman Act claims under *Fed. R. Civ. P. 12(b)(6)*. WNG contended that (1) CMS had failed to allege the elements of an antitrust violation, (2) the state action immunity doctrine was a bar to the claims, [\*\*7] (3) the "filed tariff" or *Keogh* doctrine was a bar to the claims, and (4) the claims were barred under the doctrine of primary jurisdiction. In May 1995, the district court entered an order which granted WNG's motion. The court found that CMS's antitrust claims were barred by the state action immunity doctrine, but did not address WNG's remaining contentions. The court also dismissed CMS's state law claims without prejudice. CMS timely appealed.

## II

CMS first argues that the district court erred by finding that its claims were barred by [HN1](#) the "state action immunity" doctrine. This doctrine, which originated in the Supreme Court's opinion in *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), "exempts qualifying state and local government regulation from federal antitrust, even if the regulation at issue compels an otherwise clear violation of the federal antitrust laws." H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* § 20.2, at 673 (West 1994) (hereinafter "*Federal Antitrust Policy*"). The doctrine is based on principles of federalism, and on judicial recognition of the fact that "continued enforcement of the national antitrust policy grants the States [\*\*8] more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls." *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 632, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992). However, a broad interpretation of the doctrine may inadvertently extend immunity to anticompetitive activity which the states did not intend to

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<sup>3</sup> WNG concedes that it has a monopoly over gas delivery.

<sup>4</sup> Neither the district court's order nor any of the parties' appellate briefs discusses the latter two of CMS's four theories. Accordingly, we will not reach the merits of those allegations.

sanction. Because of a concern that a broad application of the doctrine will thus impede states' freedom by threatening to hold them accountable for private activity they do not condone "whenever they enter the realm of economic regulation," the doctrine is said to be "disfavored." *Id. at 635-36.*<sup>5</sup>

[\*942] In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980), the Supreme Court outlined HN2<sup>↑</sup> a two-part test which courts must apply when determining whether alleged anticompetitive conduct is immunized under the doctrine. As recently [\*\*9] described by the Court in its decision in *Ticor Title, supra*, under the *Midcal* test

[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors.

*Ticor Title*, 504 U.S. at 631 (citing *Midcal*, 445 U.S. at 105); see also *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 60 F.3d 1390, 1395 (9th Cir. 1995) (applying *Midcal* test).

The district court concluded that CMS's claims were barred under this test. First, quoting *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985), the court stated that in order to satisfy the first prong of the test, WNG must show only that Washington "clearly intends to displace competition in [the market for sale of natural gas] with a regulatory structure." *Id. at 64*. The court concluded that this requirement was satisfied with respect to CMS's Tariff 57 "monopoly leveraging" claim, because "the Washington statutory scheme displaces pure [\*\*10] competition in sale of natural gas with a regulatory structure." The court also concluded that *Midcal*'s "active supervision" requirement was satisfied with respect to this claim, because "the record amply demonstrates that the WUTC was actively involved in setting Tariff 57." With respect to CMS's off-tariff pricing claim, the court concluded that the first prong of the *Midcal* test was satisfied because "the WUTC is empowered to set and police pricing, including off-tariff violations." (Emphasis added). The court did not explicitly discuss whether the "active supervision" requirement was satisfied with respect to CMS's off-tariff pricing claim.

For a number of reasons, we conclude that the district court erred. First, although the court properly quoted *Southern Motor Carriers*, the court misapplied the first prong of the *Midcal* test. As noted above, the Supreme Court clarified in *Ticor Title* that this prong is satisfied if a plaintiff establishes that "the State has articulated a clear and affirmative policy to allow the anticompetitive conduct . . ." *Ticor Title*, 504 U.S. at 631 (emphasis added); see also *id. at 627* ("state-action immunity . . . [\*\*11] . permits anticompetitive conduct if authorized and supervised by state officials") (emphasis added). Accordingly, the fact that Washington may have displaced competition in the market for sale of natural gas with a regulatory structure is not dispositive. Rather, the relevant question is whether the regulatory structure which has been adopted by the state has specifically authorized the conduct alleged to violate the Sherman Act. As applied to CMS's off-tariff pricing claim, the first prong of the *Midcal* test will thus be satisfied only if WNG can establish either that (1) it did not participate in off-tariff pricing, or that (2) off-tariff pricing is legal under Washington's regulatory scheme. Because this case arises on a motion to dismiss under *Rule 12(b)(6)*, WNG cannot make the former showing here. In addition, CMS's allegation that off-tariff pricing is illegal under Washington law is supported by a state statute which provides in relevant part that

no gas company . . . shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such service as specified [\*\*12] in its schedule filed and in effect at the time . . . .

*Wash. Rev. Code § 80.28.080* (1991). Moreover, the district court's conclusion that the first prong of the *Midcal* test was satisfied because "the WUTC is empowered to set and police pricing, including off-tariff violations," misses the point. If, as the district court suggested, off-tariff pricing is a violation of Washington law, then WNG's alleged conduct simply would not be protected by the state action immunity doctrine. Accordingly, the [\*943] court erred in dismissing the off-tariff pricing claim on that ground.

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<sup>5</sup> For a comprehensive discussion of the state action immunity doctrine, see *Federal Antitrust Policy, supra* at §§ 20.1 - 20.8.

The district court also erred in applying *Midcal's* "active supervision" requirement to CMS's Tariff 57 "monopoly leveraging" claim. In *Ticor Title*, the Supreme Court explained that

the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among [\*\*13] private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

*Ticor Title*, 504 U.S. at 634-35. Furthermore, "the mere potential for state supervision is not an adequate substitute for a decision by the State." *Id.*

As should be clear from this discussion, the question of whether a state has "actively supervised" a state regulatory policy is a factual one which is inappropriately resolved in the context of a motion to dismiss. CMS has argued that the WUTC approved Tariff 57 only because WNG deliberately withheld key information from the WUTC which the WUTC repeatedly requested and which the WUTC admitted it needed in order to make an informed decision on whether to approve the tariff. The district court was required to accept CMS's allegation as true. In addition, if CMS is able to prove its allegations, then the state action immunity doctrine almost certainly would not preclude its claim based on Tariff 57. See *Ticor Title*, 504 U.S. at 638 (finding [\*\*14] that Montana had failed adequately to supervise its state regulatory policy because "a rate filing became effective despite the failure of the rating bureau to provide additional requested information").

Accordingly, we hold that the court erred in dismissing CMS's claims on the ground of state action immunity.<sup>6</sup>

### III

WNG next urges us to affirm the district court on the ground that the "filed tariff" or *Keogh* doctrine precludes CMS's claims. The *Keogh* doctrine stems from *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922).<sup>7</sup>

[\*\*15] In *Keogh*, a private shipper claimed that rates which had been submitted to and approved by the Interstate Commerce Commission ("ICC") under the authority of the Interstate Commerce Act ("ICA") had been fixed pursuant to a conspiracy prohibited by the Sherman Act. The shipper alleged that because of the conspiracy, the rates were "higher than the rates would have been, if competition had not been thus eliminated." *260 U.S. at 160*. The shipper sought damages based on the difference between the rates established pursuant to the agreement and the rates previously in effect. *Id.*

The defendants argued that approval of the rates by the ICC conclusively established [\*944] that the rates were "reasonable and nondiscriminatory," *id. at 161*, and the Court agreed. The Court noted that the ICC approval "did

<sup>6</sup> WNG urged this court that *Tanner Elec. v. Puget Sound Power & Light*, 128 Wash. 2d 656, 911 P.2d 1301 (Wash. 1996) was controlling with respect to the preeminence of regulatory law. In light of our conclusion on the applicability of the state action immunity doctrine, we need not consider that case on these facts.

<sup>7</sup> The phrase "*Keogh* doctrine" is usually applied in cases involving rates filed with the Interstate Commerce Commission, whereas the "filed rate doctrine" applies more broadly to cases involving rates filed with any regulatory body. See, e.g., *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware*, 805 F. Supp. 1277, 1294 n.32 (D.S.C. 1992), aff'd, 998 F.2d 1009 (4th Cir. July 6, 1993) (unpublished disposition), cert. denied, 510 U.S. 993, 126 L. Ed. 2d 454, 114 S. Ct. 553 (1993). However, we have also applied the "*Keogh* doctrine" in cases involving state regulatory agencies. See, e.g. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393-94 (9th Cir. 1992), cert. granted, 510 U.S. 810, 114 S. Ct. 56, 126 L. Ed. 2d 26 (1993), cert. dismissed as improvidently granted, 511 U.S. 117, 114 S. Ct. 1359, 128 L. Ed. 2d 33 (1994). Accordingly, we will use the terms "*Keogh* doctrine" and "filed tariff doctrine" interchangeably.

not foreclose the possibility that slightly lower rates would also have been within the zone of reasonableness that the Commission would also have found lawful," [\*Square D Co. v. Niagara Frontier Tariff Bureau, Inc.\*, 476 U.S. 409, 415, 90 L. Ed. 2d 413, 106 S. Ct. 1922 \(1986\)](#) (describing *Keogh*), nor did it "require rejection of Keogh's contention that the combination among the railroads violated the Sherman Act." [\*\*16] *Id.* Nonetheless, the Court held that Keogh could not "recover damages under [the Sherman Act] because he lost the benefits of rates still lower, which, but for the conspiracy, he would have enjoyed." [\*Keogh\*, 260 U.S. at 162](#).

The Court offered four rationales for its holding. First, the Court noted that under the ICA, shippers who had been injured by illegally filed rates had a right to recover their actual damages in proceedings before the ICC. [\*Id. at 162-63\*](#). Because damages were available in an ICC proceeding, the Court doubted that Congress intended to provide a duplicative remedy in the Sherman Act. *Id.* Second, the Court concluded that granting an antitrust damages remedy only to those shippers who chose to sue would result in an arbitrary and discriminatory rate structure, because the successful litigant would receive a lower effective rate than other shippers. The Court concluded that this would conflict with "the paramount purpose of Congress - prevention of unjust discrimination." [\*Id. at 163\*](#). Third, the Court noted that a damage recovery would require a showing that a hypothetical lower rate should and would have been adopted by the ICC. Whether or not [\*\*17] the agency would have actually approved a different rate was a question best left to the agency itself, rather than the courts. [\*Id. at 163-64\*](#). Fourth and finally, the Court explained that individual shippers would not be injured by the illegal rate, because if the rate applied to all of the shipper's competitors, the increase in the rate would simply be passed on to the shippers' customers. [\*Id. at 164-65\*](#).

The *Keogh* doctrine has been vigorously criticized by a number of leading observers. Professor Hovenkamp, for one, has argued that "none of these arguments had much to be said for them at the time they were originally made, and they are even less sensible today." *Federal Antitrust Policy*, *supra* § 19.6 at 660; see also P. Areeda & H. Hovenkamp, [\*Antitrust Law: An Analysis of Antitrust Principles and Their Application\*](#) Par. 227.2a, at 267-69 (Supp. 1994) (arguing that modern legal developments have undermined rationales for *Keogh* doctrine). Similar considerations dominated Judge Friendly's opinion for the Second Circuit in [\*Square D Co. v. Niagara Frontier Tariff Bureau, Inc.\*, 760 F.2d 1347](#) (2d Cir.), cert. granted, 474 U.S. 815, 106 S. Ct. 57, 88 L. Ed. 2d 47 (1985), aff'd, [\*476\* \[\\*\\*18\] \*U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 \(1986\)\*](#). In an opinion which the Supreme Court subsequently praised as "characteristically thoughtful and incisive," [\*Square D Co., supra, 476 U.S. at 423\*](#), Judge Friendly effectively invited the Supreme Court to overturn *Keogh*. He noted that each of the rationales which may have justified the *Keogh* rule in 1922 had been undermined by subsequent legal developments. More specifically, he noted that under current law, antitrust damage remedies are available in spite of the fact that similar remedies are also available under other federal statutes. [\*Square D\*, 760 F.2d at 1353-54](#). Accordingly, the Court's earlier conclusion that Congress did not intend to provide for duplicative remedies seemed mistaken. Second, the Court's concerns about possible rate discrimination which might result if only certain shippers decided to sue was undermined by the emergence of modern class actions. [\*Id. at 1352\*](#). In addition, Judge Friendly explained that "the fear that recovery of antitrust damages would operate 'like a rebate' to produce discrimination among shippers ignores the difference between a carrier's passing money under the table to a favored shipper and a court's deciding [\*\*19] that a shipper had suffered antitrust injury." *Id.*

Third, Judge Friendly noted that concern that "an antitrust action would require the carrier to prove that a hypothetical lower rate conformed to the requirements of the [\*\*45] ICA" was no longer compelling in light of the fact that "the process in which the ICC would have to engage if a court requested it to determine whether lower rates procured by competition would be reasonable and non-discriminatory does not differ in essence from that which it must undertake" in other antitrust actions. *Id.* Fourth and finally, Judge Friendly noted that the *Keogh* Court's concern that "'no court or jury could say that, if the rate had been lower, [the shipper] would have enjoyed the difference,' since the benefit 'might have gone to his customers,'" [\*id. at 1353\*](#) (quoting [\*Keogh\*, 260 U.S. at 165](#)), was no longer valid in light of subsequent decisions in which the Court had "rejected the argument that a plaintiff cannot recover damages it was able to pass on to its customers in the antitrust context." *Id.* (citations omitted).

The Supreme Court ultimately declined Judge Friendly's invitation to overrule *Keogh*. See *Square D, Inc.*, [\[\\*20\] 476 U.S. at 417-24](#).<sup>8</sup> However, the Court did not directly challenge the validity of his observations. Instead, the Court "assumed that petitioners are correct in arguing that the *Keogh* decision was unwise as a matter of policy," *id. at 420*, but nonetheless affirmed on grounds of *stare decisis*. The Court explained that

the developments in the six decades since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute. As Justice Brandeis himself observed, a decade after his *Keogh* decision, in commenting on the presumption of stability in statutory interpretation: "*Stare decisis* is usually the wise policy because in most matters, *it is more important that the applicable rule of law be settled than that it be settled right.* . . ." We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.

*Id. at 424* (footnotes omitted) (emphasis added). Finally, the Court offered [\[\\*21\]](#) a relatively narrow interpretation of the *Keogh* rule: "*Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation." *Id. at 422*.<sup>9</sup>

[\[\\*22\]](#) The fact that *Square D*'s endorsement of *Keogh* was only lukewarm is of particular importance here, because WNG is essentially asking us to extend *Keogh* to preclude rate-related suits brought by competitors, as opposed to customers, of regulated entities. The weight of authority, and the better-reasoned authority, supports CMS's argument that *Keogh* simply does not apply to such suits. See, e.g., *Federal Antitrust Policy* § 19.6, at 660 ("Most courts correctly hold that *Keogh* does not apply to competitor suits - for example, suits challenging filed rates as predatory pricing."); *Antitrust Law* Par. 227.2c, at 270 ("Many courts have allowed antitrust damage actions by actual or potential competitors against allegedly predatory [\[\\*946\]](#) filed rates."). As Professor Hovenkamp has explained:

First, of the original rationales given for *Keogh* only the third, the primacy of agency rate determination, would apply to a competitor suit. Indeed, even that argument is weak because the agency generally scrutinizes rates to see if they are too high, making sure that cost figures are justified. It much less frequently scrutinizes tariff requests to see if the requested [\[\\*23\]](#) rates are too low. Second, a doctrine as indefensible as *Keogh* should be narrowly tailored.

*Federal Antitrust Policy* § 19.6, at 660.

The Second, Third, and Eighth Circuits have all held that *Keogh* does not preclude rate-related suits brought by competitors of regulated entities. See *In re Lower Lake Erie Iron Ore Antitrust Litigation*, [998 F.2d 1144](#) (3rd Cir. 1993), cert. dismissed, [510 U.S. 1021](#) (1993); *City of Kirkwood v. Union Elec. Co.*, [671 F.2d 1173, 1179](#) (8th Cir. 1982), cert. denied, [459 U.S. 1170](#), [74 L. Ed. 2d 1013](#), [103 S. Ct. 814](#) (1983); *City of Groton v. Connecticut Light & Power Co.*, [662 F.2d 921, 929](#) (2d Cir. 1981) ("an anticompetitive practice embodied in a tariff may violate the

<sup>8</sup> Justice Marshall dissented, noting that "Judge Friendly cogently and comprehensively explained why the reasoning of [*Keogh*] has been rendered obsolete by subsequent developments in the law." *Square D, Inc.*, [476 U.S. at 424-25](#) (Marshall, J., dissenting).

<sup>9</sup> The Court's description of the *Keogh* rule clarifies that *Keogh* only precludes claims based specifically on rates approved by the relevant regulatory agency. See *Keogh*, [260 U.S. at 161](#) ("The instrument by which *Keogh* is alleged to have been damaged is rates approved by the Commission."); *Square D, Inc.*, [476 U.S. at 414](#) (*Keogh* precludes "a treble-damages action based on the filed tariffs") (emphasis added). Accordingly, the only one of CMS's allegations which might arguably be barred by *Keogh* is its allegation that WNG has included anticompetitive provisions within Tariff 57; this is, in effect, an action "based on the filed tariff." However, to the extent that CMS's other allegations are not "rate-related," they would not be barred by *Keogh*. See, e.g., *In re Lower Lake Erie Iron Ore Antitrust Litigation*, [998 F.2d 1144, 1159](#) (3rd Cir.) (*Keogh* "does not preclude liability based on non-rate anticompetitive activity"), cert. dismissed, [510 U.S. 1021](#) (1993); *Pinney Dock & Transport Co. v. Penn Cent. Corp.*, [838 F.2d 1445, 1457](#) (6th Cir.) ("To the extent that these alleged acts are unrelated to defendants' rates, any damages suffered therefrom would not be barred by *Keogh*."), cert. denied, [488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196](#) (1988).

antitrust laws if it . . . impacts upon competitors as opposed to customers"); [Essential Communications Sys., Inc. v. American Tel. & Tel. Co., 610 F.2d 1114, 1121 \(3d Cir. 1979\)](#).

In *City of Kirkwood*, the Eighth Circuit explained that *Keogh* does not apply to competitor suits because "[a] rule formulated to ensure uniformity of rates as between customers should not give an unfair advantage to a utility in its dealings with competitors." [City of Kirkwood, 671 F.2d at 1179](#). **[\*\*24]** Similarly, in *Essential Communications*, the Third Circuit explained that

In this case the plaintiff is not suing in the capacity of a customer for communication services. Essential seeks recovery *for injury to its business or property from actions taken by the defendants in formulating a tariff*, and in rendering customer services. The [defendant] will not be asked to disgorge to any customers any revenues derived under the filed tariff. Indeed, it can continue to collect those revenues until a new tariff is filed. There is no policy conflict, actual or potential, therefore, between the Section 4 Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule.

[Essential Communications, 610 F.2d at 1122](#) (emphasis added). Finally, one district court has persuasively observed that although the Supreme Court's ruling in *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. That holding does not justify **[\*\*25]** expansion of the doctrine to nullify competitor suits.

[Capital Freight Serv., Inc. v. Trailer Marine Transp. Corp., 704 F. Supp. 1190, 1195 \(S.D.N.Y. 1988\)](#) (Leval, J.); see also [Frontier Enter. v. Amador Stage Lines, Inc., 624 F. Supp. 137, 143 \(E.D. Cal. 1985\)](#) (declining to apply *Keogh* in suit involving competitor).

The Sixth Circuit is the only circuit which has concluded that *Keogh* bars rate-related claims brought by competitors. See [Pinney Dock & Transport Corp. v. Penn Central Corp., 838 F.2d 1445](#) (6th Cir.), cert. denied, 488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 (1988).<sup>10</sup> However, we are not persuaded by the Sixth Circuit's analysis. In *Pinney Dock*, the court conceded that "the anti-discrimination arguments behind the *Keogh* doctrine lose their force in competitor lawsuits such as this." [838 F.2d at 1457](#). The court nonetheless concluded that

when the ICC approves a rate . . . it necessarily takes an anticompetitive action. This action is justified by the [Interstate Commerce Act] because *the statute assumes that the pro-competition policies of the antitrust laws have been taken into account* but also assumes that the [Interstate **[\*947]** Commerce Commission] **[\*\*26]** possesses and ought to have the power to override those policies in order to further national transportation policy as expressed in the Act. Rates must not only protect against overcharging captive customers but must also keep in mind the economic costs of delivery of the service. Regulation of one aspect inevitably begets regulation of the other. Thus, the ICC is the sole source of the rights not only of shippers, but of the entire public, including competitors.

*Id. at 1457* (emphasis added).

As has been noted elsewhere, the Sixth Circuit's reasoning is somewhat obscure. Indeed, Judge Leval cogently observed in *Capital Freight*,

<sup>10</sup> We note that one district court, which relied on *Pinney Dock*, also held that *Keogh* bars competitor suits. See [Lischultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware, 805 F. Supp. 1277 \(D.S.C. 1992\)](#), aff'd, **998 F.2d 1009** (4th Cir. July 6, 1993) (unpublished disposition), cert. denied, **510 U.S. 993, 126 L. Ed. 2d 454, 114 S. Ct. 553** (1993).

the Sixth [\*\*27] Circuit's argument that ICC review "assumes that the pro-competition policies of the antitrust laws have been taken into account," [838 F.2d at 1457](#), is somewhat inconsistent with the Supreme Court's statement in [Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 460, 65 S. Ct. 716, 727, 89 L. Ed. 1051](#) [1945], that "the Interstate Commerce Act does not provide remedies for the correction of all the abuses of ratemaking which might constitute violations of the anti-trust laws," and is at odds with the Second Circuit's assertion that [HN3](#)[<sup>1</sup>] "an anti-competitive practice embodied in a tariff may violate the antitrust laws if it . . . impacts upon competitors as opposed to customers."

[704 F. Supp. at 1195-96](#) (quoting [City of Groton, 662 F.2d at 929](#)). We agree with this conclusion. In addition, even if we were to agree with *Pinney Dock*'s assumption that the ICC has necessarily taken "the pro-competition policies of the antitrust laws" into account when calculating its rates, we fail to see how that justifies a conclusion that a competitor may not sue under the Sherman Act based on an allegation that the rates which were adopted were adopted in part because of an antitrust violation on the [\*\*28] part of the defendant. Cf. [Otter Tail Power Co. v. United States, 410 U.S. 366, 372, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\)](#) [HN4](#)[<sup>1</sup>] ("Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws."); [City of Long Beach v. Standard Oil Co. of California, 872 F.2d 1401, 1408 \(9th Cir. 1989\)](#) (holding that existence of federal price controls did not absolve companies of antitrust liability, because "if the price ceilings were based on prices set artificially low as a result of an unlawful conspiracy, liability should still exist"), as amended on denial of reh'g, [886 F.2d 246 \(9th Cir. 1989\)](#), cert. denied, 493 U.S. 1076, 110 S. Ct. 1126, 107 L. Ed. 2d 1032 (1990). In addition, even if such an assumption is appropriate with respect to the Interstate Commerce Commission, we question whether it would be appropriate to extend a similar assumption to cases involving the plethora of state agencies which approve commercial tariffs of a variety of regulated enterprises.

Nor are we persuaded by the Sixth Circuit's reliance on [Georgia v. Pennsylvania Railway Co., 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 \(1945\)](#), in support of its conclusion that *Keogh* precludes competitor suits. It is true that in *Georgia*, [\*\*29] the Supreme Court applied *Keogh* in a case in which the State of Georgia was suing in its dual capacity as a customer and a competitor of the defendant. See [Pinney Dock, 838 F.2d at 1457 n.12](#) (citing *Georgia*); see also [Lirschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware, 805 F. Supp. 1277, 1295 \(D.S.C. 1992\)](#) (citing *Georgia* in support of its conclusion that *Keogh* applies in competitor suits), aff'd, 998 F.2d 1009 (4th Cir. July 6, 1993) (unpublished disposition), cert. denied, 510 U.S. 993, 126 L. Ed. 2d 454, 114 S. Ct. 553 (1993). However, the Third Circuit has persuasively explained that in *Georgia*, the state of Georgia sued both in its *parens patriae* capacity and as owner of a railroad and other public institutions. Although Georgia's ownership of a railroad placed it in competition with the defendants, the [Court] clearly focused on Georgia's *parens patriae* claim and treated the injury to the state as proprietor merely as "make weight." . . . It is obvious that in rendering its decision the Court's focus was on Georgia's claims as a *customer*. We, therefore, do not construe *Georgia* as Supreme Court precedent to apply *Keogh* to bar competitor [\*\*30] suits.

[\*948] [In re Lower Lake Erie Iron Ore, 998 F.2d at 1161-62 n.6](#) (emphasis added). We agree. In addition, although not specifically discussed by the Third Circuit, we also note that the court's conclusion is supported by the fact that in [Square D, supra](#), Judge Friendly distinguished certain cases on the grounds that "all of these cases, moreover, were suits by *competitors* rather than users of the service, so that many of the considerations relied upon in *Keogh* would not apply." [Square D, 760 F.2d at 1356](#) (citing [Essential Communications, 610 F.2d at 1122](#)) (emphasis added). Significantly, the Supreme Court did not take issue with this observation when it affirmed Judge Friendly's opinion.

Our conclusion that *Keogh* does not apply in competitor suits also finds some support in our decision in [Barnes v. Arden Mayfair, Inc., 759 F.2d 676 \(9th Cir. 1985\)](#). In *Barnes*, two companies which had developed new methods of pasteurizing and packing milk sued two Alaskan dairies and a shipping company under the Sherman Act. The plaintiffs alleged that the dairies had undertaken various anticompetitive tactics to keep the plaintiffs out of the Alaskan dairy market. [\*\*31] In particular, the plaintiffs alleged that the dairies had convinced the shipping company to help them keep the plaintiffs out of Alaska by illegally manipulating the tariff rates which the carrier charged for shipping milk to Alaska. The plaintiffs also alleged that an employee of the shipping company had

discouraged a potential purchaser of one of the plaintiff's distributorships from entering into an agreement with the plaintiffs.

The defendants argued that the plaintiffs' complaint was barred under *Keogh*. We rejected this argument by noting that

[the plaintiffs] do not seek damages *solely* for an illegally-set price, as did the plaintiffs in *Keogh*. Rather, they claim a conspiracy to destroy their businesses through a broad range of anticompetitive behavior. The district court observed that [the plaintiffs] did not allege merely that illegal rates were set, but in addition that [the defendants] undertook further alleged anticompetitive acts by attempting to prevent a prospective distributor from entering into an agreement with [one of the plaintiffs]. *Because such activities would be beyond the scope of the ICC's jurisdiction*, the antitrust action **[\*\*32]** was not subject to dismissal on this ground.

*Id. at 679* (emphasis added).

It is clear from this passage that we did not actually hold that a competitor may bring an action for damages based on "rate-related" activity; instead, we emphasized that the plaintiffs in that case had alleged that the defendants also participated in other, "non-rate related" conduct not covered by *Keogh*. However, our decision to allow CMS's claims to proceed is consistent with our holding today that competitor suits are not barred by *Keogh*.

Finally, we note that our conclusion that *Keogh* should not be extended to preclude antitrust damage actions brought by competitors is also consistent with the Supreme Court's observation that "exemptions from the antitrust laws are strictly construed and strongly disfavored," *Square D, 476 U.S. at 421*, and with our prior observation that "implied repeals of the antitrust statutes are disfavored, and require a convincing showing that the antitrust laws and the regulatory program cannot coexist." *City of Long Beach, 872 F.2d at 1409*.

Accordingly, because the rationales offered for the *Keogh* doctrine do not justify extending that doctrine **[\*\*33]** to preclude rate-based damages actions brought by competitors of regulated entities, we decline to apply the doctrine here.

#### IV

WNG next argues that we should affirm the district court on the basis of the primary jurisdiction doctrine.<sup>11</sup> Specifically, WNG argues we should decline to exercise jurisdiction over this case and should instead transfer the case to the WUTC for resolution **[\*949]** of such "threshold" questions as whether WNG did in fact violate Tariff 87.

In *United States v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987)*, we explained that:

**HN5**  The doctrine of primary jurisdiction operates as follows: When there is a basis for judicial action, independent of agency proceedings, courts may route the *threshold decision* as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved. **[\*\*34]** The doctrine applies when protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.

*Id. at 1362* (internal quotation marks and citations omitted) (emphasis added); see also *Mt. Hood Stages, Inc. v. Greyhound Corp., 616 F.2d 394, 403* (9th Cir.), cert. denied, 449 U.S. 831, 66 L. Ed. 2d 36, 101 S. Ct. 99 (1980) (applying doctrine). We further explained that

there are four factors uniformly present in cases where the doctrine properly is invoked: (1) *the need to resolve an issue* that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration.

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<sup>11</sup> For a discussion of the primary jurisdiction doctrine, see *Federal Antitrust Policy, supra* § 19.4 at 655-57.

General Dynamics, 828 F.2d at 1362 (citations omitted) (emphasis added).

WNG's argument that we should apply this doctrine in this appeal is misplaced. Because this case arises in the context of a motion to dismiss under Rule 12(b)(6), we must accept as true CMS's allegation that WNG violated Tariff 87. For that reason, the "threshold decision" which WNG would **[\*\*35]** have us refer to the WUTC must necessarily be resolved in favor of CMS. Accordingly, the primary jurisdiction doctrine is simply inapplicable here.<sup>12</sup>

**[\*\*36] V**

Finally, WNG argues that we should affirm the district court on the alternate ground that CMS has failed to allege the elements of a Sherman Act claim.

Section 2 of the Sherman Act provides: HN6<sup>13</sup> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce . . . [commits a felony]."  
15 U.S.C. § 2 (1994). In order to state a claim for monopolization under this provision, a plaintiff must prove 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. SmileCare Dental Group v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir. 1996) (citations omitted).<sup>13</sup> In order to state a claim for **[\*950]** attempted monopolization, 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. *Id.* (citations omitted). HN7<sup>14</sup> In order to survive a motion to dismiss under Rule 12(b)(6), **[\*\*37]** 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). CMS's complaint should not be dismissed unless it appears beyond doubt that CMS can prove no set of facts in support of its claim which would entitle it to relief. SmileCare Dental Group, 88 F.3d at 783.

**[\*\*38]** WNG raises three specific challenges to CMS's complaint. We address each in turn.

A

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<sup>12</sup> We note in passing that we are not entirely persuaded that the doctrine should be applied in any event to allow a federal court to "route" issues to a state agency for resolution. In Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co., 505 F.2d 152 (9th Cir. 1974), we did apply the doctrine to stay proceedings in federal court pending a decision by the California Public Utilities Commission on whether certain proposed tariffs would become effective. However, in our more recent decisions, we have emphasized that because "the primary jurisdiction doctrine is in effect, a power-allocating mechanism, a court *must not* employ the doctrine *unless* the particular division of power was intended by Congress." General Dynamics, 828 F.2d at 1363 n.13 (emphasis added); see also P. Areeda & D. Turner, Antitrust Law: An Analysis of Antitrust Principles and Their Application Par. 213, at 79 (1978) (noting that the primary jurisdiction doctrine "is designed to harmonize the conflicting commands of the same sovereign" and is "not well-suited for a situation in which the conflict is between commands of two different sovereigns, one of whom is superior by force of the Constitution"). However, because we conclude that the doctrine is inapplicable in this appeal in any event, we need not decide this question.

<sup>13</sup> We have explained that

HN8<sup>15</sup> to show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive 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*.

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir.), cert. denied, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1995).

WNG first challenges the sufficiency of CMS's allegation that WNG possesses monopoly power.<sup>14</sup> WNG notes that the Supreme Court has defined monopoly power as the power to "control prices or exclude competition," [United States v. Grinnell Corp., 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#) (citation omitted), and asserts that because it cannot set its own rates it meets neither of these standards. WNG also notes that market share standing alone does not establish monopoly power in a regulated industry, and argues that CMS's complaint is defective because the only factual allegation which CMS offers on the monopoly power issue is its allegation that WNG has a 90 percent market share.

WNG's first argument effectively boils down to an assertion [\*\*39] that it cannot possess monopoly power because it is a regulated entity. However, the mere fact that WNG is a regulated utility does not preclude a finding that it retains monopoly power. See, e.g., *Federal Antitrust Policy*, *supra* § 19.5, at 658 (discussing "market power" offenses in regulated markets).<sup>15</sup> Moreover, CMS has alleged, in addition to its allegation that WNG has a 90 percent market share, that (1) WNG has charged rates other than those mandated by its tariffs, or, in other words, that WNG retains the ability to control its prices, and (2) that WNG's off-tariff pricing has "made it impossible for others to compete for the sale of Gas," or, in other words, that WNG's practices have excluded competition. These allegations are sufficient to survive a motion to dismiss.

With respect to WNG's second argument, it is true that market share standing alone does not automatically equate to monopoly power. See, e.g., *SmileCare* [\*\*40] [Dental Group, 88 F.3d at 783; Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1439 \(9th Cir. 1995\)](#) (offering comprehensive analysis of market power and noting that [HNG](#) [↑] "[a] mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price."), cert. denied, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1995). However, as noted above, CMS's allegation that WNG possesses monopoly power does not rest entirely on its market share allegation. Moreover, in [Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 \(9th Cir. 1980\)](#), cert. denied, 450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981) we held that

while market share is just the starting point for assessing market power, we think that market share, at least above some level, could support a finding of market power in the absence of contrary evidence. *Where such an inference is not implausible* [\*\*41] *on its face, an allegation of a specific market share is sufficient, as a matter of pleading, to withstand* [\*\*42] *a motion for dismissal.* With nothing but Hunt's complaint before us, we cannot say that allegations that Ragu had a 65 per cent market share, and that the share was increasing, could not under any market conditions provide a basis for inferring the requisite market power.

*Id.* at 925 (emphasis added).

In sum, while CMS's complaint perhaps could have provided more detailed allegations on this issue, we are not prepared to hold, based on CMS's allegations that (1) WNG has a 90 percent market share in the relevant market, (2) WNG has been able to charge off-tariff prices, and (3) WNG's alleged off-tariff pricing has excluded competition from the market, that CMS can prove no set of facts establishing that WNG has monopoly power. CMS's allegations are sufficient to withstand a motion to dismiss. Cf. [Rebel Oil, 51 F.3d at 1438](#) ("ARCO's market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing.").

B

Second, WNG argues that CMS's "monopoly leveraging" theory was rejected by this court in [Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 549 \(9th Cir. 1991\)](#), cert. denied, 503 U.S. 977, 118 L. Ed. 2d 316, 112

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<sup>14</sup> The question of whether a party possesses monopoly power is essentially one of fact. [Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1425 \(9th Cir. 1993\)](#), cert. denied, 510 U.S. 1197, 127 L. Ed. 2d 658, 114 S. Ct. 1307 (1994).

<sup>15</sup> The terms "market power" and "monopoly power" are used interchangeably herein.

S. Ct. 1603 (1992), and that CMS therefore cannot proceed on its theory that WNG has used its monopoly over gas delivery services in an attempt to monopolize the market for gas sales.

The dispute between the parties on this issue turns primarily on the definition of "monopoly leveraging." In *Alaska Airlines*, we did in fact reject the Second Circuit's holding in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980) that "a single firm may be liable for monopoly leveraging, even in the absence of a threat that the 'leveraged' market will be monopolized . . ." *Alaska Airlines*, 948 F.2d at 546 (internal quotation marks and citations omitted) (emphasis added). We noted that

in contrast to the traditional actions for monopoly and attempted monopoly, *Berkey Photo*'s "monopoly leveraging" doctrine has only two rather loose elements: 1) there must be monopoly power in some market, and 2) such power must be "exercised . . . to the detriment of competition" in another market. The *Berkey Photo* court slighted the functions performed [\*\*43] by the elements of the traditional Section 2 offenses, stating: "There is no reason to allow the exercise of [monopoly] power to the detriment of competition, in either the controlled market or any other. That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable."

*Id. at 547* (quoting *Berkey Photo*, 603 F.2d at 275). Accordingly, we rejected *Berkey Photo*'s definition of "monopoly leveraging" as an independent theory of liability under Section 2.<sup>16</sup>

It is clear from our analysis, however, that to the extent that "monopoly leveraging" is defined as an attempt to use monopoly power in one market to monopolize another market, this theory remains a viable theory under Section 2. For example, we explained that "even in the two-market situation, a plaintiff cannot establish a violation of Section 2 without [\*\*44] proving that the defendant used its monopoly power in one market to obtain, or attempt to attain, a monopoly in the downstream, or leveraged, market." *Id.* (emphasis added). We also explained 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 [\*952] among monopolies. The anticompetitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in the second market. By definition, the monopolist has failed to gain, or attempt to gain, a monopoly in the second market. Thus, such activity fails to meet the second element necessary to establish a violation of Section 2. Unless the monopolist uses its power in the first market to acquire and maintain a monopoly in the second market, or to attempt to do so, there is no Section 2 violation.

*Id. at 548* (emphasis added). Finally, we concluded that *HN10* [if there is a dangerous probability [\*\*45] that a monopoly will be created by leveraging conduct, then the conduct will be reached under the doctrine of attempted monopoly.] *Id. at 549* (emphasis added).

It is clear from our opinion in *Alaska Airlines* that to the extent that CMS seeks to proceed on the basis of the "monopoly leveraging" theory adopted in *Berkey Photo*, it may not proceed. However, CMS has alleged that WNG has used its monopoly power in the gas delivery market in an attempt to monopolize the market for gas sales. Accordingly, CMS has alleged conduct which may be reached "under the doctrine of attempted monopoly," *Alaska Airlines*, 948 F.2d at 549, and it may proceed on this theory. We emphasize, however, that under this theory, CMS must establish each of the elements normally required to prove an attempted monopolization claim under Section 2 of the Sherman Act. See, e.g., *SmileCare Dental Group, supra*, 88 F.3d at 783.

C

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<sup>16</sup> See also *Federal Antitrust Policy*, *supra* § 7.9, at 283-85 (criticizing *Berkey Photo*'s "monopoly leveraging" theory).

Third, WNG challenges CMS's attempted monopolization claim based on WNG's alleged off-tariff pricing. WNG argues that CMS's off-tariff pricing claim is in effect a claim for predatory pricing, and argues that because CMS has failed to allege that WNG's prices were below [\*\*46] its average total costs of production, CMS's claim necessarily fails. CMS responds by arguing that in *Farley Transp. Co. Inc. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342 (9th Cir. 1985), and [\*Western Concrete Structures Co., Inc. v. Mitsui & Co. \(U.S.A.\), Inc.\*, 760 F.2d 1013](#) (9th Cir.), cert. denied, 474 U.S. 903, 88 L. Ed. 2d 229, 106 S. Ct. 230 (1985), this court held that off-tariff pricing alone may constitute a violation of the Sherman Act, independent of any allegation of predatory pricing.<sup>17</sup> The parties' arguments require us to examine *Farley* and *Western Concrete*.

In *Western Concrete*, the plaintiff and one of the defendants ("VSL") were [\*\*47] competitors in the business of post-tensioning. The court explained that post-tensioning "is a construction process . . . that involves the stretching of steel strand tendons within concrete slabs or girders." [\*Western Concrete\*, 760 F.2d at 1015](#). Because the cost of steel strand represented more than half of the companies' direct costs, the price of steel strand significantly affected the companies' respective competitive positions. *Id.* Under regulations promulgated by the United States Treasury Department, importation of steel strand below certain "trigger prices" was illegal. The plaintiff alleged that the defendants had conspired to import steel strand at prices below the trigger prices, and had done so in order to allow VSL to monopolize the industry. *Id.* Importantly, the plaintiff "expressly disclaimed" that it was proceeding on a predatory pricing theory. *Id.* Instead, the plaintiff alleged that the defendants had imported steel at prices below the legal levels, knowing that the plaintiff could not legally match those rates, and had done so in order to obtain an illegal competitive advantage and monopolize the market.

The district court dismissed the plaintiff's [\*\*48] claim for failure to state a claim, concluding that "price cutting does not violate section 1 [of the Sherman Act], unless it is 'predatory' in the sense that it is below cost." [\*Id. at I\\*953I 1016\*](#). We reversed. In doing so, we effectively treated the plaintiff's claim as one alleging predatory pricing. However, relying in part on our decision in [\*Transamerica Computer Co., Inc. v. International Bus. Mach. Corp.\*, 698 F.2d 1377](#) (9th Cir.), cert. denied, 464 U.S. 955, 78 L. Ed. 2d 329, 104 S. Ct. 370 (1983), we concluded that it was not necessary for the plaintiff to establish that the defendant's prices were below its costs. We noted that in *Transamerica Computer*, we had stated that "this court has . . . recognized that prices exceeding average total cost might nevertheless be predatory in some circumstances." [\*Transamerica Computer\*, 698 F.2d at 1387](#). Relying in part on this exception, we held that the plaintiff had stated a valid claim. Judge Sneed succinctly explained the legal theory which we found to be adequate in that case:

The improper conduct alleged in this case is a conspiracy to sell at prices below those that other competitors, *acting within the law*, could offer. This is no more [\*\*49] and no less than a form of predatory pricing. The only difference between the conduct alleged in this case and ordinary predatory pricing is that here it is the law, rather than costs, that prevents the defendant's competitors from matching the defendant's price.

[\*Western Concrete\*, 760 F.2d at 1020](#) (Sneed, J., concurring in part and dissenting in part) (emphasis added).<sup>18</sup>

We applied the majority's and Judge Sneed's reasoning in *Western Concrete* to *Farley*. In *Farley*, the plaintiff sued two of its competitors, a trucking company and a railroad company, under Sections 1 and 2 of the Sherman Act. *Farley*, 786 F.2d at 1344. The defendants and plaintiff were each subject [\*\*50] to tariff schedules approved by the Interstate Commerce Commission through a regional tariff bureau. *Id.* Under the Interstate Commerce Act, it was illegal for the parties to charge any rates not authorized by the tariff schedules. The plaintiff argued that the

<sup>17</sup> "Predatory pricing occurs when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time." [\*Transamerica Computer Co., Inc. v. International Business Machines Corp.\*, 698 F.2d 1377, 1384](#) (9th Cir.) (citations omitted), cert. denied, 464 U.S. 955, 78 L. Ed. 2d 329, 104 S. Ct. 370 (1983).

<sup>18</sup> Judge Sneed dissented from the majority's conclusion that the plaintiff's claim stated a cause of action under Section 1, rather than [\*Section 2\*](#), of the Sherman Act: "Our cases have always treated predatory pricing as a violation of [\*Section 2\*](#), not Section 1." *Id.* (Sneed, J., concurring in part and dissenting in part).

defendants had conspired to violate the tariffs by providing false information concerning their cargos to the tariff bureau, and had thereby obtained lower rates than those which the plaintiff could legally offer to its customers. The plaintiff alleged that the violation of the tariff illegally deprived it of business, and distorted the structure of the market. *Id.* at 1347.

As Judge Sneed had done with respect to the claim in *Western Concrete*, we noted that the plaintiff's theory in *Farley* "closely resembles predatory pricing." *Id.* We also observed that "under ordinary circumstances, Farley's theory would be difficult to sustain in light of the fact that the tariff for the Santa Fe Plan V was above average total cost." *Id.* However, relying on the legal theory outlined in Judge Sneed's concurring opinion in *Western Concrete*, and noting that the facts in *Farley* were "virtually identical" to those [\*\*51] in *Western Concrete*, we held that the plaintiff had stated a Sherman Act claim. *Id.* at 1348.

CMS argues that *Western Concrete* and *Farley* should be read broadly for the proposition that a plaintiff seeking recovery for attempted monopolization may satisfy its burden of showing "predatory or anticompetitive conduct," [SmileCare](#), 88 F.3d at 783, merely by showing that the defendant has offered prices below those outlined in a legally binding tariff. We disagree.

Our decisions in *Western Concrete* and *Farley* proceeded from the premise that the plaintiffs in those cases were seeking recovery under a legal theory which amounted to a variation of predatory pricing. In each case, we noted that a predatory pricing claim normally may not proceed unless the plaintiff establishes that the defendant's prices are below its costs. However, as Judge Sneed recognized, the rationale for the "below cost" rule is simply that a defendant who is setting its prices below its costs may legitimately be presumed to be doing so in an attempt to drive its competitors out of the market by charging economically inefficient prices which its competitors cannot match. Because [\*954] the defendant's [\*\*52] prices are below its costs, the pricing may legitimately be deemed "predatory." The rule which we adopted in *Western Concrete* and *Farley* simply acknowledged that in cases where both the plaintiff and defendant are regulated entities subject to tariff restrictions, a defendant may be able to achieve the same result by illegally charging prices below its tariff rate, knowing that its competitor cannot match those rates without similarly violating the law. Cf. *Farley*, 786 F.2d at 1350 ("The purpose of the [defendant's] scheme to falsify the weight and composition of cargo was to arrive at a rate lower than that possible under [the tariff which the plaintiff was obligated to follow].") By charging prices below this rate, the defendant can force its competitors into a Hobson's choice: either match the defendant's prices and risk incurring legal sanctions, or fail to match those prices and run the risk of being underbid and, eventually, driven from the market. Accordingly, we held that in these particular, narrow set of circumstances, "below-tariff pricing may serve as a surrogate for below-cost pricing . . ." [Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.](#), 833 F.2d 208, 212 (9th Cir. 1987).

Accordingly, CMS's broader reading of *Western Concrete* and *Farley* is erroneous. In order for CMS to establish, on the basis of the theory outlined in these cases, that WNG participated in "predatory or anticompetitive conduct to accomplish the monopolization," [SmileCare](#), 88 F.3d at 783, CMS would have to establish that (1) CMS and WNG are regulated entities in the same relevant market; (2) each is precluded by law from setting prices below those outlined in controlling tariffs; (3) WNG has illegally offered prices below the tariff prices; and (4) CMS cannot match WNG's prices without similarly violating the law. Because CMS is not a regulated entity, it cannot establish a violation of [section 2](#) based on *Western Concrete* and *Farley*. We therefore dismiss CMS's off-tariff pricing claim outright.

## VI

For the foregoing reasons, the district court's order is REVERSED, and this case is REMANDED for further proceedings not inconsistent with this opinion.

*REVERSED and REMANDED.*



## Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.

United States District Court for the Middle District of Florida, Orlando Division

November 19, 1996, Decided ; November 19, 1996, Filed

CASE NO. 95-130-CIV-ORL-22

### **Reporter**

1996 U.S. Dist. LEXIS 22287 \*

SOUTHERN CARD & NOVELTY, INC., Plaintiff -vs- LAWSON MARDON LABEL, INC., d/b/a LAWSON MARDON POST CARD, and DANIEL J. SAUNDERS, Defendants

**Disposition:** [\*1] Lawson Mardon Post Card's Motion for Summary Judgment (Doc. 42) GRANTED; Lawson Mardon's Motion to Strike Expert Affidavit Testimony In Limine to Exclude Expert Testimony Regarding Damages (Doc. 86) DENIED as moot; Southern Card's Motion In Limine to Prohibit Evidence of Settlement or Compromise (Doc. 88) and to Preclude Any Reference to Trebling of Damages (Doc. 90) DENIED as moot; Southern Card's Motion In Limine to Prohibit Bad Acts Evidence (Doc. 92) DENIED as moot; Southern Card's Motion to Compel Attendance of Witnesses at Trial (Doc. 115) DENIED as moot.

## **Core Terms**

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Card, postcards, distributor, manufacturer, geographic, products, relevant market, monopolization, consumer, sales, anticompetitive, contends, summary judgment, rule of reason, tied product, dealer, tying arrangement, antitrust, markets, sellers, competitors, purchases, buy, tying product, Sherman Act, nonprice, vertical, tie-in, buyer, summary judgment motion

## **LexisNexis® Headnotes**

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

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 > Motions for Summary Judgment > General Overview

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

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

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

A motion for summary judgment is granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. There is no genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor. The court considers the evidence and all inferences drawn therefrom in the light most favorable to the non-moving party.

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 > ... > 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 > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

## [HN2](#) Tying Arrangements, Clayton Act

[Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), prohibits contracts in restraint of trade. 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. A tying arrangement may violate [§ 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. Tying claims may violate [15 U.S.C.S. § 14](#) if the tie-in involves goods, wares, merchandise or other commodities.

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

## [HN3](#) Tying Arrangements, Clayton Act

A "tying" arrangement is defined as an agreement by a party to sell one product, the "tying" product, but only on the condition that the buyer also purchases a different, or "tied," product. A tying arrangement is not illegal simply because two products are sold together in the same package. The key to such an arrangement's anti-competitiveness, and thus its illegality, is the seller's ability to force buyers to purchase one product in the package, the tied product, by virtue of the seller's control or dominance over the other product in the package, the tying product. The essential characteristics 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.

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

#### **HN4** Price Fixing & Restraints of Trade, Tying Arrangements

In traditional antitrust "tying" cases, in which the end consumer is subjected to the tie-in, the court uses a per se analysis. However, not every refusal to sell two products separately can be said to restrain competition. This is the case when the tie-in does not force the end consumer to buy the two products together.

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

#### **HN5** Price Fixing & Restraints of Trade, Tying Arrangements

Although antitrust tying arrangements are one of the classic per se forms of anti-competitive behavior, such claims are also analyzed under the rule of reason in certain instances. This shift to a rule of reason analysis is particularly evident in cases involving middlemen, who are intermediate links in the chain of commerce.

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

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 > Nonprice Restraints

#### **HN6** Price Fixing & Restraints of Trade, Tying Arrangements

An antitrust tie-in can foreclose some distributors of the tied product without threatening the kind of impact on consumers that anti-tying rules are designed to prevent. Requiring a distributor to purchase a tied product from the manufacturer need not impair the ultimate consumers' purchases from the manufacturer's rivals who sell directly to consumers or who continue to reach consumers through an ample number of other dealers. Arrangements whereby the manufacturer requires a distributor or dealer to carry a less popular item from its line in order to receive a more popular item has been described by various courts as "full" or "representative" line forcing or "vertical non-price restraints," undeserving of per se treatment. When only dealers are subject to a tie, competitors do not lose a segment of the tied market if there are genuine alternative paths to consumers.

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

#### **HN7** Price Fixing & Restraints of Trade, Tying Arrangements

Where manufacturers require dealers to carry a full or representative line, or condition purchase of a more popular product on the purchase of a less popular product, such arrangements are not illegal per se, since they often promote competition, rather than stifle it, thereby benefiting the ultimate consumer.

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

#### **HN8** Price Fixing & Restraints of Trade, Tying Arrangements

Where a dealer is serving as an intermediate link in a distribution chain, if one manufacturer is foreclosed from selling to a dealer because of an arrangement, it is likely going to find another way to take its product to market, providing a profit potential continues to exist. There is no ultimate foreclosure to the consumer of a choice of goods. In other more traditional tying arrangements, there is an ultimate foreclosure of choice to the ultimate consumer. A foreclosure of choice to an ultimate consumer is the principal key to a tie that is illegal per se. No such foreclosure occurs or is threatened in a typical line forcing situation.

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

#### **HN9** Price Fixing & Restraints of Trade, Tying Arrangements

When an alleged tying action is not per se illegal, the court must apply the rule of reason to determine whether the restrictive practice imposes an unreasonable restraint on competition.

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

#### **HN10** Regulated Practices, Price Fixing & Restraints of Trade

Speculation about anti-competitive effects is not enough.

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

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

#### **HN11** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In order to show anti-competitive effect under the rule of reason standard, a plaintiff must first offer proof of a well-defined relevant market upon which the challenged anti-competitive actions would have had a substantial impact. In the case of a tying vertical non-price restraint between a manufacturer and a distributor, the manufacturer's power in the tying market tells nothing of other competing distributors.

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

## **HN12** [ ] **Price Fixing & Restraints of Trade, Tying Arrangements**

The plaintiff in an antitrust tying action must establish the particularized or relevant market in which the defendant's actions had an anticompetitive effect. The relevant market contains a product dimension and a geographic dimension, both of which must be shown to be economically significant. The product dimension is determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producers' ability to expand output. The geographic dimension is the area in which the product or its reasonably interchangeable substitutes are traded.

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

International Law > Dispute Resolution > Tribunals

International Trade Law > General Overview

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

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

International Law > Territorial Boundaries

## **HN13** [ ] **Market Definition, Relevant Market**

Without a definition of the relevant market in which commerce is allegedly being restrained, there is no way to measure the anti-competitive effect. The relevant geographic market is the area in which sellers of the particular product or service operate and to which purchasers can practicably turn for such products or services.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

## **HN14** [ ] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

In determining the relevant geographic market in which a product or its substitutes are traded, such economic and physical barriers to expansion as transportation costs, delivery limitations and customer convenience and preference must be considered. The location and facilities of other distributors are essential in determining the relevant geographic market. Economically significant geographic barriers limit the ability of sellers outside the market to operate within, and the ability of purchasers to obtain the product from suppliers outside the geographic area. If sellers within the market must take account of sellers outside it, either because those sellers are mobile and can easily come into the area to sell, or because buyers are mobile and can easily go outside the area to buy, the market is being defined too narrowly.

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

## [\*\*HN15\*\*](#) [blue icon] **Tying Arrangements, Per Se Rule**

The four elements required to prove that a tying arrangement is illegal per se are: 1) that there are two separate products, a "tying" product and a "tied" product; 2) that those products are in fact "tied" together, that is, the buyer was forced to buy the tied product to get the tying product; 3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and 4) involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

Antitrust & Trade Law > Sherman Act > General Overview

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

## [\*\*HN16\*\*](#) [blue icon] **Antitrust & Trade Law, Sherman Act**

[15 U.S.C.S. § 2](#) provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or person, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony.

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN17\*\*](#) [blue icon] **Antitrust & Trade Law, Sherman Act**

The offense of monopoly under [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. To establish an attempted monopolization claim, a plaintiff must show: (1) an intent to bring about a monopoly; and (2) a dangerous probability of success.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN18\*\*](#) [blue icon] **Sherman Act, Claims**

Proof of monopoly power in the relevant market is the first element of a monopolization claim, and proof that there is a dangerous probability of the defendant successfully attaining monopoly power is the second element of an attempted monopolization claim. A plaintiff's failure to adequately define the relevant market and to prove that the defendants possessed or were close to possessing monopoly power in the relevant market, will be fatal to a [15 U.S.C.S. § 2](#) claim for monopolization and for attempted monopolization.

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## HN19[] Regulated Practices, Market Definition

The principal judicial device for measuring actual or potential market power remains market share, typically measured in terms of a percentage of total market sales.

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Evidence > ... > Testimony > Lay Witnesses > General Overview

## HN20[] Regulated Practices, Market Definition

Construction of a relevant economic market or a showing of monopoly power in the market cannot be based upon lay opinion testimony.

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**Judges:** ANNE C. CONWAY, United States District Judge.

**Opinion by:** [\*2] ANNE C. CONWAY

## Opinion

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### ORDER

This cause comes before the Court on Defendant Lawson Mardon Label, Inc. d/b/a Lawson Mardon Post Card's Motion for Summary Judgment (Doc. 42) and Plaintiff Southern Card & Novelty, Inc.'s Opposition (Doc. 61). This case involves claims by Southern Card that Lawson Mardon engaged in an unlawful tying scheme by conditioning purchases of licensed Disney postcards upon purchases of local or general view ("non-Disney") postcards. Southern Card alleges that, due to the market power of Lawson Mardon's licensed Disney postcards in the greater Orlando area, Lawson Mardon has attempted to extend its monopoly into the local view postcard market in the greater Orlando area. Southern Card seeks treble damages and injunctive relief for Lawson Mardon's alleged antitrust violations and invokes this Court's jurisdiction pursuant to the Sherman and Clayton Acts, [15 U.S.C. §§ 1, 2, 14, 15, 24](#). Southern Card also claims Lawson Mardon has violated Florida's antitrust provisions, [Fla. Stat. §§ 542.18](#), .19, & .22.

The question presented by Lawson Mardon's motion for summary judgment is whether Southern Card's illegal tying claim should properly be analyzed as a [\*3] *per se* restraint of trade or under the rule of reason; and whether Lawson Mardon's actions were monopolistic or constituted an attempted monopolization. The Court finds that Southern Card has failed to define the relevant market for the tied product, or alternatively, has failed to define two separate products, and as such, Lawson Mardon's motion for summary judgment is due to be granted on the tying claim (Counts I and II). Southern Card has also failed to measure Lawson Mardon's market power in the relevant

market; therefore, summary judgment is also warranted on the monopolization (Counts III and IV) and attempted monopolization claims (Counts V and VI).

## I. Standard for Summary Judgment

**HN1** A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. "The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record 'which it believes demonstrate the absence [\*4] of a genuine issue of material fact.'" *Cohen v. United American Bank of Cent. Fla.*, 83 F.3d 1347, 1349 (11th Cir. 1996) (quoting *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1396 (11th Cir. 1994)). There is no genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor. *Cohen*, 83 F.3d at 1349. The Court considers the evidence and all inferences drawn therefrom in the light most favorable to the non-moving party. *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 918 (11th Cir. 1993).

## II. Background facts

The following facts are either undisputed or are taken in the light most favorable to Southern Card, the non-moving party:

Southern Card & Novelty, Inc. ("Southern Card") is a postcard distributor located in Daytona Beach, Florida. Southern Card does not print its own postcards, but buys instead printed postcards from Lawson Mardon Label, Inc. d/b/a Lawson Mardon Post Card ("Lawson Mardon") and distributes them mainly to retail outlets (primarily to chain stores) in the northern half of the State [\*5] of Florida.

Lawson Mardon is a nonexclusive licensee of Walt Disney Company postcards.<sup>1</sup> Although the license is "nonexclusive" in nature, no other postcard printers have been granted such a license in the greater Orlando area, where Walt Disney World is located; thus, Lawson Mardon is the only available source for postcards printed with copyrighted Disney images and characters. As such, Lawson Mardon is the exclusive seller of copyrighted Disney postcards in the greater Orlando area.

Lawson Mardon also sells postcards that contain only local or general views [hereinafter "local view"] and bear non-licensed local images, such as beaches, palm trees, alligators and other images that typify the area. Unlike the Disney postcards, Lawson Mardon has a number of competitors for local view postcards in the Orlando market. Until 1991, Southern Card purchased as many postcards as it desired, Disney and local view, from Lawson Mardon. [\*6] During the late 1980's and early 1990's, Southern Card bought a percentage of its local view cards from manufacturers other than Lawson Mardon, and found the postcards of Lawson Mardon's competitors to be superior in price and quality. Southern Card still purchased all of the unique Disney cards from Lawson Mardon because there was no other source for these licensed postcards in the greater Orlando area.

In late 1991, Lawson Mardon informed Southern Card that it was introducing its "Premium Disney Product" program in the State of Florida. In correspondence dated December 12, 1991, Lawson Mardon set forth the following terms of the agreement it wished to reach with Southern Card:

- d) Distributor will purchase local view and general postcards and allied products from Lawson Mardon equal to his purchases from Lawson Mardon of Disney products, i.e., if distributor purchases \$ 100,000.00 in 1992 of Disney product from Lawson Mardon, distributor agrees to purchase a minimum of \$ 100,000.00 in 1992 of Local View or General Product Florida product from Lawson Mardon.

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<sup>1</sup> Lawson Mardon's predecessor-in-interest, Crocker, was the previous licensee.

e) Failure to meet the minimum agreed to in d) above, may result in Lawson Mardon's decision to not sell [\*7] any product the following year.

Doc. 87, Ex. 19, Letter setting forth "Outline of Basic Agreement." Based on its fear of losing the significant Orlando Disney-postcard market, Southern Card complied with the requirements in the December 12, 1991 letter.

By October 1993, Lawson Mardon noted Southern Card was selling a significant quantity of local view postcards manufactured by Lawson Mardon's competitors. In November 1993, Lawson Mardon stated its expectation that Lawson Mardon receive 100% of Southern Card's local view business, on penalty of losing the supply of Disney postcards. Southern Card responded that it was already giving Lawson Mardon 75-80% of its total business and insisted that it had never committed to giving Lawson Mardon any specific percentage of its local view business. Lawson Mardon continued to insist that Southern Card carry Lawson Mardon's entire postcard line including local view postcards, not just the copyrighted Disney postcards.

A few months later, in February 1994, Lawson Mardon began recruiting other distributors, competitors of Southern Card, to sell Lawson Mardon's Disney and local view postcards in the chain stores (Southern Card's primary [\*8] market). Lawson Mardon also raised Southern Card's prices, and limited Southern Card's selection of Disney products to those postcards Southern Card actually purchased in 1993. However, Lawson Mardon has elected to sell a number of new Disney cards that have been developed since 1994 to Southern Card's competitors who agreed to carry Lawson Mardon's local view cards. As a result, Southern Card has faced new competition in the chain stores for sales of postcards in the Orlando market.

### **III. Analysis of Summary Judgment Motion**

#### **A. Tying claim - [15 U.S.C. §§ 1 & 14](#)**

Southern Card alleges that Lawson Mardon's sales of Disney and local view cards constitute an illegal tying arrangement in violation of [§ 1](#) of the Sherman Act and [§ 3](#) of the Clayton Act, [15 U.S.C.A. §§ 1 & 14 \(West Supp. 1996\)](#). Lawson Mardon seeks summary judgment on the tying claim, contending that the "tie-in" alleged by Southern Card is not illegal *per se*, and should be evaluated under the rule of reason standard.

**[HN2](#)** [Section 1](#) of the Sherman Act does not mention "tying," but prohibits contracts in restraint of trade: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint [\*9] of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U.S.C.A. § 1 \(West Supp. 1996\)](#). A tying arrangement may violate [§ 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." [Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#) (quoting [Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 503, 22 L. Ed. 2d 495, 89 S. Ct. 1252 \(1969\)](#)). Tying claims may violate [§ 3](#) of the Clayton Act pursuant to the same test as the Sherman Act if the tie-in involves goods, wares, merchandise or other commodities. [Jefferson Parish Hospital v. Hyde, 466 U.S. 2, 23-24 n.39, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). Eleventh Circuit and Supreme Court precedent define **[HN3](#)** a "tying" arrangement, a violation of [Section 3](#) of the Clayton Act or [Section 1](#) of the Sherman Act, as

"an agreement by a party to sell one product [the "tying" product] but only on the condition that the buyer also purchases a different (or "tied") product." A tying arrangement is not illegal, however, simply because two products are sold together in the same package. The [\*10] key to such an arrangement's anticompetitiveness (and thus its illegality) is the seller's ability to force buyers to purchase one product in the package, the tied product, by virtue of the seller's control or dominance over the other product in the package, the tying product. As the Supreme Court stated ... "the essential characteristics 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."

[Tic-X-Press, Inc. v. Omni Promotions Co. of Ga., 815 F.2d 1407 \(11th Cir. 1987\)](#) (quoting [Northern Pacific Railway Co., 356 U.S. 1, 4, 78 S. Ct. 514, 517, 2 L. Ed. 2d 545 \(1958\)](#) and [Jefferson Parish Hospital v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 1558, 80 L. Ed. 2d 2 \(1984\)](#) (other citations and footnote omitted)). Southern Card's state law

antitrust claims are to be construed under federal law, except for interstate commerce issues. See [St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.](#), 457 So. 2d 1028, 1032 (Fla. 2d DCA 1984) (the Florida legislature has adopted as the law of Florida [\*11] the body of **antitrust law** developed by the federal courts under the Sherman Act); [Hackett v. Metropolitan General Hospital](#), 465 So. 2d 1246, 1251 (Fla. 2d DCA 1985) (same).

In this case, Lawson Mardon challenges the application of the *per se* rule, contending that the alleged tie should be analyzed under the rule-of-reason standard, and not as a *per se* illegal restraint, because the alleged "tie" in this case is really a vertical nonprice restraint. See [Business Electronics Corp. v. Sharp Electronics Corp.](#), 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988) (applying rule of reason analysis to a vertical nonprice restraint).

**HN4**[] In traditional "tying" cases, in which the end consumer is subjected to the tie-in, the Eleventh Circuit uses a *per se* analysis. See, e.g., [Tic-X-Press](#), 815 F.2d at 1414 (applying *per se* analysis). However, "not every refusal to sell two products separately can be said to restrain competition." [Jefferson Parish](#), 466 U.S. at 11. This is especially the case when the tie-in does not force the *end consumer* to buy the two products together. [Roy B. Taylor Sales, Inc. v. Hollymatic Corp.](#), 28 F.3d 1379, 1382 (5th Cir. 1994), cert. denied, 513 U.S. 1103, 115 S. Ct. [\*12] 779, 130 L. Ed. 2d 673 (1995). The practice challenged in this case is unlike traditional tying arrangements, historically condemned under the antitrust laws, because Southern Card does not allege that the ultimate consumer must buy the tied product (a local view postcard) to buy the tying product (a Disney postcard). As another district court has recently recognized, "the law has undergone substantial changes in recent years and modern tying cases indicate that tying may be subject to a 'rule of reason' balancing approach." [Servicetrends, Inc. v. Siemens Medical Systems, Inc.](#), 870 F. Supp. 1042, 1060 n.11 (N.D. Ga. 1994) (four Supreme Court Justices favor removing tying from the *per se* category of antitrust offenses) (citing [Jefferson Parish Hosp. v. Hyde](#), 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)).<sup>2</sup> The Eleventh Circuit has recognized that, **HN5**[] although tying arrangements are one of the classic *per se* forms of anti-competitive behavior, such claims can also be analyzed under the rule of reason in certain instances. [Thompson v. Metropolitan Multi-List, Inc.](#), 934 F.2d 1566, 1574 (11th Cir. 1991), cert. denied sub nom. [DeKalb Bd. of Realtors, Inc. v. Thompson](#), 506 U.S. 903, 121 L. Ed. 2d 219, 113 S. Ct. 295 (1992) (citing [Tic-X-Press, Inc. \[\\*13\] v. Omni Promotions Co. of Ga.](#), 815 F.2d 1407 (11th Cir. 1987) and [Times-Picayune Publishing Co. v. United States](#), 345 U.S. 594, 608-10, 97 L. Ed. 1277, 73 S. Ct. 872, (1953)). This shift to a rule of reason analysis is particularly evident in cases involving middlemen, who are intermediate links in the chain of commerce.

In certain situations, **HN6**[] a tie-in can foreclose some distributors of the tied product without threatening the kind of impact on [\*14] consumers that anti-tying rules are designed to prevent. IX Philip E. Areeda, [Antitrust Law](#) § 1725a., at 317 (1991). Requiring a distributor to purchase a tied product from the manufacturer need not impair the ultimate consumers' purchases from the manufacturer's rivals who sell directly to consumers or who continue to reach consumers through an ample number of other dealers. *Id.* Arrangements whereby the manufacturer requires a distributor (or dealer) to carry a less popular item from its line in order to receive a more popular item has been described by various courts as "full" or "representative" line forcing or "vertical nonprice restraints," undeserving of *per se* treatment. When "only dealers are subject to a tie, competitors do not lose a segment of the tied market if there are genuine alternative paths to consumers." [Taylor](#), 28 F.3d at 1383.

The Eleventh Circuit has not ruled on a case involving a distributor or middleman subjected to an alleged tie-in,<sup>3</sup> however, other appellate courts have considered "forcing" or vertical nonprice arrangements similar to the one in the instant case and determined such arrangements were not *per se* illegal. **HN7**[] In cases [\*15] in which

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<sup>2</sup> "This evolution in judicial thinking is based on a reevaluation of the economic theory associated with tying. Originally, tying was condemned because of a fear that a firm with monopoly power in the tying product market would be able to use that power as a lever into the tied product market. The leverage theory underpinning the *per se* treatment of tying has lost favor, however, as economists today generally concede that tying cannot transfer monopoly power from one market to another." [Servicetrends, Inc. v. Siemens Medical Systems, Inc.](#), 870 F. Supp. 1042, 1060 n.11 (N.D. Ga. 1994).

<sup>3</sup> Compare [Graphic Products Distributors v. Itek Corp.](#), 717 F.2d 1560, 1568 (11th Cir. 1983) (holding anticompetitive effect to be "at the center of the analysis" of vertical nonprice restraint claim).

manufacturers required dealers to carry a full or representative line, or conditioned purchase of a more popular product on the purchase of a less popular product, appellate courts have held that such arrangements were not illegal *per se*, since they often promote competition, rather than stifle it, thereby benefitting the ultimate consumer. See, e.g., [Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379, 1383 \(5th Cir. 1994\)](#) (holding manufacturer's requirement that dealer buy less popular product to have access to more popular product to be a vertical nonprice restraint), cert. denied, 513 U.S. 1103, 115 S. Ct. 779, 130 L. Ed. 2d 673 (1995); [Smith Machinery Co., Inc. v. Hesston Corp., 878 F.2d 1290, 1296 \(10th Cir. 1989\)](#) (holding manufacturer's requirement for distributor to carry full line to be a vertical nonprice restraint), cert. denied, 493 U.S. 1073, 107 L. Ed. 2d 1026, 110 S. Ct. 1119 (1990); [Southern Pines Chrysler-Plymouth v. Chrysler Corp., 826 F.2d 1360, 1363 \(4th Cir. 1987\)](#) (holding manufacturer's conditioning dealer's purchase of desirable autos on purchase of hard-to-sell autos not within antitrust statute); [Fox Motors, Inc. v. Mazda Distributors, 806 F.2d 953, 959 \(10th Cir. 1986\)](#) (holding challenged [\*16] allocation system was not *per se* unlawful); [Paul E. Volpp Tractor Parts v. Caterpillar, Inc., 917 F. Supp. 1208, 1231 \(W.D.Tenn. 1995\)](#) (holding *per se* analysis of exclusive line-forcing arrangement to be inappropriate).

In [Smith Machinery Co., Inc. v. Hesston Corp., 878 F.2d 1290 \(10th Cir. 1989\)](#), the Tenth Circuit held that an arrangement whereby a manufacturer required a dealer to carry one product in its line to receive the more popular product (but did not prohibit the dealer from carrying competing lines) enhanced interbrand competition by making another product available for sale to the public. [\*Id.\* at 1296](#); see also [Paul E. Volpp, 917 F. Supp. at 1230](#) (exclusive line forcing arrangement enhanced interbrand competition). The plaintiff in *Smith* argued that due to its limited [\*17] financial resources, this requirement restricted competition because every forced purchase of the defendant's "tied" product effectively foreclosed the plaintiff's purchase of a product sold by the defendant's competitor. [Smith, 878 F.2d at 1296](#). The Tenth Circuit rejected this argument, saying:

**HN8** [↑] Where a dealer is serving as an intermediate link in a distribution chain, if one manufacturer is foreclosed from selling to a dealer because of [an] arrangement, it is likely going to find another way to take its product to market, providing a profit potential continues to exist In such a case, there is no ultimate foreclosure to the consumer of a choice of goods. In other more traditional tying arrangements there is an ultimate foreclosure of choice to the ultimate consumer. Thus, a foreclosure of choice to an ultimate consumer appears to be the principal key to a tie that is illegal *per se*. No such foreclosure occurs or is threatened in a typical line forcing situation....

*Id.*

Similarly, in [Ray B. Taylor Sales, Inc. v. Hollymatic Corp.](#), the Fifth Circuit considered an alleged tie in which the manufacturer of foodhandling equipment conditioned the distributor's [\*18] purchase of patty machines on the purchase of patty paper to be used with the machine. [28 F.3d 1379 \(5th Cir. 1994\)](#), cert. denied, 115 S. Ct. 779 (1995). The Fifth Circuit held that the agreement constituted a vertical nonprice restraint between a manufacturer and dealer on goods that the dealer offered to customers independently--in effect an exclusive dealing agreement [28 F.3d at 1384](#). The customers purchasing the patty machines from the distributor were free to buy the patty paper from another paper manufacturer elsewhere; only the distributor was bound. *Id.* "Such an arrangement is not the sort 'that would always or almost always tend to restrict competition and decrease output'" and does not warrant *per se* analysis. [28 F.3d at 1384-85](#) (quoting [Sharp, 485 U.S. 717 at 723](#)).

Rejecting the *per se* analysis, the Fifth Circuit used the rule of reason standard, holding that such an arrangement would be illegal only if it had a substantially adverse effect on competition. [\*Id.\* at 1385](#); see also [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343, 73 L. Ed. 2d 48, 102 S. Ct. 2466 \(1982\)](#) (party challenging the alleged unlawful tie must set forth both the tying arrangement and that the arrangement [\*19] is "an unreasonable restraint on competition"); [Paul E. Volpp Tractor Parts v. Caterpillar, Inc., 917 F. Supp. 1208, 1231 \(W.D. Tenn 1995\)](#) (citing *Maricopa* and *Taylor*). **HN9** [↑] When an alleged action is not *per se* illegal, the Court must apply the rule of reason to determine whether the restrictive practice imposes an unreasonable restraint on competition. [Sharp, 485 U.S. at 723](#).

#### 1. Anticompetitive effect

Lawson Mardon contends that, as in *Smith Machinery and Taylor*, Lawson Mardon's packaged sales arrangement only affected distributors and did not foreclose competition in the local view postcard market for the ultimate consumers. Lawson Mardon contends that "faced with vigorous competition from other postcard manufacturers," it is merely using its exclusive arrangement with Southern Card as a means to bring its entire line of Disney and local view postcards to market, and there "has been no foreshore to the consumer of a choice of postcards."

In this case, Southern Card serves as an intermediate link in a distribution chain between manufacturers and retailers, who then sell to the ultimate consumer. This is not a case of foreclosure to the ultimate consumer [\*20] -- the "principal key to a tie that is illegal *per se*." See [Smith, 878 F.2d at 1296](#). Since Southern Card fails to allege a tie-in that is illegal *per se*, its tying claim will be evaluated under the rule of reason approach. Under this approach, Southern Card must set forth the alleged tying arrangement and that the arrangement unreasonably restrains competition. Lawson Mardon seeks summary judgment on the tying claims, contending that Southern Card has failed as a matter of law to demonstrate that Lawson Mardon has unreasonably restrained competition.

Southern Card contends that three items demonstrate the "anticompetitive effect" of Lawson Mardon's actions in the local view postcard market First, Southern Card contends that a competing distributor has testified that it will not buy local view postcards from other manufacturers. When the distributor was asked, "If a printer solicited you tomorrow, for example offering you let's say a better price and a higher quality of general and local view cards, would you use that printer?", the distributor merely answered "No." Doc. 87, Ex. 3 at 26, Scenic Card Depo. However, the same distributor testified that Lawson Mardon did not require [\*21] him to purchase his general and local view cards from Lawson Mardon, but that he did so in part not to jeopardize the relationship. *Id.* Southern Card's interpretation of a competing distributor's preference for Lawson Mardon's local view cards, without more, is speculation. [HN10\[\]](#) "Speculation about anticompetitive effects is not enough." [Taylor, 28 F.3d at 1385](#).

Second, Southern Card contends that Lawson Mardon has a disproportionate share of the local view market based on the statement of a competing distributor. In fact, the distributor was asked, "Is Lawson Mardon's share of the non-Disney market in this local area greater than outside of this area?" He responded, "It could be." The distributor's lack of expertise in assessing market share underscores the difference between a lay opinion and an economist's expert opinion. Southern Card has failed to present any supportable opinion on the size of Lawson Mardon's local view market share in or outside of Orlando. See [American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 \(11th Cir. 1985\)](#) (relevant market cannot be based on lay opinion testimony).

Third. Southern Card contends that consumers pay more for local view cards [\*22] in Orlando than elsewhere in the state. Even assuming *arguendo* that Dr. Seaman's study is valid <sup>4</sup> for the price of local view cards sold within and outside the Orlando area, Dr. Seaman's conclusions are without foundation since he has not adequately derived the relevant market for the tied product, local view postcards.

#### [HN11\[\]](#)

In order to show anticompetitive effect under the rule of reason standard, "a plaintiff must first offer proof of a 'well-defined relevant market upon which [\*23] the challenged anticompetitive actions would have had a substantial impact.'" Cf. [Graphic Products Dist. v. Itek Corp. 717 F.2d 1560, 1569](#). In the case of a tying vertical nonprice restraint between a manufacturer and a distributor, the manufacturer's power in the tying market "tells us nothing of other [competing] distributors." [Taylor, 28 F.3d at 1384](#). To survive summary judgment, Southern Card must show an anticompetitive effect in the tied market Evaluation of the anticompetitive effect of an alleged restraint is "rendered impossible in the absence of proof regarding the economic significance (or relevance) of the market

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<sup>4</sup> Dr. Seaman's survey is of little value for purposes of determining the cause of the alleged price differential. First, Southern Card did not file the supporting information with Dr. Seaman's affidavit. Second, any price differential may be caused by the biased sample of local view postcard purchases from Orlando gift and souvenir shops, rather than from lower-cost retail outlets served by Southern Card. Third, Dr. Seaman fails to factor in differentials in the cost of living (or cost of a vacation) in the various parts of the state.

allegedly influenced by the defendant's conduct." *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 423 (11th Cir. 1984).

**HN12**[] Southern Card must establish the particularized or relevant market in which the defendant's actions had an anticompetitive effect. The relevant market contains a product dimension and a geographic dimension, both of which must be shown to be economically significant. *Id.* The product dimension is determined by the availability of substitutes to which consumers can turn in response to price increases and other existing [\*24] or potential producers' ability to expand output *Id.* The geographic dimension is the area in which the product or its reasonably interchangeable substitutes are traded. *Id.*

Southern Card has alleged that the relevant product market for the tied product is local (and general) view cards. Seaman Report P 1a. Dr. Seaman opines that the tying product is Disney postcards and the tied product is local view cards based on his analysis of their substitutability and cross price elasticities. Lawson Mardon challenges Southern Card's definition of two separate product markets, contending that Disney postcards and local view postcards are one product with high substitutability.<sup>5</sup> Lawson Mardon also challenges the relevant geographic market of the greater Orlando area contending that the geographic market for postcards is national or international. The Court finds that, even assuming *arguendo* that local view postcards constitute the relevant product market, Southern Card offers insufficient proof to create a genuine issue of material fact as to the relevant geographic boundaries of the local view postcard market. **HN13**[] Without a definition of the relevant market in which commerce is allegedly [\*25] being restrained, there is no way to measure the anticompetitive effect. *American Key Corp. v. Cumberland Assoc.*, 579 F. Supp. 1245, 1255 (N.D. Ga. 1983) (rejecting plaintiff's definition of geographic market), aff'd, 762 F.2d 1569 (11th Cir. 1985) (affirming grant of summary judgment). "Ordinarily 'the relevant geographic market is the area in which sellers of the particular product or service operate and to which purchasers can practicably turn for such products or services.'" *579 F. Supp. at 1256* (quoting H.M. Applebaum, et al., *Antitrust Law Developments*, at 51 (ABA 1975)).

**HN14**[]

In determining the relevant geographic market in which a product or its substitutes are traded, "such economic and physical barriers to expansion as transportation costs, delivery limitations and customer convenience and preference must be considered." *Draper*, 735 F.2d at 423 (quoting *Hornsby Oil Co. v. Champion Sparkplug*, 714 F.2d 1384, 1394 (5th Cir. 1983)). [\*26] The location and facilities of other distributors are essential in determining the relevant geographic market *Draper*, 735 F.2d at 423. "Economically significant geographic barriers limit the ability of sellers outside the market to operate within, and the ability of purchasers to obtain the product from suppliers outside the geographic area." *Id.* (citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)). "If sellers within the market must take account of sellers outside it, either because those sellers are mobile and can easily come into the area to sell, or because buyers are mobile and can easily go outside the area to buy, the market is being defined too narrowly." *Draper*, 735 F.2d at 423 (quoting L. Sullivan, *Handbook of the Law of Antitrust* § 19 at 68 (1977)).

In *Draper*, the Eleventh Circuit affirmed the district court's granting of a directed verdict when the plaintiff insufficiently proved the relevant market. 735 F.2d 414 (11th Cir. 1984). The plaintiff defined the geographic market as the four-state area in which it had 50% of the relevant product sales. *Id. at 423*. The Eleventh Circuit held that any showing on how the four-state [\*27] sales area functioned as a distinct or relevant geographic market was "notably absent from the record"; the plaintiff had offered no evidence on the location of the product manufacturers (other than defendant's location) or the ability of those competing manufacturers to sell in the four-state area. *Id.* Even though the plaintiff-distributor competed in the four-state area with eight to ten other distributors, there was no evidence in the record concerning where those competing distributors obtained the product or sold the product *Id.* The plaintiff also failed to introduce evidence of the sales pattern of competing distributors, other than that of its main competitor. *Id.* Upon completing its analysis, the Eleventh Circuit rejected the four-state sales area as the appropriate geographic market definition. *Id. at 425*.

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<sup>5</sup> The Court addresses this issue in greater detail *supra*.

In this case, Southern Card's expert, Dr. Seaman, opines that the relevant geographic market is two counties in the greater Orlando area, closest to Disney World. Even if this is arguably the relevant geographic market for Disney postcards, it is not the relevant market for local view postcards, the market for which anticompetitive effects must be considered. [\*28] As Dr. Seaman readily admits, the manufacturers of local view postcards who compete with Lawson Mardon are national and international. Further, the postcards are not printed locally in Orlando, and it is not necessary for the manufacturer to be located nearby since the "local view" depicted on the postcard is often owned by the distributor and merely printed by the manufacturer. These factors alleviate the necessity of using a locally-based manufacturer. It is undisputed that Lawson Mardon sells nationwide and that Southern Card has purchased local view cards from other national and international manufacturers, Dynacolor (of Miami, Florida) and Argentofot (of Germany).

Additionally, Southern Card's customers, the chain stores, purchase local view postcards for sale to their customers throughout the state of Florida, not just in Orlando. Dr. Seaman admits that chain store buyers negotiate with distributors to service large areas of the state, not just the Orlando area. These factors support at least a statewide, if not a national, geographic market for local view postcards. Applying the Eleventh Circuit's *Draper* analysis to the instant case, Southern Card has failed to sufficiently [\*29] identify the greater Orlando area as a distinct geographic market.

In this case, it is undisputed that Southern Card competes with eight other independent postcard distributors. However, other distributors' sales areas or sales patterns, or which manufacturers they purchase from, are factors completely absent from Dr. Seaman's definition of the relevant geographic market. The only information of the sales of manufacturers competing with Lawson Mardon is a distributors' guess that Lawson Mardon has less than 50% of the local view sales in Florida; therefore other manufacturers must have more than 50%. The Court finds that Southern Card's opposition and expert's report is devoid of sufficient evidence to support the use of "greater Orlando" as the relevant geographic market. By failing to sufficiently define the relevant geographic market, Southern Card cannot demonstrate that Lawson Mardon's actions have an anticompetitive effect on the local view postcards market. Summary judgment is warranted on the tying claims, under the rule of reason approach.

## 2. *Per se* analysis

The Court believes that the rule of reason approach is appropriate in this case. However, even if the Court were [\*30] to use a *per se* analysis, Southern Card's tying claims would fail. [HN15](#)[] The four elements required to prove that a tying arrangement is illegal *per se*, are those set forth in the Eleventh Circuit case of *Tic-X-Press, Inc. v. Omni Promotions Co. of Ga.*:

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

[815 F.2d 1407, 1414 \(11th Cir. 1987\).](#)

Assuming *arguendo* that the *per se* test is appropriate, summary judgment nevertheless would be warranted because the alleged "Disney" and non-Disney classifications are not two separate products such that there can be a "tie-in" between them (element # 1). Rather, all of Lawson Mardon's postcards are sufficiently unitary to be considered a single product. See Areeda P 1725d, at 324 & n.29. Whether one or two products [\*31] are involved "turns not on the functional relation between them, but rather on the character of the demand for the two items." [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 19, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). No tying arrangement can exist unless there is a sufficient demand for the purchase of local view cards separate from Disney cards to identify a distinct product market in which it is efficient to offer the local view postcards separately from Disney cards. See [id. at 19](#).

It is undisputed that there are significant fluctuations in the demand for "Disney" postcards throughout the state; there is limited demand for Disney postcards other than in the Orlando area.<sup>6</sup> However, fluctuating demand in different parts of the state for a particular type of postcard does not create two separate products. Compare *Southern Pines Chrysler-Plymouth v. Chrysler Corp.*, 826 F.2d 1360, 1363 (4th Cir. 1987) (holding that various models of one car manufacturer are not separate products; differences in demand for models merely reflection of shifting tastes within same product market).

[\*32] Southern Card's expert, Dr. Seaman, opines that the large volume of Disney postcards sold in the two-county area in close proximity to the Disney attractions "is suggestive of limited substitutability between the two types of [Disney and local view] postcards" and thus suggests the existence of two separate product markets. Seaman's Rep. at 6-7. However, in his deposition, Dr. Seaman acknowledged that the final consumer (once distributors and retailers are excluded) would probably view Disney and non-Disney postcards as "reasonably similar products." Doc. 56 at 112-13; 133-34 ("If the only consumer worth considering in this situation is the final consumer of these cards, it wouldn't make any difference to them.").

Further, Lawson Mardon's expert, Dr. Blair, refutes the opinion that the popularity of Disney cards in Orlando creates two separate product markets:

Dr. Seaman [Plaintiff's expert] attempts to bolster the notion that Disney postcards and non-Disney postcards are in separate markets *in Orlando* because Disney postcards are more popular *in Orlando* than non-Disney postcards. For Dr. Seaman, Disney and non-Disney postcards are *not* in separate product [\*33] markets in Pensacola, but they are in separate product markets in Orlando. Frankly, this is economically illogical. When products are differentiated, some are apt to be more popular than others. This does not place them in separate markets for antitrust purposes.

Doc. 50 at 8. In fact, the more logical analysis is that the "Disney" cards have a particularly localized demand in the Orlando area because they are associated with the principal tourist attraction there, Walt Disney World (and its characters).

However, fluctuations in the demand for particular types of postcards in the different parts of the state does not create separate product markets.<sup>7</sup> Dr. Seaman admits that "a highly distinct localized demand" for postcards is "an inevitable element" present in each "relevant geographic market" Doc. 87, Ex. 13 at 16.

After all, local view is by definition limited [sic] to a particular location. There is no real market for Grand Canyon local view post cards in the area surrounding Mount Rushmore. [One distributor] has testified that he is not able to sell a warehouse full of Disney post cards in the Panhandle section of Florida, which is at least in the same state [\*34] as the Disney attractions.

*Id.* Dr. Seaman admits that, in order to support his analysis, he must deviate from the "general rule that two products do not vary in their degree of substitutability across geographical areas" and recognize Disney postcards as a separate product Dr. Seaman does not cite any legal or economic support for this admitted deviation from the general rule.

As further evidence of the separate markets for the products, Southern Card points to Lawson Mardon's own treatment of the Disney postcards as a separate product *is a vis* the local view postcards. It is undisputed that Lawson Mardon develops and engages in specific marketing plans for its Disney postcards, its distribution agreements have different sales requirements and separate pricing schedules [\*35] for the Disney postcards, and it will allow for separate ordering and delivery of Disney postcards. This evidence does not indicate two separate product markets; rather, it is simply an indication of Lawson Mardon's separate treatment of its more popular

<sup>6</sup> "In every area in Florida outside of the greater Orlando area, local view cards occupy the vast majority of rack space in retail outlets and greatly outsell all other postcards." Doc. 61 at 2.

<sup>7</sup> Dr. Blair uses the analogy of the varying demand for Coca Cola and RC Cola in the cities of Los Angeles and Houston. Despite the wide differences in demand in the two separate cities, the two colas are in the same product market.

featured postcards. Varying demand for a particular type of postcard in different parts of the state does not mean that two separate product markets exist for those products in the various areas. Compare [Southern Pines, 826 F.2d at 1363](#). Southern Card has failed to define a separate product market for Disney cards as required under a *per se* analysis. Summary judgment is due to be granted on the tying claims under a *per se* approach.

#### B. Monopoly claims - [15 U.S.C. § 2](#)

Southern Card claims that Lawson Mardon violated [§ 2](#) of the Sherman Act<sup>8</sup> by monopolizing and attempting to monopolize the market for the alleged tying product, the licensed Disney postcards. Lawson Mardon contends that Southern Card's claims for monopolization and attempted monopolization fail as a matter of law because Southern Card has not made any effort to measure market power in the relevant market.

[\*36] [HN17](#)<sup>↑</sup>

"The offense of monopoly under [§ 2](#) of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538, 1555 \(11th Cir. 1996\)](#) (quoting [United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#)), cert. denied, 117 S. Ct. 75 (1996). To establish an attempted monopolization claim, "a plaintiff must show (1) an intent to bring about a monopoly and (2) a dangerous probability of success." [Levine, 72 F.3d at 1555](#) (quoting [Norton Tire Co. v. Tire Kingdom Co., 858 F.2d 1533, 1535 \(11th Cir. 1988\)](#)).

[HN18](#)<sup>↑</sup> "Proof of monopoly power in the relevant market is the first element of a monopolization claim, and proof that there is a dangerous probability of the defendant successfully attaining monopoly power is the second element of an attempted monopolization claim." [Levine, 72 F.3d at 1556](#). A plaintiff's failure to adequately define the relevant market and to prove that the defendants possessed or [\*37] were close to possessing monopoly power in the relevant market, will be fatal to a [§ 2](#) claim for monopolization and for attempted monopolization. See *id.*

In this case, Lawson Mardon contends that Southern Card has failed to adequately define the relevant market, in that Southern Card's expert does not have any opinion regarding the [§ 2](#) claims. [HN19](#)<sup>↑</sup> The principal judicial device for measuring actual or potential market power remains market share, typically measured in terms of a percentage of total market sales." [U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 \(11th Cir. 1993\)](#), cert. denied, 512 U.S. 1221, 114 S. Ct. 2710, 129 L. Ed. 2d 837 (1994). Southern Card's expert, Dr. Seaman, testified that he did not have any opinion as to a violation of [§ 2](#), nor had he included such an analysis in his expert report. Doc. 56 at 70-71, Seaman Depo.<sup>9</sup>

[\*38] Under Eleventh Circuit precedent, [HN20](#)<sup>↑</sup> "construction of a relevant economic market or a showing of monopoly power in the market" cannot be based upon lay opinion testimony. [American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 \(11th Cir. 1985\)](#) (affirming summary judgment for defendant). In its opposition, Southern Card fails to point to any expert testimony regarding the relevant economic market, and can point only to the insufficient lay opinions of a competing distributor and a Southern Card employee. Southern Card has failed to produce any admissible evidence that creates triable issues of fact with respect to the existence of a cognizable market or Lawson Mardon's monopoly power in such a market. See *id.*; see also [Cal Distributing Co. v. Bay Distributors, Inc., 337 F. Supp. 1154, 1158 \(M.D. Fla. 1971\)](#) (holding that relevant geographic market was entire Florida west coast area, rather than merely Sarasota area, where each of the six competitors was distributing wine

<sup>8</sup> [HN16](#)<sup>↑</sup> [Section 2](#) provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ...." [15 U.S.C.A. § 2 \(West Supp. 1996\)](#).

<sup>9</sup> The Court also reviewed Dr. Seaman's supplemental affidavit filed on July 31, 1996 (Doc. 78) in opposition to Lawson Mardon's motion for summary judgment, and found no mention of an opinion as to the [§ 2](#) claims.

in the entire Florida west coast area). Lawson Mardon's motion for summary judgment on the § 2 claims is due to be granted.

C. State claims - Fla. Stat. § 542.18, .19 & .22

Southern Card claims [\*39] that Lawson Mardon's actions violated the Florida Antitrust Act. Florida antitrust law mirrors federal law as applied to the tying, monopolization and attempted monopolization claims in the instant case. See St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So. 2d 1028 (Fla. 2d DCA 1984). State law does not offer alternative grounds for Southern Card's claims to survive summary judgment.

Based on the foregoing, it is ordered as follows:

1. Lawson Mardon Post Card's Motion for Summary Judgment (Doc. 42) is GRANTED.
2. The case is removed from the November 1996 trial docket.
2. The Clerk is directed to enter a final judgment providing that the Plaintiff Southern Card & Novelty, Inc. shall take nothing on its claims against the Defendants, Lawson Mardon Label, Inc. d/b/a Lawson Mardon Post Card, and Daniel J. Saunders, and that the Defendants shall recover their costs of action.
3. The Clerk is directed to CLOSE the file.
4. Lawson Mardon's Motion to Strike Expert Affidavit Testimony and *In Limine* to Exclude Expert Testimony Regarding Damages (Doc. 86) is DENIED as moot.
5. Southern Card's Motion *In Limine* to Prohibit Evidence of Settlement or Compromise [\*40] (Doc. 88) is DENIED as moot.
6. Southern Card's Motion *In Limine* to Preclude Any Reference to the Trebling of Damages (Doc. 90) is DENIED as moot.
7. Southern Card's Motion *In Limine* to Prohibit Bad Acts Evidence (Doc. 92) is DENIED as moot.
8. Southern Card's Motion to Compel Attendance of Witnesses at Trial (Doc. 115) is DENIED as moot.

DONE AND ORDERED in Chambers, Orlando, Florida, this 19th day of November, 1996.

ANNE C. CONWAY

United States District Judge

## **State ex rel. Ieyoub v. Bordens, Inc.**

Court of Appeal of Louisiana, Fourth Circuit

November 20, 1996, Decided

No. 95-CA-2655

**Reporter**

684 So. 2d 1024 \*; 1996 La. App. LEXIS 2746 \*\*; 95-2655 (La.App. 4 Cir. 11/20/96);

STATE OF LOUISIANA, EX REL RICHARD P. IEYOUB, ATTORNEY GENERAL, ET AL v. BORDENS, INC.

**Subsequent History:** [\*\*1] Rehearing Refused January 16, 1997. Released for Publication January 16, 1997.

**Prior History:** APPEAL FROM CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS. NO. 94-15827, DIVISION "J". HONORABLE GEORGE C. CONNOLLY, JR., JUDGE.

**Disposition:** AFFIRMED

### **Core Terms**

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prescription, antitrust, bids, one year, bid-rigging, conspiracy, period of prescription, federal complaint, attorney general, damages, antitrust action, parens patriae, prescribed, school system, concealment, schools, prices, milk

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN1** **Public Enforcement, State Civil Actions**

*La. Const. art. IV, § 8* and *La. Rev. Stat. Ann. § 13:5036* provide the Attorney General's authority to institute proceedings to protect the state's interests. *La. Rev. Stat. Ann. § 51:138* of the Louisiana Anti-Monopoly Statute, *La. Rev. Stat. Ann. §51:121 et seq.*, provides authority to file suit to enforce the **antitrust law**.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN2** **Public Enforcement, State Civil Actions**

State attorney generals have parens patriae authority to bring antitrust actions on behalf of state citizens.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

684 So. 2d 1024, \*1024 (1996 La. App. LEXIS 2746, \*\*1

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Res Judicata

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Governments > Federal Government > Claims By & Against

Governments > Legislation > Statute of Limitations > General Overview

### **HN3** [down] Public Enforcement, State Civil Actions

A final judgment in a criminal prosecution by the United States shall be prima facie evidence against a defendant in any civil proceeding as to all matters which would be res judicata between the parties to the suit or prosecution. Running of prescription of a private right of action arising under the laws and based in whole or in part on any matter complained of in the proceeding shall be suspended during the pendency of the federal criminal proceeding. [La. Rev. Stat. Ann. § 51:132](#) of the Louisiana Anti-Monopoly Statute, [La. Rev. Stat. Ann. §51:121 et seq.](#)

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Torts > Procedural Matters > Statute of Limitations > General Overview

### **HN4** [down] Public Enforcement, State Civil Actions

An antitrust action sounds in tort and the one year prescriptive period of [La. Civ. Code Ann. art. 3492](#) applies in a private action.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

Torts > Procedural Matters > Statute of Limitations > General Overview

### **HN5** [down] Public Enforcement, State Civil Actions

The one year prescriptive period begins to run from the date actual or appreciable damage is sustained. [La. Civ. Code Ann. art. 3492](#). The damage need not be calculable or fully incurred but cannot be speculative. The commencement of prescription is delayed when a complex business tort, similar to a continuing tort, is involved. Prescription does not begin to run until the continuing tort ceases. There must be continuing acts coupled with continued damages.

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Interpretation

### **HN6** [down] Legislation, Statute of Limitations

Prescriptive statutes are strictly construed against prescription and in favor of the claim. If there are two possible constructions of a prescriptive statute, the one that maintains the action should be adopted.

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

### **HN7** Legislation, Statute of Limitations

The burden of proving that a suit has prescribed rests with the party pleading prescription. When a petition reveals on its face that prescription has run, the plaintiff has the burden of showing that the claim has not prescribed.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

### **HN8** Public Enforcement, State Civil Actions

In the context of a continuing conspiracy to violate antitrust laws, each time a plaintiff is injured by the act of a defendant, a cause of action accrues to recover damages caused by that act and the statute of limitations runs from the commission of the last act. Federal cases interpreting the statute of limitations involved in antitrust actions hold that in a conspiracy action the period begins with an overt act pursuant to the conspiracy. Cases look to the last bid in which wrongdoing is alleged in bid rigging cases.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Torts > Procedural Matters > Statute of Limitations > General Overview

### **HN9** Public Enforcement, State Civil Actions

In an antitrust action the plaintiff must know or should have known that he is sustaining an actionable injury before the prescriptive period begins to run. When an act does not effect a traumatic injury but produces ill effects by passage of time, and it is impossible to designate the exact moment when the act produced the requisite damage to start prescription, recovery should be allowed for all damages sustained within one year prior to the filing of the suit.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Revival

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

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

#### **HN10** [blue icon] **Statute of Limitations, Revival**

There are two grounds for allowing an antitrust suit to be filed more than four years after the events that create the cause of action: the continuing conspiracy or continuing violation exception that allows a cause of action to accrue whenever the defendant commits an overt act to further the antitrust conspiracy, and the revival of the cause of action outside the limitations period because the plaintiff's damages were speculative or unprovable when the act originally occurred.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **HN11** [blue icon] **Public Enforcement, State Civil Actions**

Actions to show fraudulent concealment need not be separate from the acts underlying the bid-rigging.

**Counsel:** RICHARD P. IEYOUB, Attorney General, JANE BISHOP JOHNSON, Assistant Attorney General, Baton Rouge, Louisiana 70801, Attorneys for Plaintiff/Appellee.

ALSTON & BIRD, MICHAEL A. DOYLE, Atlanta, Georgia 30309-3424 and JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE, L.L.P., EDWARD H. BERGIN, PAULINE F. HARDIN, NAN ROBERTS EITEL, New Orleans, Louisiana 70170-5100, Attorneys for Defendant/Appellant.

**Judges:** PANEL Judge Denis A. Barry, Judge Robert J. Klees, Judge Joan Bernard Armstrong. JUDGE DENIS A. BARRY, Author.

**Opinion by:** DENIS A. BARRY

### **Opinion**

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Pg 1

[\*1026] On October 10, 1994 the State ex rel. the Attorney General filed a petition for treble damages (pursuant to Louisiana Anti-Monopoly Statute, [La. R.S. 51:132, 51:137](#) and [51:138](#)) against Borden's Inc. (Borden) in state court.

<sup>1</sup> The Attorney General sued on behalf of a number of Louisiana school systems alleging the schools did not receive competitive bids or pay competitive prices for milk; and on behalf of school <sup>\*\*2</sup> children who paid inflated prices due to bid-rigging. <sup>2</sup> Attached to the petition was: an October 12, 1993 federal criminal antitrust complaint; Borden's guilty plea agreement; a federal judgment which fined Borden \$ 750,000 for its participation in a conspiracy to rig bids (Sherman [Antitrust Law](#)) which was signed April 14, 1994 and entered April 18, 1994. <sup>3</sup> Borden removed [Pg 2] the case to federal court, but it was remanded to state court with a declaration that the Louisiana Attorney General had authority to sue in a *parens patriae* capacity, and Louisiana had a quasi-sovereign interest in the economic well-being of its citizens and was a real party in interest. In state court Borden filed an exception of prescription which was overruled.

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<sup>1</sup> The petition is stamped October 10, 1994 and has an entry date of October 12, 1994.

<sup>2</sup> In two paragraphs the state alleges that the children who suffered damages are plaintiffs but they are not listed in the caption. Only the school systems are in the caption.

<sup>3</sup> The Attorney General and Borden make reference to an amended petition which included a number of Catholic dioceses. The record does not contain an amended petition.

### [\*\*3] THE LAW

**HN1** [↑] [La. Const. art. IV, § 8](#) and [La. R.S. 13:5036](#) provide the Attorney General's authority to institute proceedings to protect the state's interests. [La. R.S. 51:138](#) provides authority to file suit to enforce the [Antitrust Law](#). Here the State filed the action on behalf of the school systems and the citizens of the state as *parens patriae*, literally "parent of the country," the concept of "standing" which is utilized to protect quasi-sovereign interests such as the general economy of the state. **HN2** [↑] State attorney generals have *parens patriae* authority to bring antitrust actions on behalf of state citizens. See generally [Alfred L. Snapp and Son, Inc. v. Puerto Rico ex rel., Barez, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 \(1982\)](#); [State v. Time, Inc., 249 So. 2d 328 \(La. App. 1st Cir. 1971\)](#), writ denied 259 La. 761, 252 So. 2d 456 (La. 1971); [Black's Law Dictionary](#), 1003 (5th Ed. 1979); National Association of Attorneys General, L. Ross, ed., [State Attorneys General: Powers and Responsibilities](#), 91-92.<sup>4</sup> **HN3** [↑] A final judgment in a criminal prosecution by the United States "shall be prima facie evidence" against the defendant in any civil proceeding as to all matters [\*\*4] which would be res judicata between the parties to the suit or prosecution. "Running of prescription of a private right of action arising under these laws and based in whole or in part on any matter complained of in the [Pg 3] proceeding shall be suspended during the pendency of the [federal criminal] proceeding." [La. R.S. 51:132](#).

There is no statute of limitation in [La. R.S. 51:121 et seq.](#), the Louisiana Anti-Monopoly Law, more particularly [R.S. 51:137](#) which provides for recovery of treble damages. There is one Louisiana case which discusses a prescriptive period. In [Loew's, Incorporated v. Don George, Inc., 237 La. 132, 110 So. 2d 553 \(La. 1959\)](#), the Supreme Court held that **HN4** [↑] an antitrust action sounds in tort and the one year prescriptive period of [La. C.C. art. 3492](#) applies in a private action. See also [\*\*5] [Delaughter v. Borden Company, 364 F.2d 624 \(5th Cir. 1966\)](#); [Diliberto v. Continental Oil Company, 215 F. Supp. 863 \(E.D. La. 1963\)](#)<sup>5</sup>; ABA Antitrust Section, [State Antitrust Practice and Statutes: Chapter 20 for the State of Louisiana](#), 20-21 (1990).

**HN5** [↑] The one year prescriptive period begins to run from the date actual or appreciable [\*1027] damage is sustained. [La. C.C. art. 3492](#). The damage need not be calculable or fully incurred but cannot be speculative. [Harvey v. Dixie Graphics, Inc., 593 So. 2d 351 \(La. 1992\)](#). The commencement of prescription is delayed when a complex business tort, similar to a continuing tort, is involved. Prescription does not begin to run until the continuing tort ceases. [National Council on Compensation Insurance v. Quixx Temporary Services, Inc., 95-0725 \(La. App. 4 Cir. 11/1/95\), 665 So. 2d 120](#). There must be continuing acts coupled [\*\*6] with continued damages. *Id.*; [South Central Bell Telephone Company v. Texaco, Inc., 418 So. 2d 531 \(La. 1982\)](#).

**HN6** [↑] Prescriptive statutes are strictly construed against prescription and in favor of the claim. [Bustamento v. Tucker, 607 So. 2d 532 \(La. 1992\)](#). If there are two [Pg 4] possible constructions of a prescriptive statute, the one that maintains the action should be adopted. [Louisiana Health Services and Indemnity Company v. Tarver, 93-2449 \(La. 4/11/94\), 635 So. 2d 1090](#).

**HN7** [↑] The burden of proving that a suit has prescribed rests with the party pleading prescription. [Boyd v. B.B.C. Brown Boveri, Inc., 26,889 \(La. App. 2 Cir. 5/10/95\), 656 So. 2d 683, writ not considered 95-2387 \(La. 12/8/95\), 664 So. 2d 417](#). When a petition reveals on its face that prescription has run, the plaintiff has the burden of showing that the claim has not prescribed. [Wimberly v. Gatch, 93-2361 \(La. 4/11/94\), 635 So. 2d 206](#); [Lima v. Schmidt, 595 So. 2d 624 \(La. 1992\)](#). [La. R.S. 51:122 et seq.](#) is a counterpart to § 1 of the Sherman Antitrust Act. The U.S. Supreme Court's interpretation of the Sherman Act is a persuasive influence on the interpretation of our state statutes. [Louisiana](#) [\*\*7] [Power and Light Company v. United State Pipe Line Company, 493 So. 2d 1149 \(La. 1986\)](#),

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<sup>4</sup> The Hart-Scott-Rodino Antitrust Act of 1976 provides that any Attorney General of a state has the authority to sue *parens patriae* for treble damages for a Sherman Act violation. [15 U.S.C. § 15c](#).

<sup>5</sup> [Loew's Incorporated](#), [Delaughter](#), and [Diliberto](#) use [La. C.C. art. 3536](#), which was subsequently incorporated into [La. C.C. 3492](#).

rehearing granted on other grounds. Generally, an antitrust cause of action accrues when a defendant commits an act which injures a plaintiff's business. However, [HN8](#) in the context of a continuing conspiracy to violate antitrust laws, each time a plaintiff is injured by the act of a defendant, a cause of action accrues to recover damages caused by that act and the statute of limitations runs from the commission of the last act. [Al George, Inc. v. Envirotech Corporation](#), 939 F.2d 1271 (5th Cir. 1991), quoting [Zenith Radio Corporation v. Hazeltine Research, Inc.](#), 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971). See also [Imperial Point Colonnades Condominium, Inc.](#), 549 F.2d 1029 (5th Cir. 1977), cert. denied 434 U.S. 859, 98 S. Ct. 185, 54 L. Ed. 2d 132 (1977); [Bell v. Dow Chemical Company](#), 847 F.2d 1179 (5th Cir. 1988); [Poster Exchange, Inc. v. National Screen Service Corporation](#), 517 F.2d 117 (5th Cir. 1975). Federal cases interpreting the statute of limitations involved [Pg 5] in antitrust actions (four years under [15 U.S.C. § 15b](#)) hold that in a conspiracy action the period begins with an overt act pursuant to the conspiracy; cases look to the last bid in which wrongdoing is alleged in bid rigging cases. See [State of Texas v. Allan Construction Company](#), 851 F.2d 1526 (5th Cir. 1988).

[HN9](#) In an antitrust action the plaintiff must know or should have known that he is sustaining an actionable injury before the prescriptive period begins to run. When an act does not effect a traumatic injury but produces ill effects by passage of time, and it is impossible to designate the exact moment when the act produced the requisite damage to start prescription, recovery should be allowed for all damages sustained within one year prior to the filing of the suit. [Delaughter](#), 364 F.2d at 624.<sup>6</sup>

[\*\*9] However, [HN10](#) there are two grounds for allowing an antitrust suit to be filed more than four years after the events that create the [\*1028] cause of action: the continuing conspiracy or continuing violation exception that allows a cause of action to accrue whenever the defendant commits an overt act to further the antitrust conspiracy; and the revival of the cause of action outside the limitations period because the plaintiff's damages were speculative or unprovable when the act originally occurred. [Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.](#), [Pg 6] 677 F.2d 1045 (5th Cir. 1982). See also [Zenith Radio Corporation](#), 91 S. Ct. at 795.

In order to avoid the federal statute of limitations a plaintiff may also invoke the fraudulent concealment doctrine, which is similar to Louisiana's doctrine of *contra non valentem*. Fraudulent concealment involves proof that the defendant concealed the injurious conduct and that the plaintiffs did not discover the conduct despite due diligence. Some federal circuits have held that antitrust violations arising from bid-rigging conspiracy are self-concealing and affirmative acts of concealment need not be shown. [New York v. Hendrickson](#) [\\*\\*101](#) [Brothers, Inc.](#), 840 F.2d 1065 (2d Cir. 1988), cert. denied 488 U.S. 848, 109 S. Ct. 128, 102 L. Ed. 2d 101 (1988); [State of Colorado ex rel. Colorado Attorney General v. Western Paving Construction Co.](#), 833 F.2d 867 (10th Cir. 1987), panel opinion vacated en banc 841 F.2d 1025 (1988). See also [Hobson v. Wilson](#), 237 U.S. App. D.C. 219, 737 F.2d 1 (D.C. Cir. 1984), cert. denied 470 U.S. 1084, 105 S. Ct. 1843, 85 L. Ed. 2d 142 (1985). The Fifth Circuit rejects that argument, but holds that [HN11](#) actions to show fraudulent concealment need not be separate from the acts underlying the bid-rigging. [State of Texas](#), 851 F.2d at 1531.

## DISCUSSION

Borden argues that prescription runs where the State asserts claims in its *parens patriae* capacity and here the one year prescriptive period has run. The Attorney General counters that prescription does not run against the State based on [La. Const. art. XII, § 13](#), which declares that "prescription shall not run against the state in any civil matter

<sup>6</sup> At issue in [Delaughter](#), 364 F.2d at 624, was Borden's alleged offering and paying of rebates and discounts, violations of the Louisiana Orderly Milk Marketing Act, which declared that each day's violation constituted a separate offense. The U.S. Fifth Circuit adopted Louisiana's one year prescriptive period because the Louisiana Supreme Court utilized the one year period in [Loew's Inc.](#), 237 La. at 132, 110 So. 2d at 553, which was a private anti-monopoly action. The Fifth Circuit reversed the district court's decision that the action prescribed because prescription ran from the month that Delaughter knew of Borden's injurious activities, and the action was filed more than one year afterward, and allowed Delaughter's claims for injuries sustained within one year of the filing of suit.

unless otherwise provided in the constitution or expressly by law." A *parens patriae* action brought by the State on behalf of its citizens has elements of private and public enforcement. The passage of the four year period under [\*\*11] federal law is used to bar actions by the states. See *State* [Pg 7] v. *Texas*, 851 F.2d at 1526. The Attorney General quotes the constitutional article which grants the State immunity, but provides no support for that proposition in this case where the State filed suit on behalf of citizens and school systems against whom prescription runs. See *State of Louisiana through Department of Highways v. City of Pineville*, 403 So. 2d 49 (La. 1981). The passage of the prescriptive period has barred antitrust actions by states. See *State v. Texas*, 851 F.2d at 1526.

The Attorney General also argues that *La. R.S. 51:121 et. seq.* does not set out a prescriptive period for antitrust actions, and a ten year period is appropriate because Borden was unjustly enriched. Borden correctly notes that the petition below did not raise an unjust enrichment claim. The Petition For Treble Damages Pursuant To The Louisiana Monopolies Law referred to *La. R.S. 51:132*, *51:137* and *51:138* and sought treble damages as a result of Borden's acts. The petition alleged a bid-rigging scheme that affected the ability of the schools to receive fair competitive bids and pay competitive prices on milk sold to [\*\*12] Louisiana schools. The petition claimed that Borden and its co-conspirators had a continuing agreement to allocate among themselves all or part of contracts to supply milk to schools, to refrain from submitting bids or to submit collusive, non-competitive and rigged bids, to supply milk to Louisiana schools at non-competitive prices. The petition claimed that Borden and the other co-conspirators discussed submission of bids, designated which conspirator was to be the low bidder, discussed and agreed upon prices to be bid, and submitted intentionally high bids. There is no mention of Borden's unjust enrichment except in an opposition to Borden's prescription exception. The petition did not allege unjust enrichment or quasi-contract. The one year prescriptive period of the *antitrust law*, La. [Pg 8] 51:121 et seq., applies. *Loew's Incorporated*, 110 So. 2d at 553; *Delaughter*, 364 F.2d at 624; *Diliberto*, 215 F. Supp. at 863.

[\*1029] Borden contends that the petition predicates liability entirely upon the federal criminal antitrust judgment. Borden argues that the state civil claim is limited to the time frame of the federal judgment ending in June, 1989 and the October 10, 1994 petition has [\*\*13] prescribed.

Paragraph 3 of the State's petition declares that "during the critical period, defendant engaged in the sale, processing and distribution of fluid milk...." Paragraph 10 of the petition filed October 10, 1994 states: "During the pertinent period, relative to the criminal judgment...." without directly stating the time period. The description of the offense in the federal information filed October 12, 1993 against Borden Inc. states: "Beginning at least as early as 1985 and continuing thereafter until at least June 1989, the exact dates being unknown to the United States, the defendant and others entered into and engaged in a combination and conspiracy to suppress and eliminate competition by rigging bids...." Borden pleaded guilty pursuant to a plea bargain agreement on October 12, 1993 and judgment, which declared that the conduct concluded in June, 1989, was entered on April 18, 1994.

The civil petition does not clearly set out the time periods. The federal complaint, which arose pursuant to a federal grand jury investigation, stated that Borden's activities continued at least until June, 1989. The criminal antitrust judgment is *prima facie* evidence against Borden [\*\*14] in the civil proceeding as to all matters which would be res judicata between the parties in the prosecution. Borden points out that the state court civil petition encompassed claims by 27 school systems not included in the federal complaint. Borden also declares that the [Pg 9] civil suit "appears to go far beyond the limited scope of the earlier federal proceeding." The federal complaint involved bid-rigging in western Louisiana; the civil suit includes a number of school systems in eastern Louisiana as well. The state civil petition covered far more than the federal complaint; it included a bid-rigging scheme involving many school systems not in the federal complaint. The *parens patriae* suit was not limited to the allegations and time periods in the federal complaint.<sup>7</sup>

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<sup>7</sup> The petition is poorly drafted, but Borden did not complain about the drafting; it only filed a prescription exception. The petition erroneously declares that "antitrust liability is established, leaving only damages to be proven at trial." However, the petition, which includes a number of school systems not mentioned in the federal complaint, is not limited to the ending date in the federal judgment.

[\*\*15] Regardless, the one year tort period runs from the time the plaintiff acquired sufficient knowledge of the offense to realize there was an injury. [Delaughter, 364 F.2d at 624](#). The federal complaint was filed October, 1993 and Borden concedes that prescription as to the civil suit was suspended until the judgment of April 18, 1994. The state petition filed October 10, 1994 was not prescribed on its face. In its memorandum in support of its prescription exception, Borden argued that the civil action had prescribed one year after the June, 1989 date in the federal judgment. It did not allege or show that bid-rigging was known prior to the date the federal complaint was filed. Nothing was presented to show there was sufficient knowledge about Borden's antitrust violations more than one year prior to filing the civil petition (deleting the time suspended because of the federal prosecution) or that the last act of bid-rigging in furtherance of the antitrust conspiracy occurred more than one year prior to that date.

Borden concedes that under [La. R.S. 51:132](#) prescription was suspended from October 12, 1993 to April 18, 1994, and bid-rigging occurring after April [Pg 10] 14, 1993 (counting [\*\*16] the date backward from October 12, 1994) fell within one year. Although Borden contends that such conduct was not properly alleged, we conclude the trial court did not err by overruling the prescription exception. The exception may be raised if the claims are subsequently shown to have prescribed.

The judgment is affirmed.

**AFFIRMED**

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End of Document



## Cyber Promotions v. America Online

United States District Court for the Eastern District of Pennsylvania

November 26, 1996, Decided

C.A. NO. 96-2486, C.A. NO. 96-5213

### **Reporter**

948 F. Supp. 456 \*; 1996 U.S. Dist. LEXIS 17771 \*\*; 1997-1 Trade Cas. (CCH) P71,675; 25 Media L. Rep. 1144

CYBER PROMOTIONS, INC. VS. AMERICA ONLINE, INC.; AMERICA ONLINE, INC. VS. CYBER PROMOTIONS, INC.

**Disposition:** **[\*\*1]** Motion by Cyber Promotions, Inc. to amend its Complaint GRANTED. Cyber Promotions, Inc. GRANTED leave to file and serve a Second Amended Complaint in the form appended to its motion. Motion of Cyber Promotions, Inc. for injunctive relief in the form of a temporary restraining order DENIED.

## **Core Terms**

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advertisements, subscribers, e-mail, Internet, online, competitors, networks, temporary restraining order, electronic, marketing, blocking, servers, relevant market, messages, advertising material, facilities, software, injunctive relief, electronic mail, unsolicited, customers, hardware, non-AOL, sending, prices, Web, advertising agency, monopoly power, supracompetitive, communications

## **LexisNexis® Headnotes**

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Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

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

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

### **HN1 [] Injunctions, Preliminary & Temporary Injunctions**

The factors a court must consider when ruling on a motion for a temporary restraining order or preliminary injunction are (1) the likelihood that the applicant will prevail on the merits at a final hearing; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; (4) the public interest. All four factors should favor preliminary relief before the injunction will issue.

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

## **HN2** [down arrow] Monopolies & Monopolization, Actual Monopolization

Under the "essential facilities" or "bottleneck" doctrine, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it.

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

## **HN3** [down arrow] Monopolies & Monopolization, Actual Monopolization

In order to make out a claim under the essential facilities doctrine, 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

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

## **HN4** [down arrow] Monopolies & Monopolization, Actual Monopolization

In order to show a defendant is a monopolist, a plaintiff must show that the defendant possessed monopoly power in a relevant market and 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. Monopoly power is the power to control prices and exclude competition with respect to a particular product and within a particular geographic market. The determination of a well-defined market, both geographically and by product, is essentially one of fact, turning on the unique market situation of each case.

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

## **HN5** [down arrow] Monopolies & Monopolization, Actual Monopolization

The test for determining the relevant product market is one of "reasonable interchangeability." That is, commodities reasonably interchangeable by consumers for the same purpose make up that part of the trade or commerce, monopolization of which may be illegal. The key factor in determining whether certain products move in the same market is their cross-elasticity of demand, i.e. the degree that buyers of one product switch to the other in response to price changes. The higher the cross-elasticity of demand, the more buyers consider the two products substitutes for each other, and the more sensible it is to describe them as within the same market.

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

## **HN6** [down arrow] Monopolies & Monopolization, Actual Monopolization

An "essential facility" is one which is not merely helpful but vital to the claimant's competitive viability.

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**Judges:** CHARLES R. WEINER

**Opinion by:** CHARLES R. WEINER

## **Opinion**

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### **[\*457] MEMORANDUM OPINION [\*2] AND ORDER**

WEINER, J.

NOVEMBER 26, 1996

A mere two days after this Court ruled in a Memorandum Opinion and Order dated November 4, 1996 that Cyber Promotions, Inc. ("Cyber") does not have a right under the First Amendment to the United States Constitution or under the Constitutions of Pennsylvania and Virginia to send unsolicited e-mail advertisements over the Internet to subscribers of American Online, Inc. ("AOL"), Cyber filed a motion for leave to [\*458] amend its First Amended Complaint to assert an entirely different yet equally untenable theory which it claims gives it the right to use AOL's private property free of charge to send millions of e-mail advertisements to AOL subscribers that AOL's blocking of Cyber's e-mail advertisements in favor of its own advertising violates the federal antitrust laws. Specifically, Cyber contends that AOL has obtained a monopoly in the market for providing direct marketing advertising material via electronic transmission to AOL's own subscribers in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Proposed Second Amended Complaint at PP 119-21. Not only has Cyber sought leave to file a Second Amended Complaint alleging its monopolization [\*3] theory, it has also moved for injunctive relief in the form of a temporary restraining order on that claim. Cyber, however, has not cited nor has our research disclosed a single case which has granted a temporary restraining order in a Sherman Act case. In any event, after reviewing the parties' submissions and hearing oral argument by telephone, we will grant the motion to amend but deny the motion for a temporary restraining order.

The following are facts from our Memorandum Opinion and Order of November 4, 1996 which the parties have stipulated to and which provide background to Cyber's motion for a temporary restraining order.

1. AOL is a private online company that has invested substantial sums of its own money in equipment, name, software and reputation.
2. AOL's members or subscribers pay prescribed fees for use of AOL resources, access to AOL and access and use of AOL's e-mail system and its connection to the Internet.
3. AOL's e-mail system operates through dedicated computers known as servers, which consist of computer hardware and software purchased, maintained and owned by AOL. AOL's computer servers have a finite, though expandable, capacity to handle e-mail. All Internet [\*4] e-mail from non-AOL members to AOL customers or members and from AOL customers or members to non-AOL members requires the use of AOL's computer hardware and software in combination with the hardware and software of the Internet and the hardware and software of the non-AOL members.
4. Private companies compete with AOL in the online business.

5. Although the Internet is accessible to all persons with just a computer, a modem and a service provider, the constituent parts of the Internet (namely the computer hardware and software, servers, service providers and related items) are owned and managed by private entities and persons, corporations, educational institutions and government entities, who cooperate to allow their constituent parts to be interconnected by a vast network of phone lines.

6. In order for non-AOL members to send Internet e-mail to AOL members, non-AOL members must utilize a combination of their own hardware and software, the Internet and AOL's network.

7. Cyber, an advertising agency incorporated in 1996, provides advertising services for companies and individuals wishing to advertise their products and services via e-mail.

8. Cyber sends its e-mail via the Internet **[\*\*5]** to members of AOL, members of other commercial online services and other individuals with an Internet e-mail address.

9. AOL provides its subscribing members with one or more e-mail addresses so that members can exchange e-mail with one another and exchange e-mail (both sending and receiving) over the Internet with non-AOL members.

10. AOL attached to its Memorandum of Law in Support of its Motion for Partial Summary Judgment on [First Amendment](#) Issues three sets of examples of e-mail messages sent by Cyber to AOL members. The first set (Tab 1) consists of a multi-page set of advertisements; the second set (Tab 2) consists of an exclusive or single-advertiser e-mail; and the third set (Tab 3) consists of a document called by Cyber an "e-mag." Under each tab are two examples, the first selected by AOL and the second selected by Cyber. The Court has reviewed all of the examples and notes that many of the ads **[\*459]** include get-rich-quick ads, weight loss ads, health aid promises and even phone sex services.

In addition to the parties's factual stipulations, the following factual findings about the Internet itself made earlier this year by our court in [American Civil Liberties Union v. Reno, \*\*\[\\*\\*61\*\* 929 F. Supp. 824 \(E.D. Pa. 1996\)](#) are relevant:

11. The Internet is "a giant network which interconnects innumerable smaller groups of linked computer networks." [Id. at 830](#). In short, it is "a global Web of linked networks and computers..." [Id. at 831](#).

12. "The Internet is an international system." *Id.* It is "a decentralized, global medium of communications--or 'cyberspace'-- that links people, institutions, corporations, and governments around the world. This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information." *Id.*

13. "No single entity academic, corporate, governmental, or non-profit--administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocol to exchange communications and information with other computers (which in turn exchange communications and information with still other computers)." [Id. at 832](#).

14. Computer users have a wide variety of avenues by which to access the Internet. *Id.* One such avenue is "through one of the major national **[\*\*7]** commercial 'online services' such as America Online, CompuServe, the Microsoft Network, or Prodigy. [Id. at 833](#). These online services offer nationwide computer networks (so that subscribers can dial-in to a local telephone number), and the services provide extensive and well organized content within their own proprietary computer networks. In addition to allowing access to the extensive content available *within* each online service, the services also allow subscribers to link to the much larger resources of the Internet." *Id.* (emphasis in original). "The major commercial online services have almost twelve million individual subscribers across the United States." *Id.* Approximately seven million individuals are subscribers of AOL.

15. There are a number of different ways to communicate over the Internet. One such way "is via electronic mail, or 'e-mail', comparable in principle to sending a first class letter. One can address and transmit a message to one or more other people." [Id. at 834](#).

The Court has also received an unrefuted affidavit from a UNIX Systems Administrator for AOL who avers:

16. From September 18 through October 21, 1996 AOL received from Cyber an average of 1.5 [\*\*8] million e-mail messages per day.
17. From October 21, 1996 to the present, Cyber has continued to send to AOL members, on average, more than one million e-mail messages per day.
18. From November 4 through November 11, 1996, Cyber has sent to AOL members more than 1.9 million e-mail messages per day.

The motivation behind Cyber's assertion of its latest theory which it claims entitles it to send unsolicited e-mail advertisements over the Internet to subscribers of AOL appears to be AOL's implementation of a system "tool" which it calls "PreferredMail-The Guard Against Junk E-Mail". This "tool" allows access to Cyber's e-mail advertisements to those AOL subscribers who wish to receive these advertisements. Cyber objects to this tool because, according to Cyber, it places the onus on the AOL subscriber to take affirmative steps to access Cyber's e-mail by checking off a box on the screen captioned "I want junk e-mail!" and because it groups legitimate advertisers such as Cyber with pornographic advertisers thereby discouraging the subscriber to choose to receive Cyber's e-mail. Cyber likens "PreferredMail" to a "virtual black list" because it "contains the names of Internet advertisers [\*\*9] who are responsible for sending the vast majority of unsolicited advertising through the Internet to AOL subscribers." Memorandum of Cyber in Support of Motion for Injunctive Relief at 3-4.

[\*460] Cyber points out in its Memorandum that AOL does not automatically block its own unsolicited advertising which it transmits to its subscribers under the label "marketing 'pop-up' messages". Instead, it places the onus on its subscribers to *block* these messages by entering an area of AOL called "Marketing Preferences". The Marketing Preferences area advises AOL subscribers that AOL sells the right to target electronic advertising to its subscribers and sells the subscribers names to direct mail advertisers who use the U.S. Postal Service to send unsolicited advertisements. Cyber contends that the "striking distinctions between the means by which an AOL subscriber can receive or block unsolicited advertising from AOL and its competitors was intended by AOL to secure, and has in fact secured, AOL's monopoly in the market for providing targeted electronic advertising to its subscribers." Second Amended Complaint at P 119. Cyber requests that we temporarily enjoin AOL from implementing its PreferredMail [\*\*10] blocking tool, or from otherwise blocking system-wide, or interfering with, the electronic transmission of Cyber's advertising material sent to AOL subscribers.

**HN1** The well-established factors we must consider when ruling on a motion for a temporary restraining order or preliminary injunction are (1) the likelihood that the applicant will prevail on the merits at a final hearing; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; (4) the public interest. S & R Corp. v. Jiffy Lube Intern., Inc., 968 F.2d 371, 374 (3rd Cir. 1992). "All four factors should favor preliminary relief before the injunction will issue." Id. Because Cyber cannot satisfy the first factor--a likelihood of success on the merits at a final hearing--the motion for injunctive relief in the form of a temporary restraining order must be denied.<sup>1</sup>

[\*\*11] Cyber contends that the ability to advertise to AOL's subscribers over the Internet via electronic mail is an "essential facility" and that AOL has "refused to deal" with Cyber in violation of Section 2 of the Sherman Act. The irony of this contention is that AOL has *not* actually excluded Cyber from having access to AOL's system. Cyber is continuing to send its e-mail advertisements to AOL's servers. By implementing its PreferredMail system, AOL has given its own subscribers the option of viewing Cyber's e-mail without them having to pay to erase the e-mail every time they go online. Thus, Cyber is only being denied the access to AOL's system in a manner which *it prefers*, i.e.,

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<sup>1</sup> As it has done in its previous motions for a temporary restraining order, Cyber continues to argue that unless a temporary restraining order is issued enjoining AOL from blocking Cyber's e-mail advertisements from reaching AOL's subscribers, AOL will go out of business. Despite the absence of any such orders, Cyber is not only still very much in business but, as the Roach affidavit discloses, has actually increased the amount of e-mail advertisements it sends to AOL servers to 1.9 million per day. In short, Cyber will not be irreparably harmed in the absence of the temporary restraining order it seeks.

that AOL's customers should be able to view Cyber's e-mail without having to take affirmative steps to view the e-mail.

In any event, [\*\*HN2\*\*](#)<sup>↑</sup> under the "essential facilities" or "bottleneck" doctrine, "a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it." [\*Byars v. Bluff City News Co., Inc.\*, 609 F.2d 843, 846, 856](#) & n.34 (6th Cir. 1980) citing [\*Associated Press v. United States\*, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 \(1945\)](#). [\*\*\\*\\*12\*\*](#) Areeda & Turner caution that the doctrine should "at most" extend to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately." P. Areeda & D. Turner, [\*\*Antitrust Law\*\*](#), P 736.2b at 680-81.

[\*\*HN3\*\*](#)<sup>↑</sup> In order to make out a claim under the essential facilities doctrine, Cyber 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 [\*\*\[\\*461\]\*\*](#) of providing the facility." [\*Ideal Dairy Farms\*, 90 F.3d 737, 748](#).

With regard to the first factor, there is little likelihood that Cyber will be able to demonstrate that AOL is a monopolist. [\*\*HN4\*\*](#)<sup>↑</sup> In order to show AOL is a monopolist, Cyber must show that AOL possessed monopoly power in a relevant market and "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 \[\\*\\*\\[\\\*\\\*131\\]\\*\\*\]\(#\) S. Ct. 1698 \(1966\)](#); [\*Ideal Dairy Farms, Inc. v. John Labatt, Ltd.\*, 90 F.3d 737, 749 \(3rd Cir. 1996\)](#). Monopoly power is the power to control prices and exclude competition with respect to a particular product and within a particular geographic market. [\*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 determination of a well-defined market, both geographically and by product, is essentially one of fact, turning on the unique market situation of each case. [\*Id. at 394-95\*](#).

In its Second Amended Complaint, Cyber alleges the relevant market to be "the market for providing direct marketing advertising material via electronic transmission to AOL's subscribers". Second Amended Complaint at PP 114, 115, 120, 122. In its Reply Memorandum, Cyber defines the product market as the service of transmitting commercial advertising by electronic means to AOL's subscribers and defines the geographic market as AOL's subscribers themselves, a type of "electronic island to which AOL controls the only bridge". Reply Memorandum of Cyber Promotions, Inc. in Support of Motion for Temporary Restraining Order at 6. Even without the benefit [\*\*\[\\*\\*14\]\*\*](#) of discovery or a hearing, the market as defined by Cyber appears to us to be unrealistically narrow and tailored solely for Cyber's own purpose.

The first problem with Cyber's definition of the market is that AOL and Cyber are not competitors. Cyber alleges that Cyber and AOL are. "competitors in the business of providing direct marketing advertising materials, via electronic transmission, to AOL's subscribers." Second Amended Complaint at P 114 (emphasis added). Cyber repeats this allegation in its Memorandum by stating that "AOL and Cyber Promotions are head-to-head competitors in the market for transmitting direct marketing advertising materials to AOL's subscribers by electronic means." Memorandum in Support of Motion for Injunctive Relief at 10.

The record reveals, however, that AOL is not a business competitor of Cyber. AOL's business is that of a private commercial online service.<sup>2</sup> Cyber, on the other hand, is not in the business of providing commercial online service but instead is an advertising agency which provides advertising services for companies and individuals wishing to advertise their products and services via e-mail. Cyber's potential competitors are not [\*\*\[\\*\\*15\]\*\*](#) the online systems

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<sup>2</sup> Numerous other commercial online services including CompuServe, Prodigy and the Microsoft Network compete with AOL for the growing number of potential online customers. Indeed, an article about AOL in the October 31, 1996 edition of the Wall Street Journal which Cyber has attached to its Motion for Injunctive Relief as part of Exhibit H states that "AOL is besieged by competition." As stated above, the parties have also stipulated that "private companies compete with AOL in the online business." In fact, in order to keep up with its competition, AOL only recently announced that it was offering its subscribers a flat rate of \$ 19.95 per month for unlimited access to AOL's electronic services as well as the Internet.

whose customers it seeks to send its e-mail advertisements but rather other potential advertisers who also wish to provide direct marketing advertising materials via electronic mail to AOL subscribers.

Even if AOL and Cyber can somehow be viewed as "competitors" in the market **[\*\*16]** for providing direct marketing advertising material via electronic transmission to AOL's subscribers, AOL has the right to control the advertisements which reach its own subscribers. After all these individuals became AOL subscribers by paying AOL a monthly fee. As is evident from the exhibits Cyber attaches to its Memorandum, AOL has no problem accepting advertisements from advertisers as long as these advertisers pay AOL and therefore provide AOL with a **[\*462]** source of revenue. Cyber, however, refuses to pay AOL for sending approximately 1.9 million e-mail advertisements to AOL servers each day.<sup>3</sup> In short, the federal antitrust laws simply do not forbid AOL from excluding from its system advertisers like Cyber who refuse to pay AOL any fee (as opposed to those advertisers who do pay a fee) for their advertising on AOL's system. See [\*Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)\*](#) (a "business...has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.")

**[\*\*17]** The problems with Cyber's market definition can best be revealed by the following analogy: Suppose that an advertising agency (Cyber) promises that for a fee it can get an advertiser's advertisements for get-rich-quick schemes, health aid promises and phone sex services in a daily newspaper or magazine for dissemination to that publication's subscribers without having to pay any fee to the publication. When the publication refuses to carry the ads, the advertising agency sues the publication claiming it has a monopoly over the market of advertising access to its own subscribers by means of the pages of its newspaper. The likelihood of success on such a theory would be slim indeed.

Even accepting Cyber's definition of the relevant market<sup>4</sup>, in order to prove that AOL possesses monopoly power in this market, Cyber must show that AOL has the ability to charge advertisers supracompetitive prices for the right to advertise to AOL subscribers. Cyber has not, at least at this stage of the proceedings, made any showing that because AOL has restricted the manner in which Cyber may send its e-mail advertisements to AOL's subscribers, AOL has charged other potential advertisers supracompetitive **[\*\*18]** prices for the right to advertise on its system or would desire to do so in the future. Indeed, it would be against AOL's economic best interests for it to even attempt to charge supracompetitive prices to advertisers on its system. As mentioned above, there are numerous commercial online services which compete for AOL's customer base, including CompuServe, the Microsoft Network and Prodigy. Were AOL to charge supracompetitive prices for advertising on its system, advertisers would only have to switch to any of these competing services or to other parts of the Internet such as the World Wide Web to disseminate their advertisements to online users. In short, AOL is not blocking the e-mail advertisements of a so-called competitor such as Cyber in order to charge supracompetitive prices but is blocking the Cyber's advertisements because Cyber is bombarding AOL's servers with up to 1.9 million e-mail advertisements per day without paying AOL a cent for the imposition.

**[\*\*19]** There is one more problem with Cyber's definition of the market. Cyber correctly points out that [\*\*HNS\*\*](#)<sup>5</sup> the test for determining the relevant product market is one of "reasonable interchangeability". That is, "commodities reasonably interchangeable by consumers for the same purpose make up that 'part of the trade or commerce,' monopolization of which may be illegal." [\*Id. at 391\*](#). The key factor in determining whether certain products move in the same market is their cross-elasticity of demand, i.e. the degree that buyers of one product switch to the other in response to price changes. The higher the cross-elasticity of demand, the more buyers consider the two products substitutes for each other, and the more sensible it is to describe them as within the same market. [\*Id. at 380-81.\*](#)

<sup>3</sup> Thus, we find it ironic that Cyber states in its Reply Memorandum that "the fact remains ... that AOL is the only 'game in town'. Those who want to send commercial advertising material electronically to AOL's subscribers can either pay the freight or go elsewhere." Reply Memorandum of Cyber in Support of Motion for Temporary Restraining Order at 7. Cyber, of course, has never even offered to "pay the freight" to advertise on AOL's system.

<sup>4</sup> As noted above, the definition of the relevant market is ultimately a question of fact which will have to be determined by a jury or a factfinder.

In the case *sub judice*, there are numerous competitive methods for advertisers such as Cyber to reach AOL subscribers including, but not limited to, the World Wide Web as [\*463] well as direct mail, billboards, television, newspapers and leaflets. AOL does not do business in these alternative advertising methods. If these additional advertising methods are ultimately found to be reasonably interchangeable with electronic [\*\*20] mail and included as part of the relevant product market, AOL would not control a large enough percentage of the relevant product market to justify a finding of monopoly power.

Finally, even if Cyber could prove that AOL exercises monopoly power in a relevant market, there is little likelihood that Cyber will be able to show that AOL willfully acquired that power. On the contrary, AOL has throughout this litigation offered a number of legitimate business justifications for blocking Cyber's e-mail including the numerous complaints it has received from its subscribers, the technical burden the millions of e-mail advertisements cause on AOL's servers and the fact that Cyber does not pay AOL any fee whatsoever to carry Cyber's e-mail.

Even if Cyber could prove AOL is a monopolist in the relevant market, there is little likelihood that Cyber could prove that AOL monopolizes an "essential facility".

**HN6** [↑] "An 'essential facility' is one which is not merely helpful but vital to the claimant's competitive viability." *Monarch Entertainment Bureau v. N.J. Highway Authority*, 715 F. Supp. 1290, 1300 (D.N.J. 1989) (citing P. Areeda & D. Turner, *Antitrust Law*, P 736.2b at 680-81 (Supp. 1988), [\*\*21] aff'd, 893 F.2d 1331 (3d Cir. 1989)). The essential facility Cyber contends that AOL monopolizes is advertising to AOL's own subscribers via electronic mail. We believe there is little likelihood that Cyber will be able to show that the ability to advertise to AOL's subscribers is vital to Cyber's competitive ability.

In the first instance, as mentioned above, AOL has not even completely excluded Cyber from the AOL system. AOL's Preferred Mail simply gives the AOL subscriber the option to choose whether he wishes to view Cyber's e-mail advertisements. In addition, AOL currently has approximately seven million members who constitute no more than one-sixth to one-seventh of the current total e-mail population of 40 to 50 million and approximately one-half of the current total online population of 12 million. Cyber also has many other means of disseminating its advertising to Internet users in general and to AOL subscribers in particular besides electronic mail. Cyber can send its advertisements to the subscribers of the many other online services which compete with AOL, including CompuServe, the Microsoft Network and Prodigy. Cyber can send its advertisements to AOL members over [\*\*22] the Internet through the World Wide Web which would allow access by AOL subscribers who want to receive Cyber's advertisements. Cyber, as an advertising agency, can disseminate its advertisements to AOL subscribers and others by non-Internet means including the United States mail, telemarketing, television, cable, newspapers, magazines, billboards and leaflets. And, of course, Cyber could attempt to lure AOL subscribers away from AOL by developing its own commercial online system or advertising web site and charging a competitive rate.

As a result, this case is not like the situation in *United States v. Terminal Railroad Association*, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912) where the defendant railroads jointly owned the *only* feasible terminal for rail traffic coming to St. Louis from the west or the situation in *MCI Communications v. AT & T*, 708 F.2d 1081 (7th Cir.) cert. denied, 464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983) where AT&T controlled access to the communications facility essential to operation of its competitor or the situation in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984) where the defendant [\*\*23] ski operator controlled three of the four skiing mountains in the Aspen area and defendant refused to market a multi-day multi-mountain ticket with plaintiff leaving plaintiff unable to compete.

Instead, this case is much more similar to *Colonial Penn Group v. American Association of Retired Persons*, 698 F. Supp. 69 (E.D.Pa. 1988). The defendant in *Colonial Penn* was a publisher of several magazines targeted to individuals in the over-fifty age group. Plaintiff was a provider of travel [\*464] services, homeowners and automobile insurance programs also targeted to individuals in the over-fifty age group. After endorsing plaintiff's services for a period of time in its publications, defendant decided to endorse only the services of plaintiff's rivals while at the same time excluding advertisements for plaintiff's services. Plaintiff brought an "essential facilities" claim, contending that advertising in defendant's publications is the only effective means to market its products to persons over the age of fifty in general and to defendant's members in particular. In reviewing plaintiff's definition of

the relevant market as advertising access to defendant's members, the same market Cyber [\*\*24] has defined here, this Court stated:

Moreover, plaintiff, to show that [defendant] members comprise a discrete market segment, must show distinguishing characteristics of defendant members from the broader population of persons over the age of fifty. Merely defining the relevant market by the readership of defendant publications without further distinction is plainly insufficient and an exercise in circular reasoning; i.e., defining a market merely by a publication's readership begs the question of whether that publication is an essential facility.

*Colonial Penn, 698 F. Supp. at 71, n. 1.*

Although the Court ultimately denied the defendant's motion to dismiss with leave to renew in the form of a motion for summary judgment after discovery was completed, the reasoning of *Colonial Penn* is equally applicable to the case *sub judice*. Merely defining the relevant market as Cyber has done by the subscribership of AOL without further distinguishing AOL's subscribers from the other online subscribers or other Internet e-mail users to whom Cyber provides advertising services is also insufficient as such a definition begs the question of whether the subscribership [\*\*25] of AOL is an essential facility. In short, Cyber has failed to show why its advertising to AOL subscribers is any more vital than its advertising to the subscribers of the many other commercial online services or its advertising to other individuals with an Internet e-mail address.

Even if Cyber could prove an essential facility, it is unlikely that it could satisfy the remaining elements of its essential facilities claim. With regard to the second factor--the competitor's inability practically or reasonably to duplicate the essential facility--Cyber has not shown any reason why it could not (other than perhaps because it would have to pay its own way) use its servers to create its own commercial online internet service or advertising web site and attempt to lure away AOL subscribers.

With regard to the third element--denial of the use of the essential facility to a competition--we reiterate that Cyber has *not* been completely prevented from sending its e-mail advertisements to AOL subscribers. Although the onus is on the AOL subscriber who wants to view Cyber's advertisements to click the "I want junk e-mail!" box on the screen, we do not believe this process is unreasonably [\*\*26] burdensome to AOL subscribers.

Finally, Cyber is unlikely to be able to show the feasibility of AOL providing its facility to Cyber without the PreferredMail tool. It is clearly unfeasible for AOL's e-mail servers, which the parties have stipulated have a finite capacity, to be burdened with up to 1.9 million e-mail advertisements each day from a single advertiser such as Cyber. In addition, as we noted in our Memorandum Opinion of November 4, 1996, the Court has received a plethora of letters from disgruntled AOL subscribers who complain of not only having to sift through Cyber's e-mail advertisements in their e-mail boxes but also of having to pay for the time it takes to erase these messages. AOL simply should not have to incur the wrath of its paying customers and resulting damage to its reputation in order to carry millions of Cyber's e-mail advertisements free of charge.

In sum, we find that there is little likelihood that Cyber will be able to establish the necessary elements of its claim under the "essential facilities" or "bottleneck" doctrine and that AOL has "refused to deal" with Cyber in violation of *Section 2* of the Sherman Act. As there is little likelihood that Cyber [\*\*27] will prevail on the merits of its antitrust claim at a final hearing or that it will be [\*465] irreparably harmed in the absence of a temporary restraining order, its motion for injunctive relief in the form of a temporary restraining order must be denied.

**ORDER**

The motion of Cyber Promotions, Inc. to amend its Complaint is GRANTED. Cyber Promotions, Inc. is GRANTED leave to file and serve a Second Amended Complaint in the form appended to its motion.

The motion of Cyber Promotions, Inc. for injunctive relief in the form of a temporary restraining order is DENIED.

IT IS SO ORDERED.

948 F. Supp. 456, \*465 (1996 U.S. Dist. LEXIS 17771, \*\*27

CHARLES R. WEINER

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## **In re NASDAQ Market-Makers Antitrust Litig.**

United States District Court for the Southern District of New York

November 26, 1996, Decided ; November 27, 1996, FILED

M.D.L. No. 1023, 94 Civ. 3996 (RWS)

### **Reporter**

169 F.R.D. 493 \*; 1996 U.S. Dist. LEXIS 17671 \*\*; 1996-2 Trade Cas. (CCH) P71,643

IN RE: NASDAQ MARKET-MAKERS ANTITRUST LITIGATION

**Subsequent History:** Motion granted by, Class certification granted by [In re NASDAQ Market-Makers Antitrust Litig., 172 F.R.D. 119, 1997 U.S. Dist. LEXIS 4687 \(S.D.N.Y., 1997\)](#)

**Prior History:** [Tisdale v. A.G. Edwards & Sons \(In re NASDAQ Market-Makers Antitrust Litig.\), 938 F. Supp. 232, 1996 U.S. Dist. LEXIS 13967 \(S.D.N.Y., 1996\)](#)

**Disposition:** [\*\*1] Plaintiffs' motion for class certification pursuant to [Rule 23\(b\)\(2\)](#) and [\(b\)\(3\) of the Federal Rules of Civil Procedure](#) granted in part. Plaintiffs motion to compel discovery granted in part and denied in part

## **Core Terms**

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conspiracy, Defendants', damages, spreads, class action, class member, antitrust, class certification, traded, Plaintiffs', market-makers, cases, discovery, prices, brokers, courts, alleged conspiracy, investors, purchasers, aggregate, methodologies, predominate, odd-eighth, price-fixing, allegations, Comparing, inflated, bid, certification, stock

## **LexisNexis® Headnotes**

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Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### [HN1](#) **Class Actions, Certification of Classes**

For purposes of deciding a [Fed. R. Civ. P. 23](#) motion for class certification, the allegations set forth in the complaint are accepted as true.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### [HN2](#) **Class Actions, Prerequisites for Class Action**

See [Fed. R. Civ. P. 23\(c\)\(1\)](#).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN3** Class Actions, Certification of Classes

In applying [Fed. R. Civ. P. 23\(c\)\(1\)](#), class action determinations are to be based solely on the allegations set forth in the complaint, which are accepted as true. Thus, the only question to be determined at the certification stage is whether the requirements of [Rule 23](#) have been satisfied.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN4** Class Actions, Certification of Classes

District courts will apply [Fed. R. Civ. P. 23](#) according to a liberal rather than a restrictive interpretation. However, despite the liberal interpretation that the court must give to [Rule 23](#), the court may certify a case as a class action only after undertaking rigorous analysis to assure that the requirements of the rule are satisfied.

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

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

### **HN5** Justiciability, Standing

The burden is on the party claiming jurisdiction to demonstrate that a court has jurisdiction over the subject matter. Standing is an essential element of subject matter jurisdiction.

Civil Procedure > ... > Justiciability > Standing > Personal Stake

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

### **HN6** Standing, Personal Stake

The fundamental principles governing whether a plaintiff has standing to maintain an action in federal court are straightforward and familiar. A plaintiff must allege such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial power on his behalf.

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

### **HN7** Justiciability, Standing

A plaintiff may not use the procedural device of a class action to bootstrap himself into standing he lacks under the express terms of the substantive law.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## **HN8**[] **Justiciability, Standing**

The question of standing is totally separate and distinct from the question of w plaintiff's right to represent a purported class under [Fed. R. Civ. P. 23](#). Standing to sue is an essential threshold which must be crossed before any determination as to class representation under [Rule 23](#) can be made.

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

## **HN9**[] **Justiciability, Standing**

Where a particular industry structure includes a principal-agent relationship between the indirect and direct purchasers such that the two are not distinct economic entities in the purchase chain, the indirect purchaser has standing.

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

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

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

Business & Corporate Law > Agency Relationships > General Overview

## **HN10**[] **Private Actions, Purchasers**

Several factors are relevant to determining whether a principal and an agent constitute distinct economic entities for purposes of Illinois Brick standing: whether the agent performs a function on behalf of his principal other than securing an offer or a price from a buyer or seller for the product; the degree to which the agent is authorized to exercise his discretion concerning the price and terms under which the principal's product is to be sold or bought; and finally whether the use of the agent constitutes a separate step in the vertical distribution of the product.

Governments > State & Territorial Governments > Employees & Officials

## **HN11**[] **State & Territorial Governments, Employees & Officials**

See [La. Rev. Stat. Ann. § 49:257\(A\)](#).

Governments > State & Territorial Governments > Employees & Officials

## [\*\*HN12\*\*](#) [blue icon] State & Territorial Governments, Employees & Officials

[La. Rev. Stat. Ann. § 49:257\(A\)](#) does not allow the Attorney General to act as a party in interest on behalf of state agencies; rather, it merely provides that the Attorney General may act as counsel for state agencies in certain cases.

Governments > State & Territorial Governments > Claims By & Against

## [\*\*HN13\*\*](#) [blue icon] State & Territorial Governments, Claims By & Against

The State of Louisiana cannot sue on causes of action that belong to state agencies as distinct legal entities.

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

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

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

## [\*\*HN14\*\*](#) [blue icon] Standing, Requirements

Because antitrust liability is joint and several, a plaintiff injured by one defendant as a result of the conspiracy has standing to represent a class of individuals injured by any of the defendant's co-conspirators.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

## [\*\*HN15\*\*](#) [blue icon] Parties, Joinder of Parties

See [Fed. R. Civ. P. 23\(a\)](#).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [\*\*HN16\*\*](#) [blue icon] Prerequisites for Class Action, Numerosity

[Rule 23\(a\)\(1\)](#) requires that the class be so numerous that joinder of all members is impracticable. [Fed. R. Civ. P. 23\(a\)\(1\)](#). Impracticability means difficulty or inconvenience of joinder; the rule does not require impossibility of joinder.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [HN17](#) [blue document icon] Prerequisites for Class Action, Numerosity

Precise quantification of the class members is not necessary because the court may make common sense assumptions to support a finding of numerosity. Plaintiffs may rely on reasonable inferences drawn from the available facts in order to estimate the size of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [HN18](#) [blue document icon] Class Actions, Prerequisites for Class Action

Fed. R. Civ. P. 23(a)(2) requires that, for an action to be properly maintained as a class action, there must be common issues of fact and law.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [HN19](#) [blue document icon] Private Actions, Purchasers

Allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of Fed. R. Civ. P. 23(a)(2).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [HN20](#) [blue document icon] Prerequisites for Class Action, Typicality

Fed. R. Civ. P. 23(a)(3) requires that the claims asserted by plaintiffs on behalf of a proposed class be typical of the claims of the other members of the class. Typicality refers to the nature of the claim of the class representatives and not to the specific facts from which the claim arose or relief is sought. The proper inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct not special or unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [HN21](#) [blue document icon] Prerequisites for Class Action, Typicality

Typicality under Fed. R. Civ. P. 23 requires that a class representative have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

## [HN22](#) [blue icon] Class Members, Named Members

The typicality requirement of [Fed. R. Civ. P. 23\(a\)](#) is established where the claims of the representative plaintiffs arise from the same course of conduct that gives rise to the claims of the other class members, where the claims are based on the same legal theory, and where the class members have allegedly been injured by the same course of conduct as that which allegedly injured the proposed representatives.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [HN23](#) [blue icon] Private Actions, Purchasers

Typicality does not require that the situations of the named representatives and the class members be identical. Provided that all claims arise from a same price-fixing conspiracy, factual differences among proposed class members' claims do not defeat class certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Class Members > Named Members

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [HN24](#) [blue icon] Prerequisites for Class Action, Adequacy of Representation

[Fed. R. Civ. P. 23\(a\)\(4\)](#) requires that the class representatives be adequately representative of the class. Plaintiffs must satisfy both prongs of a two-pronged test to qualify as adequate representatives: (1) the representatives' interests must not conflict with the class members' interests, and (2) the representatives and their attorney must be able to prosecute the action vigorously. The plaintiffs thus must show, first, that there is an absence of conflict and antagonistic interests between the proposed representatives and the class members, and second, that plaintiffs' counsel is qualified, experienced and capable. The commonality and typicality requirements blend together in determining whether the representative plaintiffs' claims are typical enough of the classwide claims that the representatives will adequately represent the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [HN25](#) [blue icon] Class Actions, Certification of Classes

In order to warrant denial of class certification, it must be shown that any asserted conflict is so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## **HN26** [blue icon] **Prerequisites for Class Action, Adequacy of Representation**

Fed. R. Civ. P. 23(a)(4) requires that, in order for a case to proceed as a class action, the court must find that the representative parties will fairly and adequately protect the interests of the class. The party's attorney must therefore be qualified, experienced, and generally able to conduct the proposed litigation. Adequacy of representation merely requires that the class representative's attorney be qualified, and that the class representative not have interests conflicting with the class in the litigation at hand.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## **HN27** [blue icon] **Class Actions, Prerequisites for Class Action**

In order to maintain a class action, plaintiffs must satisfy the requirements of Rule 23(b) (Fed. R. Civ. P. 23(b)) in addition to satisfying the prerequisites of Rule 23(a) (Fed. R. Civ. P. 23(a)).

Civil Procedure > Special Proceedings > Class Actions > General Overview

## **HN28** [blue icon] **Special Proceedings, Class Actions**

See Fed. R. Civ. P. 23(b).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## **HN29** [blue icon] **Class Actions, Prerequisites for Class Action**

Certification is appropriate under Fed. R. Civ. P. 23(b)(2) where declaratory or injunctive relief is an important aspect of the overall relief sought.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

## **HN30** [blue icon] **Class Actions, Certification of Classes**

To certify a case under [Fed. R. Civ. P. 23\(b\)\(3\)](#), a court must find that the common issues of law and fact predominate over individual issues. The predominance requirement is satisfied unless it is clear that individual issues will overwhelm the common questions and render the class action valueless.

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

### [HN31](#) [ ] **Private Actions, Remedies**

To recover damages for an antitrust action, plaintiffs will have to prove: (1) that defendants violated the antitrust laws; (2) that the alleged violations caused plaintiffs to suffer some direct antitrust injury to their business or property; and (3) that the extent of this injury can be quantified with requisite precision.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### [HN32](#) [ ] **Class Actions, Certification of Classes**

The existence of a conspiracy is the predominant issue in price fixing cases, warranting certification of a class even where significant individual issues are present. Other questions regarding damages and the like are subordinate to the common question of the existence of the alleged conspiracy.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### [HN33](#) [ ] **Private Actions, Remedies**

Liability for antitrust violations is joint and several. Each class member may therefore recover his or her full loss from any defendant who can be shown to have participated in the alleged conspiracy.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Time Limitations

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

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Evidence > Burdens of Proof > General Overview

Governments > Legislation > Statute of Limitations > General Overview

### [HN34](#) [ ] **Tolling of Statute of Limitations, Fraud**

In order to show fraudulent concealment, an antitrust plaintiff must prove (1) that the defendant concealed the existence of the antitrust violation, (2) that plaintiff remained in ignorance of the violation until sometime within the four year antitrust statute of limitations; and (3) that his continuing ignorance was not the result of lack of diligence. Plaintiffs may prove concealment by showing either that the defendants took affirmative steps to prevent plaintiffs' discovery of the conspiracy, or that the conspiracy itself was inherently self-concealing.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN35** [blue icon] **Private Actions, Remedies**

In a class action, even when the issue of fraudulent concealment involves both common and individual questions, the common question of whether defendants successfully concealed the existence of the alleged conspiracy predominates over any individual questions regarding the knowledge or diligence of individual plaintiffs.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > General Overview

### **HN36** [blue icon] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(d) provides in part that a court may make "appropriate orders" dealing with "procedural matters," which may be altered or amended "from time to time," including orders determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument. Rule 23(d) provides that these orders may be combined with an order under Fed. R. Civ. P. 16. Fed. R. Civ. P. 16(c) provides that the court may take appropriate action with respect to inter alia: the avoidance of unnecessary proof and of cumulative evidence; the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; an order establishing a reasonable limit on the time allowed for presenting evidence; an order for a separate trial pursuant to Fed. R. Civ. P. 42(b) with respect to a claim or with respect to any particular issue in the case; or referring matters to a master.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### **HN37** [blue icon] **Private Actions, Remedies**

Even if it can be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where an antitrust violation has caused widespread injury to the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

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

Evidence > Burdens of Proof > General Overview

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

### [\*\*HN38\*\*](#) [blue icon] Class Actions, Prerequisites for Class Action

To prove an effective conspiracy to fix prices, facts will be adduced which will tend to establish, perhaps circumstantially, that each class member was injured. In the class action context the inference is predicated on the establishment of certain facts: (1) an antitrust violation, typically a conspiracy to fix prices or allocate markets; (2) an ability on the part of defendant-conspirators to effectuate the conspiracy; (3) generalized price increases or damages in the industry involved; and (4) purchase or rental by plaintiffs during the period of anti-competitive activity. The impact element necessitates only an illustration of generalized injury.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### [\*\*HN39\*\*](#) [blue icon] Class Actions, Certification of Classes

The fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing generalized damage as to all.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### [\*\*HN40\*\*](#) [blue icon] Class Actions, Prerequisites for Class Action

The predominance requirement of [\*Fed. R. Civ. P. 23\(b\)\(3\)\*](#) is satisfied with respect to proof of injury, even though individualized inquiry may be necessary on the quantum of damages.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Trials > Separate Trials

### [\*\*HN41\*\*](#) [blue icon] Class Actions, Prerequisites for Class Action

Even if it develops that each class member's damages must be separately determined, class certification would still be appropriate. Under those circumstances, bifurcation would allow classwide issues to proceed on a class basis, while reserving any individual issues to be litigated in a subsequent set of proceedings.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

### [\*\*HN42\*\*](#) [blue icon] Class Actions, Prerequisites for Class Action

In a class action suit, fluid recovery refers to the distribution of unclaimed or unclaimable funds to persons not found to be injured but who have interests similar to those of a class.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [\*\*HN43\*\*](#) [blue document icon] **Private Actions, Purchasers**

Causation is susceptible of common classwide proof, and as a general rule, an illegal price-fixing scheme presumptively damages all purchasers of a price-fixed product in an affected market.

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

## [\*\*HN44\*\*](#) [blue document icon] **Private Actions, Remedies**

In an antitrust action, once the existence of injury is established (by direct evidence or inference from the character of a sustained conspiracy), the proof necessary to set the amount of damages need not be exact.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [\*\*HN45\*\*](#) [blue document icon] **Class Actions, Prerequisites for Class Action**

*Fed. R. Civ. P. 23(b)(3)* requires plaintiffs to demonstrate that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Civil Procedure > Special Proceedings > Class Actions > General Overview

## [\*\*HN46\*\*](#) [blue document icon] **Special Proceedings, Class Actions**

Manageability problems are significant in class actions only if they create a situation that is less fair and efficient than other available techniques.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

## [\*\*HN47\*\*](#) [blue document icon] **Discovery, Privileged Communications**

See *Fed. R. Civ. P. 26(b)(1)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## [\*\*HN48\*\*](#) [blue document icon] **Class Actions, Prerequisites for Class Action**

The phrase, "relevant to the subject matter involved in the pending action," contained in *Fed. R. Civ. P. 26(b)(1)*, is construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.

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

Civil Procedure > Discovery & Disclosure > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

#### **HN49** [blue icon] Regulated Practices, Private Actions

Although the relevancy requirement of *Fed. R. Civ. P. 26(b)(1)* should be firmly applied, where the proof is largely in the hands of alleged conspirators, antitrust plaintiffs must be given ample opportunity for discovery.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

#### **HN50** [blue icon] Methods of Discovery, Inspection & Production Requests

Under *Fed. R. Civ. P. 34*, a party need not have actual possession of documents to be deemed in control of them.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

#### **HN51** [blue icon] Methods of Discovery, Inspection & Production Requests

*Fed. R. Civ. P. 34* requires production if a party has the practical ability to obtain the documents from another, irrespective of his legal entitlement.

Civil Procedure > Attorneys > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

#### **HN52** [blue icon] Civil Procedure, Attorneys

A current or former employee may be considered under a defendant's control for *Fed. R. Civ. P. 34* purposes where that employee was: (i) briefed by a company representative or counsel prior to the civil investigation demand (CID) deposition or debriefed after the deposition; (ii) represented by counsel recommended, retained, or paid for by a company representative or counsel; or (iii) informed by a representative of defendant or defense counsel of the possibility of ordering a copy of their CID transcript.

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

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

#### **HN53** [blue icon] Regulated Practices, Private Actions

Pursuant to *15 U.S.C.S. § 1313(c)(3)*, the Government may not disclose materials obtained through civil investigation demands without the target's consent.

**Counsel:** APPEARANCES:

ATTORNEYS FOR PLAINTIFFS: FINE KAPLAN AND BLACK, Philadelphia, PA, By: ARTHUR M. KAPLAN, ESQ., Of Counsel. LOVELL & SKIRNICK, LLP., New York, NY, By: CHRISTOPHER LOVELL, ESQ., ROBERT A. SKIRNICK, ESQ., Of Counsel. MILBERG, WEISS, BERSHAD, HYNES & LERACH, San Diego, CA, By: LEONARD B. SIMON, ESQ., Of Counsel.

SHEARMAN & STERLING, Liaison Counsel for Defendants and Attorney for Defendant Herzog, Heine, Geduld, Inc., New York, NY, By: JOSEPH T. McLAUGHLIN, ESQ., JAMES T. HALVERSON, ESQ., THOMAS F. SWIFT, ESQ., BRIAN S. CHEVLIN, ESQ., Of Counsel.

**Judges:** ROBERT W. SWEET, U.S.D.J.

**Opinion by:** ROBERT W. SWEET

## Opinion

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### [\*498] OPINION

**Sweet, D. J.,**

Plaintiffs in this multidistrict securities antitrust class action have moved for class certification pursuant to [Rules 23\(b\)\(2\)](#) and [\(3\)](#), Fed. R. Civ. P, and to compel discovery pursuant to [Rule 37\(a\), Fed. R. Civ. P.](#) For the reasons set forth below, Plaintiffs' motion will be granted in part.

#### Parties

The [\*2] parties and prior proceedings are fully set forth in several prior opinions of this court. See [In re Nasdaq Market-Makers Antitrust Litigation, 894 F. Supp. 703 \(S.D.N.Y. 1995\)](#) ("Nasdaq I"); [In re Nasdaq Market-Makers Antitrust Litigation, 164 F.R.D. 346 \(S.D.N.Y. 1996\)](#) ("Nasdaq II"); [In re Nasdaq Market-Makers Antitrust Litigation, 1996 U.S. Dist. LEXIS 4969, 1996 WL 187409 \(S.D.N.Y. April 18, 1996\)](#) ("Nasdaq III"); [In re Nasdaq Market-Makers Antitrust Litigation, 929 F. Supp. 723 \(S.D.N.Y. 1996\)](#) ("Nasdaq IV").

The 33 named Defendants (the "Defendants" or "Market-makers") in this action are all market-makers on the Nasdaq exchange.<sup>1</sup> The Complaint in this action describes them as "leading Nasdaq market-makers." Nasdaq [\*499] is a computerized securities quotations system operated by the National Association of Securities Dealers ("NASD"). In 1993, Nasdaq trading volume totaled more than 66.5 billion shares, with an average of 263 million shares traded each trading day. For that year, more than \$ 1.35 trillion dollars in trades were executed through Nasdaq. [1994 Nasdaq Fact Book and Company Directory](#) ("Fact Book"). In 1993, there were 492 Nasdaq market-makers, making markets [\*3] in 5,393 stocks, of which approximately 3,250 are listed and traded on the Nasdaq National Market, and the remainder on the Nasdaq Small Cap Market. On average there are 11 market-makers for each Nasdaq stock, although there are some stocks with more than 40 market-makers.

[\*\*4] Plaintiffs include the State of Louisiana, through its Attorney General, Richard P. Ieyoub, which brings this action in its capacity as *parens patriae*, trustee, guardian, and representative of Louisiana investors allegedly damaged by Defendants' price-fixing scheme, and 30 individual plaintiffs<sup>2</sup> who purchased or sold shares of Class

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<sup>1</sup>The named Defendants include: Goldman Sachs & Co.; Herzog, Heine, Geduld, Inc.; Alex. Brown & Sons, Inc.; Cantor Fitzgerald & Co.; CS First Boston Corp.; Donaldson, Lufkin & Jenrette, Inc.; Bear, Stearns, Inc.; Cowen & Co.; Dean Witter Reynolds Inc.; Hambrecht & Quist, Inc.; Jeffries and Co., Inc.; Kidder, Peabody & Co. Incorporated; Lehman Brothers, Inc.; Kemper Securities Group, Inc.; Legg Mason Wood Walker, Inc.; Mayer & Schweitzer, Inc.; Merrill Lynch & Co.; Morgan Stanley & Co.; Old Discount Corporation; PaineWebber Inc.; Montgomery Securities; Nash, Weiss & Co.; Oppenheimer & Co., Inc.; Piper Jaffray & Hopwood, Inc.; Prudential Securities Incorporated; The Robinson-Humphrey Company, Inc.; Sherwood Securities Corp.; Troster Singer; Robertson, Stephens & Company; Salomon Brothers Inc.; Smith Barney Inc.; UBS Securities Inc.; Weeden & Co., L.P.

<sup>2</sup>Individual named plaintiffs include: Donald Bleznak c/f Andrew Bleznak, a resident of New Jersey; Richard I. Burstein, a resident of Vermont; Chevra Gemilath Chasodah, a charitable organization located in New York; Carl S. Clark and Patricia

Securities from one or more Defendants or their commonly owned affiliates during the period of May 1, 1989 to May 24, 1994.

#### [\*\*5] *Prior Proceedings*

The first class-action complaint in what is now a multidistrict case was filed in this Court on May 27, 1994 following reports in the media on May 26 and 27, 1994 of a study by Professors William G. Christie and Paul H. Schultz<sup>3</sup> discussing the spreads on the Nasdaq exchange (the "Christie & Schultz study"). Eventually more than two dozen complaints were filed around the country, alleging variations on the theme that Nasdaq Market-makers had engaged in a conspiracy to avoid odd-eighth quotes in violation of the Sherman Act, [15 U.S.C. § 1](#). Approximately two dozen of the thirty-three moving Defendants were defendants in at least one of these initial complaints.

Certain parties named in the initial complaints petitioned the Judicial Panel on Multidistrict Litigation (the "Panel") for consolidation of all related actions before this Court. [\*\*6] On October 14, 1994, the Panel ordered that the already filed actions, as well as later-filed actions, be assigned to this Court.

A pretrial order was signed on November 16, 1994 which named Plaintiffs' Co-Lead Counsel and directed Defendants to choose liaison counsel. The Court confirmed Defendants' choice on December 21, 1994.

Plaintiffs filed a "Consolidated Amended Complaint" on December 16, 1994. By Opinion dated August 3, 1995, this Court granted Defendants' motion to dismiss that complaint based on Plaintiffs' failure to identify the securities that are the subject of this action, and granted Plaintiffs leave to replead within 45 days. See *Nasdaq I*.

On August 22, 1995, Plaintiffs filed a Refiled Consolidated Complaint (the "Complaint"), identifying 1659 Nasdaq traded securities as the securities at issue in this action.

On December 6, 1995, Plaintiffs moved for an order, pursuant to [Federal Rule of Civil Procedure 37\(a\)](#), to compel Defendants to produce, to the extent responsive to consolidated discovery requests, CID interrogatories, documents reflecting agreements modifying the CIDs, answers to the CID interrogatories, CID deposition transcripts, and CID financial discovery; [\*\*7] and to modify the Stipulated Order Regarding Confidential Documents (the "Confidentiality Order") to permit Plaintiffs to confer with the DOJ regarding Defendants' compliance with Court orders regarding CID discovery.

Plaintiffs' motion was resolved pursuant to Joint Proposed Pretrial Order No. 3 (the "Pretrial Order"), prepared by the parties and ordered by this Court on March 7, 1996. The Pretrial Order read in part:

6. On February 28, 1996, each defendant will identify those of its current employees or former employees who were deposed by the DOJ in connection with the Nasdaq investigation, to the extent known to that defendant.
7. By March 7, 1996, each defendant shall produce copies of all materials, not previously produced pursuant to the Stipulated Order, that were given to the Department of Justice, Antitrust Division, pursuant to Civil Investigative Demands as described in the Stipulated Order, setting forth revenues, costs, profit and/or losses derived from trading Nasdaq securities.

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Clark, residents of Michigan; Daniel D'Addario, a resident of New York; Roseann D'Addario, a resident of New York; Maxine Dampf, a resident of New York; Jerome D. Derdel, M.D., a resident of Pennsylvania; Sulochana Desai, a resident of Michigan; H. Leslie Fineberg, a resident of New Jersey; Nicholas Frangiosa, a resident of Pennsylvania; Neal Hansen and Donna Hansen, residents of New Jersey; Timothy Hennessey, a resident of Oregon; Brent Johnson, a resident of Minnesota; Charles Kaye, a resident of Michigan; James Krum, a resident of Minnesota; Robert Lipinski, a resident of New Jersey; Dr. John Lorge, a resident of the State of Washington; William Lutz, Jr., a resident of Pennsylvania; Dennis Maloney, a resident of New York; Kevin Maloney, a resident of New York; Richard I. Perlman, a resident of California; Jeffrey Sachs, a resident of California; David Siegel, a resident of California; Two Guys Limited Partnership and their General Partner, Geltmore, Inc., having their principal place of business in New Mexico; Peter Wasserman, a resident of the State of New Hampshire; Dennis Weiner, a resident of New Jersey; and Sumner Woodrow, a resident of Massachusetts.

<sup>3</sup> The article, entitled "Why do NASDAQ Market Makers Avoid Odd-Eighth Quotes?," was published in *The Journal of Finance* in December, 1994.

...

10. By March 20, 1996, defendants shall produce copies of all interrogatory answers that were given to the Department of Justice, Antitrust Division, pursuant to **[\*\*8]** Civil Investigative Demands as described in the Stipulated Order, to the extent such answers related to the operation and structure of the Nasdaq Stock Market. Defendants shall also produce the interrogatories to which answers are being produced pursuant to this paragraph.

The Pretrial Order also stayed discovery on the merits of this litigation pending resolution of Plaintiffs' as yet unfiled motion for class certification. See Pretrial Order, P 24.

Plaintiffs moved for class certification on March 20, 1996. By Opinion dated April 18, 1996, this Court granted in part Defendants' motion to depose certain proposed class representatives prior to submission of Defendants' opposition to the instant motion for class certification. Pursuant to that Opinion, Defendants were permitted to conduct depositions of the State of Louisiana. See *Nasdaq III*.

Oral argument on Plaintiffs' motion for class certification was heard on June 25, 1996. Additional submissions have been received until issuance of this Opinion.

On August 30, 1996, Plaintiffs moved (i) to lift the stay of discovery imposed by P 24 of Pretrial Order No. 3, and (ii) to compel Defendants to produce the following documents **[\*\*9]** related to a companion case filed by the Antitrust Division of the Department of Justice ("DOJ") (the "Government Action"): (a) all Civil Investigative Demand ("CID") deposition transcripts within defendants' control, and (b) a settlement memorandum created by the DOJ (the "Settlement Memorandum") and any evidentiary materials expressly referenced therein.<sup>4</sup> Oral argument on Plaintiffs' discovery motion was heard on October 16, 1996, at which time the motion was considered fully submitted.

As of November 1996, more than 30 actions had been consolidated in this Court as MDL 1023 -- *In re NASDAQ Market-Makers Antitrust Litigation*.

#### **Related Proceedings**

In October 1994, the Antitrust Division of the Department of **[\*\*10]** Justice ("DOJ") announced that it was commencing a broad review of a number of aspects of Nasdaq's market structure.

On November 14, 1994, the Securities and Exchange Commission (the "SEC") announced that it was undertaking a review of the operation of Nasdaq, including the "spreads" issue alleged in the Complaint, and broader issues concerning the structure of the market itself.

**[\*501]** In addition, on November 20, 1994, the NASD announced the formation of a seven-member panel to undertake a "plenary review of the effectiveness of the operation and surveillance" of the NASD.

On July 17, 1996, as a result of its investigation of Nasdaq's market structure, the Antitrust Division of the DOJ filed the Government Action, *United States v. Alex. Brown & Sons, Inc., et. al.*, 96 Civ. 5313, in this Court, alleging that twenty-three NASDAQ market-makers had engaged in price-fixing in violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#).<sup>5</sup> At least fifteen of the twenty-three Defendants in the Government Action are also Defendants in the consolidated class action. The Government Action was assigned to this Court as a related action to the instant class action.

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<sup>4</sup> The background and proceedings of the Government Action are more fully set forth in the Related Proceedings section herein, and in the Opinion of the Court issued today in that action. See *United States v. Alex. Brown & Sons, Inc., et. al.*, 96 Civ. 5313 (S.D.N.Y. Nov. 27, 1996).

<sup>5</sup> See *United States v. Alex. Brown & Sons, Inc., et. al.*, 96 Civ. 5313 (S.D.N.Y. Nov. 26, 1996).

[\*\*11] The Government Action was based on evidence gathered by the DOJ during the course of its investigation. According to the Competitive Impact Statement filed by the DOJ pursuant to Section 2(b) of the APPA, [15 U.S.C. § 16 \(b\)-\(h\)](#), which summarizes the evidence supporting the Complaint's allegations, the Antitrust Division took over 225 depositions. Defendants have previously identified 62 of their current or former employees whose depositions were taken by the DOJ. In connection with its investigation, the DOJ prepared the Settlement Memorandum, a compilation of evidence which was reviewed by Defendants.

Simultaneously with its Complaint in the Government Action, the Government filed a proposed Stipulation and Order, signed by each party, which, upon approval of the Court, will resolve the allegations of the Complaint in that action. Entry of the proposed Stipulation and Order is subject to the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), which requires a sixty-day period in which the public may submit comments relating to the Order.

On August 28, 1996, Plaintiffs in this class action moved to intervene in the Government Action in order to obtain discovery of [\*\*12] the Settlement Memorandum and the underlying documents. Plaintiffs' motion to intervene and for discovery is resolved by an Opinion of this Court issued today in the Government Action.

## Facts

**HN1** [↑] For purposes of deciding a [Rule 23](#) motion for class certification, the allegations set forth in the complaint are accepted as true. See [Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 661 n.15 \(2d Cir. 1978\)](#). The facts presented herein are taken from the Complaint and are limited to this motion.

Nasdaq is a computerized stock quotations system operated by the NASD and is one of the world's largest securities markets. Complaint PP 2, 99. In contrast to the stock exchanges, which employ an auction system (in which customer orders to buy or sell are matched against one another by a single "specialist" for the security), Nasdaq employs a multiple market-maker system in which customers sell to and buy from market-makers. Complaint PP 3, 100. Defendants are leading Nasdaq market-makers. Complaint PP 2(b), 99(a).

Nasdaq operates on a "bid and asked" system. The "bid" price is the price at which a given market-maker is willing to buy a security. The "ask" price is [\*\*13] the price at which a market-maker is willing to sell the security. Complaint PP 2(c), 99(b), 100. Each Nasdaq market-maker is purportedly independent, and purportedly competes against other market-makers in quoting bids and asks for customer trades. Complaint PP 3, 100(b). All Nasdaq market-makers, including Defendants, continuously communicate to one another their bid and ask quotations through Nasdaq's "electronic billboard" computer system and computer screens in their respective offices. By virtue of such communication, each market-maker is continuously aware of the price quotations of every other market-maker. Complaint PP 4, 101.

A major source of every market-maker's profits -- and a significant element of Plaintiffs' cost in executing trades over the Nasdaq system -- is the difference between the bid price and the ask price for a given security. Complaint PP 3(c), (d), 99(b), (c). This [\*502] difference is referred to as the bid/ask spread, or simply the "spread." *Id.* The wider the spreads, the greater the market-makers' individual and collective revenues and profits. *Id.*

In a competitive market for most actively traded stocks, the spread in the stock will typically be one [\*\*14] eighth of a point, or \$ 0.125, i.e., the bid will be 20 1/8 and the ask will be 20 1/4. Complaint PP 6, 7, 105(a). On stock exchanges generally, including the New York Stock Exchange and the American Stock Exchange, spreads of one eighth are typical for most actively traded stocks. Complaint P 105(b).

Nasdaq itself has claimed that multiple market-makers competing for business on Nasdaq securities and Nasdaq's high degree of automation should result in vigorous competition between market-makers to narrow spreads. Complaint PP 5, 103. However, Plaintiffs allege that beginning at least as early as May 1989, Defendants and their

co-conspirators conspired to raise, fix and maintain at supra-competitive levels the "spread" paid by Plaintiffs and members of the proposed Class to trade in Class Securities. Complaint PP 1, 102, 103.<sup>6</sup>

[\*\*15] As a result, spreads on Class Securities have been, on average, approximately twice as large as spreads on the New York and American stock exchanges for securities with comparable characteristics. Complaint PP 5, 11, 103. Moreover, from May 1, 1989 to May 1993, average spreads on the Nasdaq National Market increased by over 37%, while average spreads on the New York and the American stock exchanges held steady. Complaint PP 11, 110. Spreads were reduced by more than 50% on average when the very same securities moved from trading on Nasdaq to trading on an exchange. *Id.*

Defendants are alleged to have used a number of mechanisms to effect and police their conspiracy to fix spreads. Notably, Defendants and their co-conspirators collectively refused to quote odd-eighths (*i.e.*, 1/8, 3/8, 5/8 and 7/8 of a dollar) in their bids and asks for Class Securities, thereby inflating their spreads. Complaint PP 7, 106(a).

In the absence of collusion, odd-eighth bids or asks would be expected to occur nearly as often as even-eighth bids or asks for any given security. However, Defendants quoted bids and asks for Class Securities in a manner that reflects a statistically unexplainable, almost [\*\*16] complete absence of bids or asks in odd-eighths. Complaint PP 12, 105(c), 111. Accordingly, \$.25 per share became the minimum spread for Class Securities, whereas the typical spread for actively traded Class Securities otherwise would have been half that amount. Complaint PP 7, 106(b).

Defendants are also alleged to have effected their conspiracy by following the spread set by the dominant dealer (known as "the name") in a particular security, and by agreeing not to compete by "breaking the spread" -- that is, by quoting any odd-eighth or better bid or ask which would reduce Defendants' inflated spread. Complaint PP 10, 109. Any trader who attempted to break the spread was subject to various kinds of pressure and sanctions. Complaint PP 8-10, 107-109. For example, one trader who tried on occasion to narrow a spread told *Forbes Magazine*: "I used to get phone calls from people; they'd scream, 'Don't break the spread! You're ruining it for everybody else!'" Complaint P 108. Another trader who tried something similar said: "My phone lights up like a Christmas tree. 'Whaddya doing in the stock? You're closing the spread. We don't play ball that way. Go back where you belong.'" [\*\*17] *Id.* In addition to exhortations to rejoin the conspiracy, Defendants and their co-conspirators are alleged to have refused to conduct business in other contexts with any trader who tried to break a spread. Complaint PP 10, 109.

[\*503] In May 1994, Professors William G. Christie and Paul H. Schultz completed a study indicating the existence of collusion in the fixing of Nasdaq spreads.<sup>7</sup> Drafts of the Christie & Schultz study were circulated to the NASD, and the study was widely reported in the national press in late May 1994, along with criticism of Defendants' apparently collusive behavior. Complaint P 112.

In late [\*\*18] May 1994, immediately after the publicity about collusion, and in order to deflect such criticism, Defendants allegedly reintroduced odd-eighth quotations for certain high-profile Nasdaq securities, thereby cutting the spreads on those securities by approximately 50%. Complaint PP 13, 112. According to Plaintiffs, there were no significant changes in the structure of the market or the costs or risks of doing business that can account for this reintroduction of odd-eighths and dramatic reduction in the size of spreads. Complaint PP 14, 113.

<sup>6</sup>The spread in effect is a charge paid by plaintiffs and Class members to the market-makers for their services in making a market in these securities. Complaint P 122. (The market-maker's charge per share for a buy or sell respectively is measured by the effective half-spread.) Defendants are alleged to have overcharged plaintiffs and other Class members by inflating that charge. *Id.* The extent of the overcharge is the difference between the spreads charged and the spreads that would have prevailed in a competitive market, absent violations of the antitrust laws. *E.g.*, [New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1077 \(2d Cir. 1988\)](#).

<sup>7</sup>The Christie and Schultz study, "Why Do NASDAQ Market Makers Avoid Odd Eighth Quotes?," was published in *The Journal of Finance* in December, 1994. At the American Finance Association's annual meeting on January 6, 1996, this study was awarded the Smith Breeden award, as best paper published in *The Journal of Finance* (the official journal of the American Finance Association) for the year.

Plaintiffs allege that the sole reason for Defendants' ability to cut the spreads for selected high-profile Class Securities by approximately 50% is that those spreads previously had been fixed and maintained at artificially inflated and supra-competitive levels. Complaint PP 14, 113. Plaintiffs allege that despite Defendants' effort to deflect criticism by cutting the spreads on selected high-profile Class Securities, Defendants' spread-fixing conspiracy has continued. Complaint P 117.<sup>8</sup>

[\*\*19] Plaintiffs allege that, as a result of Defendants' conspiracy, spreads on Class Securities were maintained at supra-competitive levels, and price competition among Defendants and their co-conspirators was restrained or eliminated. Complaint P 120. Consequently, the prices which Plaintiffs and the members of the Class paid for purchases of Class Securities were artificially inflated, and the prices received from sales of Class Securities were artificially depressed. Complaint PP 120, 121.

### ***Discussion***

The Plaintiffs seek an order pursuant to [Rule 23, Fed. R. Civ. P.](#), certifying this action as a class action on their own behalf and as representatives of the class defined herein.

The persons injured by Defendants' alleged conspiracy are those who traded in "Class Securities," which are defined by Plaintiffs as:

any and all stocks traded on the Nasdaq National Market for which odd-eighth quotations were effectively eliminated for a period of at least one continuous, full year within the relevant time period. A security is a Class Security only for those periods during which odd-eighth quotations were effectively eliminated.

Complaint P 82. Plaintiffs have [\*\*20] identified 1,659 stocks which fit this definition of a Class Security.<sup>9</sup>

Plaintiffs seek certification of:

(a) a Class consisting of all persons, firms, corporations, and other entities (excluding Defendants and other Nasdaq market-makers, and their respective affiliates) who purchased or sold Class [\*504] Securities on the Nasdaq National Market, trading directly (or through agents) with the Defendants or their co-conspirators, or with their respective affiliates, during the period May 1, 1989 to May 27, 1994 ("Class Period"); and

(b) a Subclass consisting of those members of the above Class who at the time of class notice are current brokerage customers of Defendants (or their affiliates), or whose brokerage accounts are cleared by the Defendants (or their affiliates), and to whom Defendants (or their affiliates) send periodic mailings. [\*\*21]<sup>10</sup>

For purposes of this Class Definition, the term "affiliates" includes parents, subsidiaries and other commonly-owned affiliates.

### ***I. Applying Rule 23***

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<sup>8</sup> For example, after Domestic Securities Inc. broke the spread on Intel Corp. on a trading day in late summer 1994, defendant Weeden & Co. flashed a message of "pathetic" on the trading terminal of Domestic Securities Inc. and defendant Morgan Stanley & Co. called immediately and complained "did you guys break the spread for 1,000 shares?" Complaint P 108.

Similarly, after Domestic Securities Inc. broke the spread for Chiron Corp. stock, Keith Balter, the head of over-the-counter trading for defendant Weeden & Co., immediately telephoned Domestic Securities Inc. and stated "you're embarrassing and pathetic ... you're breaking the spreads for everybody." *Id.*

On July 15, 1994, Domestic Securities Inc. broke the spread in Xilinx Corp. stock, and, in response, defendant Hambrecht & Quist called Domestic and stated "This is bull . I have institutional customers come to me and I have to meet your price. It's bull , you guys going down 1/8 for 1,000 shares." *Id.*

<sup>9</sup> A list of these stocks, reflecting the respective dates within the Class Period for which each stock is a Class Security, is attached as Exhibit "A" to the Complaint.

<sup>10</sup> The proposed Subclass is limited to persons to whom the Defendants send periodic mailings.

Rule 23(c)(1), Fed. R. Civ. P., provides that [HN2](#) "as soon as practicable after the commencement of an action brought as a class action, the Court shall determine by order whether it is to be so maintained."

[HN3](#) In applying this Rule, courts have held that class action determinations are to be based solely on the allegations set forth in the complaint, which are accepted as true, see [Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 661 n.15 \(2d Cir. 1978\)](#), and not on an inquiry into the merits of the plaintiff's claims. See [Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177-78, 40 L. Ed. 2d 732, 94 S. Ct. 2140 \(1974\)](#); [Dura-Bilt Corp. v. Chase Manhattan Corp., 89 F.R.D. 87, 94 \(S.D.N.Y. 1981\)](#). Thus, the only question to be determined [\[\\*\\*22\]](#) at this stage is whether the requirements of [Rule 23](#) have been satisfied. In making this determination, any references to the Plaintiffs' factual allegations set forth below are not to be construed as findings of fact regarding those allegations.

Furthermore, the Second Circuit has directed [HN4](#) district courts to apply [Rule 23](#) according to a liberal rather than a restrictive interpretation, see [Korn v. Franchard Corp., 456 F.2d 1206, 1208-09 \(2d Cir. 1972\)](#); [Green v. Wolf Corp., 406 F.2d 291, 298, 301 \(2d Cir. 1968\)](#).

However, despite the liberal interpretation that this Court must give to [Rule 23](#), it may certify this as a class action only after undertaking "rigorous analysis" to assure that the requirements of the Rule are satisfied. [General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 \(1982\)](#).

Before addressing the specific requirements of [Rule 23](#), the Court must address the standing issues raised by Defendants.

## II. Standing

It is well-established that [HN5](#) "the burden is on the party claiming jurisdiction to demonstrate that the court has jurisdiction over the subject matter." [International Shipping Co., S.A. v. Hydra](#) [\[\\*\\*23\]](#) [Offshore, Inc., 675 F. Supp. 146, 151 & n.5 \(S.D.N.Y. 1987\)](#), *aff'd*, [875 F.2d 388 \(2d Cir. 1989\)](#). Standing is an essential element of subject matter jurisdiction, and the question presented is whether this action should be dismissed against any of these Defendants for lack of subject matter jurisdiction because Plaintiffs do not have standing to bring it.

[HN6](#) The fundamental principles governing whether a plaintiff has standing to maintain an action in federal court are straightforward and familiar. A plaintiff must "allege[] such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial power on *his* behalf." [Warth v. Seldin, 422 U.S. 490, 498-99, 45 L. Ed. 2d 343, 95 S. Ct. 2197 \(1975\)](#) (internal quotation omitted).

As this Court has noted, [HN7](#) a plaintiff may not use the procedural device of a class action to bootstrap himself into standing he lacks under the express terms of the substantive law. [Angel Music Inc. v. ABC Sports, Inc., 112 F.R.D. 70, 74 \(S.D.N.Y. 1986\)](#). It must be noted that [HN8](#) the question of standing is totally separate and distinct from the question of plaintiff's [\[\\*\\*24\]](#) right to represent a purported class under [Rule 23](#). Standing to [\[\\*505\]](#) sue is an essential threshold which must be crossed before any determination as to class representation under [Rule 23](#) can be made. [Vulcan Society of Westchester County v. Fire Dep't of City of White Plains, 82 F.R.D. 379, 398 \(S.D.N.Y. 1979\)](#); [German v. Federal Home Mortgage Corp., 885 F. Supp. 537, 547-48 \(S.D.N.Y. 1995\)](#).

### A. *Illinois Brick*

Defendants contend that under the Supreme Court's holding in *Illinois Brick*, which held that only direct purchasers from an alleged conspirator have standing to bring antitrust claims, proposed class members who traded through brokers not owned or controlled by Defendants are indirect purchasers, and therefore lack standing to sue

Defendants.<sup>11</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977). As set forth above, the issue of *Illinois Brick* standing must be addressed at this juncture, prior to class certification.

[\*\*25] The Supreme Court has strictly adhered to the bright-line rule established in *Illinois Brick*, holding that the "possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 110 S. Ct. 2807, 2817, 111 L. Ed. 2d 169 (1990). Nonetheless, HN9 where a particular industry structure includes a principal-agent relationship between the indirect and direct purchasers such that the two are not distinct economic entities in the purchase chain, the indirect purchaser has standing under *Illinois Brick*. See *Diskin v. Daily Racing Form, Inc.*, 1994 U.S. Dist. LEXIS 9129, 1994-1 CCH Trade Cases P 70,649 (S.D.N.Y. 1994).

Plaintiffs contend that proposed class members who purchased securities through non-Defendant owned brokers have standing under *Illinois Brick* because, as a matter of law, securities brokers are not distinct economic entities; rather, as statutorily defined, brokers buy or sell "for the account of others," not for their own accounts. See 15 U.S.C. § 78(c).

The small body of case law addressing this issue indicates that the question whether an investor who purchased Class Securities through non-Defendant-owned [\*\*26] brokers has standing turns on the scope of the brokers' role in relation to the transaction at issue.

The plaintiff in *Diskin*, an antitrust suit against the publisher of the Daily Racing Form, a horse racing newspaper, asserted that *Illinois Brick* did not bar his suit because the distributors from whom he purchased the newspaper were mere sales agents who retained the right to send back all unsold copies to the publisher. The Court held that the distributors were "mere agents", and did "not constitute a distinct entrepreneurial link in the chain of distribution." *Diskin* at \*5.

In *McCarthy v. Recordex Service, Inc.*, 80 F.3d 842 (3d Cir. 1996) several individuals who had been plaintiffs in medical malpractice cases brought suit against copying services and hospitals that had charged \$ 1 or more per page for copying. However, the hospital or copying service "in each case, billed the [plaintiff's] attorney directly." *Id. at 845*. Moreover, "in actual practice, the [law] firm never sought reimbursement for advanced costs where representation of the client did not lead to a recovery." *Id. at 846*. The Court found that, where "none of the plaintiffs retained their [\*\*27] lawyers to act as mere purchasing agents," the lawyers themselves were "the direct purchasers of the hospital-record photocopies." *Id. at 852*.

The *McCarthy* court noted that, under the circumstances, the "plaintiffs here are no more direct purchasers of the hospital record photocopies than a passenger in a taxicab would be considered the direct purchaser of the gasoline used by the taxicab to carry the passenger to his destination." *McCarthy*, 80 F.3d at 853, n.18.

This analogy clarifies the distinctions between the facts upon which the *McCarthy* [\*506] holding was based and the facts present here. The brokers who purchased securities on behalf of investors did not incorporate those securities into a bundle of services that was then provided to the investors, in the way the photocopies were incorporated into legal services, or gasoline is incorporated into taxi service. Rather, the purchase of the securities was itself the ultimate service provided to the investor. Moreover, as securities brokers are in the business of effecting transactions "for the account of others," they do not constitute a distinct link in the chain of distribution.

Accordingly, the *McCarthy* court's [\*\*28] holding -- that an attorney's status as agent did not render her clients direct purchasers of photocopies -- does not compel the conclusion that brokers' agent status does not render investors direct purchasers of stock such that they have standing under *Illinois Brick*. Stock brokers are not

<sup>11</sup> Defendants concede that investors who purchased securities through brokers who are commonly-owned affiliates of Defendants have standing under *Illinois Brick*. Accordingly, this section addresses only the standing of those investors who purchased securities through brokers not owned by Defendants.

necessarily a separate "link in the chain of distribution," but instead (by statute) they trade "for the account of others."

This Court, in *Diskin*, [HN10](#) has set forth several factors relevant to determining whether a principal and an agent constitute distinct economic entities for purposes of *Illinois Brick* standing:

whether the agent performs a function on behalf of his principal other than securing an offer [or a price] from a buyer [or seller] for the . . . product; the degree to which the agent is authorized to exercise his discretion concerning the price and terms under which the principal's product is to be sold [or bought]; and finally whether the use of the agent constitutes a separate step in the vertical distribution of the . . . product.

*Diskin* at \*5 (citing [Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025, 1031, n.5 \(2d Cir. 1979\)](#)). [\[\\*\\*29\]](#)

With respect to the first of these criteria, Defendants urge that some securities brokers provide investment advice as well as purchasing and sales services, and that they charge one lump sum to cover that advice as well as the sales. There has been no evidence submitted regarding which non-Defendant owned brokers provide such advice, and which only execute the purchases and sales requested by investors. Likewise, there is no evidence before the Court with respect to the broker's discretion concerning the price and terms of the purchase and sales. The third factor, whether the use of the broker constitutes a "separate step" in the vertical distribution of the securities, appears to be not an independent factor so much as the conclusion to which the first two factors lead.

In light of the cases cited above and the factors set forth in *Diskin*, the class will be defined to include investors who transacted through non-Defendant owned brokers where those brokers did not function as a distinct economic entity in the chain of purchase or sale. Thus, a determination of whether, in the event of a monetary settlement or judgment, particular investors who transacted through brokers are [\[\\*\\*30\]](#) entitled to a portion of the award, will require evidentiary submissions in light of the *Diskin* factors.

In any event, even if it is later determined that some or all Plaintiffs who purchased or sold securities through a non-Defendant owned broker lack standing under *Illinois Brick*, those Plaintiffs will only be barred from prosecuting damage claims, and will still be entitled to remain in the class for purposes of seeking injunctive relief. See [McCarthy, 80 F.3d at 856](#) (citing [Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 590 \(3d Cir. 1979\); In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1167 \(5th Cir. 1979\)](#)).

#### B. The State of Louisiana Cannot Sue on Claims of State Agencies

Plaintiff the State of Louisiana, through its Attorney General, Richard P. Ieyoub, seeks inclusion in the proposed class in its capacity as *parens patriae*, trustee, guardian, and representative of individual Louisiana residents. Plaintiffs have identified five retirement systems (the "Systems") on whose behalf the State of Louisiana now seeks to proceed as a class representative.<sup>12</sup> [\[\\*507\]](#) Complaint, P 91. Plaintiffs contend that, pursuant to L.A. Rev. [\[\\*\\*31\]](#) Stat. § 49:257A, the Attorney General has statutory authority to represent the systems, as they are state agencies.

L.A. Rev. Stat. § 49:257A provides:

.... [HN11](#) In addition, to any other powers, duties or authority granted to the attorney general and the Department of Justice by the constitution and the laws of the state, the attorney general shall represent the state and all departments and agencies of state government....

L.A. Rev. Stat. § 49:257A.

[HN12](#) This statute, however, does not allow the Attorney General to act as a party in interest on behalf of state agencies; rather, it merely provides that the Attorney General may act as counsel for state agencies in certain

<sup>12</sup> The Systems are the Louisiana School Employees Retirement System, the Louisiana State Employees Retirement System, the Employees Retirement System of the Sewerage & Water Board of New Orleans, the Employees Retirement System of the City of Baton Rouge and the State of Louisiana District Attorneys' Retirement System.

cases. [\*\*32] See Minutes of the House Committee on Appropriations, Regular Session, June 20, 1988 (legislative committee discussions focusing on litigation control issues, i.e., numbers of attorneys to be retained, and method of selecting outside attorneys).

Louisiana's Supreme Court has long held that [HN13](#)<sup>13</sup> the State cannot sue on causes of action that belong to state agencies as distinct legal entities. The contrary view, advanced by the Attorney General here, was rejected by the Louisiana Supreme Court in *State v. Tensas Delta Land Co.*, 126 La. 59, 52 So. 216 (La. 1910):

The argument that the board is . . . a mere instrumentality of the state, and that therefore the state may sue in every case where the said board might sue, contains a manifest non sequitur. Every city, town, and parish of the state is a mere agency or instrumentality of the state; but no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the state, any cause of action which any of them might have . . . If one of these corporations have [sic] a right of action, the proper functionary to enforce same is the governing body of the corporation, [\*\*33] and not the Attorney General, or the state.

*Id.* at 221. See also [Saint v. Allen](#), 172 La. 350, 134 So. 246, 249 (La. 1931); *State, through Governor's Special Comm'n on Educ. v. Dear*, 532 So. 2d 902 (La. App. 5th Cir. 1988) (state agencies and political corporations are sole parties capable of bringing suit to enforce their rights); [State ex rel. Guste v. Board of Highways](#), 275 So. 2d 207 (La. App. 1st Cir. 1973), writ issued by, 279 So. 2d 201 (La. 1973), aff'd, 289 So. 2d 82 (La. 1974).

Under Louisiana law, each of the Systems has the power to "sue and be sued," <sup>13</sup> demonstrating that each is a distinct legal entity from the State of Louisiana. See [Saint](#), 134 So. at 249. Indeed, the retirement systems' legal independence from the State is demonstrated by the fact that the State has previously been sued by two of the Systems -- the Louisiana State Employees' Retirement System and the Louisiana School Employees' Retirement System. See [Louisiana State Employees' Retirement Sys., et al. v. State of Louisiana](#), 423 So. 2d 73 (La. App. 1st Cir. 1982), writ denied, 427 So. 2d 1206 (La. 1983).

[\*\*34] There is thus a distinction between the State acting as plaintiff, and the Attorney General's statutory authority to represent state agencies proceeding in their own names. Even assuming the Attorney General is authorized here to serve as counsel to the Systems, such authorization does not transform the State into the real party in interest.<sup>14</sup>

[\*508] Moreover, in the absence of a direct pecuniary interest, the state cannot proceed. See [Green v. Louisiana Underwriters Ins. Co.](#), 571 So. 2d 610, 615 (La. 1990). Because the Systems' assets belong to state employees,<sup>15</sup> not to the State of Louisiana, Louisiana has no distinct pecuniary interest [\*\*35] in the Systems' funds:

The [retirement system] funds involved here consist of contributions made by the individual members of the retirement systems and matching contributions by the State. The State contributions are in the nature of fringe

<sup>13</sup> See [La. Rev. Stat. Ann. § 11:1001 et seq.](#) (Louisiana School Employees' Retirement System); [La. Rev. Stat. Ann. § 11:401 et seq.](#) (Louisiana State Employees' Retirement System); [La. Rev. Stat. Ann. § 11:1581 et seq.](#) (Louisiana District Attorneys' Retirement System); [La. Rev. Stat. Ann. § 11:3821 et seq.](#) (Employees' Retirement System of the Sewerage & Water Board of New Orleans); [Board of Trustees of the Employees' Retirement System of the City of Baton Rouge and Parish of East Baton Rouge v. Commission on Ethics for Public Employees](#), 655 So. 2d 1355 (La. App. 1st Cir. 1995) (Employees Retirement System at the City of Baton Rouge).

<sup>14</sup> Even where the Attorney General has represented a state agency pursuant to [La. Rev. Stat. Ann. § 49:257](#), the real party in interest remained the agency, not the State. See, e.g., [American Furniture Co. v. International Accommodations Supply](#), 721 F.2d 478 (5th Cir. 1981) (Attorney General represented Louisiana State Employees' Retirement System in its own name).

<sup>15</sup> The Attorney General has acknowledged that retirement system funds are not "public funds," but rather belong to the employee members of the systems, such that the State has no interest. Mr. Ieyoub admitted that the State has no interest in the monies owned by the Original and Late Filing Systems. Louisiana Attorney General Opinion No. 94-44.

benefits or additional compensation. The funds here belong to the members of the systems. Neither the State nor the general public has any proprietary interest in same.

*Louisiana State Employees' Retirement Sys., 423 So. 2d at 75.*

The claims for relief here thus belong to the individual retirement systems that bought or sold the securities. Those Systems alone have the right to assert their claims. See *Guste, I\*\*36] 275 So. 2d at 207;* *Tensas Delta Land Co., 52 So. at 216.* Consequently, Louisiana has no viable claim to bring on its own behalf.

Plaintiffs also contend that the Systems may confer, and have conferred, authority upon the State to pursue its claims and upon the Attorney General "to represent" the systems. Although affidavits have been sworn on behalf of each of the Systems purporting to confer on the Attorney General authority to represent these systems in this case, this purported conferral of representational authority on the Attorney General does not establish the State as a party with claims to pursue, as required to proceed.

Finally, although Plaintiffs refer to the systems' purported willingness to intervene as plaintiffs, they have not done so, and their stated willingness to seek intervention in the future is not relevant to the instant motion.

**C. The Proposed Class Representatives Have Standing to Sue Each of the Named Defendants**

Defendants note that 23 of the 33 named Defendants are not alleged to have traded with any of the named individual Plaintiffs. However, in order to establish standing against all the named Defendants, Plaintiffs need not have included *[\*\*37]* among their proposed Class Representatives one individual who traded with each Defendant. *HN14* [↑] Because antitrust liability is joint and several, a Plaintiff injured by one Defendant as a result of the conspiracy has standing to represent a class of individuals injured by any of the Defendant's co-conspirators. *Rios v. Marshall, 100 F.R.D. 395, 404 (S.D.N.Y. 1983).*

**II. The Requirements of Rule 23(a)**

*Rule 23(a)* provides that:

*HN15* [↑] one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

If these four criteria are not met, an action may not be maintained as a class action. *Fed. R. Civ. P. Rule 23(b).* Each of these criteria is considered in turn below.

**A. Numerosity and Impracticability**

*Rule 23(a)(1) HN16* [↑] requires that the class be "so numerous that joinder of all members is impracticable." *[\*\*38]* Impracticability means difficulty or inconvenience of joinder; the rule does not require impossibility of joinder. *Northwestern National Bank of Minneapolis v. Fox & Co., 102 F.R.D. 507, 511* *[\*5091 (S.D.N.Y. 1984); Goldstein v. North Jersey Trust Company, 39 F.R.D. 363, 367 (S.D.N.Y. 1966).* Here, the class numbers at least a million members, and the numerosity requirement is clearly satisfied. Moreover, a class of this size plainly makes joinder of all members impracticable, if not impossible.

Courts in this circuit have routinely held that classes far smaller than the one proposed here are sufficiently numerous for class certification. See, e.g., *Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972)* (certifying class which may be limited to 70 investors); *McNeill v. New York City Housing Authority, 719 F. Supp. 233, 252 (1989)* (1,059 Section 8 tenants whose subsidies were suspended or terminated); *Fidelis Corp. v. Litton Industries, Inc., 293 F. Supp. 164, 170 (S.D.N.Y. 1968)* (certifying class of 35-70 individuals).

As this Court noted in [German, 885 F. Supp. at 552, HN17](#) [↑] "precise quantification of the class members is not necessary because the court may make [\*\*39] common sense assumptions to support a finding of numerosity." *Accord, Maywalt v. Parker & Parsley Petroleum Co., 147 F.R.D. 51, 55 (S.D.N.Y. 1993); Ellender v. Schweiker, 550 F. Supp. 1348, 1359 (S.D.N.Y. 1982), app. dism'd, 781 F.2d 314 (2d Cir. 1984).* Plaintiffs may rely on reasonable inferences drawn from the available facts in order to estimate the size of the class. [McNeill, 719 F. Supp. at 252.](#)

Here, as in *McNeill*, more precise information as to the numbers of persons affected is within Defendants' control, but "there is something within the record from which it can be inferred that a class does exist," and "a rough estimate could be made." See [Clarkson v. Coughlin, 783 F. Supp. 789, 798 \(S.D.N.Y. 1992\).](#)

In sum,

there is no magic minimum number that breathes life into a class, see *Bruce v. Christian*, 113 F.R.D. 554, 556 (S.D.N.Y. 1986), and lack of knowledge of the exact number of persons affected is not a bar to certification where the Defendants alone have access to such data, see [McNeill v. New York City Housing Authority, 719 F. Supp. 233, 252 \(S.D.N.Y. 1989\); Folsom v. Blum, 87 F.R.D. 443, 445 \(S.D.N.Y. 1980\) ....](#)

[\*\*40] [Clarkson, 783 F. Supp. at 798.](#)

The number of plaintiffs who have bought or sold Class Securities during the Class Period readily meets the numerosity requirement of [Rule 23\(a\)\(1\).](#)

## **B. Commonality**

[Rule 23\(a\)\(2\) HN18](#) [↑] requires that, for an action to be properly maintained as a class action, there must be common issues of fact and law.

Here, common questions of law and fact exist as to whether a conspiracy existed among the Defendants to eliminate odd-eighths in order to inflate the spread artificially. Specifically, Plaintiffs assert that the following questions of law or fact are common to all plaintiffs in the proposed class:

- (a) whether Defendants and their co-conspirators engaged in a conspiracy to raise, fix and maintain Nasdaq spreads at supra-competitive levels;
- (b) the duration and extent of Defendants' conspiracy;
- (c) whether each Defendants was a participant in the conspiracy;
- (d) whether Defendants' conspiracy violated [Section 1](#) of the Sherman Act;
- (e) whether Defendants took affirmative steps to conceal their conspiracy;
- (f) the effect of Defendants' conspiracy upon the Nasdaq spreads for Class Securities;
- (g) the appropriate [\*\*41] measure of damages and the amount of damages suffered by the Class as a whole;
- (h) whether Plaintiffs and the members of the Class are entitled to declaratory and injunctive relief.

Complaint P 88.

Numerous courts have held that [HN19](#) [↑] allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of [Rule 23\(a\)\(2\).](#) See *In Re Potash Antitrust Litigation, 159 F.R.D. 682, 689 (D. Minn. 1995); In Re Workers' Compensation Antitrust Litigation, 130 F.R.D. 99, 105 (D. Minn. 1990)* (recognizing [\*510] that "antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy"); *Town of New Castle v. Yonkers Contracting Co., Inc., 131 F.R.D. 38, 41 n.4 (S.D.N.Y. 1990)* ("We agree with plaintiffs that the issue of the existence and effect of an antitrust conspiracy involves common questions of law and fact."); *Thillens, Inc. v. Community Currency Exch. Assn., 97 F.R.D. 668, 677 (N.D. Ill. 1983)* ("The overriding common issue of law is to determine the existence of a conspiracy."); [\*\*42] *In re Alcoholic Beverages Antitrust Litigation, 95 F.R.D. 321, 324 (E.D.N.Y. 1982); Jennings Oil Co., Inc. v. Mobil Oil Corp., 80 F.R.D. 124, 128 (S.D.N.Y. 1978)* (commonality requirement satisfied when plaintiff raises "common questions of the

existence, scope, and effect of the alleged conspiracy"); *In Re Master Key Antitrust Litigation, 70 F.R.D. 23, 25-26 (D. Conn.)*, app. dism'd, [528 F.2d 5 \(2d Cir. 1975\)](#); *Dennis v. Saks & Co.*, 1975-2 CCH Trade Cases P 60, 396 (S.D.N.Y. 1975). See also, 4 H. Newberg & A. Conte, *Newberg on Class Actions* § 18.05 (3d ed. 1992).

The Complaint alleges a single conspiracy among Defendants and their co-conspirators, as leading Nasdaq market-makers. Complaint P 1, 2(b), 7-10, 99(b), 102, 104, 106-109. Proof of the alleged conspiracy is the heart of this case, and is crucial to the claims of all members of the class. Each of the putative class members has a common interest in proving the existence, scope, effectiveness and impact of that conspiracy, as well as the appropriate injunctive and monetary relief to remedy the injury caused by the conspiracy.

Even to the extent that "each member of the class presents a slightly **[\*\*43]** different factual situation, each presents a common legal question." *Stenson v. Blum*, [476 F. Supp. 1331, 1335](#) (citing *Lyons v. Weinberger*, [376 F. Supp. 248, 263 \(S.D.N.Y. 1974\)](#)); 3B Moore's *Federal Practice* P 23.06-1 at 23-176, 23-180 (3d ed. 1978)). In the event further proceedings reveal that some of the questions raised by the Plaintiffs require individual inquiries, those issues can be resolved either by further defining the scope of the class action, by designating sub-classes, or by decertifying the class. See *Fed. R. Civ. P. 23(c)(4)(B)*.

In sum, there are sufficient common questions of fact and law to satisfy this requirement.<sup>16</sup>

### C. Typicality

[Rule 23\(a\)\(3\) HN20](#) [↑] requires that the claims asserted by plaintiffs on behalf of a proposed class be typical of the claims of the other members of the class.

Typicality refers to the nature **[\*\*44]** of the claim of the class representatives and not to the specific facts from which the claim arose or relief is sought. The proper inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct not special or unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.

*Dura-Bilt Corp.*, [89 F.R.D. at 99](#); see *Gary Plastic Packaging Corp. v. Merrill Lynch*, [903 F.2d 176, 179 \(2d Cir. 1990\)](#).

[HN21](#) [↑] Typicality under [Rule 23](#) requires that a class representative "have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions." *Daniels v. Amerco*, 1983-1 Trade Cas. P 65, 274 (S.D.N.Y. 1983); *National Auto Brokers Corp. v. General Motors Corp.*, [60 F.R.D. 476, 486-87 \(S.D.N.Y. 1973\)](#) ("the primary criterion [for determining typicality] is the forthrightness and vigor with which the representative party can be expected to assert the interests of the members of the class").

The Plaintiffs in this action, like every other member of the proposed Class, are purchasers **[\*\*45]** and sellers of Class Securities during the Class Period. They allege that they have been injured by Defendants' conspiratorial refusal to quote in odd-eighths, which artificially inflated the spread between **[\*511]** the bid and the ask price, to the financial disadvantage of investors.

[Rule 23\(a\)'s HN22](#) [↑] typicality requirement is established where, as here, the claims of the representative Plaintiffs arise from the same course of conduct that gives rise to the claims of the other Class members, where the claims are based on the same legal theory, and where the class members have allegedly been injured by the same course of conduct as that which allegedly injured the proposed representatives. See, e.g., *In Re Drexel Burnham Lambert Group*, [960 F.2d 285, 291 \(2d Cir. 1992\)](#); *Rossini v. Ogilvy & Mather, Inc.*, [798 F.2d 590, 598 \(2d Cir. 1986\)](#); *German*, [885 F. Supp. at 554-55](#); *Maywalt*, [147 F.R.D. at 57](#); *Trief v. Dun & Bradstreet Corp.*, [144 F.R.D. 193, 200 \(S.D.N.Y. 1992\)](#); *Dura-Bilt*, [89 F.R.D. at 99](#). See also 1 Newberg on Class Actions § 3.13 at 2-76 (the

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<sup>16</sup> The issue of the predominance of common issues of law and fact is addressed herein at the Court's discussion of the requirements of [Rule 23\(b\)\(1\)](#).

typicality requirement is usually met "when it is alleged that the same unlawful conduct was directed at or affected [\*\*46] both the named plaintiffs and the class sought to be represented").

Defendants advance several contentions with respect to the typicality requirement of [Rule 23\(a\)](#). First, Defendants urge that typicality is defeated by objective economic variables which determine the spreads on a given security and which must be assessed individually to assess whether a given Class Security was actually affected by the alleged conspiracy. According to the Defendants, each Plaintiff has an interest only in demonstrating that the security which she bought or sold was affected by the alleged conspiracy at the time of the Plaintiff's transaction, and such a limited interest is insufficient to adequately represent the proposed class, which would include millions of investors with varying individual interests in demonstrating the effect of the alleged conspiracy on millions of different transactions over a five-year period.

[HN23](#) [+] Typicality, however, does not require that the situations of the named representatives and the class members be identical. [Trief v. Dun & Bradstreet Corp., 144 F.R.D. at 200](#). See also [Dura-Bilt Corp., 89 F.R.D. at 99 n.12](#). Moreover, provided that all claims arise from the same [\*\*47] price-fixing conspiracy, factual differences among proposed Class members' claims do not defeat class certification.

As set forth above, the Court has determined that the alleged conspiracy will be susceptible by proof common to all class members. Moreover, the Court has also determined that a Plaintiff injured by one of the Defendants as a result of the conspiracy has standing to sue the co-conspirator defendants even though that plaintiff had no direct dealings with the co-conspirators. See [Rios, 100 F.R.D. at 404](#). Accordingly, each Plaintiff has an incentive to demonstrate each Defendant's participation in the alleged conspiracy.

In [In re South Central States Bakery Products Antitrust Litigation, 86 F.R.D. 407, 417 \(M.D. La. 1980\)](#), the court held:

although ... members of the proposed class, bought through different mechanisms ... the essential claim of both [class representative] and the class members is that the prices paid were established by combination or conspiracy. The mere fact that all of the methods through which the alleged conspiracy was effected were not used with respect to [the plaintiff], or the fact that [the class representative] did not [\*\*48] purchase from all defendants, does not determine that the claim of [the class representative] lacks typicality under [Rule 23\(a\)\(3\)](#).

[86 F.R.D. at 417.](#)

As held in the *In re Sugar Indus. Antitrust Litig.*:

In antitrust disputes, since the representative parties need prove a conspiracy, its effectuation, and damages therefrom -- precisely what the absentees must prove to recover -- the representative claims can hardly be considered atypical.

[73 F.R.D. 322, 336 \(E.D. Pa. 1976\)](#). See also, 1 Newberg on Class Actions § 3.13 at 3-79 & n. 208 (explaining that "differences in the methods of purchase or kinds of products purchased among class members have been held not to bar a finding of typical claims" in price-fixing actions, and that "in class actions charging defendants with a conspiracy to fix prices, the claims of the named plaintiff were [\*512] held typical of the claims of the class members despite variations in the manner in which members of the class purchased from the defendants, variations in the kinds of products purchased, differences in price, and other factors"). In the present case, the typicality requirement is satisfied, because the Complaint [\*\*49] alleges a single price-fixing conspiracy, and the class is limited to securities on which odd-eighth quotations were effectively eliminated by reason of that conspiracy.

Defendants also argue that institutional investors cannot be included in a class, because they are sophisticated traders with superior bargaining power who effectively determine, in individual negotiations, the prices at which they execute trades. In light of the Court's holding that the State of Louisiana may not proceed in this action on behalf of its state agencies, the named Plaintiffs do not currently include any institutional investors. Accordingly, the issue of the typicality of institutional investors' claims is not currently before the Court, and need not be addressed.

Finally, Defendants contend that the inclusion of six Plaintiffs who purchased or sold securities through a broker defeats typicality, as the claims of those Plaintiffs are factually and legally different from those of the remainder of the individual Plaintiffs, who traded directly with Defendants.<sup>17</sup> Defendants rely on *In re Anthracite Coal Antitrust Litig., 1978-1 Trade Cas. (CCH) P 62,059, at 74,590 (M.D. Pa. 1978)*, in which the court [\*\*50] held that the claim of the proposed class representative, a direct purchaser of coal, was not typical of a class where many of the class members purchased coal indirectly through middlemen. Here, however, the proposed class representatives include individuals who transacted directly with Defendants as well as those who used brokers to transact Defendants. Accordingly, the proposed Class representatives include those whose claims are typical of those proposed Class members who invested with a broker, as well as those who invested without a broker.

Defendants argue further that it has not been demonstrated that any of these six Plaintiffs' brokers actually traded directly with a Defendant or a co-conspirator, as required by Plaintiffs' class definition. In the event it is determined that any of those brokers did not trade [\*\*51] with a Defendant or a co-conspirator, the investors on behalf of whom they traded will be deemed excluded from the class, as they will not meet the class definition.

### **Adequacy of Representation**

Rule 23(a)(4) HN24 requires that the class representatives be adequately representative of the class.<sup>18</sup> The Supreme Court has held that Plaintiffs must satisfy both prongs of a two-pronged test to qualify as adequate representatives: (1) the representatives' interests must not conflict with the class members' interests, and (2) the representatives and their attorney must be able to prosecute the action vigorously. *General Tel. Co., 457 U.S. at 157* & n.13; *Dean v. Coughlin, 107 F.R.D. 331, 334 (S.D.N.Y. 1985)*. The commonality and typicality requirements blend together in determining whether the representative Plaintiffs' claims are typical enough of the classwide claims that the representatives will adequately represent the class. *General Tel. Co., 457 U.S. at 157* & n.13.

[\*\*52] The Plaintiffs thus must show, first, that there is an absence of conflict and antagonistic interests between the proposed representatives and the class members, and second, that Plaintiffs' counsel is "qualified, experienced and capable." *Ross v. A.H. Robins [\*513] Co., 100 F.R.D. 5, 7 (S.D.N.Y. 1982)*; accord *In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2d Cir. 1992)*.

#### **1. Absence of Conflict**

Defendants contend that inclusion in the Class of both purchasers and sellers creates an inherent conflict that precludes the named Plaintiffs from serving as class representatives. Plaintiffs' central allegation is that Defendants' conspiracy to eliminate odd-eighth quotes artificially widened spreads, such that a stock with an inside spread of 1/4 should have been quoted with a spread of 1/8. Plaintiffs have not provided a mechanism for determining whether, in the absence of the conspiracy, the bid price on a given Class Security should have been 1/8 higher, or the ask price should have been 1/8 lower. According to Defendants, buyers of a given Class Security will want to show that the extra 1/8 inflated the ask -- their purchase price -- whereas sellers of that [\*\*53] same Class Security would want to show that the bid -- their sale price -- was decreased by the Defendants' illegal conduct.

The Complaint, however, which must be taken as true for purposes of the instant motion, alleges that "spreads" on Class Securities were "raised, fixed and maintained at artificially inflated and supra-competitive levels"; and that as a result of "these artificially inflated and supra-competitive spreads, the prices paid for Class Securities" by Class

<sup>17</sup> The issue of the *Illinois Brick* standing of those Plaintiffs who traded through non-defendant owned brokers is addressed *supra*, in the section of this Opinion addressing standing.

<sup>18</sup> Plaintiffs propose the following 21 class representatives:

State of Louisiana, through its Attorney General Richard P. Ieyoub, Donald Bleznak c/f Andrew Bleznak, Richard I. Burstein, Carl S. and Patricia Clark, Maxine Dampf, Jerome D. Derdel, M.D., H. Leslie Fineberg, Neal and Donna Hansen, Brent Johnson, Charles Kaye, James Krum, Robert Lipinski, John Lorge, Dennis Maloney, Kevin Maloney, Richard I. Perlman, Jeffrey Sachs, David Siegel, Two Guys Limited Partnership and its General Partner, Geltmore, Inc., Peter Wasserman and Dennis Weiner.

members were "artificially inflated," and the "prices realized from the sale of Class Securities" were "artificially depressed." Complaint, P 120. Thus, the conspiracy alleged by Plaintiffs is a conspiracy to fix the price of Defendants' market-making service, which is charged both to the buyers and sellers of Class Securities. As stated by Plaintiffs' expert, Professor Barclay:

.... All members of the plaintiffs' class in this litigation are purchasers of market-making services.... Class members paid for market-making services, through the spread, every time they bought securities and every time they sold securities.

Each buyer and seller in the putative Class has an interest in proving the existence [\*\*54] of Defendants' conspiracy, and in securing declaratory and injunctive relief to bring an end to that conspiracy. Moreover, every buyer and every seller has the same interest in maximizing the aggregate amount of classwide damages. See [Bacon v. Toia, 437 F. Supp. 1371, 1381 \(S.D.N.Y. 1977\)](#), aff'd, [580 F.2d 1044 \(2d Cir. 1978\)](#).

The conflict to which Defendants refer relates only to the apportionment of the damages as between purchasers and sellers. Such hypothetical conflicts regarding proof of damages are not sufficient to defeat class certification at this stage of the litigation.

This Court previously has rejected efforts by Defendants to defeat certification by raising the possibility of hypothetical conflicts or antagonisms among class members, especially regarding proof of damages. In [National Super Spuds, Inc. v. New York Mercantile Exchange, 77 F.R.D. 361 \(S.D.N.Y. 1977\)](#), holders of Maine potato futures contracts sued short sellers and brokers of such contracts who allegedly conspired to manipulate the market price of such contracts in violation of, *inter alia*, [Section 1](#) of the Sherman Act. Defendants argued that conflicts existed among Class members who purchased [\*\*55] and sold their contracts at different times. [Id. at 370-71](#). The Court held:

Plaintiffs have pleaded a continuing course of conduct over the period in question ... and the Court has great flexibility under [Rule 23](#) to deal with conflicts if and when they may arise. Defendants' argument of potential time conflicts is, therefore, insufficient to deny class status.

It is clear from the foregoing that the various claims of 'conflicts' are insubstantial. The interests of the plaintiffs and of all class members in proving a conspiracy ... throughout the Class Period are identical.

[Id. at 371.](#)

In [Blackie v. Barrack, 524 F.2d 891 \(9th Cir. 1975\)](#), the Ninth Circuit rejected the argument that alleged seller-purchaser conflicts could provide a basis for denying class certification:

[Defendants] contend that the interests of class members in proving damages from price inflation (and hence the existence and [\*\*514] materiality of misrepresentations subsumed in proving inflation) irreconcilably conflict, because some class members will desire to maximize the inflation existing on a given date while others will desire to minimize it. For example, they posit that [\*\*56] a purchaser early in the class period who later sells will desire to maximize the deflation due to an intervening corrective disclosure in order to maximize his out of pocket damages, but in so doing will conflict with his purchaser who is interested in maximizing the inflation in the price he pays. We agree that class members might at some point during this litigation have differing interests. We altogether disagree, for a spate of reasons, that such potential conflicts afford a valid reason at this time for refusing to certify the class.

[Id. at 908.](#)

"As a result, courts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit." [Blackie 524 F.2d at 909.](#) See also [Greene v. Emersons Ltd., 86 F.R.D. 47, 61 \(S.D.N.Y. 1980\)](#) ("while differing interests among class members may ultimately surface, the greater weight of recent authority militates against denying class certification on that ground, at least at this stage of the proceedings"); [Nathan Gordon Trust](#)

*v. Northgate Exploration, Ltd., 148 [\*\*57] F.R.D. 105, 108 (S.D.N.Y. 1993)* (rejecting defendants' argument that alleged conflicts required the elimination of in-and-out traders from the class); *Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480, 484 (E.D. Pa. 1977)* ("...conflicts between buyers and sellers, or between sellers and those who continued to hold relate only to damages, and thus are peripheral to the central issues in this case.").

Even to the extent Defendants are correct that a conflict may later arise as to damages, that possibility does not preclude class certification. In *In re Plywood Antitrust Litigation, 76 F.R.D. 570, 580-82 (E.D. La. 1976)*, the court held:

.... The benefit or detriment to particular class members ... goes to the amount of damages, if any, suffered by them. There is no antagonism within any of the classes with respect to proving that defendants did indeed illegally conspire....

76 F.R.D. at 581-82.

Similarly, in *Sol S. Turnoff Drug Distributors Inc. v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 51 F.R.D. 227 (E.D. Pa. 1970)* the court rejected defendants' argument that certification of a price-fixing class should be denied due to an alleged conflict: [\*\*58]

At least at this stage of the case, all the members of the class . . . have a common interest in a favorable verdict on the issue of a conspiracy.... The possibility ... that it may develop that the interests with respect to damages of several groups within the class . . . will conflict, cannot at this point justify the denial of a class action.

Id. at 233.

The *Blackie* court noted that, if real antagonism later develops among the interests of various class members, the problem could be addressed through the creation of subclasses under *Rule 23(c)(4)*. In *Herbst v. International Telephone and Telegraph Corp., 495 F.2d 1308, 1321 (2d Cir. 1974)*, the Second Circuit affirmed a district court opinion which addressed this issue as follows:

If it appears at some time in the future that the proper allocation of damages would be effectuated by the designation of appropriate subclasses, it is undisputed that the court has all the power necessary to implement such a procedure. *Fed.R.Civ.P. 23(c)(4)*. In any event, problems well down the road which may be pertinent to the procedures which ultimately should govern the allocation of damages need not and should [\*\*59] not provide a roadblock to the prompt and conditional determination of whether this suit may be properly maintained as a class action.

In sum, potential conflicts between buyers and sellers do not provide a basis for denying class certification here. Rather, HN25↑ in order to warrant denial of class certification, it must be shown that any asserted "conflict" is so palpable as to outweigh the substantial interest of every class member in proceeding with [\*515] the litigation. Defendants have not made this showing. Accordingly, the Court finds no fundamental conflict or inconsistency between the claims of the proposed class members. See *Caleb v. DuPont De Nemours, 110 F.R.D. 316, 319 (1986)*.

## 2. Qualification of Counsel

*Rule 23(a)(4) HN26*↑ requires that, in order for a case to proceed as a class action, the court must find that "the representative parties will fairly and adequately protect the interests of the class." The party's attorney must therefore be "qualified, experienced, and generally able to conduct the proposed litigation." Id. at 563. See also *Nilsson v. Coughlin, 670 F. Supp. 1186, 1191*. Adequacy of representation merely requires that the class representative's attorney [\*\*60] be qualified, and that the class representative not have interests conflicting with the class in the litigation at hand. *Sosna v. Iowa, 419 U.S. 393, 403, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975)*.

The attorneys seeking to represent the class in this case include some of the most experienced lawyers in the United States in the prosecution of antitrust and securities class actions. The firms representing Plaintiffs have

represented that they are ready, willing and able to devote the resources necessary to litigate this case vigorously. Accordingly, this prong is satisfied.

### **III. The Requirements of Rule 23(b)**

**HN27**[<sup>18</sup>] In order to maintain a class action, Plaintiffs must satisfy the requirements of Rule 23(b) in addition to satisfying the prerequisites of Rule 23(a). Pursuant to Rule 23(b), a class action may be maintained where:

(2) **HN28**[<sup>19</sup>] the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief for the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions [\*\*61] affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Subparts (b)(2) and (b)(3) of Rule 23 are disjunctive, and only one need be satisfied in order to support certification of a class. Plaintiffs request that the Court certify a class pursuant to both Rule 23(b)(2) and (b)(3).<sup>19</sup>

[\*\*62] Courts have certified antitrust class actions both under Rule 23(b)(2) and (b)(3) if the requirements of each rule are satisfied.

Nothing in the language of Rule 23 precludes certification of both an injunctive class and a damages class in the same action. In fact, where injunctive relief and damages are both important components of the relief requested, court[s] have regularly certified an injunctive class under Rule 23(b)(2) and a damages class under Rule 23(b)(3) in the same action.

[\*516] *Davis v. Southern Bell Telephone & Telegraph Co.*, 1993 U.S. Dist. LEXIS 20033, 1993-2 CCH Trade Cases P 70,480, 71,604 (S.D. Fla. 1993) (citing *Waldrup v. Motorola, Inc.*, 85 F.R.D. 349 (N.D. Ga. 1980); *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287 (D. Del. 1975)). See also *In re Domestic Air Transportation Antitrust Litigation*, 137 F.R.D. 677, 696 (N.D. Ga. 1991); *In re Catfish Antitrust Litigation*, 826 F. Supp. 1019, 1045-46 (N.D. Miss. 1993); 1 Newberg on *Class Actions* § 4.14 at 4-49 - 4-51.

#### **A. The Class Will Be Certified Under Rule 23(b)(2) Because Injunctive Relief Is Appropriate**

Plaintiffs' Complaint seeks the following relief:

<sup>19</sup> Where a class is certified under Rule 23(b)(3), notice must be provided individually to each class member who can be identified through reasonable efforts. See Fed. R. Civ. P. 23(c)(2). Notice under Rule 23(b)(2) is flexible, and may consist entirely of published notice in appropriate circumstances.

Here, a Subclass will be certified consisting of Class members who, at the time of class notice, are current customers of Defendants and to whom Defendants send periodic mailings. As to this Subclass, the notice requirement of (b)(3) can be satisfied by an insert in Defendants' regular monthly mailing, at Plaintiffs' expense. See, e.g., *Sollenbarger v. Mountain States Telephone & Telegraph Co.*, 121 F.R.D. 417, 437 (D.N.M. 1988) (telephone company required to enclose antitrust class notice in defendant's monthly billing envelopes); *In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534, 549-52 (N.D. Ga. 1992) (rejecting defendants' objections to inclusion of notice in the defendants' inflight magazines). As the Supreme Court noted with approval in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 n.11, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978), "a number of courts have required defendants in Rule 23(b)(3) class actions to enclose class notices in their periodic mailings to class members in order to reduce the expense of sending the notice." (citing, *inter alia*, *Ste. Marie v. Eastern R.R. Assn.*, 72 F.R.D. 443, 450 n.2 (S.D.N.Y. 1976), aff'd, 650 F.2d 395 (2d Cir. 1981); *Gates v. Dalton*, 67 F.R.D. 621, 633 (E.D.N.Y. 1975); *Popkin v. Wheelabrator-Frye, Inc.*, 20 Fed. R. Serv. 2d (Callaghan) 125, 130 (S.D.N.Y. 1975)). Such "piggyback notice" will significantly reduce the cost of providing mailed notice under Rule 23(b)(3).

(b) That the unlawful combination [\*\*63] and conspiracy alleged herein be adjudged and decreed to be in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

\* \* \*

(d) That Defendants be preliminarily and permanently enjoined from continuing the unlawful combination or conspiracy alleged herein.

Complaint P 124.

**HN29** [Footnote] Certification is appropriate under Rule 23(b)(2) where declaratory or injunctive relief is an important aspect of the overall relief sought. Gelb v. American Telephone & Telegraph Co., 150 F.R.D. 76, 78 (S.D.N.Y. 1993). See also In re Catfish Antitrust Litigation, 826 F. Supp. at 1045-46; Northwestern Fruit Co. v. A. Levy & J. Zentner, 116 F.R.D. 384, 388 (E.D. Cal. 1986); Davis, 1993 U.S. Dist. LEXIS 20033, 1993-2 CCH Trade Cases P 70,480 at 71,604. As reasoned in Weiss v. York Hospital, 745 F.2d 786, 811 (3rd Cir. 1984), another antitrust case:

The class in this case is a classic (b)(2) class in that the Defendants have "acted or refused to act on grounds generally applicable to the class" and the primary relief sought is an injunction.... When a suit seeks to define the relationship between the defendant(s) and the world at large, as in this case, [\*\*64] (b)(2) certification is appropriate.

Here, Plaintiffs have alleged a combination or conspiracy which has had the effect of significantly widening spreads on Class Securities. Plaintiffs specifically allege that Defendants' combination or conspiracy is continuing. Complaint P 117. Unless enjoined and made subject to the appropriate equitable relief, Defendants' alleged conspiracy will continue to inflate spreads for the benefit of Defendants and to the detriment of the Class.

Defendants contend that Plaintiffs primarily seek monetary damages, in the form of antitrust treble damage, and that under these circumstances, class certification under section 23(b)(2) is inappropriate. See The Advisory Committee Note to the 1966 Amendment of Rule 23 ("subdivision [23(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages").

In support of this contention, Defendants rely on cases from this Circuit holding that Subsection (b)(2) is applicable only where the relief sought is exclusively or predominantly injunctive or declaratory, and not where antitrust treble damages are a prominent feature of the relief sought. [\*\*65] Eisen, 391 F.2d 555, 564; see also Gelb, 150 F.R.D. at 78; Milonas v. Hess, 1976-2 Trade Cas. (CCH) P 61,069 at 69, 818-19 & n.2 (S.D.N.Y. 1976); Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 900 (S.D.N.Y. 1975); Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 30 n.9 (S.D.N.Y. 1972); Coniglio v. Highwood Serv., Inc., 60 F.R.D. 359, 363 (W.D.N.Y. 1972); United Equities Co. v. New York Tel. Co., No. 70 Civ. 4379, 1971 WL 4730, at \*3-4 (S.D.N.Y. June 18, 1971).

Defendants note that Plaintiffs have not alleged that all of the members of the purported injunctive class intend to trade in Class Securities in the future, and that Plaintiffs have alleged that the "relevant time period" of the Complaint ended almost two years ago, in May 1994. Complaint P 83. Finally, Defendants contend that imposing injunctive relief on such a massive scale would inappropriately involve this Court in the day-to-day trading operations of Nasdaq, [\*517] a large, high volume securities market. See National Auto Brokers Corp., 60 F.R.D. at 492 (in antitrust pricing case, "to attempt to grant injunctive relief on a mass basis would violate the applicable provision of [\*\*66] the antitrust laws."); United Equities Co., No. 70 Civ. 4379, 1971 WL 4370, at \*3 (S.D.N.Y. June 18, 1971) ("The injunction asked for is an order directing the defendants to cease and desist from the activities complained of . . . This injunction is as impractical as it is nebulous. It would involve the court in day-to-day supervision . . .").

As stated in the In re Catfish Antitrust Litigation, 826 F. Supp. 1019, 1046 (N.D. Miss. 1993), however, "more recent trends in Rule 23(b)(2) utilization appear to favor a broader application of equitable relief certification" even where damages also are sought. See also Vulcan Society v. Fire Department of City of White Plains, 82 F.R.D. 379, 402 (S.D.N.Y. 1979).

Defendants' contention that plaintiffs primarily seek antitrust treble damages is insufficient to defeat class certification under Rule 23(b)(2). In the event Plaintiffs are able to prove the existence and effect of the alleged

conspiracy, the requested declaratory and injunctive relief will be necessary to ensure that Nasdaq investors are not harmed in the future by Defendants' anticompetitive conduct. Moreover, the Proposed Consent Decree submitted in the Government [\*\*67] Action demonstrates that significant changes in Nasdaq's operation are necessary to eliminate the practices of which Plaintiffs complain.

Thus, the requested declaratory and injunctive relief is a significant component of the overall relief which plaintiffs seek. Class certification under [Rule 23\(b\)\(2\)](#) therefore appropriate.

## B. *The Class Will Be Certified Under Rule 23(b)(3)*

### 1. *Predominance of Common Issues*

**HN30** [+] To certify a case under [Rule 23\(b\)\(3\)](#), a court must find that the common issues of law and fact predominate over individual issues. The predominance requirement is satisfied unless it is clear that individual issues will overwhelm the common questions and render the class action valueless. [Milberg v. Lawrence Cedarhurst Federal Sav. & L. Ass'n](#), 68 F.R.D. 49, 52 (E.D.N.Y. 1975), citing *inter alia*, [Dolgow v. Anderson](#), 43 F.R.D. 472 (E.D.N.Y. 1968).

**HN31** [+] To recover damages, Plaintiffs will have to prove:

- (1) that defendants violated the antitrust laws; (2) that the alleged violations caused plaintiffs to suffer some direct [antitrust] injury to their business or property; and (3) that the extent of this injury can be quantified with requisite precision.

[\*\*68] [Zenith Radio Corp. v. Hazeltine Research, Inc.](#), 395 U.S. 100, 114 n.9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969), rev'd on other gds, 401 U.S. 321 (1971); see also [Associated Gen. Contractors of Cal., Inc v. California State Council of Carpenters](#), 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); [U.S. Football League v. National Football League](#), 842 F.2d 1335, 1377 (2d Cir. 1988).

Plaintiffs' burden on this motion for class certification is to establish that common proof will predominate at trial with respect to these three essential elements of antitrust liability. See [Daniels v. Amerco](#), 1983-1 Trade Cas. (CCH) P 65,274 at 69,313 (S.D.N.Y. 1983).

As set forth above in the discussion of the commonality requirement of [Rule 23\(a\)](#), Plaintiffs, in order to prove the existence and scope of the alleged conspiracy, will have to submit evidence regarding the following issues:

- (1) whether Defendants and their co-conspirators engaged in a combination or conspiracy to raise, fix and maintain Nasdaq spreads at supra-competitive levels;
- (2) the implementation, duration and scope of Defendants' combination or conspiracy;
- (3) whether each defendant [\*\*69] was a participant in the combination or conspiracy;
- (4) whether Defendants' conduct violated [Section 1](#) of the Sherman Act;
- (5) whether Defendants took affirmative steps to conceal their combination or conspiracy;
- [\*518] (6) the effectiveness of Defendants' combination or conspiracy;
- (7) whether Plaintiffs and the members of the Class are entitled to injunctive relief, and the appropriate contours of that relief;
- (8) the appropriate measure of damages and the amount of damages suffered by the Class as a whole.

Each of these issues will be addressed in greater detail below.

### a. *The Existence of Defendants' Conspiracy*

Since a single conspiracy is alleged, the relevant proof of this will not vary among class members, and clearly presents a common question fundamental to all class members. See, e.g., [Uniondale Beer Co., Inc. v. Anheuser](#)

Busch, Inc., 117 F.R.D. 340, 342 (E.D.N.Y. 1987); In re Alcoholic Beverages Litigation, 95 F.R.D. 321, 324 (E.D.N.Y. 1982); Fisher Bros. v. Mueller Brass Co., 102 F.R.D. 570, 574-75 (E.D. Pa. 1984).

Courts repeatedly have held that HN32[<sup>18</sup>] the existence of a conspiracy is the predominant issue in price fixing [\*\*70] cases, warranting certification of the class even where significant individual issues are present. See e.g., Rios, 100 F.R.D. at 407-08; Jennings Oil Co., 80 F.R.D. at 130; City of New York v. Darling-Delaware, 1976-1 CCH Trade Cases P 60,812 at 68,513 (S.D.N.Y. 1976) (although customized and diverse services were negotiated and priced separately for each customer, proof of conspiracy predominates); Carnivale Bag Co. v. Slide-Rite Mfg. Co., 1976-2 CCH Trade Cases P 61,032 at 69,562 (S.D.N.Y. 1976) (finding predominance of common issues based on allegations of conspiracy, even though elements of impact and damages would have to be litigated individually); In re Master Key Antitrust Litig., 70 F.R.D. 23, 26 (D. Conn. 1975) (characterizing question of the existence of a conspiracy as "the central and common element of these cases"); Shelter Realty, 75 F.R.D. 34, 37 (despite customized services priced separately for each plaintiff, existence of a conspiracy is a predominating issue "when allegations of anti-competitive behavior embracing all of the various products and distribution patterns have been credibly pleaded."); Kromer v. Saks & Co., 1977-2 CCH Trade [\*\*71] Cases P 61,771 at 73,186 (S.D.N.Y. 1977) ("other questions regarding damages and the like are subordinate to the common question of the existence of the alleged conspiracy"); Barr v. WUITAS, Inc., 66 F.R.D. 109, 115 (S.D.N.Y. 1975); Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35, 40-42 (S.D.N.Y. 1974).

In order to recover, each Plaintiff class member will have to prove the existence of the Defendants' conspiracy to fix spreads. Plaintiffs have stated that, as common proof of the existence of the alleged conspiracy, they intend to submit, *inter alia*, certain documents already produced by Defendants, including internal Nasdaq memoranda acknowledging the widening of Nasdaq spreads; academic studies, including the one by Professors Christie and Schultz, describing the widening Nasdaq spreads and the absence of odd-eighths quotations; and documents demonstrating the narrowing of the spreads following the publicity surrounding the Christie and Schultz study.

Proof of the alleged single conspiracy will also involve evidence of conspiratorial statements and conduct, including the contents of taped telephone conversations, attributable [\*\*72] to Defendants, which will not vary among the class members. See, e.g., In re Catfish Antitrust Litigation, 826 F. Supp. at 1039 ("evidence of a national conspiracy to fix the price of catfish and processed catfish would revolve around what Defendants did, and said, if anything, in pursuit of a price fixing scheme"); Transamerican Refining Corp. v. Dravo Corp., 130 F.R.D. 70, 75 (S.D. Tex. 1990) (proof of conspiracy is susceptible to generalized proof since the focus is on what defendants said and did). See also, e.g., National Super Spuds v. New York Mercantile Exchange, 77 F.R.D. 361, 363 (S.D.N.Y. 1977).

Defendants contend that Plaintiffs' Complaint alleges not a single conspiracy but thousands of mini-conspiracies, and that each Plaintiff will need to submit individualized proof that the particular market-maker with whom that Plaintiff traded was involved in [\*519] the conspiracy to eliminate odd-eighths quotations. A plain reading of the Complaint, however, confirms Plaintiffs' characterization of their Complaint, the allegations of which must be taken as true for purposes of the instant motion. Moreover, because, as set forth below, the antitrust law provides [\*\*73] for joint and several liability of co-conspirators, each Plaintiff will have an equal incentive to generally prove the Defendants' participation in the alleged conspiracy.

As held in the In re Sugar Industry Antitrust Litigation, 73 F.R.D. at 345:

In this litigation, it is the allegedly unlawful horizontal price-fixing arrangement among defendants that, in its broad outlines, comprises the predominating, unifying common interest as to these purported plaintiff representatives and all possible class members. Hence, the existence, implementation and effect of this alleged conspiracy ... are the central issues.... A common thread of evidence is admissible on these elements and will correspond to evidence which otherwise could be introduced by absent class members.

In sum, proof of Defendants' conspiracy lies at the heart of this case and is common to the Class.

#### **b. The Implementation, Duration And Scope Of Defendants' Combination Or Conspiracy**

In order to recover, each Plaintiff Class member will have to prove the implementation of the Defendants' conspiracy, and the mechanisms used to enforce or police that conspiracy. The relevant proof in this area will **[\*\*74]** include direct as well as economic evidence of: the effective elimination of odd-eighth quotations for Class Securities; the causal relationship between the absence of odd-eighth quotations and the increased spreads for Class Securities; and the reintroduction of odd-eighths that caused a dramatic reduction in spreads following publicity about collusion.

Plaintiffs also intend to introduce economic and direct evidence regarding the scope of Defendants' conspiracy, including evidence of what securities were subject to Defendants' anticompetitive conduct, and the respective time periods for which each stock was effectively targeted.

Plaintiffs have already disclosed the methodology by which the list of Class Securities was compiled; according to Plaintiffs' expert, that methodology was used without differentiation between class members and with regard to all class members, and is therefore presents a common issue that predominates over individual issues.

#### **c. Whether Each Defendant Participated In The Combination Or Conspiracy**

**HN33**<sup>↑</sup> Liability for antitrust violations is joint and several. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 635, 68 L. Ed. 2d 500, I\*\*751 101 S. Ct. 2061 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 342-48, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971). Each Class member may therefore recover his or her full loss from any defendant who can be shown to have participated in the alleged conspiracy. See, e.g., *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1257 (7th Cir. 1980). Every Class member therefore has an interest in establishing the liability of each Defendant, and evidence as to the participation and liability of each defendant is common to the claim of every Class member.

#### **d. Whether Defendants' Combination Or Conspiracy Violated Section 1 Of The Sherman Act**

A determination of whether Defendants' conduct violates relevant **antitrust law** is a question of law common to all Plaintiffs. Likewise, nearly all the Defendants have raised primary jurisdiction and implied antitrust immunity as affirmative defenses in their answers to the Complaint. These affirmative defenses also present legal issues common to the entire class.

#### **e. Whether Defendants Took Affirmative Steps To Conceal Their Combination Or Conspiracy**

Plaintiffs have alleged that the statute of limitations **[\*\*76]** has been tolled by reason of Defendants' fraudulent concealment of their conspiracy. Complaint P 118. **HN34**<sup>↑</sup> In order **[\*520]** to show fraudulent concealment, an antitrust plaintiff must prove (1) that the defendant concealed the existence of the antitrust violation, (2) that plaintiff remained in ignorance of the violation until sometime within the four year antitrust statute of limitations; and (3) that his continuing ignorance was not the result of lack of diligence. *State of New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988). Plaintiffs may prove concealment by showing either that the Defendants took affirmative steps to prevent plaintiffs' discovery of the conspiracy, or that the conspiracy itself was inherently self-concealing. *Id.*

Defendants contend that Plaintiffs have placed at issue the time at which each individual Plaintiff had, or should have had, actual knowledge of the conspiracy, as well as each Plaintiff's diligence in ascertaining information with respect to her trading and her dealings with a broker. According to Defendants, such issues of knowledge and diligence are inherently individual.

Defendants concede, however, that these individual issues have **[\*\*77]** been held to bar class certification only where they constitute the majority of Plaintiffs' proof of concealment. Courts have overwhelmingly held that, **HN35**<sup>↑</sup> even when the issue of fraudulent concealment involves both common and individual questions, the common question of whether Defendants successfully concealed the existence of the alleged conspiracy predominates over any individual questions regarding the knowledge or diligence of individual plaintiffs. See *Town of New Castle v. Yonkers Contracting Co., Inc.*, 131 F.R.D. 38, 42-43 (S.D.N.Y. 1990); *Fisher Bros. v. Mueller Brass Co.*, 102 F.R.D.

570 (E.D. Pa. 1984); In re Art Materials Antitrust Litigation, 1983-1 CCH Trade Cases P 65,315 at 69,868 (N.D. Ohio 1983).

Here, Plaintiffs' allegations of concealment include allegations common to all Plaintiffs, including allegations that Defendants: actively misrepresented the competitiveness of the Nasdaq market; falsely and publicly denied price-fixing; provided false rationales for the magnitude of Nasdaq spreads; and wrongly disparaged the Christie and Schultz study which indicated the existence of price-fixing. Insofar as the individual Plaintiffs are all members of the investing [\*\*78] public, their knowledge and diligence with respect to the information Defendants allegedly concealed from the public can be litigated collectively, without significant reference to individual differences in knowledge or diligence. Accordingly, each of Plaintiffs' allegations is susceptible to common proof.

#### **f. The Effectiveness Of Defendants' Conspiracy**

Plaintiffs have identified the securities which they allege were affected by Defendants' anticompetitive conduct and have disclosed the methodology by which that list was compiled. The same methodology was used without differentiation between class members and with regard to all class members. That methodology therefore is common to the class.

Plaintiffs intend to prove the effectiveness of Defendants' conspiracy by using economic theory, academic studies, data sources, and statistical techniques -- all designed to demonstrate that Nasdaq spreads were actually widened as a result of the conspiracy -- that are common to the entire class.

#### **g. Whether Plaintiffs Are Entitled To Injunctive Relief, And The Appropriate Contours Of That Relief**

In order to establish a claim for equitable relief, the plaintiffs must establish: [\*\*79] (1) that they are suffering actual or threatened injury as a result of the illegal conduct of the Defendants; (2) that the actual or threatened injury is reasonably traceable to the challenged conduct; and (3) that the alleged injury is likely to be redressed by the requested relief. See German, 885 F. Supp. at 559. Each of these elements is common to the class. Likewise, the contours of appropriate equitable relief will be a common question of critical importance at trial.

#### **h. The Appropriate Measure Of Damages And The Amount Of Damages Suffered By The Class As A Whole**

##### **(i) Methodologies**

Plaintiffs have disclosed the following methodologies by which they propose to [\*521] prove the existence and measure of damages suffered by the Class:

1. Comparing spreads (and resulting revenues) on Class Securities with spreads (and resulting revenues) on comparable securities traded on other markets, such as the New York Stock Exchange or American Stock Exchange;
2. Comparing spreads (and resulting revenues) before and after certain Class Securities moved from trading on Nasdaq to trading on the New York Stock Exchange or the American Stock Exchange;
3. Comparing spreads [\*\*80] (and resulting revenues) for Class Securities traded on Nasdaq, before publicity about collusion in late May, 1994 and before publicity about the commencement of the Department of Justice investigation, with spreads (and resulting revenues) for the same securities after such publicity;
4. Comparing spreads (and resulting revenues) for Class Securities traded on Nasdaq with spreads (and resulting revenues) on other Nasdaq National Market securities traded on Nasdaq;
5. Comparing spreads (and resulting revenues) for Class Securities traded on Nasdaq with spreads (and resulting revenues) for the same securities traded on alternative markets, such as Instinet;
6. Comparing Defendants' profits (as well as revenues and costs) from spreads on Class Securities with benchmarks (including but not limited to profits from spreads on other Nasdaq National Market securities traded on Nasdaq, profits after publicity about collusion or the DOJ investigation, or profits from spreads for the same or comparable securities traded on other markets).

These potential classwide measures of injury and damages may be used in combination with one another to yield a single formula or measure.

[\*\*81] Each of these methodologies is common to the class, and the validity of each will be adjudicated at trial based upon economic theory, data sources, and statistical techniques that are entirely common to the class. Once a measure of damages is established, it can be applied to the aggregate trading volumes in Class Securities to determine aggregate damages for the Class as a whole, or to individual transactions to determine damages for individual Class members.

The above-described methodologies are widely accepted means of measuring damages in antitrust cases. In ABA Antitrust Section, *Antitrust Law Developments* (3d ed. 1992) the law on "Calculation of Damages" is summarized as follows:

In price-fixing cases ... the measure of damages in a suit by a purchaser normally is the difference between the price the plaintiff paid and the price he would have paid absent the violation....

Several different methodologies have been developed for proving damages. The "before and after" theory compares ... the prices [plaintiff] paid during the period the violation continued with ... prices paid prior to the beginning of the violation or after its termination. The "yardstick" [\*\*82] approach compares profits earned or prices paid by the plaintiff with the corresponding data for a firm or in a market unaffected by the violation.... The "before and after," [and] "yardstick" ... theories are not the only acceptable methodologies.... Courts have also accepted ... damage models combining elements of both the "before and after" and "yardstick" methodologies; and analyses of the defendant's costs and profits. In practice, plaintiffs will often present alternative damage methodologies.

ABA Antitrust Section, *Antitrust Law Developments* (3d ed. 1992) at 669-673, and cases cited therein.

Methodologies of this kind likewise have been cited with approval by numerous courts in granting class certification. See, e.g., *In re South Central States Bakery Products Antitrust Litig.*, 86 F.R.D. 407, 422 (M.D. La. 1980) (certifying class based on representations that impact of Defendants' conspiracy could be shown by using at least one of four accepted methods, or a combination of these methods: comparing prices in different geographical regions, comparing prices and profits of conspirators versus non-conspirators, comparing prices in comparable markets, [\*\*83] and [\*522] comparing prices or profits before and after termination of the conspiracy); *In re Domestic Air Transportation Antitrust Litig.*, 137 F.R.D. 677, 689-90, 692 (N.D.Ga. 1991) (certifying 12.5 million member class where plaintiffs presented potential statistical methodologies for proving injury); *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244, 251-52 (S.D. Tex. 1978) (class certified based on prediction that injury could be determined to a "reasonable degree of certainty" by "either of two generally accepted methodologies"); *In re Potash Antitrust Litigation*, 159 F.R.D. 682, 697-98 (D. Minn. 1995).

The Court need not decide at this juncture what approach is best suited to the particularities of this case. It is sufficient to note at this stage that there are methodologies available, and that Rule 23(c)(1) and (d) allow ample flexibility to deal with these issues.<sup>20</sup>

<sup>20</sup> Rule 23(c)(1) provides in relevant part that any order certifying a class "may be altered or amended before the decision on the merits." Rule 23(d) **HN36** [↑] provides in relevant part that the Court may make "appropriate orders" dealing with "procedural matters", which may be altered or amended "from time to time", including orders "determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument". Rule 23(d) provides that these orders "may be combined with an order under Rule 16". Rule 16(c) provides that "the court may take appropriate action" with respect to *inter alia*: "the avoidance of unnecessary proof and of cumulative evidence"; "the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof"; "an order establishing a reasonable limit on the time allowed for presenting evidence"; "an order for a separate trial pursuant to Rule 42(b) with respect to a claim ... or with respect to any particular issue in the case"; or "referring matters to a ... master".

[\*\*84] As recently held by the Court in *In re Disposable Contact Lens Antitrust Litig.* (MDL 1030) (M.D.Fla. Sept. 5, 1996), in which of class of between 15 and 18 million members was certified, the fact "that defendants' expert disagrees with the methodology and conclusions propounded by [plaintiff's expert] is not reason to deny class certification. Whether or not plaintiffs will be successful in persuading the jury that there has been a common impact remains to be seen." [\*Id. at 12.\*](#)

### **(ii) Procedural Issues**

As well as the various substantive methodologies outlined above, a wide variety of procedural approaches will ultimately be available to the Court in determining when and how to deal with damages. See 1 *Newberg on Class Actions* § 4.26 at 4-91-97; [\*In re Potash, 159 F.R.D. at 698\*](#) ("various judicial methods are available to resolve individual damage issues" including "bifurcating liability and damages", "appointing special masters", or "using defendants' transactional records").

Price fixing cases such as this one often involve relatively small injuries to a relatively large number of people. Based on the Defendants' own records, a jury may reasonably estimate [\*\*85] damages. See, e.g., [\*Greenhaw, 721 F.2d 1019, 1024-25;\*](#) [\*In re Domestic Air Transp., 137 F.R.D. at 692-93;\*](#) [\*In re Potash, 159 F.R.D. at 698\*](#) (noting the possibility of using the defendants' transactional records to compute individual damages); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281 (S.D.N.Y. 1971) (court allowed plaintiffs to establish an aggregate quantum of classwide damages, but provided that individual class members would have to file claim to justify their entitlement to receive a portion of this sum); [\*In re Melridge, Inc. Securities Litigation, 837 F. Supp. 1076, 1080 \(D. Or. 1993\)\*](#) (court allowed proof of classwide damages and entered judgment in favor of class based on the jury's aggregate verdict; individual claims were to be determined using a measure of damages adopted by the jury, and applied to purchases as evidenced by individual proofs of claim).

Courts have allowed the plaintiffs to establish the measure of damages at trial, and this measure is then applied to the individual transactions (typically in a second bifurcated proceeding following trial on the common issues). See, e.g., [\*Dennis v. Saks & Co., 1975-2 CCH Trade Cases P60,396 at 60,749 \(S.D.N.Y. 1975\); Hedges Enterprises, Inc. v. Continental Group, 81 F.R.D. 461, 476 \(E.D. Pa. 1979\).\*](#) See also [\*Shelter Realty, 75 F.R.D. at 38\*](#) ("formulary approach to the calculation of damages.").

[\*523] Bifurcation has been widely used and in antitrust class actions. See, e.g., [\*In re Master Key, 528 F.2d 5, 14-15\*](#) ("bifurcated trials have frequently been employed with great success ... even in antitrust suits....") (citing [\*Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 \(1975\); Green v. Wolf Corp., 406 F.2d 291, 301 \(2d Cir. 1968\)\*](#) (bifurcation in securities class action); [\*City of New York v. Darling-Delaware, Inc., 1976-1 CCH Trade Cases P60,812 \(S.D.N.Y. 1976\)\*](#) (bifurcating damages in price-fixing class action)).

### **(iii) Individualized Damages**

Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that, as here, the price range was affected generally. As held in [\*Hedges Enterprises, Inc. v. Continental Gp., Inc., 81 F.R.D. 461, 475 \(E.D. Pa. 1979\)\*](#), certifying the class notwithstanding negotiated [\*\*87] prices:

The proof necessary to demonstrate that the defendants conspired to maintain an inflated "base" from which all pricing negotiations began and that this "base" price was higher than the "base" price which would have been established by competitive conditions would be common to all members of the class. Proof of a conspiracy to establish a "base" price would establish at least the fact of damage, even if the extent of the actual damages suffered by the plaintiffs would vary.... The proof with respect to the "base" price from which these negotiations began, or the structure of the conspiracy to affect individual negotiations, would be common to the class. Accordingly... the fact of damage is predominantly, if not entirely, a common question.

**HN37** Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class. As stated in

*Presidio Golf Club v. National Linen Supply Corp.*, 1976-2 CCH Trade Cases P 61,221 at 70,630-31 (N.D.Cal. 1976), quoting [Blackie, 524 F.2d at 906 n.22](#):

As a practical matter, [HN38](#) to prove an effective conspiracy [\\*\\*88](#) to fix prices, facts will be adduced which will tend to establish, perhaps circumstantially, that each class member was injured. . . . In the class action context the inference is predicated on the establishment of certain facts: (1) an antitrust violation, typically a conspiracy to fix prices or allocate markets; (2) an ability on the part of defendant-conspirators to effectuate the conspiracy; (3) generalized price increases or damages in the industry involved; and (4) purchase or, as here, rental by plaintiffs during the period of anti-competitive activity.... Contrary to defendants' contention part of plaintiffs' *prima facie* case will not require proof that overcharges were imposed upon the rental of each item rented to plaintiffs. "The impact element necessitates only an illustration of generalized injury."

\* \* \*

The fact that certain members of plaintiffs' class escaped injury altogether would not preclude certification or destroy the class's *prima facie* case of impact. Unless it is clear that no ultimate consumers were damaged, the exact amount each may have sustained is an issue to be treated at the damages phase of the litigation. *In re Western Liquid Asphalt*, [\\*\\*89](#) *supra* at 123. [HN39](#) "The fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing [generalized damage] as to all."

Other courts have likewise held that [HN40](#) the predominance requirement of [Rule 23\(b\)\(3\)](#) is satisfied with respect to proof of injury, even though individualized inquiry may be necessary on the quantum of damages. See e.g., [Bogosian v. Gulf Oil Corp.](#), 561 F.2d 434, 456; [In re Master Key](#), 70 F.R.D. at 25-26; [In Re Potash](#), 159 F.R.D. at 697-98; [In re Catfish](#), 826 F. Supp. at 1042-43; 4 Newberg on Class Actions § 18.27 at 18-89 ("Individual damages questions do not preclude a [Rule 23\(b\)\(3\)](#) class action when the issue of liability is common to the class.").

[\*524] Indeed, decisions in this District have recognized that if individual damage questions were a barrier to class certification, "there would be little if any place for the class action device in the adjudication of antitrust claims." [Shelter Realty](#), 75 F.R.D. at 37. See also e.g., [Hill v. A-T-O, Inc.](#), [\\*\\*90](#) 80 F.R.D. 68, 70 (E.D.N.Y. 1978) (although "damages in this case may have to be determined on an individual basis," this "does not preclude class action certification, where, as here, the common issues which define liability predominate"); [National Super Spuds](#), 77 F.R.D. at 372; [Maywalt](#), 147 F.R.D. at 56, 57 (differences regarding damages among class members not sufficient to defeat class certification) (citing [Green v. Wolf Corp.](#), 406 F.2d 291, 301 (2d Cir. 1968)); [Town of New Castle](#), 131 F.R.D. at 42 (citations omitted) ("the fact that each class member's damages will be different and, thus, will require individualized treatment does not prevent one from concluding that common questions predominate."); [Rios](#), 100 F.R.D. at 408 (predominance of common issues is not defeated simply because the class members have incurred varying damages); [In re Alcoholic Beverages](#), 95 F.R.D. at 327.

In sum, [HN41](#) even if it develops that each class member's damages must be separately determined, class certification would still be appropriate. See e.g., [In re Master Key](#), 70 F.R.D. at 27-28; [Shelter Realty](#), 75 F.R.D. at 37; [In re Alcoholic Beverages](#), 95 F.R.D. at 328. [\\*\\*91](#) Under those circumstances, bifurcation would allow classwide issues to proceed on a class basis, while reserving any individual issues to be litigated in a subsequent set of proceedings. See [Green v. Wolf](#), 406 F.2d at 301; [In re Master Key](#), 70 F.R.D. at 28-29; [Bresson v. Thomson McKinnon Securities Inc.](#), 118 F.R.D. 339, 343 (S.D.N.Y. 1988); [Dennis](#), 1975-2 CCH Trade Cases P60,396 at 66,749; [Darling-Delaware Inc.](#), 1976-1 CCH Trade Cases P60,812 at 68,514 (S.D.N.Y. 1976).

#### (iv) Aggregate Damages

Due to the nature of the Nasdaq market and the availability of computerized data, the aggregate damages of the Class as a whole may be susceptible to determination in a single trial along with the issue of liability. Indeed, as a

result of the computerized databases of the NASD, and of Defendants themselves, the data relevant to aggregate damages here may be susceptible to being assembled and organized in a relatively straightforward manner.

There is case support for basing the class certification in part on a finding that damages can best be determined on a classwide basis. In *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281 (S.D.N.Y.), amended, [\*\*92] [333 F. Supp. 291 \(S.D.N.Y.\)](#), *mandamus den'd*, [449 F.2d 119 \(1971\)](#), plaintiffs alleged price fixing in the sale of antibiotic drugs to millions of consumer class members. Defendants asserted that individual issues of damages were predominant and that the case was unmanageable. The court certified the class, concluding that the amount of damages could be determined on a classwide basis, because:

It is far simpler to prove the amount of damage to the members of the class by establishing their total damages than by collecting and aggregating individual damage claims as a sum to be assessed against the defendants.

And it is the court's tentative conclusion that this can be done without sacrificing the rights of the defendants.

*333 F. Supp. at 281.* <sup>21</sup>

[\*\*93] The court held that the defendants had no constitutional right to compel the plaintiffs to establish damages individually, rather than from defendants' own records:

[\*525] Most important management decisions in the business world in which these defendants operate are made through the intelligent application of statistical and computer techniques and these class members should be entitled to use the same techniques in proving the elements of their cause of action. The court is confident that they can be successfully utilized in the courtroom and that their application will allow the consumers to protect their rights while freeing the court and the defendants of the specter of unmanageability. In these circumstances the court cannot conclude that the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages.

*333 F. Supp. at 289.* The Second Circuit denied the defendants' petition for mandamus on this point. [Pfizer, Inc. v. Lord, 449 F.2d 119, 120 \(2d Cir. 1971\)](#).

In [Van Gemert v. Boeing Co., 553 F.2d 812 \(2d Cir. 1977\)](#), the Second Circuit affirmed an aggregate judgment in a securities class action. Likewise, in [Gerstle \[\\*\\*94\] v. Gamble-Skogmo, Inc., 478 F.2d 1281 \(2d Cir. 1973\)](#), the Second Circuit modified and affirmed an aggregate judgment in a securities class action. In fact, aggregate judgments have been widely used in antitrust, securities and other class actions. See cases collected in [Newberg, supra](#). See also [Van Gemert v. Boeing Co., 590 F.2d 433, 436 \(2d Cir. 1978\)](#), aff'd, [444 U.S. 472, 479-80, 62 L. Ed. 2d 676, 100 S. Ct. 745 and n.6 \(1980\)](#).

Accord, e.g., [Greenhaw v. Lubbock County Beverage Ass'n, 721 F.2d 1019, 1029 \(5th Cir. 1983\)](#) (aggregated judgment affirmed in antitrust class action); [In re Brand Name Prescription Drugs Antitrust Litigation, 1994 U.S. Dist. LEXIS 16658, 1994 WL 663590 \(N.D. Ill. Nov. 18, 1994\)](#) ("the fact of the matter is that the putative class plaintiffs have come forward with seemingly realistic methodologies for proving damages on a class-wide basis"); [In re Sugar Industry, 73 F.R.D. at 351](#) ("the most suitable procedure for the determination of damages sustained by the proposed consumer classes in this litigation, if any, is either by an aggregate class-wide approach or through individualized evidence based on proven and accepted statistical methods"). [\*\*95]

<sup>21</sup> The court in the *In re Antibiotic Antitrust Actions* envisioned that the determination and allocation of individual damages would occur in an administrative process, rather than in a second trial phase:

Damages would be awarded on a class-wide basis, if and when liability was established, and individual claims could then be processed administratively after entry of judgment.

**333 F. Supp. at 283.** In a subsequent opinion, the Court followed up on its tentative decision that the class would be manageable by finding, on a more developed record, that the class in fact was manageable. [In re Antibiotic Antitrust Actions, 333 F. Supp. 291 \(S.D.N.Y. 1971\)](#).

The leading commentator on class actions likewise notes the advantage and viability of proving aggregate class damages:

In many cases, the class representative in an antitrust suit may prove the amount of damages for the entire class . . . thus eliminating the need for individual damage proofs during trial. This approach allows the named plaintiff to show the total class damages caused by the defendant's unlawful conduct.

4 *Newberg on Class Actions*, § 18.53.

The aggregate class damage approach has obvious case management advantages. By eliminating individual damage proofs at trial, the length, complexity and attendant costs of litigation are greatly reduced. As stated in 2 *Newberg on Class Actions* § 10.01 at 10-2:

Proof of aggregate monetary relief for the class is feasible and reasonable under various circumstances. The evidentiary standard for proof of monetary relief on class-wide basis is simple - the proof submitted must be sufficiently reliable to permit a just determination of the defendant's liability within recognized standards of admissible and probative evidence.

Moreover, as noted in *Newberg*, § 10.05:

Aggregate computation [\*\*96] of class monetary relief is lawful and proper. Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis.

Finally, Defendants contend that the aggregate damage approach would lead to a "fluid class recovery," which has been rejected in this Circuit. See *Abrams v. Interco Incorp.*, 719 F.2d 23, 31 (2d Cir. 1983); *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815-16 (2d Cir. 1977), aff'd, 444 U.S. 472, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980); *Eisen v. Carlisle & Jacqueline*, 479 F.2d 1005, 1016-18 (2d Cir. 1973), vacated on other gds, 417 U.S. 156 (1974). **HN42**↑ Fluid recovery refers to the distribution of unclaimed or unclaimable funds to persons not found to be injured but who have interests similar to those of the class. See *In re Corrugated Container*, [\*526] 1980-81 CCH Trade Cases P 63,810.

In the cases on which Defendants rely, however, damages could not be returned to any meaningful number of class members, and plaintiffs accordingly proposed fluid recovery. Damages in an antitrust class action may be determined on a classwide, [\*\*97] or aggregate, basis, without resorting to fluid recovery where the computerized records of the particular industry, supplemented by claims forms, provide a means to distribute damages to injured class members in the amount of their respective damages.

As set forth above, Defendants here are required to maintain detailed computerized records of their transactions, and Plaintiffs propose that those records will provide the means to determine damages on a classwide basis without creating a need to rely on fluid recovery. Accordingly the circumstances here will permit recovery by class members who, by virtue of their membership in the class, have claimed injury caused by Defendants' practices, rather than by a broader class of investors who were not injured but who may be injured by future transactions. See *In re Agent Orange Product Liability Litig.*, 818 F.2d 179, 184-85 (2d Cir. 1987) (holding no fluid recovery problem where "the class that will benefit . . . is essentially equivalent to the class that claims injury").

#### **(v) Causation**

With respect to Defendants' argument that the Plaintiff Class will be unable to prove that the Defendants' conspiracy caused Plaintiffs [\*\*98] injury, courts have held that this element **HN43**↑ is also susceptible of common classwide proof, and that, as a general rule, an illegal price-fixing scheme presumptively damages all purchasers of a price-fixed product in an affected market. The court addressed that issue as follows in *Master Key*, 70 F.R.D. at 26 n.3:

If the plaintiffs introduce proof . . . at the liability stage that they bought master key systems and that the defendants engaged in a pervasive nationwide course of action that had the effect of stabilizing prices at supracompetitive levels, the jury may conclude that the defendants' conduct caused injury to each plaintiff.

Moreover, on defendants' appeal, the Second Circuit stated that:

If the appellees establish at the trial for liability that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that appellants' conduct caused injury to each appellee. See In re Ampicillin Antitrust Litigation, 55 F.R.D. 269, 275-76 (D.D.C. 1972); Illinois v. Harper [\*\*991] & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969). The amount of such injury could then be computed at a separate trial for damages, and appropriate sub-stratification of classes could be utilized to facilitate that determination. See Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 567 (10th Cir. 1961); Aamco Automatic Transmissions, Inc. v. Tayloe, 67 F.R.D. 440 (E.D. Pa. 1975); Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n, 66 F.R.D. 581, 591-92 (E.D. Pa. 1975); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 115 (S.D.N.Y. 1975); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534-35 (N.D. Ga. 1972).

In re Master Key Antitrust Litigation, 528 F.2d 5, 12 n.11 (2d Cir. 1975). See also, e.g., J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 567, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981) (jury may "infer antitrust injury"); Shelter Realty Corp., 75 F.R.D. at 37; In re In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 268, 272 (D. Minn. 1989) ("Proof of impact typically follows from proof of a price-fixing conspiracy where the defendants are shown to have sufficient market power."); Town of New Castle v. Yonkers Contracting Co., Inc., 131 F.R.D. 38, 41 (S.D.N.Y. 1990) (citing In re Master Key, 528 F.2d at 12 n.11); In re Folding Carton, 75 F.R.D. at 734 ("Courts have consistently held that an illegal price fixing scheme presumptively impacts upon all purchasers of a price fixed product in a conspiratorially affected market.").

[\*527] **HN44** Once the existence of injury is established (by direct evidence or inference from the character of a sustained conspiracy), the proof necessary to set the amount of damages need not be exact. In J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 565-68, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981), the Supreme Court summarized "our traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury", as follows:

In Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-124, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969), for example, the Court discussed at some length the fixing of damages .... We accepted the proposition that damages could be awarded on the basis of plaintiff's estimate....

"Damage issues in these cases are rarely susceptible of the kind of concrete, detailed [\*\*101] proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs....'"

In Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 90 L. Ed. 652, 66 S. Ct. 574 (1946) .... we explained:

"Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.... Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." 327 U.S. at 264-265....

Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages.... The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle [\*\*102] articulated in cases such a *Bigelow*, that it does not "come with very good grace" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

In sum, the numerous fundamental common issues of fact and law predominate over whatever individual issues may arise in the adjudication of this lawsuit. Accordingly, Plaintiffs have made the showing necessary under the first prong of Rule 23(b)(3).

## 2. The Class Action is Superior to Other Methods of Adjudication

**HN45** [↑] [Rule 23\(b\)\(3\)](#) requires plaintiffs to demonstrate that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Given the number of class members injured by Defendants' conspiracy, a class action is not only the most efficient and convenient method to resolve this controversy, it is the only "fair" and "efficient" means to adjudicate this controversy.

Multiple lawsuits would be costly and inefficient, and the exclusion of class members who cannot afford separate representation would be neither 'fair' nor an 'adjudication' of their claims. Moreover, although a large number of individuals may have been injured, no [\\*\\*103](#) one person may have been damaged to a degree which would induce him to institute litigation solely on his own behalf. [Green v. Wolf Corp., 406 F.2d 291, 296 \(2d Cir. 1968\)](#).

As stated in [In re Potash, 159 F.R.D. at 699](#):

Separate proceedings would produce duplicate efforts, unnecessarily increase the costs of litigation, impose an unwarranted burden on this Court and other courts throughout the country, and create the risk of inconsistent results for similarly situated parties. Additionally, the cost associated with individual claims may require claimants with potentially small claim amounts to abandon otherwise valid claims simply because pursuing those claims would not be economical. This in turn would result in unjustly enriching the Defendants; precisely the result antitrust laws are designed to remedy.

[\*528] In addition, class certification here would partially equalize the bargaining power between plaintiffs as a group and Defendants as a group, and thus improve the chances of an equitable settlement. See [In re A.H. Robins Co., Inc., 880 F.2d 709, 739-40 \(4th Cir. 1989\)](#) ("it is 'proper' in determining certification to consider whether such certification will [\\*\\*104](#) foster settlement...."); [duPont Glore Forgan Inc. v. American Telephone & Telegraph Co., 69 F.R.D. 481, 487 \(S.D.N.Y. 1975\)](#) ("The sheer disparity of economic forces suggest a death knell of those claims if individual actions are required.").

The Court foresees no insurmountable problems in the management of this lawsuit. As held in the [In re Sugar Industry, 73 F.R.D. at 358](#) (citation omitted):

The federal bench and bar must remain cognizant of the fact that difficulties in the management of class actions should not lead to a conclusion that class actions are not superior to other available means for the fair and efficient adjudication of the controversy. **HN46** [↑] Manageability problems are significant only if they create a situation that is less fair and efficient than other available techniques.

Courts are generally loath to deny class certification based on speculative problems with case management:

Three reasons exist for granting class certification when only speculative manageability difficulties are perceived. First, the nature of our judicial system mandates that our courts provide a forum for the redress of injuries, and they should not shirk this responsibility [\\*\\*105](#) because of conjecture. Secondly, at the outset of litigation, consideration of future manageability is by necessity limited because discovery has not advanced to the point where certain judgments can be made regarding the relative ease or difficulty with which the litigation will progress. Lastly, [Rule 23\(c\)\(1\)](#), which requires a court to determine the propriety of a class action as soon as practicable after institution of the lawsuit, also allows the courts the luxury of later altering or amending the class certified before any decision on the merits is rendered. It must be remembered that a determination granting a class action always may be modified upon fuller development of the facts, but a negative determination may sound the death knell of the actions as one for a class of persons or entities.

\* \* \*

Moreover, denial of class certification because of suspected manageability problems is disfavored among both the courts and the legal commentators because a court refusing to certify a class action on the basis of vaguely perceived manageability obstacles is acting counter to the policy behind [Rule 23](#), and because that court is discounting unduly its power and creativity in [\\*\\*106](#) dealing with a class action flexibly as difficulties arise.

In re Sugar Industry, 73 F.R.D. at 356 (citations omitted).<sup>22</sup>

As noted in Shelter Realty Corp., 75 F.R.D. at 38, "the threat of inundation comes from the prospect of individual, duplicative actions" rather than from a class action. Thus, the [\*\*107] size of the class militates in favor of, not against certification. See, e.g., *In re Antibiotic*, 333 F. Supp. at 282-83, 289 and n.7 (S.D.N.Y. 1971) (price-fixing class of several million members certified); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971) (class of over a million certified); Sollenberger v. Mountain States Telephone & Telegraph Co., 121 F.R.D. 417, 437 (D.N.M. 1988) (class of several million telephone customers certified in antitrust action); Davis v. Southern Bell Telephone & Telegraph Co., 1993-2 CCH Trade Cases P70,480 (S.D. Fla. 1993) [\*529] (class of several million telephone customers certified in antitrust action).

As the Court reasoned in *In re Domestic Air Transportation Antitrust Litigation*, 137 F.R.D. at 693-94, a case involving at least 12.5 million class members:

"Difficulties in management are of significance only if they make the class action a less 'fair and efficient' method of adjudication than other available techniques." *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 282 (S.D.N.Y. 1971).

The Court finds a class action the *only* fair method of adjudication for plaintiffs. The individual [\*\*108] claims of many class members are so small that the cost of individual litigation would be far greater than the value of those claims.... Thus, if this case is not certified as a class action, a majority of class members would likely abandon their claims even if it can be proven that defendants have conspired to fix prices....

Computers can index and control vast quantities of textual data and scanners are available to enter data automatically onto the computer. These are resources that have only recently become available and that courts must be willing to employ to resolve the dilemma of the massive antitrust case.

.... Defendants should not be permitted to avoid responsibility for the magnitude of their alleged conspiracy.

*Accord*, e.g., *In re Antibiotic Antitrust Litigation*, 333 F. Supp. 278.

Defendants contend that individual NASD arbitrations provide an efficient means by which aggrieved investors can pursue their claims against market-makers. Defendants' suggestion, however, serves to highlight the superiority of the class action to available alternatives.

The Securities and Exchange Commission has recognized the efficiency of class actions as a [\*\*109] means of resolving claims involving numerous investors, and accordingly approved a rule displacing individual arbitrations in favor of class actions:

The Commission agrees... that, in all cases, class actions are better handled by the courts and that investors should have access to the courts to resolve class actions efficiently.... Over the years of the evolution of class action litigation, the courts have developed the procedures and expertise for managing class actions.

*S.E.C. Release No. 34-31371, 57 Fed. Reg. 53659 (November 4, 1992).*

If the instant motion for class certification were denied, each individual investor would have to arbitrate the existence, and economic effect, of a massive antitrust conspiracy in proceedings that ordinarily provide only limited discovery. See NASD Rules of Fair Practice, Art. III § 21(f) (requiring NASD member organizations to warn customers who enter into arbitration agreements that "pre-arbitration discovery is generally more limited than and different from court proceedings.").

<sup>22</sup> See also *In Re Corrugated Container, 80 F.R.D. at 253*; Dennis, 1975-2 CCH Trade Cases P 60,396 at 66,749 ("It is the court's conclusion that at this point, the defendants' assertion that measuring the impact of the conspiracy and calculating individual damages will be an unmanageable task should not defeat plaintiff's motion. . . . However, when discovery is completed if it appears that, contrary to plaintiffs' assertion no general measure of damages can be proven and that any trial will involve separate analysis of the impact of the conspiracy on thousands of different styles of clothing, then the court, pursuant to the flexibility in Rule 23, will reconsider class certification.").

Moreover, the conspiracy would have to be litigated before securities industry panels that have been widely criticized for their lack of antitrust [\*\*110] or legal expertise. Perhaps most significantly, as set forth above, few, if any, individual investors would have the financial means and motivation necessary to prove the conspiracy alleged here.

In sum, as this Court held in *Maywalt v. Parker & Parsley Petroleum Co., 147 F.R.D. at 57*:

In light of the numerosity of the class members and the fact that the typical claim of an individual class member is too small to justify his personally maintaining a separate action, a class action is most appropriate.

Because class action treatment is superior to any other available method for the "fair" and "efficient" adjudication of this case, the requirements of *Rule 23(b)(3)* are fully satisfied. If insurmountable management problems were to develop at any point, class certification can be revisited at any time under *Fed. R. Civ. P. 23(c)(1)*.

### ***Plaintiffs' Discovery Motions***

Plaintiffs have moved (i) to lift the stay of discovery imposed by P 24 of Pretrial Order No. 3, and (ii) to compel Defendants to produce, pursuant to *Rule 37(a), Fed. R. Civ. P.*: [\*530] (a) all CID deposition transcripts within defendants' control, and (b) the Settlement Memorandum and any evidentiary [\*\*111] materials expressly referenced therein.

#### ***A. The stay of Discovery Will Be Lifted***

The stay of discovery was imposed pursuant to the Pretrial Order pending resolution of the class certification motion. That motion is resolved pursuant to this Opinion, and, accordingly, the stay of discovery will be lifted upon issuance of this Opinion.

#### ***B. Plaintiffs' Motions to Compel Production of CID Discovery***

*Rule 26 of the Federal Rules of Civil Procedure* provides that [HN47](#) "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," without regard to whether the material sought will be admissible at trial, "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Rule 26(b)(1), Fed. R. Civ. P.* As the Supreme Court stated in *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978)*, [HN48](#) "relevant to the subject matter involved in the pending action" -- has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." [\*\*112] *Id. at 351*.

As this Court has already held in connection with Plaintiffs' prior motion for discovery of CID materials, those CID materials are relevant and not privileged. See *Nasdaq IV, 929 F. Supp. 723*. The Supreme Court has held that [HN49](#) although the relevancy requirement of *Rule 26(b)(1)* "should be firmly applied," *Herbert v. Lando, 441 U.S. 153, 177, 60 L. Ed. 2d 115, 99 S. Ct. 1635 (1979)*, "where the proof is largely in the hands of alleged conspirators," antitrust plaintiffs must be given "ample opportunity" for discovery. *Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*; see, e.g., *In re Shopping Carts Antitrust Litig., 95 F.R.D. 299 (S.D.N.Y. 1982)*. The CID materials sought here could provide additional evidence regarding liability and damages and potential impeachment material and lead to the discovery of other admissible evidence. See *Nasdaq IV*.

Moreover, the CID materials are not privileged. This Court has adopted the reasoning of the cases that have held in favor of compelling the production of CID materials where such materials are within Defendants' control. See *Nasdaq IV* (citing [\*\*113] *In re Domestic Air Transp. Antitrust Litig., 142 F.R.D. 354 (N.D. Ga. 1992)*; *In re Domestic Air Transp. Antitrust Litig., 141 F.R.D. 556 (N.D. Ga. 1992)*; *In re Air Passenger Computer Reservation Sys. Antitrust Litig., 116 F.R.D. 390 (C.D. Cal. 1986)*).

Defendants urge that the CID materials sought by Plaintiffs are not within the Defendants "possession, custody, or control," and therefore Defendants are not required to produce them pursuant to [Rule 34, Fed. R. Civ. P.](#). However, [HN50](#)[] under [Rule 34](#), "a party need not have actual possession of documents to be deemed in control of them." [In re Folding Carton Antitrust Litigation, 76 F.R.D. 420, 423 \(N.D. Ill. 1977\)](#). A "party has 'control' over a document if that party has a legal right to obtain those documents." [Haseotes v. Abacab International Computers, Inc., 120 F.R.D. 12, 15 \(D. Mass. 1988\)](#). See also [Searock v. Stripling, 736 F.2d 650, 653 \(11th Cir. 1984\)](#) ("Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand"). Courts have also "interpreted [Rule 34](#) to [HN51](#)[] require production if the party has the practical ability to obtain the documents from another, irrespective [\*\*114] of his legal entitlement." [Golden Trade S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 525 \(S.D.N.Y. 1992\)](#). Accord, e.g., [Scott v. Arex, Inc., 124 F.R.D. 39, 41 \(D. Conn. 1989\)](#) ("A party controls documents that it has the right, authority, or ability to obtain upon demand").

### **1. Defendants Will Be Compelled to Produce the CID Transcripts**

Those CID deposition transcripts already in Defendants' possession must be produced. As set forth above, discovery of those transcripts was stayed pending resolution of the [\*531] class certification motion, and that motion is resolved pursuant to this Opinion. Accordingly, no reason presently exists to further delay production of those transcripts currently in Defendants' possession.

With respect to Defendants' employees' deposition transcripts not in Defendants' possession, those employees are entitled by law to copies of their CID deposition transcripts. See [15 U.S.C. § 1312\(i\)\(6\)](#). Moreover, to the extent Defendants exercise control over their current and former employees, Defendants will produce transcripts of those employees' depositions. See [In re Woolworth Corporation Securities Class Action Litigation, 166 F.R.D. 311, 1\\*\\*1151 313 \(S.D.N.Y. 1996\)](#); [In re Domestic Air, 142 F.R.D. 354, 357 n.4 \(N.D. Ga. 1992\)](#); [In re Folding Carton, 76 F.R.D. at 423](#).<sup>23</sup>

[HN52](#)[] A current or former employee may be considered under a Defendants' control for [Rule 34](#) purposes where that employee was: (i) briefed by a company representative or counsel prior to the CID deposition or debriefed after the deposition; (ii) represented by counsel [\*\*116] recommended, retained, or paid for by a company representative or counsel; or (iii) informed by a representative of defendant or defense counsel of the possibility of ordering a copy of their CID transcript. See [In re Domestic Air, 142 F.R.D. at 357](#). See also [Herbst v. Able, 63 F.R.D. 135, 138 \(S.D.N.Y. 1972\)](#) ("Plaintiffs . . . may request [Defendant] to have its non-defendant employees procure copies of their private testimony before the SEC so that [Defendant] may give same to plaintiffs. Plainly [Defendant's] employees are persons within its control").

Accordingly, each Defendant will be required to identify those of its current employees or former employees who were deposed by the DOJ in connection with the Nasdaq investigation,<sup>24</sup> and to produce to Plaintiffs, at Plaintiffs' expense, transcripts of the depositions of those current and former employees under Defendants' control as defined herein.

### **[\*\*117] 2. Defendants Will Not Be Compelled to Produce the Settlement Memorandum**

Defendants contend that they cannot produce the Settlement Memorandum, as it is not in their possession, custody or control as required under [Rule 34](#). Plaintiffs contend that Defendants can be compelled to produce the Settlement Memorandum, because they have the legal right to obtain it -- and all of the CID evidence collected by

<sup>23</sup> Defendants cite [In re Air Passenger Computer Reservation Systems Antitrust Litigation, 116 F.R.D. 390, 393 \(C.D. Cal. 1986\)](#), in support of their position that a witness might be able to avoid discoverability of his CID deposition testimony by simply refusing to request a copy of it. [116 F.R.D. at 393](#). The *dictum* upon which Defendants rely has been superseded by statute. See [In re Woolworth Corp. Securities Class Action Litigation, 166 F.R.D. 311, 313 \(S.D.N.Y. 1996\)](#) (*dictum* in *Air Passenger* pre-dates the 1991 Amendments to the Federal Rules of Civil Procedure, and rejected by *Woolworth* court).

<sup>24</sup> To the extent Defendants have already provided, pursuant to the Pretrial Order, lists of employees deposed by the DOJ, Defendants will be required to update those lists.

the government -- pursuant to *Fed.R.Civ.P.* 26 and [34](#) and DOJ regulations set forth in the Antitrust Division Manual. Pursuant to those regulations, "if a civil action is commenced based on information obtained by CID, the defendants in that action may invoke their full discovery rights under the Federal Rules of Civil Procedure and obtain CID information relevant to their defense." See Antitrust Division, U.S. Department of Justice, Antitrust Division Manual at III-46.

The plain language quoted above, however, indicates that this regulation was intended to afford Defendants in government antitrust actions a full and fair opportunity to defend against such actions. To hold that such language can be invoked to allow Plaintiffs to obtain discovery of CID materials for use [\[\\*118\]](#) against Defendants in a private action would distort the regulations and impose an injustice on Defendants.<sup>25</sup> No case support exists [\[\\*532\]](#) for the proposition that, pursuant to the regulation cited, Plaintiffs may obtain Government evidence against Defendants even where Defendants do not want to obtain such evidence for use in their own defense. Accordingly, Defendants will not be compelled to obtain from the Government and produce to the Plaintiffs the Settlement Memorandum.

### **Conclusion**

For the foregoing reasons, Plaintiffs' motion for class certification pursuant to [Rule 23\(b\)\(2\)](#) and [\(b\)\(3\) of the Federal Rules of Civil Procedure](#) is hereby granted in part, as set forth above. Plaintiffs motion to compel discovery is hereby granted in part and denied in part as set forth above.

Settle order on notice.

It is so ordered.

**New York, N. Y.**

**November 26, 1996**

**ROBERT W. SWEET**

**U.S.D.J.**

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<sup>25</sup> Moreover, [HN53](#) pursuant to [15 U.S.C. § 1313\(c\)\(3\)](#), the Government may not disclose materials obtained through CIDs without the target's consent. If Plaintiffs here were allowed to obtain all CID materials by forcing Defendants to invoke their general right to discovery of the DOJ's evidence against them, Defendants would be effectively denied the protection intended by [§ 1313\(c\)\(3\)](#).



## Peters v. Saunders

Court of Appeal of California, Second Appellate District, Division Seven

November 26, 1996, Filed

No. B092492

**Reporter**

50 Cal. App. 4th 1823 \*; 58 Cal. Rptr. 2d 690 \*\*; 1996 Cal. App. LEXIS 1105 \*\*\*; 96 Cal. Daily Op. Service 8605; 96 Daily Journal DAR 14205; 1996-2 Trade Cas. (CCH) P71,646

RONALD J. PETERS, Cross-Complainant and Appellant, v. MARK SAUNDERS, Cross-Defendant and Respondent.

**Notice:** NOT CITABLE - ORDERED NOT PUBLISHED

**Subsequent History:** [\*\*\*1] As Modified on Denial of Rehearing December 19, 1996; Reported at: [1996 Cal. App. LEXIS 1179](#). Review Denied March 26, 1997 and the Reporter of Decisions directed not to publish this opn. in the Official Reports ([Cal. Const., art. VI, § 14](#); [rule 976, Cal. Rules of Ct.](#)), Reported at: [1997 Cal. LEXIS 1733](#).

**Prior History:** Appeal from an order of the Los Angeles Superior Court. Super. Ct. No. BC072147. Hon. David A. Workman, Judge.

**Disposition:** Affirmed in part and reversed in part.

## **Core Terms**

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declaration, trial court, boycott, secondary boycott, Devine-Hall, contracting, cause of action, lawsuit, unfair competition, cross-complaint, establishments, defamation, target, personal knowledge, Cartwright Act, competitor, coerce, practices, hearsay, notice, exclude evidence, free speech, manufacturers, grounds, reasons, unfair, cases, right of petition, public issue, nonreviewability

## **LexisNexis® Headnotes**

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Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Time, Place & Manner Restrictions

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Forums

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

### **HN1** Judicial & Legislative Restraints, Time, Place & Manner Restrictions

In order to allow prompt exposure and dismissal of strategic lawsuit against public participation (SLAPP) suits, [Cal. Civ. Proc. Code § 425.16\(b\)](#) provides a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike. An act in furtherance of a person's right of petition or free speech includes any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest. [Cal. Civ. Proc. Code § 425.16\(e\)](#).

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

### **HN2** Dismissal, Involuntary Dismissals

The defendant seeking to dismiss a cause of action under the strategic lawsuit against public participation (SLAPP) statute bears the initial burden of showing the cause of action arises from any act in furtherance of the defendant's right of petition or free speech. [Cal. Civ. Proc. Code § 425.16\(b\)](#).

Constitutional Law > ... > Freedom of Speech > Defamation > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

### **HN3** Freedom of Speech, Defamation

To invoke the strategic lawsuit against public participation (SLAPP) statute a defendant does not have to show every statement he made about a plaintiff was made in furtherance of his First Amendment, [U.S. Const. amend. I](#), rights. He only needs to show the defamation cause of action arises from any act in furtherance of his right of petition or free speech. [Cal. Civ. Proc. Code § 425.16\(b\)](#).

Constitutional Law > ... > Freedom of Speech > Defamation > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

50 Cal. App. 4th 1823, \*1823L<sup>58</sup> Cal. Rptr. 2d 690, \*\*690L<sup>1996</sup> Cal. App. LEXIS 1105, \*\*\*1

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

#### **HN4** Freedom of Speech, Defamation

Requiring the defendant in a strategic lawsuit against public participation (SLAPP) suit to show every act complained of was in furtherance of his First Amendment, *U.S. Const. amend. I.*, rights would be inconsistent with the stated legislative purpose of the statute to address lawsuits brought primarily to chill the valid exercise of constitutional rights. *Cal. Civ. Proc. Code § 425.16(a).*

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

#### **HN5** Dismissal, Involuntary Dismissals

Once the defendant shows one or more causes of action arose from acts in furtherance of his right of petition or free speech the burden shifts to the plaintiff to establish a probability that the plaintiff will prevail on those causes of action. *Cal. Civ. Proc. Code § 425.16(b).* To establish a probability of success the plaintiff must (1) demonstrate the complaint is legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited and (2) meet the defendant's constitutional defenses by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law or by a *prima facie* showing of facts which, if accepted by the trier of fact, would negate such defenses.

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Defamation

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

#### **HN6** Related Legal Issues, Defamation

Under the strategic lawsuit against public participation statute, a showing in support of a cause of action must be made by competent evidence within the personal knowledge of the declarant.

Civil Procedure > Appeals > Standards of Review > General Overview

#### **HN7** Appeals, Standards of Review

It has long been the rule in California an appellate court will not look behind the trial court's judgment to review its reasoning. This rule is often referred to as the rule of nonreviewability.

Civil Procedure > Appeals > Standards of Review > General Overview

#### **HN8** Appeals, Standards of Review

50 Cal. App. 4th 1823, \*1823L<sup>58</sup> Cal. Rptr. 2d 690, \*\*690L<sup>1996</sup> Cal. App. LEXIS 1105, \*\*\*1

The rule of nonreviewability applies to the exclusion of evidence. If evidence is excluded on an improper objection, or the trial court excludes evidence on its own motion, the exclusion will be upheld if the evidence was inadmissible for any reason.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

### **HN9**[ **Reviewability of Lower Court Decisions, Preservation for Review**

An appellate court will uphold the exclusion of evidence on grounds not raised in the trial court except in cases where the appellant can show the defect in the evidence was neither manifest or at least suggested by the opponent's objection; the defect could have been cured if it had been called to the proponent's attention; and it is reasonably probable the proponent of the evidence would have obtained a more favorable ruling had he or she been afforded the opportunity to cure the defect or supply substitute evidence.

Civil Procedure > Appeals > Standards of Review

### **HN10**[ **Appeals, Standards of Review**

The rule a reviewing court will uphold the trial court's ruling if it reached the correct result, regardless of how it got there, is justified because it prevents a reversal on technical grounds where the cause was correctly decided on the merits. Thus, the rule should apply in circumstances where the reviewing court can have confidence in the outcome, i.e. that the cause was correctly decided on the merits. But where the procedures in the trial court undermine the reviewing court's confidence in the outcome, the rule should not apply.

Civil Procedure > ... > Pretrial Judgments > Nonsuits > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

### **HN11**[ **Pretrial Judgments, Nonsuits**

The rule of nonreviewability is intended to uphold judgments correct on the merits. It should not be permitted to produce the opposite result.

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

### **HN12**[ **Regulated Practices, Price Fixing & Restraints of Trade**

The Cartwright Act prohibits two or more persons from combining to do certain specified anti-competitive acts including creating or carrying out restrictions on trade or commerce and preventing competition in the sale or purchase of any commodity. [Cal. Bus. & Prof. Code § 16720\(a\), \(c\)](#).

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

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

### **HN13** [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

In order to succeed on a cause of action under the Cartwright Act, the plaintiff must prove the formation and operation of a conspiracy or combination; illegal acts done pursuant to this conspiracy; a purpose to unlawfully restrain trade; and injury to the plaintiff's business or property.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

### **HN14** [blue icon] **Regulated Practices, Trade Practices & Unfair Competition**

Unfair competition is defined as any unlawful, unfair or fraudulent business act or practice. [Cal. Bus. & Prof. Code § 17200](#)

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

### **HN15** [blue icon] **Regulated Practices, Trade Practices & Unfair Competition**

The unfair competition statute borrows violations of other laws and treats them as unlawful practices independently actionable under [Cal. Bus. & Prof. Code § 17200](#).

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

### **HN16** [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

Violations of the Cartwright Act are unlawful business practices under [Cal. Bus. & Prof. Code § 17200](#).

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

Civil Procedure > Remedies > Injunctions > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

### **HN17** [blue icon] **Regulated Practices, Private Actions**

A private litigant is not entitled to damages under [Cal. Bus. & Prof. Code § 17200](#) but may seek injunctive relief under [§17203](#) which provides: any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

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

#### **HN18** [↓] Practices Governed by Per Se Rule, Boycotts

In a secondary boycott, the defendant and the target are competitors who do not engage in any transactions among themselves, so the defendant cannot remove the target from competition by refusing to deal with it. Instead, the defendant uses the threat of economic sanctions to coerce the suppliers or customers it shares with the target to refuse to deal with the target, thus denying the target access to the goods or buyers it needs to compete with the defendant.

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

#### **HN19** [↓] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

For a secondary boycott to violate the antitrust laws the defendant need not conspire with fellow competitors against the target competitor. A boycott by a single trader constitutes the necessary combination in restraint of trade if it is carried out through coercion, threats or intimidation upon the target's suppliers. Nor is it necessary the coercion actually result in the supplier refusing to do business with the target. A would-be boycotter may be enjoined from attempting to violate the antitrust laws.

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

#### **HN20** [↓] Practices Governed by Per Se Rule, Boycotts

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiries as to the precise harm they have caused or the business excuse for their use. Indirect or secondary boycotts have traditionally been held to fall within this pernicious category of practices which means they are presumed to be unlawful restraints of trade without the necessity of analyzing their economic effects and possible justifications.

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

#### **HN21** [↓] Private Actions, Remedies

See [Cal. Bus. & Prof. Code § 16750 \(a\).](#)

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

Civil Procedure > Remedies > Injunctions > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

#### **HN22** [↓] Regulated Practices, Private Actions

See [Cal. Bus. & Prof. Code § 17203.](#)

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

### [HN23](#) **Regulated Practices, Trade Practices & Unfair Competition**

[Cal. Bus. & Prof. Code § 17200](#) is no longer limited to a business practice, i.e. a pattern of behavior or course of conduct but applies to any act of unfair competition.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

### [HN24](#) **Regulated Practices, Trade Practices & Unfair Competition**

The Unfair Practices Act prohibits locality discrimination, sales below cost and special rebate schemes. [Cal. Bus. Prof. Code §§ 17040- 17045.](#)

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Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

### [HN25](#) **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The Unfair Practices Act (Act) makes it unlawful for a person to use threats, intimidation or boycotts to effectuate any violation of the Act or to solicit any violation of the Act. [Cal. Bus. & Prof. Code §§ 17046, 17047.](#)

**Counsel:** Dan Stormer for Cross-Complainant and Appellant.

Yvonne M. Renfrew for Cross-Defendant and Respondent.

**Judges:** WOODS, J.; LILLIE, P.J., and GODOY-PEREZ, J. \*, concurring.

**Opinion by:** WOODS

## **Opinion**

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**[\*1829] [\*\*693]** WOODS, J.:

The trial court granted a special motion to strike the cross-complaint in this action based on California's SLAPP suit statute.<sup>1</sup>

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\* Assigned by the Chairperson of the Judicial Council.

<sup>1</sup> The acronym SLAPP stands for "strategic lawsuit against public participation." SLAPPs can be described briefly as lawsuits lacking merit brought primarily for the purpose of chilling the defendant's exercise of the right to free speech and to petition the government for a redress of grievances. ([Wilcox v. Superior Court \(1994\) 27 Cal. App. 4th 809, 823.](#)) For a detailed discussion of SLAPPs see [Wilcox, supra, 27 Cal. App. 4th at pp. 815-817.](#)

## [\*\*\*2] [\*\*694] FACTS AND PROCEEDINGS BELOW

This appeal is the latest battle between two groups of certified shorthand reporters: the California Reporting Alliance (CRA or Alliance) led by Peters and the Court Reporters' Action Fund (CRAF) led by Saunders. We discussed the dispute between these organizations and their members in detail in [\*Saunders v. Superior Court \(1994\) 27 Cal. App. 4th 832\*](#) and [\*Wilcox v. Superior Court, supra\*](#), and therefore we only summarize it here.

The dispute between the parties involves the practice of "direct contracting" under which a certified shorthand reporter or reporter agency contracts with a major consumer of reporters' services, such as an insurance company, for the exclusive right to report depositions taken by attorneys representing that consumer. In August 1992 Saunders and other reporters filed the underlying action against Peters and other reporters alleging "direct contracting" as practiced by defendants constituted an unfair business practice and intentional interference with plaintiffs' economic advantages and existing contracts. Peters and the other defendants filed a cross-complaint against Saunders and other reporters alleging defamation and unlawful [\*\*\*3] restraint of trade.

One of the cross-defendants, Wilcox, claimed the cross-complaint was a SLAPP suit and brought a special motion to strike under California's SLAPP statute, [\*Code of Civil Procedure section 425.16\*](#).<sup>2</sup> The trial court denied the motion to strike and Wilcox sought review by way of petition for writ of mandate. We granted the writ and directed the trial court to strike the cross-complaint in its entirety as to Wilcox. ([\*Wilcox, supra, 27 Cal. App. 4th at p. 831\*](#).) We held Wilcox met her burden of showing the claims against her arose from acts in furtherance of her right of petition or free speech while Peters and the other cross-complainants failed [\*1830] to establish a probability of prevailing on their defamation and business tort claims against Wilcox. ([\*§ 425.16, subdivision \(b\); 27 Cal. App. 4th at pp. 825-830\*](#).)

Following our decision in Wilcox, cross-defendant Saunders brought a motion under the SLAPP statute to strike [\*\*\*4] the cross-complaint as to him. Saunders based the motion on the pleadings and his declaration. Peters and the other cross-complainants opposed the motion and filed counter-declarations. The trial court took Saunders' motion under submission and subsequently issued an order striking the cross-complaint. Peters appeals.<sup>3</sup>

## [\*\*\*5] DISCUSSION

### I. SAUNDERS MADE A SUFFICIENT SHOWING THE CROSS-COMPLAINT AGAINST HIM AROSE FROM ACTS IN FURTHERANCE OF HIS RIGHTS OF PETITION AND FREE SPEECH IN CONNECTION WITH A PUBLIC ISSUE.

**HN1** [↑] In order to allow prompt exposure and dismissal of SLAPP suits, [\*section 425.16, subdivision \(b\)\*](#) provides "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike . . . ." An act in furtherance of a person's "right of petition or free speech" includes "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body . . . or any written or oral statement or writing [\*\*695] made in a place open to the public or a public forum in connection with an issue of public interest." ([\*§ 425.16, subd. \(e\).\*](#)) It is conceded for purposes of this litigation direct contracting is a public issue within the meaning of [\*section 425.16, subdivisions \(b\)\*](#) and [\*\(e\).\*](#) ([\*Wilcox, supra, 27 Cal. App. 4th at p. 821\*](#))

<sup>2</sup> All statutory references are to the Code of Civil Procedure until further notice.

<sup>3</sup> Ordinarily, an appeal will not lie from an order striking the defendant's cross-complaint against the plaintiff. However, we elected to decide the issues raised by the granting of the SLAPP motion in order to avoid further delay which would prejudice respondents and would undermine the very purpose of the SLAPP statute, which is to permit rapid disposition of actions brought to chill the exercise of constitutional rights of free speech and petition. (See [\*Wilcox, supra, 27 Cal. App. 4th at p. 823\*](#).)

Peters' cross-complaint alleged causes of action in addition to defamation and restraint of trade, however he does not discuss these additional claims on appeal. Therefore he has waived any objections to the trial court's striking these causes of action.

**HN2**[<sup>7</sup>] The defendant [\*\*\*6] seeking to dismiss a cause of action under the SLAPP statute bears the initial burden of showing the cause of action arises from "any act . . . in furtherance of the [defendant's] right of petition or free speech . . . (" [§ 425.16, subd. \(b\)](#).) Peters argues if Saunders had confined [**\*1831**] himself to acts in support of the litigation against CRA or to criticism of "direct contracting" he might have been able to make a *prima facie* showing the cross-complaint arose out of protected constitutional activity. However, Saunders went beyond acts in furtherance of his rights of petition or free speech "in connection with a public issue" and engaged in a defamatory attack on Peters personally as well as an attempt to coerce other reporters into boycotting Peters and CRA.

Peters submitted the declarations of four shorthand reporters in support of his argument that some of Saunders' acts were not in furtherance of the rights of petition and free speech on a public issue.

Elizabeth Devine-Hall described a telephone conversation she had with Saunders in April 1992, prior to the filing of the lawsuit. In this conversation Saunders "tried to discourage [Ms. Devine-Hall] from remaining a member of [\*\*\*7] [CRA]" by telling her "there was going to be a lawsuit and that he did not want to see [her] damaged as a result." Saunders also told Ms. Devine-Hall if she did not resign from CRA he would not speak to her any more and "he would not be able to recommend [her] agency." In addition, Saunders asked Ms. Devine-Hall if she would be interested in participating in a group of reporters he was setting up to compete with CRA.

The declaration by Karen Abbott described a shorthand reporters' meeting she attended at a hotel in Los Angles in June or July of 1992, shortly before the lawsuit was filed. Saunders was in charge of the meeting. An attorney addressed the group describing grounds for a potential lawsuit against CRA and an insurance company based on direct contracting. Saunders then told the group it would cost between \$ 2,000 and \$ 2,500 per person to join the lawsuit. Saunders read the group a list of reporter agencies he claimed were members of CRA. Ms. Abbott cannot remember if Saunders specifically urged the group not to do business with these agencies but "he strongly implied that we were not to accept work from, or refer work to, those agencies."

Jeri Burnett described a [\*\*\*8] letter she allegedly received from Saunders in May 1993, nine months after the lawsuit was filed. The letter stated "reporters could lose their licenses by reporting depositions pursuant to a contract with an insurance company." The letter also stated "CRA members are illegally contracting with insurance companies."

Saunders statements as described in the Devine-Hall, Abbott and Burnett declarations fall within the category of statements "made in connection with an issue [i.e. direct contracting] under consideration or review by a legislative, executive or judicial body." ( [§ 425.16, subd. \(e\)](#).) Saunders' remarks at [**\*1832**] the shorthand reporters' meeting may also come within the category of statements "made in a place open to the public or a public forum in connection with an issue of public interest." (*Ibid.*)

Peters also submitted the declaration of a shorthand reporter, Susan Harris, who described a telephone conversation she had with Saunders in September 1992, a month after the complaint was filed. According to Harris, Saunders first mentioned the lawsuit against CRA and then went on to tell her "working for CRA was like working for the Mafia;" her firm "would never get paid by [\*\*\*9] CRA;" and "CRA had lost an account with Aetna Insurance because Aetna caught Ron Peters at fraud and double-billing." Saunders also said Peters "bilks' insurance companies," "is not a certified reporter" and described Peters as "a crook."<sup>4</sup>

[\*\*696] Peters contends Saunders' statements to Harris were defamatory and not in furtherance of Saunders' First Amendment rights. We agree these statements by Saunders were not made "in connection with" the CRA litigation or the public issue of direct contracting. However, **HN3**[<sup>8</sup>] to invoke the SLAPP statute Saunders does not have to show every statement he made about Peters was made in furtherance of his First Amendment rights. [\*\*\*10] He only needs to show the defamation cause of action arises "from any act . . . in furtherance of [his] right of petition or free speech." ( [§ 425.16, subd. \(b\)](#); emphasis added.) **HN4**[<sup>9</sup>] Requiring the defendant in a SLAPP suit to show

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<sup>4</sup> We postpone our consideration of the admissibility of the Burnett and Harris declarations until we reach the question whether Peters made a *prima facie* showing in support of his defamation cause of action. (See Part II below.) For purposes of the present discussion, the result is the same whether or not the Burnett and Harris declarations were properly admitted.

every act complained of was in furtherance of his First Amendment rights would be inconsistent with the stated legislative purpose of the statute to address "lawsuits brought primarily to chill the valid exercise of constitutional rights . . ." ( [§ 425.16, subd. \(a\)](#); emphasis added.)

Because the restraint of trade and defamation causes of action rest, in part, on acts done in connection with the public issue of "direct contracting," Saunders satisfied the statutory requirement for invoking the special motion to strike.

## II. PETERS HAS MADE A SUFFICIENT SHOWING IN SUPPORT OF HIS DEFAMATION CAUSE OF ACTION.

**HN5** Once the defendant shows one or more causes of action arose from acts in furtherance of his right of petition or free speech the burden shifts to the plaintiff to establish "a probability that the plaintiff will prevail" on those [\*1833] causes of action. ( [§ 425.16, subd. \(b\)](#).) In Wilcox we held that to establish a probability of success the plaintiff must [\*\*\*11] (1) "demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited" and (2) "meet the defendant's constitutional defenses. . . by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses." ([27 Cal. App. 4th at p. 824](#).)

Of particular relevance to the present appeal, we held in Wilcox the plaintiff must base his prima facie showing on admissible evidence. We specifically rejected Peters' argument the plaintiff need only demonstrate the existence of sufficient evidence in order to establish a prima facie case. ([27 Cal. App. 4th at p. 830](#).)

Evidence of Saunders' defamatory statements is contained in the declaration of Susan Harris. The Harris declaration states "Mark Saunders called me [on the telephone]" and said, among other things, Peters "is not a certified reporter," he had been caught "at fraud and double-billing," he "bilks' insurance companies," he is a "crook" and working for his organization [\*12] is "like working for the Mafia." With the exception of the reference to the Mafia, these statements clearly were defamatory because they charged Peters with criminal activity and tended directly to injure him in his profession, trade or business as a court reporter and head of a court reporter agency. ( [Civ. Code § 46](#).)<sup>5</sup>

Saunders objected to the statements in the Harris declaration as hearsay. The trial court did not explicitly rule on this objection. After hearing oral argument on the motion to strike, the court [\*\*\*13] took the matter under submission and later issued a minute order granting the motion without explanation. Thus, we cannot determine from the record whether the trial court admitted the Burnett and Harris declarations or excluded them on hearsay or other grounds.

[\*\*697] The statements are not hearsay. Clearly, Peters was not introducing Saunders' defamatory statements to prove the truth of the matters stated. Therefore, the only way the trial court's ruling striking the defamation claim can [\*1834] be upheld is if the Harris declaration was excludable on some ground other than hearsay.

Saunders suggests such an alternative ground exists in Harris' lack of personal knowledge the defamatory telephone call actually came from Saunders. ( [Evid. Code § 702](#).) We agree. **HN6** Under the SLAPP statute, a showing in support of a cause of action must "be made by competent evidence within the personal knowledge of the declarant." ( [Church of Scientology v. Wollersheim \(1996\) 42 Cal. App. 4th 628, 654](#).) Ms. Harris states in her declaration: "Mark Saunders called me." She provides no information showing how she knew it was Saunders to whom she was speaking. (Cf. [People v. Hess \(1970\) 10 Cal. App. 3d 1071, 1078, 90 Cal. Rptr. 268](#).) Her

<sup>5</sup> As to Saunders' comparison of Peters' organization to the Mafia, an expression of opinion or an exercise in hyperbole is not defamatory. ( [Fletcher v. San Jose Mercury News \(1989\) 216 Cal. App. 3d 172, 190-191, 264 Cal. Rptr. 699](#).) Clearly, the comparison of one organization to another expresses the opinion of the person making the comparison. ( [Holy Spirit Ass'n v. Harper & Row Publishers \(N.Y.Sup.Ct. 1979\) 101 Misc. 2d 30, 420 N.Y.S.2d 56, 59](#) [comparison of "Moonies" to Nazis an expression of opinion not actionable as defamation].)

conclusory [\*\*\*14] statement the information in her declaration is within her personal knowledge does not fill in this gap. ( [Fisher v. Cheeseman \(1968\) 260 Cal. App. 2d 503, 506, 67 Cal. Rptr. 258.](#))

**HN7**[] It has long been the rule in California an appellate court will not look behind the trial court's judgment to review its reasoning. This rule is often referred to as the "rule of nonreviewability." A century ago our Supreme Court pronounced, "No rule of decision is better or more firmly established by authority, nor one resting on a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason." ( [Davey v. Southern Pacific Co. \(1897\) 116 Cal. 325, 329, 48 P. 117.](#))

**HN8**[] This rule of nonreviewability applies to the exclusion of evidence. If evidence is excluded on an improper objection, or the trial court excludes evidence on its own motion, the exclusion will be upheld if the evidence was inadmissible for any reason. ( [Davey v. Southern Pacific Co., supra, 116 Cal. at p. 330; Philip Chang & Sons Associates v. La Casa Novato \(1986\) 177 Cal. App. 3d 159, 173, 222 Cal. Rptr. 800.](#)) Here, evidence of the defamatory statements was inadmissible because Harris failed to [\*\*\*15] allege facts demonstrating her personal knowledge Saunders made the statements.

In our original opinion in this appeal, our analysis ended at this point because we determined a proper ground existed for the exclusion of the evidence and, without this evidence, Peters could not establish a *prima facie* case of defamation. On petition for rehearing, however, Peters urged there should be an exception to the rule of nonreviewability in cases where the appellant shows (1) he lacked actual or constructive notice of the defect in the evidence; (2) if he had notice of the actual defect in the evidence he could have cured it or supplied substitute evidence; and (3) it is reasonably probable he would have obtained a more favorable result in the proceeding if the evidence had been admitted. We granted rehearing to consider this and other points raised by Peters.

As the present case demonstrates, it is common in motion practice, where the facts and arguments are presented principally in writing, for one party to [\*1835] object to another party's evidence but for the trial court never to rule explicitly on the objection. Typically, the trial court reviews the parties' legal memoranda and declarations, hears argument on the motion and either rules from the bench or takes the matter under submission and later issues its [\*\*\*16] ruling in the form of a minute order. These rulings rarely address evidentiary issues raised by the parties. Thus, whatever evidentiary rulings the trial court makes, it makes in private. It may decide to accept or reject an evidentiary objection raised by a party or it may determine on its own motion an item of evidence is admissible or inadmissible for a reason not raised by any party.<sup>6</sup>

[\*\*698] Affirming the judgment in such a case on the [\*\*\*17] ground the trial court reached the correct result no matter how it got there would be consistent with the long-established and well-recognized rule of nonreviewability discussed above. Nevertheless, there is merit to Peters' argument it is unfair to apply the rule in this case because he had no way of knowing the trial court (or this court) was going to rule the declaration inadmissible for lack of personal knowledge. Saunders did not raise this ground below nor was it ever mentioned by the trial court. The ground was first raised on appeal, after it was too late to correct the defect. Peters asserts had he known of this ground for objection in the trial court he could have filed a supplemental declaration showing declarant Harris did have personal knowledge she was speaking to defendant Saunders on the telephone. (See discussion below, pp. 17-18.)

Notwithstanding the historical basis and sound reasons for the rule of nonreviewability, precedent exists for the kind of exception urged by Peters.

In [Davey, supra](#), the appellant argued for an exception to the rule on grounds similar to those urged by Peters in the present case. Davey brought a personal injury action against Southern [\*\*\*18] Pacific after she fell between the rails of its track into an excavation negligently left open and unprotected by defendant. The complaint alleged

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<sup>6</sup>We are not suggesting the trial court should refrain from excluding inadmissible evidence on its own motion. A trial judge, after all, is not a bucket of rocks sitting behind the bench and the authority to exclude evidence on the court's own motion is well established. (3 Witkin, Cal. Evid. (3d ed. 1986) § 2032, p. 1994.) What we are suggesting is that trial courts should be cautious in exercising their authority to exclude evidence on their own motion when the proponent of the evidence does not have fair notice of the ground for exclusion. (See discussion below, pp. 15, 16.)

Southern Pacific was negligent in leaving exposed and unprotected a dangerous excavation on a public street. The evidence Davey offered at trial, however, showed the excavation was on the private property of Southern Pacific, but at a point where the public was privileged to pass. Southern Pacific objected to Davey's evidence on the ground it was "irrelevant, immaterial, and incompetent." The trial court [**\*1836**] sustained the objection and granted Southern Pacific's motion for nonsuit. ([116 Cal. at p. 328](#).)

On appeal, Davey argued the trial court erred in excluding her evidence on the general objection it was irrelevant, immaterial and incompetent. Southern Pacific responded even if it had objected on the wrong ground in the trial court, the evidence was properly rejected on the ground of material variance between the pleadings and the proof at trial and therefore the judgment should be affirmed. Davey acknowledged there was an obvious material variance but contended the question of variance "was not raised in the court below; that no such specific [\*\*\*19] objection was there made, nor was it fairly included within the general objection interposed; that had it been called to the attention of counsel for appellant at the time the evidence was offered, plaintiff would have had an opportunity to conform her pleading to the proof, and thus have obviated the objection; and . . . respondent should not now be heard to make such objection for the first time in this court, and thus cut off plaintiff's right to so amend, and have her case tried upon its merits." ([116 Cal. at pp. 328-329](#).)

The Supreme Court acknowledged the specific objection of material variance was not raised at trial and "the objection there made, and the ruling had, would seem to have proceeded upon a different theory from that upon which respondent now rests." ([116 Cal. at p. 329](#).) Nevertheless, relying on the general rule discussed above, the court held where the trial court excludes evidence "the ruling will be sustained, if the evidence was for any reason inadmissible." ([116 Cal. at p. 330](#).) As to appellant's argument for an exception to the rule, the court responded exclusion of the plaintiff's evidence was entirely her fault. Not only was the defect in the evidence "so manifest [\*\*\*20] that it should have been perceived without suggestion; but, moreover, it was suggested, although not in express terms, by the objection made." ([116 Cal. at p. 332](#).)

It is important to note the court in Davey did not reject the appellant's argument in principle; it only said the argument was not supported by the facts in that particular case. Thus, Davey left the door open for reversal of a judgment based on exclusion of the appellant's evidence where there was no objection to the evidence or the only ground [**\*\*699**] of objection was improper, the actual defect in the evidence was not "manifest" or "suggested by the objection made," the defect in the evidence could have been cured if the appellant had been on notice of it and it is reasonably probable the appellant would have obtained a more favorable result in the proceeding if the evidence had been admitted.

In [Lawless v. Calaway \(1944\) 24 Cal. 2d 81, 147 P.2d 604](#), the Supreme Court did make an exception to the rule of nonreviewability for reasons very [**\*1837**] much like those urged in Davey. The issue in Lawless was whether a judgment of nonsuit could be upheld on appeal on grounds other than those specified at trial. Respondent relied on the traditional rule a reviewing [\*\*\*21] court will uphold the judgment if it is right even if the trial court's reasons are wrong. The Supreme Court declined to apply that doctrine to nonsuits, explaining: "The doctrine is sound and salutary in most situations since it prevents a reversal on technical grounds where the cause was correctly decided on the merits. But this is not true as applied to nonsuits, for such a doctrine would frequently undermine the requirement that a party specify the ground upon which his motion for nonsuit is based in order to afford the opposing party an opportunity to remedy the defects in proof. It seems obvious that the doctrine intended solely to uphold judgments correct on the merits should not be permitted to produce the opposite result." Therefore, the court concluded, "the correct rule is that grounds not specified in a motion for nonsuit will be considered by an appellate court only if it is clear that the defect is one which could not have been remedied had it been called to the attention of plaintiff by the motion. This rule is complementary to the requirement that a party specify the grounds upon which his motion for nonsuit is based." ([Id. at p. 94](#).)

Another exception to the rule [\*\*\*22] of nonreviewability holds the appellate court will not affirm a judgment on the basis of a theory not advanced in the trial court which involves controverted questions of fact or mixed questions of law and fact. The rationale for this exception is the appellant has not had an opportunity to present evidence contradicting the new theory because he was not on notice the theory would be relied upon. ([Cramer v. Morrison](#)

(1979) 88 Cal. App. 3d 873, 887, 153 Cal. Rptr. 865; *Pacific Gas & E. Co. v. Peterson* (1969) 270 Cal. App. 2d 434, 439, 75 Cal. Rptr. 673.) Still other exceptions to the rule have been recognized which we will not detail here but are discussed elsewhere. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 262, p.269.)

The exceptions noted above rest on the premise it is fundamentally unfair to rule against a party without telling him what the defect in his case is and giving him an opportunity to cure it. This is the same premise which requires the opponent to state his specific objection to the evidence or the objection is waived. "To require this is simply a matter of fairness and justice" because if attention is called to the particular objection counsel would be "advised directly what the particular complaint [\*\*\*23] against the [evidence] was, and, if he [\*1838] deemed it tenable, could have withdrawn the inquiry or reframed his question to obviate the particular objection." ( *Bundy v. Sierra Lumber Co.* (1906) 149 Cal. 772, 776, 87 P. 622.)<sup>7</sup>

A ruling excluding evidence on a ground not raised in the trial court is analogous to a ruling granting a nonsuit on a ground not raised in the trial court because [\*\*\*24] it undermines the requirement a party specify its objection to evidence in a manner which "clearly informs . . . the proponent of the defect to be corrected." ( *Rupp v. Summerfield* (1958) 161 Cal. App. 2d 657, 662, 326 P.2d 912). It is also analogous to affirming a judgment on a theory not advanced in the trial court involving contested facts because [\*\*700] the opponent was denied notice and an opportunity to present evidence to counter the theory raised for the first time on appeal.

Considerations of fair play, therefore, lead us to conclude the correct rule should be [HN9](#)<sup>↑</sup> an appellate court will uphold the exclusion of evidence on grounds not raised in the trial court except in cases where the appellant can show the defect in the evidence was neither "manifest" or at least "suggested" by the opponent's objection; the defect could have been cured if it had been called to the proponent's attention; and it is reasonably probable the proponent of the evidence would have obtained a more favorable ruling had he or she been afforded the opportunity to cure the defect or supply substitute evidence.

Sound policy reasons support this exception. [HN10](#)<sup>↑</sup> The rule a reviewing court will uphold the trial court's ruling if it reached [\*\*\*25] the correct result, regardless of how it got there, is justified because "it prevents a reversal on technical grounds where the cause was correctly decided on the merits." ( *Lawless v. Calaway*, *supra*, 24 Cal. 2d at p. 94.) Thus, the rule should apply in circumstances where the reviewing court can have confidence in the outcome, i.e. that "the cause was correctly decided on the merits." But where the procedures in the trial court undermine the reviewing court's confidence in the outcome, the rule should not apply. As the court explained in Lawless, [HN11](#)<sup>↑</sup> the rule of nonreviewability is intended to uphold judgments correct on the merits. It should not be permitted to produce the opposite result. (*Ibid.*) In Lawless, the court found, on a motion for nonsuit, failure to afford the plaintiff a fair opportunity to remedy defects in its proof undermined confidence the cause was correctly decided. In the present case, the plaintiff was [\*1839] denied a fair opportunity to know and correct the defects in his proof on the defamation claim thereby undermining confidence the cause was correctly decided on the merits.

The principle argument against the exception we recognize here is that it would permit reversal [\*\*\*26] in cases where admittedly the evidence was properly excluded thus turning the concept of reversible error upside down. In addition, it could be argued the exception would flood the appellate courts with appeals from every losing party who had an evidentiary ruling go against it and impose unreasonable delay and expense in obtaining a final resolution of the parties' dispute.

We believe the exception discussed here is consistent with traditional notions of fundamental fairness which should be an appellate court's chief guide and that the exception can be applied without disrupting the appellate process or unfairly burdening either party.

<sup>7</sup> The situation would be different if the Harris declaration had been admitted and Saunders was the appellant. Under those circumstances, notions of fairness and justice would have required him to confine his argument to the hearsay objection he specifically raised at trial. To allow the appellant to assert a new objection to the evidence on appeal would not only deprive his opponent of the opportunity to cure the defect it would allow a party knowing of a defect in the evidence to take his chance on a favorable verdict with the power and intent to annul it should it go against him. (1 Wigmore on Evidence (Tillers rev. 1983) § 18, p. 793.)

The argument the exception permits reversal where there is no error to reverse is based on a misunderstanding of the theory underlying the exception. The "error" being reversed is not the ruling excluding the evidence but the failure to afford the proponent notice and an opportunity to cure the defect which causes the evidence to be inadmissible. This error is prejudicial, i.e. reversible, if, as we have said, the appellant can show he could have cured the defect had he been given the opportunity to do so and it is reasonably probable he would have [\*\*\*27] received a more favorable result had his evidence been admitted.

The narrow exception we have framed will not unduly burden the respondent, the trial court or the Court of Appeal.

Occasions to apply the exception will seldom arise because only rarely will affirmance of the judgment depend on whether the trial court correctly excluded an item of evidence offered by the appellant. Even in those rare cases, in order to invoke the exception the appellant will have to show lack of notice of the grounds for exclusion, curability and prejudice. The showing necessary to invoke the exception can usually be made on the basis of the trial court record and the briefs on appeal. In some cases, such as the one before us, the appellant will have to go outside the record to establish that had he known of the actual defect in the evidence he could have cured it or supplied substitute evidence. The authority and procedure for making such a showing in the Court of Appeal already exists in section 909 and California Rules of Court, rule 23, subdivision (b). Alternatively, the Court of Appeal could remand [\*\*701] the curability issue to the trial court for determination.

[\*1840] The exception will arise even less frequently [\*\*\*28] if trial courts, before excluding evidence on a ground not raised by a party, give the proponent notice of the alternative ground for exclusion and an opportunity to respond. Furthermore, there would be no need for the exception at all in motion practice if the Legislature provided across-the-board, as it has with respect to motions for summary judgment, that all objections to the form and substance of supporting and opposing declarations shall be first made in the trial court and not on appeal. ( § 437c, subd. (d); Stats. 1990, ch. 1561, § 1.)

To summarize our holding: if the excluded evidence was inadmissible for any reason an appellate court should uphold the exclusion except in cases where the appellant can show the defect in the evidence was neither "manifest" or at least "suggested" by the opponent's objection, the defect could have been cured if it had been called to the proponent's attention and it is reasonably probable the proponent of the evidence would have obtained a more favorable ruling if he or she had been afforded the opportunity to cure the defect or supply substitute evidence.

In this instance the trial court struck the cross-complaint in its entirety. We do [\*\*\*29] not reach the question whether the exception should apply to rulings which do not terminate the action.

In the present case, the first requirement is met because the defect in Harris' declaration, failure to demonstrate personal knowledge it was Saunders speaking on the telephone, was not suggested by making a hearsay objection to evidence of the conversation nor was the defect so obvious "it should have been perceived without suggestion." (*Davey, supra, 116 Cal. at p. 332.*) In Davey, the court concluded the objection to the plaintiff's evidence as "irrelevant" was at least technically correct because the evidence "had no tendency to establish the facts" alleged in the complaint and was sufficient to put the plaintiff on notice of the material variance between the complaint and the evidence offered. (*116 Cal. at pp. 330, 332.*) Here, as we have previously explained, Harris' declaration clearly was not hearsay because it was not offered to prove the truth of the statements attributed to Saunders, nor should the hearsay objection have alerted counsel to the true defect in the declaration.<sup>8</sup> The true defect, Harris' failure to demonstrate personal knowledge she was speaking to Saunders, is [\*\*\*30] not the kind of "obvious" or "manifest" defect which should have been perceived without the necessity for a specific objection. The declaration clearly demonstrated Harris' personal knowledge of the conversation because she was a party to it. Her failure to state the reasons she knew it was [\*1841] Saunders on the other end of the conversation is more in the nature of an understandable oversight than a manifest defect in proof.

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<sup>8</sup> Had the caller said, "Hello, this is Mark Saunders," or words to that effect, an hearsay objection would lie if this statement was being offered to prove the caller was in fact Mark Saunders. However, no such statement was offered into evidence in this case.

In order to determine whether the defect in the declaration could have been cured at the time the motion to strike was heard, we treated a supplemental declaration by Harris filed in this court as a motion to produce additional evidence under California Rules of Court, rule 23, subdivision (b). We afforded Saunders an opportunity to respond [\*\*\*31] to the motion. Having considered the supplemental declaration and the response thereto, we are satisfied Peters has met his burden of showing the defect could have been cured if it had been called to his attention at the time of the hearing. Indeed, Saunders' response concedes this point.

Prejudice is established because the evidence of Saunders' statements to Harris was necessary to make a prima facie case of defamation. The statements Peters was "caught . . . at fraud and double-billing," he "'bilks' insurance companies," and he "is not a certified reporter" are defamatory per se and establish Peters' entitlement to general damages. Had the trial court admitted evidence of these statements it would have had to find a prima facie case of defamation. The element of fault was established through Saunders' own declaration in which he denied making the statements contained in the Harris [\*\*702] declaration. If Harris' testimony is credited it necessarily follows Saunders was at least negligent in failing to learn whether the statements were false, since he cannot have verified the truth of statements he denies making. There were no constitutional defenses for Peters to overcome because, as we [\*\*\*32] have explained, the statements Saunders made to Harris were not made "in connection with" the CRA litigation or the public issue of direct contracting.

Summing up, it was error to exclude the Harris declaration as hearsay. Although the declaration was excludable for lack of personal knowledge, Saunders cannot rely on this ground on appeal because this ground was not manifest or suggested by Saunders' hearsay objection, Peters could have supplied evidence of Harris' personal knowledge had he been on notice of this defect and Peters would have defeated the motion to strike had he been afforded the opportunity to cure the defect. For these reasons the ruling striking the defamation/slander cause of action is reversed.

### III. THE TRIAL COURT ERRED IN STRIKING THE CAUSE OF ACTION FOR UNFAIR COMPETITION BASED ON SAUNDERS' ATTEMPT TO ENGAGE IN A SECONDARY BOYCOTT.

Peters' cross-complaint alleges Saunders is engaged in a restraint of trade in violation of the Cartwright Act (California's anti-trust law) as well [\*1842] as statutes prohibiting unfair trade practices and unfair competition. (*Bus. & Prof. Code §§ 16700 et seq., 17000 et seq.*)<sup>9</sup> He seeks damages and injunctive relief. For the reasons [\*\*\*33] explained below, we conclude Peters made a prima facie showing for injunctive relief under the unfair competition statute based on Saunders' attempt to restrain trade in violation of the Cartwright Act.

According to the cross-complaint and Peters' declaration, most reporter agencies are small companies which do not employ reporters directly but rather subcontract with independent, freelance reporters to handle assignments as they arise. These independent reporters typically accept work from a number of reporter agencies. Without the availability of these independent reporters, many reporter agencies, including Peters', would be unable to undertake their clients' assignments. Peters claims Saunders is attempting to drive him out of business by coercing independent reporters not to do business with him. Saunders' alleged coercive activities include threatening not to do business with reporters who do business with [\*\*\*34] Peters.

**HN12**[<sup>14</sup>] The Cartwright Act prohibits two or more persons from combining to do certain specified anti-competitive acts including creating or carrying out restrictions on trade or commerce and preventing competition in the sale or purchase of any commodity. ( *§ 16720, subds. (a), (c.) HN13*[<sup>15</sup>] In order to succeed on a cause of action under the Cartwright Act, the plaintiff must prove the formation and operation of a conspiracy or combination; illegal acts done pursuant to this conspiracy; a purpose to unlawfully restrain trade; and injury to the plaintiff's business or property. ( *Jones v. H. F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 119, 81 Cal. Rptr. 592, 460 P.2d 464; G.H.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 265, 195 Cal. Rptr. 211.*)

**HN14**[<sup>16</sup>] Unfair competition is defined as "any unlawful, unfair or fraudulent business act or practice . . ." ( *§ 17200.*) As we explained in *Saunders v. Superior Court, supra, HN15*[<sup>17</sup>] the unfair competition statute "borrows"

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<sup>9</sup> All future statutory references are to the Business and Professions Code unless otherwise noted.

violations of other laws and treats them as unlawful practices independently actionable under [section 17200](#). ([27 Cal. App. 4th at p. 839](#).) [HN16](#)<sup>1</sup> Violations of the Cartwright Act are unlawful business practices under [section 17200](#). ([People v. National Association of Realtors \(1981\) 120 Cal. App. 3d 459, 474, 174 Cal. Rptr. 728](#).) \*\*\*35 [HN17](#)<sup>1</sup> A private litigant is not entitled to damages under [section 17200](#) but may seek injunctive relief under [section 17203](#) which provides: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction."

[\*1843] [\*\*703] The declaration of Elizabeth Devine-Hall reports a telephone call she received from Saunders in which he told her unless she resigned from CRA "he would not be speaking to [her] anymore and he would not be able to recommend [her] agency."<sup>10</sup> In other words, Saunders threatened to stop sending work to Devine-Hall unless Devine-Hall agreed to stop accepting work from Peters.

The Devine-Hall declaration describes what is often referred to as an indirect or "secondary" boycott. ([Jomicra, Inc. v. California Mobile Home Dealers Assn. \(1970\) 12 Cal. App. 3d 396, 401, 90 Cal. Rptr. 696](#); \*\*\*36 [People v. Santa Clara Valley Bowling Etc. Assn. \(1965\) 238 Cal. App. 2d 225, 237, 47 Cal. Rptr. 570](#).) [HN18](#)<sup>1</sup> In a secondary boycott, the defendant and the target are competitors who do not engage in any transactions among themselves, so the defendant cannot remove the target from competition by refusing to deal with it. Instead, the defendant uses the threat of economic sanctions to coerce the suppliers or customers it shares with the target to refuse to deal with the target, thus denying the target access to the goods or buyers it needs to compete with the defendant. (Note, Three Exceptions to the Per Se Rule Against Boycotts (1985) [65 B.U.L.Rev 165, 170](#); and see e.g. [Klor's v. Broadway-Hale Stores \(1959\) 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705](#).) Here, Saunders threatened to refuse to deal with Devine-Hall unless she refused to deal with Peters thus attempting through economic coercion on Devine-Hall to affect Peters' labor supply.

[HN19](#)<sup>1</sup> For a secondary boycott to violate the antitrust laws the defendant need not conspire with fellow competitors against the target competitor. A boycott by a single trader constitutes the necessary combination in restraint of trade if it is carried out through coercion, threats or intimidation upon the target's \*\*\*37 suppliers. ([Albrecht v. Herald Co. \(1968\) 390 U.S. 145, 149-150, 19 L. Ed. 2d 998, 88 S. Ct. 869](#); [Klor's v. Broadway-Hale, supra, 359 U.S. at p. 209](#); [G.H.I.I. v. MTS, supra, 147 Cal. App. 3d at pp. 268-269](#) and cases cited therein.) Nor is it necessary the coercion actually result in the supplier refusing to do business with the target. (Cf. [Associated Press v. United States \(1945\) 326 U.S. 1, 12, 89 L. Ed. 2013, 65 S. Ct. 1416](#).) A would-be boycotter may be enjoined from attempting to violate the antitrust laws. ([Lorain Journal v. United States \(1951\) 342 U.S. 143, 144-145, 96 L. Ed. 162, 72 S. Ct. 181](#); [Jomicra, Inc. v. California Mobile Home Dealers Assn., supra, 12 Cal. App. 3d at pp. 398-399](#) [association enjoined from "attempting or threatening" a secondary boycott].) Thus, in order to make out a prima facie case of secondary boycott, Peters did not have to show Saunders previously had referred Devine-Hall's agency to anyone, although the trier of fact could reasonably infer this from Saunders' statement. The threat of economic coercion is enough. It is not necessary to show Devine-Hall took the threat seriously or that the coercion actually resulted in devine-Hall refusing to do business with Peters.

The principal issue before us is whether Saunders' attempt to organize a boycott should be treated as a "per se" violation of the Cartwright [\*1844] Act or reviewed under the "rule of reason" standard. As the United States Supreme Court explained in Northern Pac. Ry. co. v. [United States \(1958\) 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514](#): [HN20](#)<sup>1</sup> "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate \*\*\*38 inquiries as to the precise harm they have caused or the business excuse for their use." Indirect or secondary boycotts have traditionally been held to fall within this "pernicious" category of practices which means they are presumed to be unlawful restraints of trade without the necessity of analyzing their economic effects and possible justifications.

<sup>10</sup> Ms. Devine-Hall states she had previously met Saunders. Therefore, the trier of fact could draw the inference she knew it was he on the telephone. (See discussion, [supra, at p. 1831](#).)

[\*\*704] *Klor's v. Broadway-Hale, supra*, remains the leading federal case on secondary boycotts.<sup>11</sup> Klor's was a small retailer of household appliances located next to a Broadway department store which sold the same goods. Klor's complaint alleged Broadway-Hale used its huge buying power to coerce manufacturers and distributors of well known brands not to sell to Klor's or to sell only at discriminatory prices and highly unfavorable terms. This concerted refusal to deal seriously handicapped Klor's ability to compete with Broadway and resulted in a great loss of profits, goodwill, reputation and prestige. ([359 U.S. at p. 209.](#)) Broadway-Hale did not dispute these allegations but submitted unchallenged evidence there were hundreds of other retailers, some within a few blocks of Klor's, which sold many competing brands of appliances, including [\*\*\*39] those whose manufacturers refused to sell to Klor's. The trial court granted summary judgment to Broadway-Hale, concluding the controversy was a "purely private quarrel" between Klor's and Broadway-Hale which had no affect on the market for household appliances. The Ninth Circuit affirmed on the same rationale. ([359 U.S. at p. 210.](#))

The Supreme Court took an entirely different view of the dispute between Klor's and the Broadway. The Court framed the issue as whether "a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively." ([359 U.S. at p. 210.](#)) In answering this question, the Court referred to its earlier decisions recognizing there were "classes of restraints which from their 'nature or character' were unduly restrictive, and hence forbidden [\*\*\*40] by both the common law and the [Sherman Act]. \*\*\* Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category." ([359 U.S. at pp. 211-212 \[3 L. Ed. 2d at p. 744\], \[\\*1845\]](#) fns. omitted.) Such a boycott, the Court found, was plainly disclosed by the allegations in Klor's complaint. "This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship." Rather, the complaint alleged "a wide combination consisting of manufacturers, distributors and a retailer." (59 U.S. at pp. 212-213.) The harm in this combination was that it took from Klor's "its freedom to buy appliances in an open and competitive market and drives it out of business as a dealer in the [manufacturers'] products" while at the same time it deprived "the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever." ([Id. at p. 213.](#)) The restraint on trade Broadway-Hale imposed on the manufacturers, distributors and its targeted competitor had by its "nature' and 'character' [\*\*\*41] a 'monopolistic tendency.'" (*Ibid.*)

Furthermore, the Court held, a concerted refusal to deal "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." For this reason, "the Sherman Act has consistently been read to forbid all contracts and combinations which tend to create a monopoly, whether the tendency is a creeping one or one that proceeds at full gallop." ([359 U.S. at pp. 213-214](#) (internal quotes, citations and footnote omitted).) (See also, *Fashion Guild v. Trade Comm'n. (1941) 312 U.S. 457, 465, 85 L. Ed. 949, 61 S. Ct. 703*, in which the Court applied the per se rule to strike down an agreement by a manufacturer's guild not to sell to retailers who pirated their original dress designs.)

The leading California case on secondary boycotts is *People v. Santa Clara Valley Bowling Etc. Assn., supra* (hereafter Santa Clara Bowling). In that case the defendants, two associations of bowling establishment proprietors, adopted rules providing only bowlers who confined their league [\*\*\*42] bowling to member establishments could participate [\*\*705] in tournaments sponsored or conducted by those establishments. Defendants subsequently amended these rules to provide a bowler had to participate in at least one league in a member establishment in order to participate in a member establishment's tournaments. The trial court found these tournament eligibility rules had no adverse effect on competition for league bowlers between member and nonmember establishments but concluded, nevertheless, the original rules constituted a secondary boycott in violation of the Cartwright Act because "they constituted agreements to coerce bowlers to refrain from [\*1846] dealing with [nonmember establishments]." ([238 Cal. App. 2d at p. 237.](#)) Based on the reasoning of Klor's, the Court of Appeal held both the original and modified rules were per se illegal restraints of trade. The court concluded the fact the tournament

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<sup>11</sup> Federal cases interpreting the Sherman Act are applicable as an aid in interpreting California's antitrust statute. (*Marin County Bd. of Realtors, Inc. v. Palsson, (1976) 16 Cal. 3d 920, 925, 130 Cal. Rptr. 1, 549 P.2d 833.*)

eligibility rules had no effect on competition was not relevant." (*Ibid.*) "The gravamen of the offense against the Cartwright Act," the court held, "is the mere formation of the combination or conspiracy for the unlawful purpose of restraining trade." ([238 Cal. App. 2d at p. 238](#).) The court found the original [\*\*\*43] rules "were adopted for the primary purpose of inducing league bowlers bowling in leagues in nonmember houses to cease doing so and thus suppress the competition from nonmember establishments." ([238 Cal. App. 2d at pp. 238-239](#).) The modified rule was just as objectionable even though it did not totally preclude a bowler from bowling in a nonmember establishment. The distinction between the two versions was "one of degree only and not of purpose." ([238 Cal. App. 2d at p. 239](#).)

In [\*Jomicra, Inc. v. California Mobile Home Dealers Assn., supra\*](#), the plaintiff, a mobile home dealer, brought an action for an injunction and damages under the Cartwright Act alleging defendant was attempting through economic sanctions to coerce businesses engaged in furnishing necessary services to mobile home dealers and parks not to deal with plaintiff. The Court of Appeal affirmed the trial court's preliminary injunction which "prohibited the Association and its members from imposing a secondary boycott on Jomicra . . ." ([12 Cal. App. 3d at p. 401](#).) Citing Klor's as authority, the appellate court characterized defendant's conduct as a group boycott which was "illegal per se and against public policy." ([Id. at p. 402](#).)

Although the [\*\*\*44] California Supreme Court has not addressed directly the question whether the per se rule or the rule of reason should apply in secondary boycott cases, its opinion in [\*Marin County Bd. of Realtors, supra\*](#), strongly suggests it would find secondary boycotts illegal per se. In that case a board of realtors comprising 75 percent of the active brokers in the county denied nonmembers access to its multiple listing service. The court held this form of boycott was subject to the rule of reason because it was "not directly aimed at coercing third parties and eliminating competitors." ([16 Cal. 3d at p. 932](#).) The court distinguished boycotts subject to the per se rule from boycotts subject to the rule of reason on the basis the boycotts in Klor's and Fashion Guild involved "a particular type of predatory activity . . . aimed at coercing parties to adopt noncompetitive practices" while boycotts subject to the rule of reason involve refusals to deal which arise "only as a byproduct of the [parties'] agreement." (*Ibid.*) The court cited Santa Clara Bowling as an example of a case in which the per se rule was properly applied because the trade associations intended to coerce bowlers into boycotting [\*\*\*45] nonmember [\*1847] establishments and patronizing member establishments, thus suppressing the competition from nonmember establishments. ([16 Cal. 3d at p. 933, fn. 9](#).)<sup>12</sup>

The present case differs from Klor's and other secondary boycott cases in one obvious [\*\*706] respect. In every other case we have found, a substantial imbalance in economic power existed between the participants in the boycott and the targeted competitor. In Klor's, for example, [\*\*\*46] the court described the defendants as a "wide combination" of "powerful businessmen" which included such major corporations as Broadway-Hale, General Electric, RCA and Zenith among others. In Fashion Guild, the defendant sold between 38 and 60 percent of all women's garments. In Santa Clara Bowling, the defendants controlled 87 and 88 percent of the bowling establishments in their respective jurisdictions. ([238 Cal. App. 2d at p. 228](#).) It could be argued that while the economic power of the targeted competitor is irrelevant ([\*Klor's, supra, 359 U.S. at p. 213\*](#)) the economic power of the boycotter is relevant because in order to fall within the proscription of the antitrust laws the boycott must "tend to create a monopoly" even if the tendency is only "a creeping one." ([359 U.S. at pp. 213-214](#).) Mark Saunders and Elizabeth Devine-Hall together can hardly be described as a "wide combination of powerful businessmen." Nor is there any evidence to suggest that if Saunders were to eliminate Peters as a competitor his demise would turn out to have been Saunders' first creeping move toward monopoly of the shorthand reporting business.

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<sup>12</sup> To avoid confusion over terminology, it should be noted the Marin court used the term "indirect boycott" to refer to boycotts where the refusal to deal was only a byproduct of the agreement between the parties as compared to a "direct boycott" aimed at coercing parties to adopt noncompetitive practices. ([16 Cal. 3d at p. 932](#).) Thus, when the court in Marin referred to "direct boycotts" it was referring to the type of combination in which the defendant attempts to shut off the target competitor's source of material or labor which is generally referred to as an indirect or "secondary" boycott.

If the only reason for condemning secondary boycotts was their [\*\*\*47] tendency to lead to monopolies, then we would agree evidence of the defendants' economic power in relation to the danger of monopolization would be relevant. But the eventual creation of a monopoly is only one factor courts and commentators have cited as the reason secondary boycotts are illegal per se. Courts have been just as concerned about the immediate effect of the boycott on the targeted competitor and the neutral third parties coerced into joining the boycott. In Klor's, the Court listed three reasons for condemning the boycott in addition to its monopolistic tendency. The boycott deprived Klor's of its freedom to buy goods in an open, competitive market. It was likely to drive Klor's out of business. And, it deprived the manufacturers and distributors of their freedom to sell to Klor's. ([359 U.S. at p. 213 \[3 L. Ed. 2d \\*1848\] at p. 745](#).) Similarly, in condemning secondary boycotts our Supreme Court observed in Marin: "Another beneficiary of antitrust law is the competitor himself. The preservation of competition, while indirectly aiding society by producing lower prices and higher quality goods and services, directly aids the scrupulous trader by insuring him a fair opportunity to compete on the market." [\*\*\*48] ([16 Cal. 3d at p. 935](#)) Secondary boycotts have also been criticized because they permit one competitor an advantage over his rival, not through "individual enterprise and sagacity," ( [Associated Press v. United States, supra, 326 U.S. at p. 15](#)) but through coercing the conduct of a neutral intermediary. (Comment, Use of Economic Sanctions By Private Groups: Illegality Under the Sherman Act (1962) 30 U. Chi. L. Rev. 171, 181.) Finally, secondary boycotts tend to polarize society by increasing the number of people aligned in a dispute and highlighting the existence of their conflict. (Heidt, Industry Regulation and the Useless Concept "Group Boycott" (1986) [39 Vand. L. Rev. 1507, 1587](#).) The hostility between the parties, their respective supporters and counsel in the present case amply demonstrate this aspect of a group boycott.

For the reasons explained above, we conclude Peters has made a prima facie showing of unlawful restraint of trade under the Cartwright Act. The remaining question is whether Peters has demonstrated entitlement to relief.

**HN21** [↑] The Cartwright Act provides any person "injured in his or her business or property by reason of anything forbidden or declared unlawful by [\*\*\*49] this [Act], may sue therefor . . . . Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this [Act], regardless of whether such injured person dealt directly or indirectly with the defendant." ( [§ 16750 \(a\)](#).) This latter provision has been interpreted to mean the plaintiff must have suffered injuries which were the direct result of the defendant's unlawful conduct and were the kind of injuries the antitrust laws were intended to prevent. ( [Cellular Plus, Inc. v. Superior Court \(1993\) 14 Cal. App. 4th 1224, 1232-1233](#).)

[\*\*707] Peters' declaration states: "A number of CRA's insurer clients have terminated their relationships with CRA in the past 16 months. . . . These clients told us that they were terminating their relationship with CRA because they did not want to be named as defendants in plaintiffs' lawsuit. The loss of clients due to threats of suit by the Saunders plaintiffs has resulted in a large reduction in business. . . . Other potential clients also terminated their relationship with CRA, without giving a reason, after questioning us about this lawsuit." Leaving aside the obvious hearsay objection [\*\*\*50] to this declaration, the declaration shows any damage Peters suffered [\*1849] was the indirect result of Saunders' filing a lawsuit challenging Peters' "direct contracting"--a constitutionally protected petitioning activity which, under the Noerr-Pennington doctrine,<sup>13</sup> cannot be the basis of an antitrust action if the threatened litigation is meritorious. ( [Coastal States Marketing, Inc. v. Hunt \(5th Cir. 1983\) 694 F.2d 1358, 1367](#); [Aircapital Cablevision, Inc. v. Starlink Communications Group, Inc. \(D.Ka. 1986\) 634 F. Supp. 316, 326](#).) There is no contention here the underlying lawsuit brought by Saunders is a sham. In [Wilcox, supra](#), Peters "contended using the threat of litigation to get the insurers to 'back off' from entering into contracts with CRA was an unlawful activity." We noted we had found no authority to support this proposition where the threatened lawsuit is meritorious. ([27 Cal. App. 4th at p. 822](#) & fn. 6.) We still haven't. Therefore, Peters is not entitled to damages under the Cartwright Act.

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<sup>13</sup> [Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc. \(1961\) 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523](#); [United Mine Workers v. Pennington \(1965\) 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585](#); [California Transport v. Trucking Unlimited \(1972\) 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609](#).

[\*\*\*51] The showing Peters made would, however, entitle him to injunctive relief under [HN22](#)<sup>↑</sup> [section 17203](#) of the Unfair Competition Act which provides: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction." The Devine-Hall declaration shows Saunders has engaged, or at least has proposed engaging, in unfair competition by organizing a secondary boycott in violation of the Cartwright Act. We note in 1992 the Legislature amended the definition of unfair competition to include "any unlawful, unfair or fraudulent business act or practice." ([Section 17200](#) as amended by Stats. 1992, ch. 430, § 2, emphasis added.) [HN23](#)<sup>↑</sup> The statute is no longer limited to a business practice, i.e. "a pattern of behavior" or "course of conduct" (see [State of California ex rel. Van de Kamp v. Texaco, Inc. \(1988\) 46 Cal. 3d 1147, 1170, 252 Cal. Rptr. 221, 762 P.2d 385](#)) but applies to "any act" of unfair competition. Thus, under the statute as amended, Saunders' single act of proposing a secondary boycott to Devine-Hall is ground for injunctive relief.<sup>14</sup>

[\*\*\*52] Finally, we agree with the trial court Peters has failed to establish a prima facie case of unfair trade practices.

[\*1850] [HN24](#)<sup>↑</sup> The Unfair Practices Act prohibits locality discrimination, sales below cost and special rebate schemes. ( §§ 17040-17045.) [HN25](#)<sup>↑</sup> The Act makes it unlawful for a person to use threats, intimidation or boycotts to effectuate any violation of the Act or to solicit any violation of the Act. ( [§§ 17046, 17047](#).) Peters presented no evidence Saunders' conduct involved a pricing policy or marketing method proscribed by the Act. Thus he failed to demonstrate a probability of prevailing on this cause of action. (Cf. [Lowell v. Mother's Cake & Cookie Co. \(1978\) 79 Cal. App. 3d 13, 25, 144 Cal. Rptr. 664](#) [affirming dismissal of unfair trade practices cause of action for [\*\*708] failure to allege conduct proscribed by the Act].) Even if the threat of legal action against anyone joining with CRA in direct contracting could somehow be construed as conduct prohibited under the Act, the Noerr-Pennington doctrine would bar Peters' suit. (See discussion, [supra, pp. 27-28](#).)

## DISPOSITION

The trial court's order striking Peters' cross-complaint as to Mark Saunders is reversed as to the third cause of action (unfair [\*\*\*53] competition) and fifth cause of action (defamation/slander). In all other respects the order is affirmed. Each party to bear its own costs on appeal.

LILLIE, P.J., and GODOY-PEREZ, J. \*, concurring.

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<sup>14</sup> Saunders argues the amendment to the statute did not take effect until January 1, 1993, and therefore it does not apply to his contact with Devine-Hall which occurred in 1992. As we have previously pointed out, however, the unfair competition statute is remedial in nature (see *supra*, p. 1842) and therefore the general rule a statute does not apply retroactively is not applicable here. ( [Kuykendall v. State Bd. of Equalization \(1994\) 22 Cal. App. 4th 1194, 1211, fn. 20](#).) A statute which is remedial or procedural in nature "may be given effect as to pending and future litigation even if the event underlying the cause of action occurred before the statute took effect." ( [Pacific Coast Medical Enterprises v. Department of Benefit Payments \(1983\) 140 Cal. App. 3d 197, 204, 189 Cal. Rptr. 558](#).)

\* Assigned by the Chairperson of the Judicial Council.



## **United States v. Alex. Brown & Sons, Inc.**

United States District Court for the Southern District of New York

November 26, 1996, Decided

96 Civ. 5313 (RWS)

### **Reporter**

169 F.R.D. 532 \*; 1996 U.S. Dist. LEXIS 17634 \*\*; 1997-1 Trade Cas. (CCH) P71,683

UNITED STATES OF AMERICA, Plaintiff, - against - ALEX. BROWN & SONS, INC., et al., Defendants.

**Subsequent History:** As Amended December 3, 1996.

Motion granted by [United States v. Alex. Brown & Sons, 963 F. Supp. 235, 1997 U.S. Dist. LEXIS 5375 \(S.D.N.Y., 1997\)](#)

**Prior History:** [United States v. Alex. Brown & Sons Inc., 1996 U.S. Dist. LEXIS 22952 \(S.D.N.Y., July 26, 1996\)](#)

**Disposition:** [\[\\*\\*1\]](#) Plaintiffs' motion to intervene in this action granted for the limited purposes of moving to compel disclosure of the Settlement Memorandum, objecting to the prospective protective order in the proposed consent decree, and appealing from the decisions of this Court upon these issues. The Plaintiffs' motion to compel disclosure of the Settlement Memorandum and underlying materials denied. The parties are granted leave to file supplemental briefs on the issue of the prospective protective order.

## **Core Terms**

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consent decree, Settlement, Memorandum, antitrust, disclosure, Tunney Act, documents, public interest, decree, market-makers, proceedings, parties, intervene, tapes, proposed order, Multidistrict, discovery, public comment, violations, protective order, provisions, telephone, cases, stock, confidentiality, comments, settlement negotiations, limited purpose, evidentiary, disclose

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

[HN1](#) [down arrow] Settlements, Antitrust Procedures & Penalties Act

Entry of a proposed consent decree in an antitrust case is subject to the Antitrust Procedures and Penalties Act (or Tunney Act), [15 U.S.C.S. § 16](#).

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

## [HN2](#) [down] Settlements, Antitrust Procedures & Penalties Act

The Tunney Act, [15 U.S.C.S. § 16](#), was designed to expose consent decree proceedings to public scrutiny in order to enhance the likelihood that antitrust decrees would serve the public interest in eliminating anticompetitive behavior. It is imperative that the integrity of and public confidence in procedures relating to settlements via consent decree procedures be assured. The purpose of Tunney Act is to prevent judicial rubber stamping of antitrust consent decrees.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Judicial Officers > Masters > Appointment of Masters

Civil Procedure > Judicial Officers > References

## [HN3](#) [down] Settlements, Antitrust Procedures & Penalties Act

Under [15 U.S.C.S. § 16](#) provides for a process of judicial consideration and public scrutiny of proposed consent decrees. Under [15 U.S.C.S. § 16\(b\)](#), requires that certain materials be filed with the court and published in the Federal register for public comment. Under [15 U.S.C.S. § 16\(c\)](#) provides for publication of summaries of certain materials in newspapers. Pursuant to [15 U.S.C.S. § 16\(d\)](#) requires the Government to respond to public comments on the proposed decree. Under [15 U.S.C.S. § 16\(e\)](#) directs the district court to determine whether the proposed consent decree is in the public interest, considering several enumerated factors, before entering judgment on the decree. Pursuant to [15 U.S.C.S. § 16\(f\)](#) permits the court to use a number of procedures to gather additional information in making its public interest determination, including taking testimony and appointing special masters.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Appeals > Amicus Curiae

#### **HN4** [down] Settlements, Antitrust Procedures & Penalties Act

Under [15 U.S.C.S. § 16\(f\)\(3\)](#), in making its determination as to whether the entry of a consent decree is "in the public interest," the court may: authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Permissive Intervention

Civil Procedure > Parties > Intervention > Intervention of Right

#### **HN5** [down] Settlements, Antitrust Procedures & Penalties Act

In making its public interest determination under the Tunney Act, [15 U.S.C.S. § 16](#), a court may consider the impact of entry of a consent decree upon the public generally and individuals alleging specific injury from the violations set forth in the complaint. [15 U.S.C.S. § 16\(e\)\(2\)](#). Permitting plaintiffs in a treble damages action to intervene in a parallel Tunney Act proceeding may assist the court in determining the impact of the proposed consent decree on the interests of those private litigants alleging injury.

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Permissive Intervention

#### **HN6** [down] Settlements, Consent Judgments

A court has discretion to allow permissive intervention in antitrust consent decree proceedings.

Civil Procedure > Parties > Intervention > General Overview

#### [\*\*HN7\*\*](#) [down] **Parties, Intervention**

Intervention under [\*Fed. R. Civ. P. 24\*](#) is the proper mechanism for a non-party to seek modification of a protective order and thus to gain access to information generated through judicial proceedings.

Civil Procedure > Parties > Intervention > General Overview

#### [\*\*HN8\*\*](#) [down] **Parties, Intervention**

Under [\*Fed. R. Civ. P. 24\(b\)\*](#), upon a timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

#### [\*\*HN9\*\*](#) [down] **Estoppel, Collateral Estoppel**

Under the collateral estoppel doctrine, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit involving a party to the prior litigation.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

#### [\*\*HN10\*\*](#) [down] **US Department of Justice Actions, Civil Actions**

A person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

## [HN11](#) [blue document icon] Settlements, Consent Judgments

The entry of a consent decree is not an adjudication on the merits that can give rise to issue preclusion because there is no judicial determination of questions of law or fact.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

## [HN12](#) [blue document icon] Settlements, Antitrust Procedures & Penalties Act

The Tunney Act, [15 U.S.C.S. § 16\(b\)](#), provides that any other materials and documents which the United States considered determinative in formulating a proposed consent decree shall also be made available to the public at the district court.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

## [HN13](#) [blue document icon] Settlements, Antitrust Procedures & Penalties Act

In enacting the Tunney Act, [15 U.S.C.S. § 16](#), Congress recognized the high rate of settlement in public antitrust cases and wished to encourage settlement by consent decrees as part of the legal policies expressed in the antitrust laws. It wanted to remedy abuses in the consent decree process by focussing judicial and public scrutiny on the Justice Department's decision to enter into a proposal for a consent decree, but not at the expense of eliminating the decree as a practicable means of resolving antitrust matters. The purpose of the competitive impact statement, the public comment procedures, and the requirement that a defendant reveal lobbying contacts with the government, [15 U.S.C.S. 16\(g\)](#), are to enable a court to determine whether a proposed consent decree is in the public interest, not to evaluate the strength of the Government's case.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

#### **HN14** [blue icon] Settlements, Antitrust Procedures & Penalties Act

The Government's judgments in a Tunney Act, [15 U.S.C.S. § 16](#), proceeding are entitled to deference.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

#### **HN15** [blue icon] Settlements, Antitrust Procedures & Penalties Act

Although "determinative documents" under the Tunney Act, [15 U.S.C.S. 16\(b\)](#), are not necessarily limited to recommendations prepared by outside consultants, the events that led Congress to enact the "determinative document" provisions support the conclusion that Congress was more concerned with exposing external influences on the consent decree process than it was with documents reflecting the Government's internal evaluation of its evidence, even when that internal evaluation is undertaken to persuade defendants to enter into a consent decree.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

#### **HN16** [blue icon] Settlements, Consent Judgments

[15 U.S.C.S. § 16\(e\)\(2\)](#) provides that, in making the Tunney Act public interest determination, the Court may consider the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations, including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

#### **HN17** [blue icon] Settlements, Consent Judgments

Under [15 U.S.C.S. § 16\(f\)\(3\)](#), in making the public interest determination required by the Tunney Act, [15 U.S.C.S. § 16](#), the Court may authorize full or limited participation by interested persons including examination of witnesses or documentary materials, or participation as the court may deem appropriate.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

#### **HN18** [blue icon] Settlements, Antitrust Procedures & Penalties Act

Under the Tunney Act, while a court may consider the interests of individuals alleging specific injury from the violations set forth in the complaint, that consideration is limited to the impact of entry of a consent decree upon those individuals pursuant to [15 U.S.C.S. § 16\(e\)\(2\)](#).

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

## [\*\*HN19\*\*](#) [blue icon] Settlements, Consent Judgments

Congress has strictly limited disclosure of materials obtained by the Government under the Antitrust Civil Process Act (ACPA), [15 U.S.C.S. § 1313\(c\)](#), from defendants and other targets of Civil Investigative Demands requests. Although the Tunney Act, [15 U.S.C.S. § 16](#), was enacted after the ACPA's confidentiality provisions, the Act does not purport to invalidate them and make the Government's files open to broad disclosure.

Administrative Law > Governmental Information > Recordkeeping & Reporting

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

Governments > Federal Government > Claims By & Against

## [\*\*HN20\*\*](#) [blue icon] Governmental Information, Recordkeeping & Reporting

Information that the Department of Justice obtains from the Securities and Exchange Commission remains confidential. [17 C.F.R. 230.122](#); [17 C.F.R. 240.0-4](#); [44 U.S.C.S. § 3510\(b\)](#). Data immune from disclosure in the hands of a federal agency acquiring the data retains that protection in the hands of a receiving agency after an inter-agency transfer.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

## [\*\*HN21\*\*](#) [blue icon] Settlements, Consent Judgments

A consenting defendant in a government antitrust suit gains whatever benefit there may be in accepting the terms of the consent decree rather than risking a more onerous decree entered after litigation. A consenting defendant also benefits from the saving in litigation expense which is made possible by a consent decree. But neither in the express nor implied terms of the statutes or rules is there any indication that a consenting defendant could gain the additional benefit of holding under seal, or stricture of nondisclosure, for an indefinite time, information which would otherwise be available to the public or at least to other litigants who had need of it.

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**Judges:** **[\*\*2]** ROBERT W. SWEET, U.S.D.J.

**Opinion by:** ROBERT W. SWEET

## Opinion

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### **[\*533] OPINION**

#### **Sweet, D. J.**

The plaintiffs in a private civil antitrust damages action, *In re Nasdaq Market-Makers Antitrust Litigation* (hereafter, "Plaintiffs"), have moved to intervene or appear as *amici* in this civil action (the "Government Action") brought by the Antitrust Division of the Department of Justice (the "DOJ" or the **[\*534]** "Government"). Plaintiffs seek to compel filing and publication of a "Settlement Memorandum" (and all evidentiary materials referenced therein) prepared by the DOJ and to challenge a provision of the proposed Consent Decree in this action.

For the reasons set forth below, the Plaintiffs' motion to intervene for the limited purposes described will be granted. Their motion to compel disclosure of the Settlement Memorandum and underlying materials will be denied, and their objection to the consent decree will be considered, along with other materials provided by the Government and through the public comment process, at the time this Court determines whether entry of the Consent Decree is in the public interest.

#### **Parties**

The parties, facts and prior proceedings in the *In re* **[\*\*3]** *Nasdaq Market-Makers Antitrust Litigation*, M.D.L. No. 1023 (the "Multidistrict action" or the "Private action") are described in the prior opinions of this court, familiarity with which is assumed. See *In re Nasdaq Market-Makers Antitrust Litigation*, 894 F. Supp. 703 (S.D.N.Y. 1995); [164 F.R.D. 346 \(S.D.N.Y. 1995\)](#); [1996 U.S. Dist. LEXIS 4969](#), No. 94 Civ. 3996, 1996 WL 187409 (S.D.N.Y. Apr. 18, 1996); [929 F. Supp. 723 \(S.D.N.Y. 1996\)](#); [929 F. Supp. 174 \(S.D.N.Y. 1996\)](#); [938 F. Supp. 232 \(S.D.N.Y. 1996\)](#).

In this Government action, defendants Alex. Brown & Sons Inc., Bear, Stearns & Co., Inc., CS First Boston Corp., Dean Witter Reynolds, Inc., Donaldson, Lufkin & Jenrette Securities Corp., Furman Selz LLC, Goldman, Sachs & Co., Hambrecht & Quist LLC, Herzog, Heine, Geduld, Inc., J.P. Morgan Securities, Inc., Lehman Brothers, Inc., Mayer & Schweitzer, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley & Co., Inc., Nash, Weiss & Co., Olde Discount Corp., Painewebber Inc., Piper Jaffray Inc., Prudential Securities Inc., Salomon Brothers Inc., Sherwood Securities Corp., Smith Barney Inc., Spear, Leeds & Kellogg, LP, and UBS Securities LLC (collectively, the "Defendants") are or were market-makers **[\*\*4]** on the Nasdaq exchange and purchased and sold stock on Nasdaq.

The Plaintiffs in the Multidistrict action, who seek to intervene here, include the State of Louisiana, in its capacity as *parens patriae*, trustee, guardian, and representative of Louisiana investors allegedly damaged by the alleged price-fixing scheme, and numerous individual plaintiffs who purchased or sold specified Nasdaq Securities from market-makers or their affiliates.

### **Background and Prior Proceedings**

On May 27, 1994, the first class action complaint in what has become a multidistrict case, *In re NASDAQ Market-Makers Litigation*, MDL 1023, was filed, following reports in the media of a study by Professors William G. Christie and Paul H. Schultz discussing the "spread" between what market-makers on the Nasdaq exchange offer to pay sellers for certain securities and the price at which they offer to sell the securities to buyers. The complaint alleged improper manipulation of spreads through, *inter alia*, a convention among brokers to not quote "odd eightths" on certain securities. Eventually more than two dozen complaints were filed around the country by various plaintiffs alleging variations [\*\*5] on the charge that the NASDAQ market-makers had engaged in a conspiracy to avoid odd-eighth quotes in violation of the Sherman Act, [15 U.S.C. § 1](#). On October 14, 1994, the Judicial Panel on Multidistrict Litigation ordered that the actions already filed and any actions filed later be assigned to this Court. A "Consolidated Amended Complaint" was filed on December 16, 1994. More than thirty actions involving thirty-three defendants have now been consolidated in this Court as part of the multidistrict litigation.<sup>1</sup>

In October 1994, the Antitrust Division of the Department of Justice (the "DOJ" or the "Government") announced that it was undertaking a broad review of a number of aspects of NASDAQ's market structure.<sup>2</sup> In its [\*535] Competitive Impact Statement (the "CIS"), the Government describes its inquiry as "a major, two-year investigation by [\*\*6] the Department of the trading activities of Nasdaq securities dealers." The investigation actually began in the summer of 1994, shortly after the public disclosure of the economic study by Professors Christie and Schultz.

During the course of its investigation, the Government reviewed thousands of pages of documents that were produced by the twenty-four Defendants in this action and other market participants in response to over 350 Civil [\*\*7] Investigative Demands ("CIDs") issued by the DOJ. The DOJ reviewed hundreds of responses to interrogatories that were submitted by the Defendants and others. The DOJ took over 225 depositions of individuals with knowledge of the trading practices of Nasdaq market-makers, including current and former officers and employees of the Defendants and other Nasdaq market-makers, as well as officials and committee members of the National Association of Securities Dealers, Inc. ("NASD"), the organization responsible for oversight of the Nasdaq market.

The DOJ conducted numerous telephone and in-person interviews of current and former Nasdaq stock traders, Nasdaq investors, and others with relevant knowledge of the industry, and listened to approximately 4500 hours of audio tapes of telephone calls between stock traders employed by the Defendants and other Nasdaq market-makers. These audio tapes had been recorded by certain of the Defendants (and other market-makers) in the ordinary course of their business and were produced to the Government in response to its CIDs.

The DOJ reviewed and analyzed substantial quantities of market data, including information showing all market-maker quote changes [\*\*8] on Nasdaq during a twenty-month period. The DOJ also reviewed eighteen months of data on trades in Nasdaq stocks. Finally, the DOJ reviewed numerous transcripts of depositions taken by the Securities and Exchange Commission ("SEC") in its concurrent inquiry into the operations and activities of the NASD and the Nasdaq market.

Based on the evidence uncovered during this substantial investigative effort, the Government concluded that the Defendants and others had been engaged for a number of years in anticompetitive conduct in violation of the Sherman Act.

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<sup>1</sup> A more complete description of the background and proceedings in the companion Multidistrict Action is set forth in the Opinion in that action issued by the Court today.

<sup>2</sup> At least two other investigations into the operation of the Nasdaq exchange have been commenced. On November 14, 1994, the Securities and Exchange Commission (the "SEC") announced that it would review the operation of NASDAQ, including the spreads issue alleged in the Consolidated Amended Complaint and broader issues concerning the structure of the market itself. On November 20, 1994, the National Association of Securities Dealers ("NASD") announced the formation of a seven-member panel to undertake a plenary review of the effectiveness of its own operation and surveillance.

On July 17, 1996, the Government filed the complaint in this civil action, pursuant to [Section 4](#) of the Sherman Act, as amended, [15 U.S.C. § 4](#), seeking equitable and other relief to prevent and restrain violations of [Section 1](#) of the Sherman Act, as amended, [15 U.S.C. § 1](#). In its complaint, the Government alleged that the Defendants and others adhered to and enforced a "quoting convention" that was designed to and did deter price competition among the Defendants and other market-makers in their trading of Nasdaq stocks with the general public. The Government believed that investors incurred higher transaction costs for buying and [\[\\*\\*9\]](#) selling Nasdaq stocks than they would have incurred had the Defendants not restrained competition through their illegal agreement.

On the same day as the complaint in the Government action was filed, the United States and the Defendants filed a Stipulation and Order ("proposed Order" or "proposed Consent Decree") to resolve the allegations in the complaint. The Government contends that the proposed Order will eliminate the anticompetitive conduct identified in the complaint and establish procedures that will ensure that such conduct does not recur. Specifically, the proposed Order seeks to prevent the Defendants from agreeing with other market-makers to adhere to the quoting convention, or to fix, raise, lower, or maintain prices or quotes for Nasdaq securities. The proposed Order also requires each defendant to adopt an antitrust compliance program and designate an antitrust compliance officer to ensure the firm's future compliance with the antitrust laws. To this end, the proposed [\[\\*536\]](#) decree requires the compliance officer to: (1) randomly monitor and tape record telephone conversations between stock traders; and (2) report any violations of the proposed Order within ten business days [\[\\*\\*10\]](#) to the Antitrust Division of the Department of Justice.

The proposed decree also requires that these tape recordings be made available to the DOJ for its review. The proposed Order gives the DOJ authority to receive complaints of possible violations, to visit Defendants' offices unannounced to monitor trader conversations as they are ongoing, to direct taping of particular suspected violators, and to request copies of tapes as they are made.

Paragraph IV (C)(6) of the proposed Order provides:

Tapes made pursuant to this stipulation and order shall be retained by each defendant for at least thirty (30) days from the date of recording, and may be recycled thereafter. Tapes made pursuant to this stipulation and order shall not be subject to civil process except for process issued by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as amended. Such tapes shall not be admissible in evidence in civil proceedings, except in actions, proceedings, investigations, or examinations commenced by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization, [\[\\*\\*11\]](#) as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as amended.

In this opinion, Paragraph IV(C)(6) will be referred to as the "non-disclosure" provision or the "prospective protective order."

In the course of conducting its investigation, the Government prepared a "Settlement Memorandum," or "briefing book," which was shared with Defendants in settlement negotiations. The document summarizes selected evidence compiled in the course of the investigation and sets forth some of the legal underpinnings of the Government's case. The purpose of the Memorandum was to facilitate negotiations by demonstrating to Defendants the supposed strength of the Government's case. In order to disclose the evidence obtained through CIDs issued by DOJ, those who responded to CIDs signed limited waivers. These waivers permitted the DOJ to disclose evidence otherwise protected by the confidentiality provisions of the Antitrust Civil Process Act (the "ACPA"), [15 U.S.C. § 1313\(c\)](#), only to Defendants and potential defendants and only for the purpose of settlement negotiations with these Defendants and potential defendants.

**HN1**<sup>[↑]</sup> Entry of the proposed Consent Decree is subject to the [\[\\*12\]](#) Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), [15 U.S.C. § 16](#). On July 17, 1996, in accordance with procedures outlined in the APPA, the Government submitted materials to the Court, including a Competitive Impact Statement ("CIS") summarizing the evidence supporting the allegations in the complaint and describing the resolution set forth in the proposed Decree. The Government also published proposed settlement documents in the Federal Register and newspapers,

thus initiating the process of public comment and court consideration of the proposed consent decree required by the Tunney Act.

Plaintiffs filed notice of the instant motion on August 28, 1996, the Court received opposition and reply papers, and oral argument was heard on October 16, 1996. Plaintiffs simultaneously filed a motion in the Multidistrict Action seeking to compel production of all CID deposition transcripts in the Multidistrict Defendants' control and the Settlement Memorandum and evidentiary materials referenced therein. Post-argument submissions were received until November 15, 1996, at which time the matter was deemed fully submitted.<sup>3</sup>

### [\*\*13] Discussion

#### I. The Motion to Intervene Will Be Granted for the Limited Purposes Advanced

**HN2** [↑] The Tunney Act, [15 U.S.C. § 16](#), was designed to expose consent decree proceedings to public scrutiny in order to enhance [\*537] the likelihood that antitrust decrees would serve the public interest in eliminating anticompetitive behavior. See H. Rep. No. 93-1463, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6535, 6536 ("it is imperative that the integrity of and public confidence in procedures relating to settlements via consent decree procedures be assured"); [United States v. Microsoft Corp., 312 U.S. App. D.C. 378, 56 F.3d 1448, 1458 \(D.C. Cir. 1995\)](#) (purpose of Tunney Act was to prevent judicial "rubber stamping" of antitrust consent decrees).

**HN3** [↑] [Section 16 of Title 15 of the United States Code](#) provides for a process of judicial consideration and public scrutiny of proposed consent decrees. [Section 16\(b\)](#) requires that certain materials be filed with the court and published in the Federal register for public comment. [Section 16\(c\)](#) provides for publication of summaries of certain materials in newspapers. [Section 16\(d\)](#) requires the Government to respond to public comments on the proposed [\*\*14] decree. [Section 16\(e\)](#) directs the district court to determine whether the proposed consent decree is in the public interest, considering several enumerated factors, before entering judgment on the decree. [Section 16\(f\)](#) permits the court to use a number of procedures to gather additional information in making its public interest determination, including taking testimony and appointing special masters. [Section 16\(g\)](#) requires defendants to disclose lobbying contacts with any officer or employee of the United States concerning the proposed decree.

**HN4** [↑] [Section 16\(f\)\(3\)](#) provides that, in making its determination as to whether the entry of a consent decree is "in the public interest," the Court may:

Authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, *intervention as a party pursuant to the Federal Rules of Civil Procedure*, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate . . . .  
(emphasis added).

Moreover, **HN5** [↑] in making its public interest determination, a court may consider [\*\*15] "the impact of entry of [a consent decree] upon the public generally and individuals alleging specific injury from the violations set forth in the complaint . . . ." [15 U.S.C. § 16\(e\)\(2\)](#). Permitting plaintiffs in a treble damages action to intervene in a parallel Tunney Act proceeding may assist the court in determining the impact of the proposed consent decree on the interests of those private litigants alleging injury.

Plaintiffs move for mandatory intervention pursuant to [Rule 24\(a\)\(2\), Fed.R.Civ.P.](#), or, in the alternative, permissive intervention pursuant to [Rule 24\(b\), Fed.R.Civ.P.](#) Because Plaintiffs will be permitted to intervene pursuant to [Rule 24\(b\)](#), the Court need not address whether Plaintiffs satisfy the standards for mandatory intervention.

**HN6** [↑] A court has discretion to allow permissive intervention in a consent decree proceeding such as this. See, e.g., [United States v. American Cyanamid Co., 719 F.2d 558, 563 \(2d Cir. 1983\)](#) (affirming permissive intervention

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<sup>3</sup> Plaintiffs' discovery motion in the companion Multidistrict action is decided by a separate opinion issued by this Court today. On November 15, 1996, the Government filed its Response to Public Comments and moved for entry of the proposed Order.

in antitrust consent decree proceedings); [United States v. American Telephone and Telegraph Co., 552 F. Supp. 131, 218-19 \(D.D.C. 1982\)](#) (intervenor status granted in antitrust consent decree proceedings; [\*\*16] intervenors permitted to file briefs, participate in proceedings and oral argument, and appeal the entry of the consent decree ), aff'd sub nom. [Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 \(1983\)](#).

Moreover, our Court of Appeals has suggested that [HN7](#) intervention under [Rule 24](#) is the proper mechanism for a non-party to seek modification of a protective order and thus to gain access to information generated through judicial proceedings. See, e.g., [Palmieri v. State of New York, 779 F.2d 861, 864 \(2d Cir. 1985\)](#); [Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 293-94 \(2d Cir. 1979\)](#); see also [In re Nasdaq Market-Makers Antitrust Litigation, 164 F.R.D. 346, 351 \(S.D.N.Y. 1996\)](#).

[HN8](#) [Rule 24\(b\)](#), in relevant part, provides:

Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and [\*538] the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Government and Defendants in this action do [\*\*17] not seriously dispute that the Multidistrict Action shares questions of law and fact in common with the Government Action. The two complaints allege essentially the same conduct on the part of Nasdaq market-makers, and both complaints assert that this conduct violated the Sherman Act.

However, the Government does contend that the specific issues to be determined in the Tunney Act proceeding are different from the issues in the Plaintiffs' action. The Government argues that the primary issue in the Tunney Act proceeding is whether the proposed consent decree is in the public interest, while the primary issue in the private action is whether Plaintiffs are entitled to damages.

This attempt to narrowly define the "main action" to mean only the Tunney Act proceeding inappropriately limits the court's discretion to permit intervention. [Rule 24](#) permits intervention in the Government "action," not merely the Tunney Act proceeding. The "main action," within the meaning of the rule, is not the Tunney Act proceeding, but the entire Government action seeking to remedy alleged violations of the [antitrust law](#). Therefore, the Plaintiffs have met the threshold condition for permissive intervention [\*\*18] that there be common issues of law and fact between the two claims.

However, the Government and Defendants urge the Court to exercise its discretion and deny intervention based on the risk that intervention would "unduly delay or prejudice the adjudication of the rights of the original parties." They contend that most courts have denied intervention in similar circumstances because of the inevitability of delay when new parties are added. See, e.g., [United States v. International Business Machines Corp., 1995 U.S. Dist. LEXIS 8482](#), No. 72-344, 1995 WL 366383, \*5 (S.D.N.Y. June 19, 1995) ("IBM") (denying permissive intervention because, *inter alia*, potential for unwarranted delay outweighed any benefit from intervention). An intervenor, they contend, may have the right to file counterclaims and cross-claims, to depose witnesses and to appeal from orders of the Court. Any such action, they argue, would only delay entry of the Stipulation and would, as a result, delay the initiation of enforcement procedures, including taping and monitoring of telephone conversation.

Defendants and the Government also argue that the Tunney Act facilitates a consolidated Government response to all comments and that [\*\*19] intervention would undermine the efficiency of such consolidated proceedings. The Tunney Act requires that such responses, together with the underlying comments, be filed with the Court. See [15 U.S.C. §§ 16\(d\), \(f\)](#). The parties to this action urge that Plaintiffs' formal intervention would impose upon the Court and the DOJ the burdensome task of separately responding to and ruling on Plaintiffs' objections.

The possible delays imposed on the Court and the existing parties to this case by intervention are not unduly burdensome in light of the potential benefit of intervenors' vigorous litigation of the prospective protective order and the discoverability of the Settlement Memorandum. Significantly, this action provides the only forum in which to

seek disclosure of the Settlement Memorandum (and appeal from the Court's decision thereon), since it will not be in the possession of parties to the Multidistrict action.

The proposed intervention in the *IBM* case, cited by the Government and the Defendants for the proposition that intervention should normally be denied in consent decree proceedings, would have required completely new discovery and the introduction of new evidence [\*\*20] and legal issues into the case. 1995 WL 366383, \*5. The *IBM* court distinguished [\*United States v. American Telephone and Telegraph Co., 552 F. Supp. at 218-19\*](#) (in which the court granted intervention in antitrust consent decree proceedings) on the grounds that the intervening parties in *AT&T* were limited to submission of comments, engaging in oral argument and filing appeals, not conducting discovery or [\*539] developing evidence. [\*IBM, 1995 U.S. Dist. LEXIS 8482, 1995 WL 366383\*](#) at \*6.

Here, Plaintiffs are being permitted to intervene for two very limited purposes: (1) to make a concurrent motion to disclose a single document (along with the underlying depositions and documentary evidence expressly referred to therein) to which they do not have access in their private action, and (2) to raise an objection to a single provision of the proposed consent decree. Resolving the motion to compel disclosure of the Settlement Memorandum and underlying documents will not delay the proceedings any more than resolving the motion to intervene, since this opinion decides both motions simultaneously. The Plaintiffs' objections to the prospective non-disclosure provisions of the proposed decree raise purely legal questions [\*\*21] that will not require additional discovery or evidence. As in *AT&T*, Plaintiffs here will be limited to submitting comments on the decree, engaging in oral argument, and filing appeals. Any delay incident to the additional argument required to decide this issue or to any appeal therefrom is not "undue" given the significance of the legal issues raised.

The Defendants' assertion that intervention will require this Court to address Plaintiffs' objections to the proposed Consent Decree separately from the objections raised by commentators from the public is unfounded. If the Government has not already responded to the specific objection raised by Plaintiffs in this motion, perhaps because no public comments addressed the issue, they may be required to make an additional submission. However, all parties have already prepared written argument on the issue. Any additional effort required will be minimal.

The Government and Defendants further contend that the interests of Plaintiffs can be protected adequately without intervention. They claim that Plaintiffs will be able to seek discovery of the Settlement Memorandum and underlying materials in the Multidistrict action. They argue further [\*\*22] that there is no reason to permit Plaintiffs to submit their views to this Court as intervenors or *amici* when they have an opportunity to comment on the proposed order pursuant to the public comment provisions of the Tunney Act. See [\*United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 652 \(D.Del. 1983\)\*](#) ("under the APPA, courts have rejected requests for third party participation in the absence of a showing that the statute's comment procedure is inadequate for evaluation of a complainant's views"); [\*United States v. Carrols Development Corp., 454 F. Supp. 1215, 1221-22 \(N.D.N.Y. 1978\)\*](#) (denying request for *amicus* participation where "the purposes for granting such participation have already been achieved here since the moving parties have set forth their views in considerable detail . . . in comments submitted to the Government under the APPA").

The Government and the Defendants urge that reliance on the Tunney Act's comment procedure, as opposed to intervention, would also be consistent with Congressional intent. They cite an interpretation of the legislative history contained in *Heileman Brewing*:

Congress expected that the district court "would adduce [\*\*23] the necessary information through the least complicated and least time-consuming means possible." . . . Hence, the legislative history reveals that the main purpose of the bill was "to encourage additional comments and response by more adequate notice to the public" and not to invite intervention with all of the attendant problems, complexities, and delays that such participation would inevitably involve. . . . According to the bill's chief sponsor, Senator John Tunney, the [Tunney Act's] proponents did "not seek to open the floodgates to litigation, nor has anyone argued that the bill, in its final version and as it was endorsed by all members of the Judiciary Committee would do so."

563 F. Supp. at 652-53 (citing S. Rep. No. 298, 93rd Cong., 1st Sess. 6-7 (1973); H.R. Rep. No. 1463, 93rd Cong., 2d Sess. 8 (1974), 1974 U.S.C.C.A.N. 6535; 119 Cong. Rec. 24598-24599 (1973) (remarks of Sen. Tunney); 120 Cong. Rec. 36343-36344 (\*1974) (remarks of Rep. Jordan)).

While it may be true that some aspects of the legislative history suggest a preference for using the public comment mechanisms in §§ 16(b), (c) and (d), the statute expressly permits intervention, and some [\*\*540] courts have exercised [\*\*24] their discretion to allow intervention. See American Cyanamid, 719 F.2d at 563; AT&T, 552 F. Supp. at 218-219. Here, intervention is appropriate because not all of the Plaintiffs' asserted interests can be protected through the public comment process. As the Government conceded at oral argument, Plaintiffs will be unable to compel production of the Settlement Memorandum in their private case, since Defendants are not in possession of the Memorandum. Moreover, if Plaintiffs' sole vehicle for seeking the Settlement Memorandum or objecting to the prospective non-disclosure provision is public comment, they would be unable, as non-parties, to appeal an adverse decision.<sup>4</sup>

[\*\*25] Plaintiffs will be permitted to intervene for the limited purposes of making their motion to compel disclosure of the Settlement Memorandum (and underlying evidence referred to therein) and to raise objections to the prospective nondisclosure provisions of the consent decree.

## **II. The Government Will Not Be Compelled to Produce the Settlement Memorandum**

Plaintiffs advance two arguments for disclosure of the Settlement Memorandum and its underlying evidentiary materials. First, they argue that the Settlement Memorandum is a "determinative document," required to be disclosed under 15 U.S.C. § 16(b). Second, they argue that the Court should exercise its discretion to order production of the documents pursuant to 15 U.S.C. § 16(f)(3), which permits the court to "authorize . . . examination of . . . documentary materials."

### **A. The Settlement Memorandum is Not a "Determinative Document"**

HN12[] The Tunney Act, 15 U.S.C. § 16(b), provides that "any other materials and documents which the United States considered determinative in formulating [a proposed consent decree], shall also be made available to the

<sup>4</sup> Plaintiffs also contend that intervention in this action is necessary to challenge the non-disclosure provision, because if they wait to challenge the provision in a separate proceeding, the Defendants will argue that they were precluded from litigating an issue that could have been litigated during the consent decree proceedings. It seems unlikely that Plaintiffs would actually be barred from challenging the provision in later proceedings. If Plaintiffs were not permitted to intervene as parties in this action, they would not be bound by traditional principles of collateral estoppel. HN9[] Under the collateral estoppel doctrine, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit involving a party to the prior litigation. United States v. Mendoza, 464 U.S. 154, 158, 78 L. Ed. 2d 379, 104 S. Ct. 568 (1984). Even so-called "non-mutual" collateral estoppel can only be asserted against parties (or privies of parties) to the prior action. See id. at 159 n.4 (describing offensive and defensive non-mutual collateral estoppel). While the Supreme Court has indicated that an individual's failure to intervene in a prior proceeding could preclude that individual from making offensive use of a prior advantageous judgment, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979), there is no reason that such a non-party would be bound by an adverse determination in a case to which it was not a party.

Further, it is not likely that Defendants could successfully argue in a later proceeding that Plaintiffs should be precluded from litigating the validity of the prospective non-disclosure provision of the decree because the Government represented Plaintiffs' interests in the prior action. In Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689, 6 L. Ed. 2d 604, 81 S. Ct. 1309 (1961), the Supreme Court denied a private parties' intervention in a government antitrust action on the grounds that "HN10[] a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation." Moreover, HN11[] the entry of the consent decree is not an adjudication on the merits that can give rise to issue preclusion of the sort Plaintiffs fear. See IAM National Pension Fund v. Industrial Gear Mfg. Co., 232 U.S. App. D.C. 418, 723 F.2d 944, 949 & n.7 (D.C. Cir. 1983) (consent decree no basis for issue preclusion because no judicial determination of questions of law or fact).

public at the district court." The government has claimed that [\*\*26] there are no "determinative" documents or materials required to be submitted in this case.

Although the Government's determinations in prosecuting an antitrust case are entitled to considerable deference, see [Microsoft, 56 F.3d at 1461](#), at least one court has decided that the Government's conclusion that there are no determinative documents is subject to independent judicial review, and that disclosure of documents the court deems determinative [\*541] may be ordered. See [United States v. Central Contracting Co., 531 F. Supp. 133 \(E.D. Va. 1982\)](#).

Plaintiffs contend that the Settlement Memorandum and associated materials provided to Defendants in advance of filing and expressly referenced in the Settlement Memorandum were determinative documents and should be made public. They argue that the Settlement Memorandum is a determinative document because it contributed to the Defendants' decision to enter into a consent decree.

Plaintiffs rely primarily on the *Central Contracting* cases, in which the district court held that determinative documents are those "materials and documents that substantially contribute to the determination (by the government) to proceed by [\*\*27] consent decree." 537 F. Supp. at 577. In applying this standard, the *Central Contracting* court compelled the Government to disclose a letter from one of the defendants in the case and a plea agreement in a prior criminal prosecution of the same defendant. [Id. at 576-78](#). The letter related information concerning the defendant's financial circumstances and referred to terms on which the defendant would be willing to settle. The plea agreement apparently included a stipulation that the defendant would accept a civil consent decree very much like that proposed in the civil case before the *Central Contracting* court.

The Settlement Memorandum Plaintiffs seek is unlike the documents considered "determinative" by the *Central Contracting* court. The documents in *Central Contracting* were non-evidentiary documents prepared by sources external to the DOJ that did not relate directly to the strength of the Government's case on the merits, but nonetheless bore heavily on the Government's determination to proceed by consent decree and on the shape of the relief itself. Here, the Settlement Memorandum is a document related directly to the merits of the case and created internally [\*\*28] by the DOJ. It has been represented that it organizes the Government's evidence and legal theory for the purpose of facilitating a consent decree, which the Government already believed would be in the public interest. It did not "determine" the Government's decision to enter into a consent decree or the shape of the proposed relief, any more than the individual elements of evidence it contained determined the relief. It was, instead, the result of the internal effort of DOJ to organize its evidence for the purpose of evaluating its case and presenting it to Defendants in settlement negotiations.

Moreover, *Central Contracting*'s broad definition of "determinative documents" may conflict with Congress's intent to maintain the viability of consent decrees as a means of resolving antitrust cases. [HN13](#) In enacting the Tunney Act, Congress recognized the "high rate of settlement in public antitrust cases" and wished to "encourage[] settlement by consent decrees as part of the legal policies expressed in the antitrust laws." H.R. Rep. 93-1463 at 6. It wanted to remedy abuses in the consent decree process by focussing judicial and public scrutiny on "the Justice Department's decision to enter [\*\*29] into a proposal for a consent decree," *id.* at 7, but not at the expense of eliminating the decree as a practicable means of resolving antitrust matters. The purpose of the competitive impact statement, the public comment procedures, and the requirement that a defendant reveal lobbying contacts with the government ([15 U.S.C. 16\(g\)](#)), are "to enable a court to determine whether a proposed consent decree is in the 'public interest'" *id.* at 21, not to evaluate the strength of the Government's case.

Plaintiffs' expansive interpretation of "determinative document" is inconsistent with the Tunney Act's limited purpose of ascertaining whether a proposed consent decree is within the scope of the public interest. Under the Tunney Act, "the court is only authorized to review the decree itself," and is "not empowered to review the actions or behavior of the Department of Justice." [Microsoft, 56 F.3d at 1459](#). Moreover, [HN14](#) the Government's judgments in a Tunney Act proceeding are entitled to deference. [Id. at 1461](#).

The legislative history of the Tunney Act gives some support to a narrower reading of "determinative document" than that proposed by Plaintiffs. Congress enacted the [\*542] Tunney [\*\*30] Act partly in response to consent

decrees entered in three cases involving the International Telephone and Telegraph Corporation (ITT). These cases challenged three ITT acquisitions, including that of the Hartford Fire Insurance Company. The consent decrees permitted ITT to retain Hartford. Subsequent Congressional hearings revealed that the Antitrust Division had employed Richard J. Ramsden, a financial consultant, to prepare a report analyzing the economic consequences of ITT's possible divestiture of Hartford. Ramsden concluded that requiring ITT to divest Hartford would have adverse consequences on ITT and on the stock market generally. Based in part on the Ramsden Report, the Department concluded that the need for divestiture of Hartford was outweighed by the divestiture's projected adverse effects on the economy.

The Ramsden Report was cited by the Act's chief sponsor as exemplifying a "determinative document." During the Senate debate on the determinative documents provision, Senator Tunney expressly stated: "I am thinking here of the so-called Ramsden memorandum which was important in the ITT case." 119 Cong. Rec. 24,605 (1973).

**HN15** [↑] Although "determinative documents" are not **[\*\*31]** necessarily limited to recommendations prepared by outside consultants, the events that led Congress to enact the "determinative document" provisions support the conclusion that Congress was more concerned with exposing external influences on the consent decree process than it was with documents, such as the Settlement Memorandum, reflecting the Government's internal evaluation of its evidence, even when that internal evaluation is undertaken to persuade defendants to enter into a consent decree.

For the reasons set forth above, the Settlement Memorandum and the underlying materials will not be disclosed as determinative documents.

#### ***B. Plaintiffs Will Not Be Permitted to Review the Settlement Memorandum Under [15 U.S.C. § 16\(f\)\(3\)](#)***

Plaintiffs also argue that the Court should order production of the Settlement Memorandum pursuant to [15 U.S.C. 16\(e\)\(2\)](#) and [16\(f\)\(3\)](#). **HN16** [↑] [Section 16\(e\)\(2\)](#) provides that, in making the Tunney Act public interest determination, the Court may consider "the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations . . . including consideration of the public benefit, if any, to be derived from **[\*\*32]** a determination of the issues at trial." **HN17** [↑] [Section 16\(f\)\(3\)](#) provides that, in making the public interest determination, the Court may "authorize full or limited participation . . . by interested persons . . . including . . . examination of witnesses or documentary materials, or participation . . . as the court may deem appropriate."

Plaintiffs claim that, because they are "individuals alleging specific injury from the violations set forth in the complaint" within [section 16\(e\)\(2\)](#), they should be granted a right to "examination of documentary materials" under [section 16\(f\)](#).

**HN18** [↑] While the Court may consider the interests of "individuals alleging specific injury from the violations set forth in the complaint," that consideration is limited to "the impact of entry of such judgment upon . . . [those] individuals . . ." [15 U.S.C. 16\(e\)\(2\)](#). Plaintiffs' primary asserted interests in obtaining the Settlement Memorandum are to facilitate their own discovery efforts and to assist the Court in determining whether the decree is in the public interest by allowing Plaintiffs to provide more detailed comments on the decree's effects.

Plaintiffs contend that it would be inefficient to require them **[\*\*33]** to "reinvent the wheel" by duplicating the Government's investigation through private discovery. They also contend that they should have access to the Settlement Memorandum as a "road map" for their private case. However, the Tunney Act's purpose is to expose consent decrees to greater public scrutiny, not to facilitate discovery in private antitrust suits. See *SEC v. Everest Management Corp.*, 475 F.2d at 1239 (intervention not aimed at assisting private plaintiffs who seek to avoid duplication of agency's investigative efforts).

Plaintiffs rely on a portion of the Tunney Act's legislative history that suggests that a court may conclude in particular cases that it **[\*543]** is appropriate to "condition approval of the consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private plaintiffs which will

assist in the prosecution of their claims." S. Rep. No. 93-298 at 6-7; *accord* H.R. Rep. No. 93-1463 at 8. However, had Congress intended that courts routinely condition their approval of consent decrees on such disclosure, it could have required that the Government make its evidentiary files public. Congress imposed [\*\*34] no such requirement, and there is no compelling reason to require the sort of disclosure Plaintiffs seek in this case. Through normal discovery in their private action, Plaintiffs will have access to much of the raw evidence collected by the Government in this case, specifically the transcripts of the testimony of CID deponents employed by the Multidistrict defendants.

In addition, [HN19](#) [↑] Congress has strictly limited disclosure of materials obtained by the Government under the ACPA from Defendants and other targets of CID requests. See *In re Nasdaq Market-Makers Antitrust Litigation*, 929 F. Supp. at 726; [15 U.S.C. 1313\(c\)\(3\)](#).<sup>5</sup> Although the Tunney Act was enacted after the ACPA's confidentiality provisions, the Act does not purport to invalidate them and make the Government's files open to broad disclosure.

[\*\*35] Moreover, the information incorporated in the Settlement Memorandum appears to be protected from disclosure by a variety of statutory, contractual and common law confidentiality provisions and privileges. For example, [HN20](#) [↑] information that the DOJ obtained from the SEC remains confidential. See [17 C.F.R. 230.122](#); [17 C.F.R. 240.0-4](#); [44 U.S.C. 3510\(b\)](#); *Shell Oil Co. v. Department of Energy*, 477 F. Supp. 413, 420 (D. Del. 1979) ("Data immune from disclosure in the hands of a federal agency acquiring data retains that protection in the hands of a receiving agency after an inter-agency transfer.").

Moreover, the Government assured all of those whose CID depositions or other confidential disclosures were to be included in the Memorandum that the information would be used for no purpose other than settlement negotiations. The Government further assured the parties that access to the Settlement Memorandum would be strictly limited to a few individuals, none of whom were permitted to keep or copy any part of that document. Each of the individuals to whom the Settlement Memorandum was disclosed agreed in writing to maintain strict confidentiality of the information. To compel public disclosure [\*\*36] of such carefully controlled information simply because it was previously disclosed exclusively in connection with settlement efforts<sup>6</sup> could seriously compromise the ability of investigative agencies to reach settlements in multi-party proceedings.

Furthermore, much of the Settlement Memorandum is arguably protected by a number of other established privileges. The Settlement Memorandum appears to have served in part as an aid in reviewing and making a decision on the Government's [\*\*37] enforcement options, and thus falls within the governmental deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52 & n.19, [44 L. Ed. 2d 29, 95 S. Ct. 1504 \(1975\)](#); *Access Reports v. Dept. of Justice*, 288 U.S. App. D.C. 319, 926 F.2d 1192, 1196 (D.C. Cir. 1991); *Weissman v. Fruchtman*, No. 83 Civ. 8958, 1986 WL 15669, at \*13 (S.D.N.Y. Oct. 31, 1986) (quoting *Mobil Oil Corp. v. Dept. of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983)). Further, since the Settlement [\*544] Memorandum was prepared for the express purpose of negotiating a settlement, it is arguably protected by the pro-settlement policy embodied in *Fed. R. Evid. 408*, which renders statements made in the course of settlement negotiations inadmissible. Cf. *Bottaro v. Hatton Associates*, 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982) (denying discovery of settlement agreement, inadmissible in evidence under *Fed. R. Evid. 408*, in absence of particularized showing of likelihood that disclosure will lead to discovery of admissible evidence); *accord*, e.g., *Weissman v Fruchtman*, 1986 WL 15669 at \*20 (S.D.N.Y. Oct. 31, 1986). Finally, because the Settlement Memorandum is part of the

<sup>5</sup> This court ruled in the companion Multidistrict action that the CID materials (which are presumably referenced in the Settlement Memorandum) are not protected by a privilege that Defendants in that action may assert. *In re Nasdaq*, 929 F. Supp. at 725-26. However, this does not mean that the Government can be compelled to disclose the materials in this action, since [15 U.S.C. § 1313\(c\)\(3\)](#) expressly prohibits the Government from disclosing such documents without permission from the targets. *Id. at 725*.

<sup>6</sup> This Court notes with some dismay the fact that the existence, and perhaps some of the allegedly confidential contents, of the Settlement Memorandum were apparently shared with members of the press. See, e.g., Scot J. Paltrow, "Nasdaq Dealers Mull Next Move in Light of U.S. Probe Evidence," *The Los Angeles Times*, June 7, 1996, at B4 (Washington Edition). However, since it is not possible to identify the parties responsible for this disclosure, the parties cannot be held to have waived the confidentiality of the documents.

Government's investigative [\*\*38] files, it may be protected by the law enforcement investigative privilege while the investigation is still pending and for a "reasonable" time thereafter. See *Raphael v. Aetna Cas. and Sur. Co., 744 F. Supp. 71, 74 (S.D.N.Y. 1990)*.

Plaintiffs argue that any privilege the Settlement Memorandum may have enjoyed was waived by the Government when it shared the Memorandum with adverse parties. See *Center for Auto Safety v. Dept. of Justice, 576 F. Supp. 739, 747-49 (D.D.C. 1983)* (under Freedom of Information Act, arguably deliberative Government documents, once disclosed in negotiations with the defendants, were no longer protected by FOIA's "deliberative process" exception). However, in this case, unlike *Center for Auto Safety*, the disclosure of the protected document was expressly conditioned on the preservation of privileges and confidentiality.

In addition, routine disclosure of the materials Plaintiffs seek would deter future defendants from entering into negotiated settlements with the Government, and, perhaps, from cooperating in investigations that are likely to lead to such negotiations. See *United States v. American Telephone & Telegraph Co., 552 F. Supp. at l\*\*391 151* (rejecting position that would, "as a practical matter [eliminate the consent decree] as an antitrust enforcement tool, despite Congress' directive that it be preserved"). The cost to antitrust enforcement, particularly in an era of declining government resources, could be substantial. Most of the Government's civil antitrust cases are now settled rather than tried. If more cases are required to be litigated because the substance of settlement negotiations are discoverable, fewer of them can be brought.

Finally, Plaintiffs are not foreclosed from seeking discovery of the evidence underlying the Settlement Memorandum in their private litigation. Although they may not be able to obtain the "road map" the Memorandum itself would provide, they do have access to the information collected by the DOJ.<sup>7</sup>

[\*\*40] With regard to Plaintiffs' assertion that disclosure is necessary to evaluate the adequacy of the proposed relief, the Court will be able to assess the provisions of the proposed order without giving Plaintiffs access to the Settlement Memorandum. The Competitive Impact Statement (the "CIS") gives the Plaintiffs, the Court, and the public detailed and specific information concerning the conduct uncovered by the DOJ in its investigation. While the CIS does not disclose specific names and dates and evidentiary details, such information is unnecessary to a meaningful evaluation of the decree. The CIS and the complaint provide sufficient information to enable the Court to determine whether the proposed order adequately remedies the violations uncovered and alleged, and thus whether entry of the proposed order is within the "reaches of the public interest." See *Microsoft, 56 F.3d at 1460* (court must look exclusively to allegations in complaint to determine whether remedies provided are adequate).

Plaintiffs argue that the Settlement Memorandum and underlying evidence should be disclosed because of the possibility that telephone monitoring will be inadequate to remedy the alleged collusion [\*\*41] of the Defendants, since Defendants could disseminate and enforce the allegedly illegal quoting convention through other means of communication. Such conjecture does not constitute an adequate basis for granting Plaintiffs broad access [\*545] to the Government's files. First, the CIS gives sufficient detail about the way in which the conspiracy has operated to obviate the need for reviewing the Settlement Memorandum. Moreover, Plaintiffs do not need to examine the Settlement Memorandum to make their argument that audio-taping of telephone conversations cannot guarantee that Defendants will not fix prices through other means.

Plaintiffs also argue that the Court needs a full evidentiary record to evaluate the adequacy of the decree, because it fails to impose on Defendants certain "quoting rules" proposed by the SEC. The CIS explains the DOJ's reasons for not insisting that the Defendant implement those rules as a condition of settlement. These reasons include the complexity involved in requiring less than all industry participants to implement the rules, fairness concerns and the pendency of the rules before the SEC. Moreover, since the Government's complaint was filed, the SEC has enacted [\*\*42] the "quoting rules" that the DOJ supported (see 61 Fed. Reg. 48,290 (Sept. 12, 1996)), thereby mooting this issue.

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<sup>7</sup> Indeed, in an opinion issued today in the companion Multidistrict Action, this Court grants Plaintiffs' motion for discovery of the CID deposition transcripts in the control of the Multidistrict Defendants.

### **III. The Court Will Consider the Plaintiffs' Objections to the Consent Decree In Making Its Public Interest Determination**

Under the terms of the proposed consent decree, the Defendants will tape record and monitor not less than 3.5 percent of their Nasdaq trader telephone conversations (up to a maximum of 70 hours per week). Section IV(C)(6) of the consent decree contains a protective order providing that tapes made pursuant to the decree are neither discoverable nor admissible in private civil actions.

Although the Court reserves decision until the time at which it makes its final public interest determination pursuant to the Tunney Act, the proposed prospective "protective order" raises serious concerns about the extent to which parties may use the consent decree as a mechanism to cloak evidence that would ordinarily be accessible to future litigants. See *Olympic Refining Company v. Carter*, 332 F.2d 260, 265 (9th Cir. 1964) ("[HN21] A consenting defendant in a Government antitrust suit gains whatever benefit there may be in accepting the terms of [\*\*43] the consent decree rather than risking a more onerous decree entered after litigation. A consenting defendant also benefits from the saving in litigation expense which is made possible by a consent decree. But neither in the express nor implied terms of the statutes or rules is there any indication that a consenting defendant could gain the additional benefit of holding under seal, or stricture of nondisclosure, for an indefinite time, information which would otherwise be available to the public or at least to other litigants who had need of it").

The parties will be permitted to file supplemental briefs on the legal permissibility and the policy implications of this prospective protective order. The Court will consider these briefs in the context of other materials made available to it in the course of the Tunney Act proceedings.

#### **Conclusion**

For the reasons set forth above, Plaintiffs' motion to intervene in this action is hereby granted for the limited purposes of moving to compel disclosure of the Settlement Memorandum (and materials referenced therein), objecting to the prospective protective order in the proposed consent decree, and appealing from the decisions [\*\*44] of this Court upon these issues. The Plaintiffs' motion to compel disclosure of the Settlement Memorandum and underlying materials is hereby denied. The parties are hereby granted leave to file supplemental briefs on the issue of the prospective protective order.

It is so ordered.

**New York, N. Y.**

**November 26, 1996**

**ROBERT W. SWEET**

**U.S.D.J.**

## 345 Benham Ave. v. Madison Square Assocs., L.P.

Superior Court of Connecticut, Judicial District of New Haven, At New Haven

November 27, 1996, Decided ; December 2, 1996, Filed

CV 96-0385225-S

**Reporter**

1996 Conn. Super. LEXIS 3157 \*; 1996 WL 704361

345 Benham Avenue, Inc. v. Madison Square Associates, L.P. et al.

**Notice:** [\*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

**Disposition:** The motion to strike is granted as to first, second, third, fourth, and fifth special defenses, and the motion to strike is granted as to the first and second counterclaims as well.

### **Core Terms**

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mortgage, special defense, counterclaim, foreclosure, motion to strike, antitrust, judicial district, alleges, defenses, factors, foreclosure action, anti trust law, equitable, Shop, antitrust violation, violates, move to strike, premises, cause of action, unclean hands, unenforceable, predecessor, grocery, courts

### **LexisNexis® Headnotes**

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Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Strike > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

#### **HN1[**

The function of a motion to strike is to test the legal sufficiency of a pleading. A plaintiff can move to strike a special defense or counterclaim. Conn. Gen. Prac. Book 152(5). A motion to strike admits all facts well pleaded. It does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings. When ruling on a motion to strike, a court must construe the facts most favorably to the nonmoving party. In ruling on a motion to strike the trial court is limited to considering the grounds specified in the motion.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

#### **HN2[**

Conn. Gen. Prac. Book 164 defines the parameters of a valid special defense and provides in part that no facts may be proved under either a general or special denial except such as show that a plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that he has no cause of action, must be specially alleged. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. A cause of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

Real Property Law > Financing > Foreclosures > Deficiency Judgments

Real Property Law > Financing > Foreclosures > General Overview

#### **HN3** [] **Defenses, Demurrsers & Objections, Affirmative Defenses**

Conn. Gen. Stat. § 49-1 provides in part that the foreclosure of a mortgage is a bar to any further action upon the mortgage debt, note or obligation against the person or persons who are liable for the payment thereof who are made parties to the foreclosure. Conn. Gen. Stat. § 49-28 provides in part that all other proceedings for the collection of a debt shall be stayed during the pendency of the foreclosure suit, and, if a deficiency judgment is finally rendered therein, the other proceedings shall forthwith abate.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Contracts Law > Defenses > Usury

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

Contracts Law > ... > Discharge & Payment > Defenses > Coercion & Duress

Contracts Law > ... > Discharge & Payment > Defenses > Failure of Consideration

Real Property Law > Financing > Mortgages & Other Security Instruments > Deed in Lieu of Foreclosure

Real Property Law > Financing > Foreclosures > Defenses

Real Property Law > Financing > Mortgages & Other Security Instruments > Usury

#### **HN4** [] **Types of Contracts, Covenants**

Because a mortgage foreclosure action is an equitable proceeding, a trial court may consider all relevant circumstances to ensure that complete justice is done. A trial court in foreclosure proceedings has discretion, on equitable considerations and principles, to withhold foreclosure or to reduce the amount of the stated indebtedness. Trial courts permit defendants to raise several additional equitable defenses in foreclosure actions, including equitable estoppel, Connecticut Unfair Trade Practices Act, laches, breach of the implied covenant of good faith and fair dealing, tender of deed in lieu of foreclosure, refusal to agree to a favorable sale to a third party, usury, unconscionability of interest rate, duress, coercion, material alteration, and lack of consideration. Special defenses to foreclosure are proper only when they attack the making, validity, or enforcement of the note or mortgage, rather

than some act or procedure of the mortgagee. Courts are not receptive to foreclosure defendants who assert defenses and counterclaims based on factors outside of the note or mortgage.

Business & Corporate Compliance > ... > Perfections & Priorities > Liens > Mechanics' Liens

Contracts Law > ... > Discharge & Payment > Defenses > General Overview

Real Property Law > Financing > Foreclosures > Defenses

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Real Property Law > Financing > Foreclosures > General Overview

#### **HN5** **Liens, Mechanics' Liens**

In a foreclosure action, the defense of unclean hands is properly stricken where the allegations of unclean hands do not address the making, validity, or enforcement of a note or mortgage, or where the allegations address a behavior of the mortgagee, or factors outside of the note or mortgage. Furthermore, the defense of unclean hands to a mortgage foreclosure is generally disallowed in Connecticut.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Real Property Law > Financing > Foreclosures > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

#### **HN6** **Trade Practices & Unfair Competition, State Regulation**

The Connecticut Unfair Trade Practices Act is a valid defense in a foreclosure action.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

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

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

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

#### **HN7** **Regulated Practices, Trade Practices & Unfair Competition**

When construing Connecticut antitrust laws, Connecticut courts must look to interpretations by federal courts of the federal antitrust laws. [Conn. Gen. Stat. § 35-44b](#). A fundamental requirement of a viable antitrust complaint is the allegation of facts that a plaintiff has suffered antitrust injury, and thus has standing to assert an antitrust claim. An antitrust injury is an injury of the type the anti-trust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of

the anti-competitive acts made possible by the violation. It should be the type of loss that the claimed violations would be likely to cause.

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Civil Procedure > ... > Justiciability > Standing > General Overview](#)

[Real Property Law > Landlord & Tenant > Lease Agreements > Standing](#)

#### **HN8[] Private Actions, Standing**

An owner and lessor of commercial property that is leased to a grocery store does not have standing to charge a competing grocery store with violating the antitrust laws because it is not a consumer, customer, competitor, or participant in the relevant market or otherwise inextricably intertwined with any such entity. Its injury is not sufficiently linked to the pro-competitive policy of the antitrust laws.

[Civil Procedure > ... > Pleadings > Crossclaims > General Overview](#)

[Civil Procedure > ... > Pleadings > Counterclaims > General Overview](#)

#### **HN9[] Pleadings, Crossclaims**

Conn. Gen. Prac. Book 116 provides in part, in any action for legal or relief, any defendant may file counterclaims against any plaintiff provided that each such counterclaim arises out of the transaction that is the subject of the plaintiff's complaint. A counterclaim is a cause of action existing in favor of the defendant against the plaintiff and on which the defendant might have secured affirmative relief had he sued the plaintiff in a separate action. A counterclaim must arise out of the transaction which is the subject of the plaintiff's complaint. When determining whether claims made in the complaint and the counterclaim arise out of the same transaction, a court must consider whether a substantial duplication of effort would result if each claim was tried separately.

[Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview](#)

[Civil Procedure > ... > Pleadings > Crossclaims > General Overview](#)

[Civil Procedure > ... > Pleadings > Counterclaims > General Overview](#)

#### **HN10[] Regulated Practices, Trade Practices & Unfair Competition**

The Connecticut Unfair Trade Practices Act (CUTPA) is the basis for a claim for damages and so can be properly pleaded as a counterclaim. However, the CUTPA-based counterclaim must still arise from the same transaction that gives rise to the complaint.

**Judges:** Donald W. Celotto, Judge Trial Referee.

**Opinion by:** Donald W. Celotto

## **Opinion**

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## Memorandum of Decision

On June 6, 1996, the plaintiff, 345 Benham Avenue, Inc., (Benham), filed a two-count amended complaint against the defendants, Madison Square Associates Limited Partnership (Madison); Amity Road Shopping Center, Inc.; Robert Fers, Incorporated, a/k/a The Robert S. Fers Incorporated; Pad Two Associates, Limited Partnership; Connecticut Bank of Commerce; Superior Products Distributors, Inc.; Town of Woodbridge; Ballou Painting and Restoration, Inc. a/k/a Ballou Painting & Restoration, Inc.; Amity Card and Gift, LLC; A. Secondino & Son, Inc.; and, Charles Farricelli; seeking a judgment of strict foreclosure of certain premises. The defendants did not object to the plaintiff's request for leave to amend the complaint, therefore, [\*2] the amended complaint is the operative complaint.<sup>1</sup> According to the facts alleged in the complaint, by a mortgage note dated December 21, 1993, Madison promised to pay People's Bank, or other holder of the note, the principal sum of \$ 22,000,000.00 with interest thereon as provided in the note. To secure the note, Madison executed a mortgage deed and security agreement, dated December 21, 1993, whereby it mortgaged to People's Bank a parcel of land known as Amity Shopping Center. As further security for the note, Madison executed a conditional assignment of leases and rentals in favor of People's Bank, dated December 21, 1993. The mortgage and assignment of leases were recorded in the appropriate municipal land records. On February 23, 1996, the note, mortgage and assignment of leases and rentals were assigned to the plaintiff.

Count one alleges that Madison defaulted on the note and mortgage and, despite Benham's demand for payment, there is now due [\*3] and owing the principal sum of \$ 20,748,291.73, plus interest and late charges.<sup>2</sup>

Count two incorporates the allegations of count one relating to the execution of the note and mortgage and alleges that, as additional security for the note, Madison granted to People's Bank a security interest in all personal property used, owned and operated in connection with the mortgaged premises. Count two further alleges that Madison failed and neglected to pay periodic installments due under the note and that Benham has exercised its option to declare the entire principal balance and accrued interest due and payable in full.

Benham seeks a judgment of strict foreclosure of the mortgage or foreclosure by sale; immediate possession of the mortgaged premises; appointment of a receiver to collect rents [\*4] and profits accruing from the mortgaged premises; the costs and expenses of this action, including reasonable attorneys fees; foreclosure of the security interest; and any other equitable relief that may pertain.

On July 12, 1996, Madison filed an answer, five special defenses and a three-count counterclaim.

On July 26, 1996, Benham filed a motion to strike and a memorandum in support thereof. Benham moves to strike Madison's first, second, third, fourth, and fifth special defenses, and Madison's first and second counterclaims. On August 7, 1996, Madison filed a memorandum in opposition to Benham's motion to strike. This motion to strike is presently before the court.

**HN1**[] The function of a motion to strike "is to test the legal sufficiency of a pleading." (Internal quotation marks omitted.) *RK Constructors, Inc. v. Fusco Corp.*, 231 Conn. 381, 384, 650 A.2d 153 (1994); Practice Book 152. "[A] plaintiff can [move to strike] a special defense or counterclaim." *Nowak v. Nowak*, 175 Conn. 112, 116, 394 A.2d 716 (1978); Practice Book 152(5).

A motion to strike "admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions [\*5] stated in the pleadings." (Emphasis omitted.) *Mingachos v. CBS, Inc.*, 196 Conn. 91, 108, 491 A.2d 368 (1985). When ruling on a motion to strike, the court must construe the facts most favorably to the nonmoving party. *Novametrix Medical Systems, Inc. v. The BOC Group, Inc.*, 224 Conn. 210, 215, 618 A.2d 25 (1992). "In

<sup>1</sup> The original complaint was filed on March 28, 1996.

<sup>2</sup> Count one also identifies the interests of various entities, including the named defendants, whose interests in the mortgaged premises are either prior in right or subsequent in right to the plaintiff's interests.

ruling on a motion to strike the trial court is limited to considering the grounds specified in the motion." [Meredith v. Police Commission, 182 Conn. 138, 140, 438 A.2d 27 \(1980\).](#)

#### A. Defendant's First Special Defense

The first special defense claims that "the second count of the plaintiff's complaint is stayed by operation of law, and in particular, by [Sections 49-1](#) and [49-28](#) of the Connecticut General Statutes as made and provided." Benham moves to strike Madison's first special defense on the ground that the alleged statutory stay is not a proper defense under Practice Book 164. Madison responds that the first special defense is proper under Practice Book 164.

**HN2**[] Practice Book 164 defines the parameters of a valid special defense and provides in pertinent part that "no facts may be proved under either a general or special denial except such as [\*6] show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that he has no cause of action, must be specially alleged . . ." "The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." [Grant v. Bassman, 221 Conn. 465, 472-73, 604 A.2d 814 \(1992\)](#). "A cause of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief . . ." [Guriacci v. Mayer, 218 Conn. 531, 546-47, 590 A.2d 914 \(1991\)](#).

**HN3**[] [General Statutes 49-1](#) provides in pertinent part that "the foreclosure of a mortgage is a bar to any further action upon the mortgage debt, note or obligation against the person or persons who are liable for the payment thereof who are made parties to the foreclosure . . ." [General Statutes 49-28](#) provides in pertinent part that "all other proceedings for the collection of a debt shall be stayed during the pendency of the foreclosure suit, and, if a deficiency judgment is finally rendered therein, the [\*7] other proceedings shall forthwith abate."

The second special defense asserts that count two is stayed by operation of law, it does not plead facts which show that the plaintiff has no cause of action. Therefore, Benham's motion to strike is granted as to Madison's first special defense.

#### B. Defendant's Second, Third, Fourth, and Fifth Special Defenses

Benham moves to strike the second, third, fourth and fifth special defenses on two grounds. First, Benham claims that these special defenses are legally insufficient because they are not related to the making, validity, or enforcement of the note or mortgage, and they rely entirely on factors outside the note and mortgage. Madison responds that the second, third, fourth, and fifth special defenses do attack the making, validity, and enforcement of the note or mortgage, and therefore, are valid special defenses. In addition, Benham moves to strike on the ground that Madison lacks standing to assert these defenses.

#### 1. Proper Foreclosure Defenses

"At common law, the only defenses to an action of [foreclosure] . . . would have been payment, discharge, release or satisfaction; . . . or, if there had never been a valid lien." [\*8] (Internal citation omitted.) [Petterson v. Weinstock, 106 Conn. 436, 441, 138 A. 433 \(1927\)](#). In *Petterson v. Weinstock*, the Supreme Court recognized accident, mistake, and fraud as additional defenses available in a foreclosure action and noted that the recognition of these additional defenses to foreclosure represented "a fine example of the triumph of equitable principles over the arbitrary and unjust dogmas of the common law." [Petterson v. Weinstock, supra, 106 Conn. 442](#). **HN4**[] "Because a mortgage foreclosure action is an equitable proceeding, the trial court may consider all relevant circumstances to ensure that complete justice is done." [Reynolds v. Ramos, 188 Conn. 316, 320, 449 A.2d 182 \(1982\)](#). "[A] trial court in foreclosure proceedings has discretion, on equitable considerations and principles, to withhold foreclosure or to reduce the amount of the stated indebtedness." [Hamm v. Taylor, 180 Conn. 491, 497, 429 A.2d 946 \(1980\)](#).

Accordingly, trial courts have permitted defendants to raise several additional equitable defenses in foreclosure actions, including "equitable estoppel, CUTPA, laches, breach of the implied covenant of good faith and fair [\*9] dealing, tender of deed in lieu of foreclosure, refusal to agree to a favorable sale to a third party, usury, unconscionability of interest rate, duress, coercion, material alteration, and lack of consideration." *Teachers Insurance v. Broad and Hanrahan*, Superior Court, judicial district of [Stamford-Norwalk at Stamford, 1995 Conn. Super. LEXIS 1896](#), Docket No. 132304 (June 28, 1995) (Hickey, J.); *Berkeley Federal Bank & Trust v. Phillips*, Superior Court, judicial district of [Fairfield at Bridgeport, 1996 Conn. Super. LEXIS 176](#), Docket No. 317957 (January 23, 1996) (West, J.).

Nonetheless, there are limits as to which equitable defenses and counterclaims may be raised in a foreclosure action. Special defenses to foreclosure "are proper only when they attack the making, validity, or enforcement of the note or mortgage, rather than some act or procedure of the mortgagee." *National Mortgage Co. v. McMahon*, Superior Court, judicial district of [New Haven at New Haven, 1994 Conn. Super. LEXIS 377](#), Docket No. 349246 (February 18, 1994) (Celotto, J.); *Berkeley Federal Bank & Trust v. Phillips*, *supra*. "Courts have not been receptive to foreclosure defendants who have [\*10] asserted defenses and counterclaims based on factors outside of the note or mortgage." *Shoreline Bank & Trust v. Leninski*, Superior Court, judicial district of [New Haven at New Haven, 1993 Conn. Super. LEXIS 670](#), Docket No. 335561, 8 CONN. L. RPTR. 522 (March 19, 1993) (Celotto, J.). "The rationale behind this is that counterclaims and special defenses which are not limited to the making, validity or enforcement of the note or mortgage fail to assert any connection with the subject matter of the foreclosure action and as such do not arise out of the same transaction as the foreclosure action." *National Mortgage v. McMahon*, *supra*; *Dime Savings Bank v. Albir*, Superior Court, judicial district of [Stamford-Norwalk, 1995 Conn. Super. LEXIS 369](#), Docket No. 132582 (February 7, 1995) (D'Andrea, J.).

#### a. Defendant's Second Special Defense

The second special defense claims that "the transaction referenced in the plaintiff's complaint is incidental to the transaction which violates the antitrust provision of Connecticut law, as made and provided, and is unenforceable."

The second special defense asserts that the note and mortgage are unenforceable because they are [\*11] incidental to a transaction which violates Connecticut **antitrust law**. Essentially, Madison is claiming that the note and mortgage are unenforceable because they are related to a separate agreement which allegedly violates Connecticut **antitrust law**. Benham counters that this separate agreement, to which the note and mortgage are allegedly incidental, is a certain "Restriction Agreement," which was entered into on May 13, 1992 by Madison and the Stop & Shop Companies. (Memorandum of Law in Support of Plaintiff's Motion to Strike, p. 6.)

In *Bristol Savings Bank v. Miller*, Superior Court, judicial district of [Hartford-New Britain at Hartford, 1992 Conn. Super. LEXIS 2981](#), Docket No. 512558 (October 19, 1992) (Aurigemma, J.), Miller, a foreclosure defendant, filed two special defenses based upon interrelated loans and business dealings between the parties. The court struck Miller's special defenses because they did "not address the making, validity or enforcement of the notes and mortgages which are the subject of the complaint. Rather they allege the nonperformance, breach, and misrepresentation with respect to agreements and dealings which are separate from the notes and mortgages [\*12] referred to in the complaint." *Id.*

The motion to strike is granted as to the second special defense because the second special defense does not attack the making, validity, or enforcement of the note or mortgage, and because it is based on an agreement separate from, and outside of the note or mortgage. See *Bristol Savings Bank v. Miller*, *supra*; *National Mortgage Co. v. McMahon*, *supra*, ("special defenses to foreclosure are proper only when they attack the making, validity or enforcement of the note or mortgage, rather than some act or procedure of the mortgagee."); *Shoreline Bank & Trust v. Leninski*, *supra*, ("courts have not been receptive to foreclosure defendants who have asserted defenses and counterclaims based on factors outside of the note or mortgage.").

#### b. Defendant's Third Special Defense

The third special defense states that "the plaintiff is a wholly-owned subsidiary of People's Bank, which is the plaintiff's predecessor in regard to the instruments referenced in its complaint. The plaintiff's predecessor, People's Bank, knowingly entered into the transactions referenced in its complaint, which are in furtherance of a restraint of trade [\*13] in favor of the Stop & Shop Companies, and accordingly are unenforceable and against the antitrust provisions of the Connecticut General Statutes as made and provided."

The third special defense claims that the note and mortgage are unenforceable because the plaintiff's predecessor participated in separate activities that violate Connecticut antitrust law. The motion to strike the third special defense is granted for the same reasons set forth with respect to the second special defense.

#### c. Defendant's Fourth Special Defense

The fourth special defense states that "for the reasons set forth in the Second and Third Special Defenses, the plaintiff and its predecessor lack clean hands in which to maintain said foreclosure."

This court has held that HN5 the defense of unclean hands is properly stricken where the allegations of unclean hands do not address the making, validity or enforcement of the note or mortgage, or where the allegations address a behavior of the mortgagee, or factors outside of the note or mortgage. *National Mortgage Co. v. McMahon*, *supra*; see also *Great Country Bank v. Kiely*, Superior Court, judicial district of Ansonia-Milford at Milford, 1995 [\*141] Conn. Super. LEXIS 2921, Docket No. 047460 (October 19, 1995) (Curran, J.). Furthermore, "the defense of unclean hands to a mortgage foreclosure has generally been disallowed in this state." Mechanics & Farmers Savings Bank, FSB v. Delco Development Co., 43 Conn. Supp. 408, 420, 656 A.2d 1075, aff'd, 232 Conn. 594, 656 A.2d 1034 (1995); *Berkeley Federal Bank & Trust v. Phillips*, Superior Court, judicial district of Fairfield at Bridgeport, 1996 Conn. Super. LEXIS 176, Docket No. 317957 (January 23, 1996) (West, J.).

In the present case, the allegations of unclean hands are based on the alleged antitrust violations. These alleged violations are separate from, and outside of, the note and mortgage. The defense of unclean hands does not address the making, validity or enforcement of the note or mortgage itself, instead, it relies on factors outside of the note or mortgage. Therefore, the motion to strike the fourth special defense is granted. See *National Mortgage Co. v. McMahon*, *supra*; *Great Country Bank v. Kiely*, *supra*.

#### d. Defendant's Fifth Special Defense

The fifth special defense states that "for the reasons set forth in the Second and Third Special [\*15] Defenses, the plaintiff and its predecessor are guilty of violating the Connecticut Unfair Trade Practices Act ('CUTPA') C.G.S. 42-110a, et seq., as made and provided."

HN6 CUTPA is a valid defense in a foreclosure action. *First Federal Savings and Loan, Rochester v. Nielsen*, Superior Court, judicial district of New Haven at New Haven, 1992 Conn. Super. LEXIS 2721, Docket No. 326502 (September 16, 1992) (Celotto, J.); *Hans L. Levi, Inc. v. Kovacs*, Superior Court, judicial district of Litchfield, 1991 Conn. Super. LEXIS 2569, Docket No. 056101, 5 CONN. L. RPTR. 260 (November 4, 1991) (Pickett, J.). However, the alleged CUTPA violation must still go to the making, validity or enforcement of the note or mortgage. *Berkeley Federal Bank & Trust v. Rotko*, Superior Court, judicial district of Fairfield at Bridgeport, 1996 Conn. Super. LEXIS 249, Docket No. 318648 (January 25, 1996) (West, J.).

In the present case, Madison's CUTPA defense arises out of Benham's alleged antitrust violations. The fifth special defense does not address the making, validity, or enforcement of the note or mortgage; rather, it is premised on factors outside of the note and mortgage. Accordingly, [\*16] the motion to strike fifth special defense is granted.

## 2. Standing

Benham's second ground for moving to strike Madison's second, third, fourth and fifth special defenses is that Madison lacks standing to assert these antitrust based special defenses. In the present case, however, this court need not determine whether Madison has standing to assert its antitrust based special defenses and counterclaims because Madison's second, third, fourth, and fifth special defenses and first and second counterclaims fail because they do not attack the making, validity, or enforcement of the note or mortgage.

**HN7** When construing Connecticut antitrust laws, Connecticut courts must look to interpretations by federal courts of the federal antitrust laws. *General Statutes 35-44b; Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218, 226-27, 413 A.2d 1226 (1979)*. "A fundamental requirement of a viable antitrust complaint is the allegation of facts that the plaintiff has suffered antitrust injury, and thus has standing to assert an antitrust claim." (Internal quotation marks omitted.) *Waterford Parkade, Inc. v. Picardi*, Superior Court, judicial district of *Hartford-New Britain at Hartford, [\*17] 1996 Conn. Super. LEXIS 679*, Docket No. 539883 (March 11, 1996) (Aurigemma, J.). An antitrust injury is an "injury of the type the anti-trust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of the anti-competitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535-45, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*, the Supreme Court expressly identified the factors to be used in determining whether a party has standing to raise federal antitrust claims. These factors include "(1) the causal connection between the antitrust violation and the 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; [\*18] (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 violations. *Southaven Land Co., Inc. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983)*, citing *Associated General Contractors, supra*. In *Blue Shield of Virginia v. McCready, 457 U.S. 465, 483-84, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*, the Supreme Court held that "although [the plaintiff] was not a competitor of the conspirators, the injury [plaintiff] suffered was inextricably intertwined with the conspirators sought to inflict on [the relevant] market."

In *Waterford Parkade, Inc. v. Picardi, supra*, Judge Aurigemma applied the factors set forth in *Southaven* and *McCready*, and after an extensive review of the pertinent federal case law, held that a land developer did not have antitrust standing to sue a supermarket for alleged antitrust violations. In *Southaven Land Co., Inc. v. Malone & Hyde, Inc., supra, 715 F.2d 1079*, the court held that **HN8** an owner and lessor of [\*19] commercial property (Southhaven) leased to a grocery store did not have standing to charge a competing grocery store with violating the antitrust laws. The court held that Southaven did not have antitrust standing because "[it] is not a consumer, customer, competitor or participant in the relevant market or otherwise inextricably intertwined with any such entity. Its injury is not sufficiently linked to the pro-competitive policy of the antitrust laws." *Id. 1087*. In *Rosenberg v. Cleary, Gottlieb, Steen and Hamilton, 598 F. Supp. 642 (1984)*, the court held that a land developer (Cherry Pike) did not have antitrust standing despite its claim that the relevant market was not the grocery market, but instead the construction market, because Cherry Pike's alleged injuries as a builder are "no more than a tangential by-product of an antitrust violation in the grocery market." (Internal quotation marks omitted.) *Id. 645*.

Conversely, in *Serfecz v. Jewel Food Stores, 67 F.3d 591 (7th Cir. 1995)*, the court held that a shopping mall owner (Serfecz) did have standing to bring an antitrust action against a grocery store chain because Serfecz had "alleged that the defendants [\*20] had conspired to restrain trade and monopolize sales in the retail shopping center market. Here, the district court quite correctly determined that the plaintiffs, who are direct participants in this market, alleged an injury that is sufficiently direct to give them standing" *Id. 599*.

### C. The Defendant's First and Second Counterclaims

Benham moves to strike Madison's counterclaims on two grounds. First, Benham claims that Madison lacks standing to assert these antitrust based counterclaims.<sup>3</sup> Second, Benham claims that these antitrust based counterclaims do not arise out of the transaction which is the subject of Madison's action.

**HN9** Practice Book 116 provides in pertinent part, "in any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each [\*21] such counterclaim . . . arises out of the transaction . . . which is the subject of the plaintiff's complaint . . ." "[A] counterclaim is a cause of action existing in favor of the defendant against the plaintiff and on which the defendant might have secured affirmative relief had he sued the plaintiff in a separate action." (Citation omitted.) *Wallingford v. Glen Valley Associates, Inc., 190 Conn. 158, 160, 459 A.2d 525 (1983)*. "[A] counterclaim must arise out of the transaction which is the subject of the plaintiff's complaint." *Id.* When determining whether claims made in the complaint and the counterclaim arise out of the same transaction, a court must consider whether a substantial duplication of effort would result if each claim was tried separately. *Bristol Savings Bank v. Miller, supra*; citing *Wallingford v. Glen Valley Associates, Inc., supra*.

#### 1. Defendant's Counterclaim First Count

Count one of the counterclaim alleges that Madison, People's Bank, and Stop & Shop Companies entered into an agreement whereby Stop & Shop sought to limit business competition and that this agreement violated Connecticut antitrust laws. Count one also alleges [\*22] that as a result of this agreement, the note and mortgage are void as against public policy and Madison is entitled to a refund of the money it has paid to People's Bank under the note and mortgage.

Benham's complaint arises out of the December 1993 note and mortgage. The first count of Madison's counterclaim arises out of the alleged May 1992 Restriction Agreement. The first count of the counterclaim alleges antitrust violations on the part of Benham in connection with an agreement which is an entirely separate agreement from the note and mortgage. Accordingly, the motion to strike count one of the counterclaim is granted because it does not arise out of the same transaction that is the subject of Benham's complaint. See *Union Trust v. Hamilton Branford LTD.*, Superior Court, judicial district of *New Haven at New Haven, 1993 Conn. Super. LEXIS 2215*, Docket No. 325651 (August 27, 1993) (Celotto, J.).

#### 2. Defendant's Counterclaim, Second Count

Count two of the counterclaim incorporates the allegations of count one and alleges that Benham has violated the Connecticut Unfair Trade Practices Act by acting in an immoral, oppressive, unethical, and unscrupulous manner, which [\*23] has caused substantial injury to consumers, competitors, and other businessmen.

**HN10** CUTPA "is the basis for a claim for damages and so [is] properly . . . pleaded as a counterclaim." *GE Capital Mortgage v. Klett, supra*. However, the CUTPA-based counterclaim must still arise from the same transaction that gives rise to the complaint. The second count of the counterclaim, like the first count, is premised on a transaction (the Restriction Agreement) which is separate from the transaction (the note and mortgage) which is the basis of Benham's complaint. Accordingly, the motion to strike the second count of the counterclaim is granted because the complaint and counterclaim do not arise out of the same transaction. See *Union Trust v. Hamilton Branford LTD., supra*.

### CONCLUSION

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<sup>3</sup> Because Madison's counterclaims fail on other grounds, the court need not determine whether Madison has standing to assert antitrust violations. For a discussion on standing see pages 13-16.

Based upon the above reasoning, the motion to strike is granted as to first, second, third, fourth, and fifth special defenses, and the motion to strike is granted as to the first and second counterclaims as well.

Donald W. Celotto, J.T.R.

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End of Document

## Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc.

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

November 27, 1996, Decided ; November 27, 1996, FILED

CIVIL ACTION NO. 94-169, CIVIL ACTION NO. 95-124

### **Reporter**

946 F. Supp. 495 \*; 1996 U.S. Dist. LEXIS 18001 \*\*; 1997-1 Trade Cas. (CCH) P71,720

BORG-WARNER PROTECTIVE SERVICES CORP., ET AL, PLAINTIFFS VS. GUARDSMARK, INC., DEFENDANT AND HAROLD I. LLOYD, ET AL, PLAINTIFFS VS. GUARDSMARK, INC., DEFENDANT

**Disposition:** [\*\*1] Guardsmark's motions for summary judgment (doc. # 193 in 94-169 and doc. # 83 in 95-124) granted on plaintiffs' claims under [§ 1](#) of the Sherman Antitrust Act, the analogous section of the Kentucky Consumer Protection Act, and Kentucky common law; Borg-Warner's motion for summary judgment (doc. # 161 in 94-169) denied; The individual plaintiffs' motion for summary judgment (doc. # 57 in 95-124) denied

## **Core Terms**

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covenants, employees, security guard, Antitrust, compete, depo, training, restraint of trade, summary judgment, plaintiffs', conspiracy, injunction, contracts, res judicata, noncompetition, enjoined, clauses, courts, guards

## **LexisNexis® Headnotes**

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Administrative Law > Agency Adjudication > Decisions > Res Judicata

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

### **[HN1](#) [down arrow] Decisions, Res Judicata**

A final, valid determination on the merits is conclusive on the parties and those in privity with them, as to matters that were litigated or should have been litigated, in another action or proceeding involving the same cause of action. Furthermore, a final valid judgment, even if erroneous on either the facts or the law, must be given a binding effect

as res judicata or collateral estoppel, in either a federal or state tribunal. [28 U.S.C.S. § 1738](#) requires that a federal court give the same preclusive effect to the judgment of a state court that would be given in the state in which the judgment was rendered. Only a final judgment is res judicata. Under Tennessee law a judgment is not final and res judicata where an appeal is pending. This is true unless the appeal has been abandoned and is, therefore, considered adjudged. Under the federal rule and the rule of the majority of states, the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel.

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN2\*\*](#) Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

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

## [\*\*HN3\*\*](#) Antitrust & Trade Law, Sherman Act

To state a valid claim for violation of [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#), a plaintiff must allege facts sufficient to establish the following elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN4\*\*](#) Antitrust & Trade Law, Sherman Act

The conspiracy required to state a claim under [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#), is not possible as a matter of law between a corporation and its employees unless those employees have an independent personal stake and stand to benefit from conspiring to restrain trade. It is perfectly plain that an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that [§ 1](#) was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a [§ 1](#) conspiracy.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

## [\*\*HN5\*\*](#) Types of Contracts, Covenants

The Tennessee Supreme Court has adopted a rule of reasonableness with regard to covenants not to compete. Under that rule, Tennessee courts, absent bad faith by the employer, will enforce covenants not to compete to the extent necessary to protect the employer's interests without imposing undue hardship on the employee as long as the public interest is not adversely affected.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

## **HN6** [ **Types of Contracts, Covenants**

In Kentucky an agreement in restraint of trade is reasonable if, on consideration and circumstances of the particular case, the restriction is such only as to afford fair protection to the interests of the covenantee and is not so large as to interfere with the public interests or impose undue hardship on the party restricted.

**Counsel:** Thomas R. Nienaber, Busald Funk Zevely, PSC, Florence, KY. Thomas L. Henderson, McKnight, Hudson, Lewis & Henderson, Memphis, TN, For Plaintiff.

Harry D. Rankin, Greenebaum Doll & McDonald, Covington, KY. David Wade, Martin, Tate, Morrow & Marston, PC, Memphis, TN, For Defendant.

**Judges:** WILLIAM O. BERTELSMAN, CHIEF JUDGE

**Opinion by:** WILLIAM O. BERTELSMAN

## **Opinion**

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### **[\*496] OPINION AND ORDER**

This matter is before the court on cross-motions for summary judgment (docs. # 161 and # 193 in 94-169 and docs. # 57 and # 83 in 95-124). After conducting oral arguments and reviewing supplemental briefs, it is determined that summary judgment should be entered in favor of the defendant on all claims.

## **BACKGROUND**

Guardsmark and Borg-Warner are competitors in the private security guard industry. **[\*\*2]** The parties agree that there are over 13,000 private security guard firms in this country. Guardsmark is the fifth largest of these, and Borg-Warner is even larger than Guardsmark.

Initially, Guardsmark contracted with the Gap to provide security officers for the Erlanger, Kentucky Gap facility. Guardsmark advertised for and recruited security guard applicants to work at the Gap facility. It required the applicants to complete a 28-page application form, undergo either the MMPI or MMPI-2 psychological test, submit to a drug test, undergo a police background check, submit notarized statements regarding periods of unemployment, and provide character references and fingerprints. In addition, Guardsmark personnel checked neighborhood references, personal references and offered polygraph examinations. Clark depo. at 22-24; see also Bisch depo. at 88-91 and 117-118. Each individual plaintiff admits that he underwent these screening procedures. Fillenwarth depo. at 11, 13-16<sup>1</sup>; Fitch depo. at 14, 16, 18-19, 27-28; Lloyd depo. at 18, 23, 25-26.<sup>2</sup> The plaintiffs vaguely contend that these procedures were not followed 100% of the time, but John Clark, of Guardsmark, testified that these **[\*\*3]** procedures were followed as to each of the security guards placed at the Gap. Clark depo.

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<sup>1</sup> Fillenwarth denies that he submitted to a drug screen. Fillenwarth depo. at 16.

<sup>2</sup> Lloyd did not recall whether he took a drug test. Lloyd depo. at 27.

at 22-23. The testimony of the Gap security supervisor, Richard Bisch, supports Clark's statements. Bisch depo. at 89, 94, 116-118.

In addition to recruiting and placing the security guards at the Gap facility, Guardsmark assisted in training each security guard recruit. Guardsmark required each security guard to view videotapes concerning fire safety and other security issues and to take tests regarding the topics covered in the videotapes. Sisson aff. at 3; Clark depo. at 22. Each plaintiff admits that he received this generalized training. Fillenwarth depo. at 18; Fitch depo. at 18-19; Lloyd depo. at 27.

Also, each security guard placed at the Gap underwent an 80-hour on-the-job training program. Bisch depo. at 104-113. This 80-hour specialized training program [\*\*4] consisted [\*\*497] of receiving training on each post at the Gap facility with either a Gap security supervisor or Guardsmark's on-site training officer, Nick Bosse. Sisson aff. at 3; Sheppard depo. at 83-84. It is undisputed that Guardsmark did not charge the Gap for the first two weeks that a new security guard was placed at the Gap so that the new guard could receive this on-site training.

Guardsmark requires each of its employees to enter into a covenant not to compete that states:

Employee hereby agrees that following his (her) termination of employment with GUARDSMARK, whether voluntary or involuntary, for a period of one year thereafter he (she) will not perform or hire others to perform any security services at the site, place or location where he (she) performed security services within the immediate preceding twelve (12) months of his (her) employment with GUARDSMARK.

The contract also provides that Tennessee law governs the interpretation of the contract. Guardsmark uses these form contracts with all of its security guards nationwide.

Ultimately, Borg-Warner obtained the Gap contract from Guardsmark. Consistent with its practice, Borg-Warner sought to hire the Guardsmark [\*\*5] security guards already working at the Gap and promised the guards that it would represent them in the event that Guardsmark attempted to enforce its non-compete clauses. This is a relatively common practice in the security guard industry.

As is its practice, Guardsmark enforced its covenants not to compete. However, Guardsmark also offered each of its Gap security guards employment at another facility.

On May 5, 1994, Guardsmark filed a tort claim against Borg-Warner in the Chancery Court of Shelby County, Tennessee for intentional interference with contractual relations. Guardsmark claimed that Borg-Warner intended to cause Guardsmark employees to breach their contracts with security guards in Seattle, Washington and Birmingham, Alabama.

Shortly thereafter, Borg-Warner filed an action in an Alabama state court seeking to resolve the issues at stake in the Tennessee chancery court. On August 29, 1994, Tennessee Chancellor Neal Small issued a restraining order enjoining Borg-Warner from "taking any action to interfere with Guardsmark's restrictive covenants with its past, present or future employees and from making misrepresentations regarding Guardsmark and its restrictive covenants." [\*\*6] The order also enjoined Borg-Warner from initiating, encouraging or assisting in litigation to challenge Guardsmark's restrictive covenants with its employees.

On September 21, 1994, Guardsmark filed a verified petition to hold Borg-Warner in contempt in Shelby County, Tennessee. Guardsmark based its contempt motion on statements allegedly made to a Guardsmark security guard formerly assigned to the Gap facility in Erlanger, Kentucky. While the contempt motion was pending, Borg-Warner filed this case.

Borg-Warner's initial complaint listed Borg-Warner as the sole plaintiff and included Chancellor Small and the Shelby County Chancery Court as defendants. The complaint alleged claims under the [First Amendment](#), the [Supremacy Clause](#), the [Full Faith and Credit Clause](#), and the Anti-Injunction Act ([28 U.S.C. § 1738](#)), and sought only injunctive relief. See doc. 1. In addition to the complaint, Borg-Warner sought a preliminary injunction enjoining Chancellor Small and Guardsmark from enforcing Chancellor Small's injunctions and restraining orders. Doc. # 2 at 1.

Concluding that this court lacks personal jurisdiction over Chancellor Small, the court denied Borg-Warner's motion for a [\*\*7] preliminary injunction. Since that time, Borg-Warner has voluntarily dismissed its claims against Chancellor Small for lack of personal jurisdiction.

Borg-Warner later filed a second amended complaint, adding a claim under [42 U.S.C. § 1983](#), antitrust claims and supplemental state law claims against Guardsmark. In addition, the second amended complaint added [\*\*498] 100 unnamed plaintiffs that formerly worked for Guardsmark at the Gap.

Ultimately, the court resolved all of Borg-Warner's claims against Guardsmark except its federal and state antitrust claims and its claims under Kentucky common law. In addition, the court dismissed the claims alleged by the 100 "John Doe" plaintiffs. Approximately eleven months after Borg-Warner filed its initial complaint, three former Guardsmark security guards filed a similar action, alleging claims under the Sherman Antitrust Act, the analogous Kentucky Consumer Protection Act, and Kentucky common law.

All plaintiffs have voluntarily dismissed their claims under [§ 2](#) of the Sherman Antitrust Act and the analogous section of the Kentucky Consumer Protection Act. This matter is now before the court on cross-motions for summary judgment on the remaining [\*\*8] claims.

## **PLAINTIFFS' CLAIMS ARE NOT BARRED BY RES JUDICATA**

Guardsmark first contends that plaintiffs' claims are barred by res judicata. The Shelby County, Tennessee Chancery Court previously concluded that Guardsmark's covenants not to compete are valid under both Tennessee and Kentucky law. According to Guardsmark, Chancellor Small's decision precludes the plaintiffs from again challenging the validity of those covenants under Kentucky law and [§ 1](#) of the Sherman Antitrust Act.

**[HN1](#)** "A final, valid determination on the merits is conclusive on the parties and those in privity with them, as to matters that were litigated or should have been litigated, in another action or proceeding involving the same cause of action." 1B Moore's *Federal Practice* § 0.405[3], at III-15 (2nd ed. 1995). Furthermore, "a final valid judgment, even if erroneous on either the facts or the law, must be given a binding effect as res judicata or collateral estoppel, in either a federal or state tribunal." *Id.* at § 0.405[4.-1], p. III-23.

Twenty-eight U.S.C. [§ 1738](#) requires that a federal court give the same preclusive effect to the judgment of a state court that would be given in the state [\*\*9] in which the judgment was rendered. [Whitfield v. City of Knoxville, 756 F.2d 455 \(6th Cir. 1985\)](#). Therefore, this court must look to Tennessee law to determine whether Chancellor Small's judgment should be given preclusive effect.

"Only a final judgment is res judicata." 1B Moore's *Federal Practice* § 0.409[1.-1], at III-123. Under Tennessee law, "a judgment is not final and res judicata where an appeal is pending." [McBurney v. Aldrich, 816 S.W.2d 30, 34 \(Tenn. Ct. App. 1991\)](#).<sup>3</sup> This is true unless the appeal has been abandoned and is, therefore, considered adjudged. [Smith v. Metropolitan Development Housing Agency, 857 F. Supp. 597 \(M.D. Tenn. 1994\)](#).

In this [\*\*10] case, Borg-Warner appealed the Tennessee Chancellor's decision on February 16, 1996. There is no evidence that this appeal has been abandoned. Therefore, Chancellor Small's decision that Guardsmark's covenant not to compete is valid under Kentucky law is not a final judgment. Accordingly, res judicata principles do not apply to that judgment, and this court should independently evaluate all of plaintiffs' claims.

## **PLAINTIFFS HAVE FAILED TO ESTABLISH THE CONSPIRACY NECESSARY TO SUPPORT A [§ 1](#) CLAIM**

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<sup>3</sup>The rule in Tennessee is the minority rule. Under the federal rule and the rule of the majority of states, "the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel. . ." 1B Moore's *Federal Practice* 40.416[3-2], at III-322, III-323 and fn. 1 (2nd ed. 1995).

**HN2** [↑] Section 1 of the Sherman Antitrust Act provides:

Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

15 U.S.C.A. § 1 (Supp. 1995). **HN3** [↑] To state a valid claim for violation of § 1 of the Sherman Antitrust Act, a plaintiff must allege [\*499] facts sufficient to establish the following elements:

- (1) a contract, combination, or conspiracy;
- (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.

Denny's Marina, Inc. v. Renfro Prod., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993); see also Postal Instant Press v. Jackson, 658 F. Supp. 739 [\*111] (D. Colo. 1987); Middlebrooks v. Eustis, 563 F. Supp. 1060 (M.D. Fla. 1983).

**HN4** [↑] The conspiracy required to state a claim under § 1 of the Sherman Antitrust Act "is not possible as a matter of law between a corporation and its employees unless those employees have an independent personal stake and stand to benefit from conspiring to restrain trade." <sup>4</sup> Caremark Homecare v. New England Critical Care, 700 F. Supp. 1033, 1035 (D. Minn. 1988); see also Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380 (10th Cir. 1985); Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F.2d 910 (8th Cir. 1976); Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974); Irving Scher, Antitrust Adviser § 1.06 (4th ed. 1995); Phillip Areeda, 7 Antitrust Law P 1470, p. 282-284 (1986). Indeed, the Supreme Court, in discussing a related issue, concluded:

It is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 [of the Sherman Antitrust Act] was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, [\*\*12] so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. . . . For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984); see also Guzowski v. Hartman, 969 F.2d 211 (6th Cir. 1991), cert. denied, 506 U.S. 1053, 113 S. Ct. 978, 122 L. Ed. 2d 132 (1993); Potters Medical Center v. City Hospital Ass'n., 800 F.2d 568, 573 (6th Cir. 1986).

[\*\*13] One case applying these principles is nearly identical to the case at bar. In Caremark Homecare, Inc. v. New England Critical Care, Inc., 700 F. Supp. 1033 (D. Minn. 1988), a health care service provider filed suit against certain former employees to enforce a covenant not to compete. The employees counterclaimed that the employer violated §§ 1 and 2 of the Sherman Antitrust Act by "forcing" them to sign covenants not to compete. In dismissing the § 1 claim, the court concluded that the necessary conspiracy was not possible as a matter of law between the corporation and its employees because those employees did not have an independent personal stake in the matter and did not stand to benefit from conspiring to restrain trade. Id. at 1035; see also Marshall v. Miles Laboratories, Inc., 647 F. Supp. 1326 (N.D. Ind. 1986).

In this case, plaintiffs contend that Guardsmark conspired with its own security guard employees to restrain trade in violation of § 1 of the Sherman Act. Guardsmark admittedly required its employees to sign covenants not to compete. The employees signed the agreements because they were required to do so in order to maintain their employment with Guardsmark. [\*14] The employees did not have any independent personal stake and did not

<sup>4</sup> It is unclear whether the Sixth Circuit would even recognize this independent personal stake exception. In Potters Medical Center v. City Hospital Ass'n., 800 F.2d 568, 573 (6th Cir. 1986), the court stated, "Although several courts have recognized the 'independent personal stake' exception to the rule that officers and agents lack capacity to conspire with their corporation, . . . this circuit has never endorsed the exception. In fact, this court has noted the 'rather substantial policy reasons for not adopting such an exception.'" Id. (citations omitted).

stand to benefit from conspiring to restrain trade. Therefore, it is impossible, as a matter of law, for the employees to provide the plurality of actors imperative for a S.1 conspiracy.

Plaintiffs claim, without citation to authority, that the above concepts do not apply in this case because Guardsmark requires its employees to sign the covenants not to compete as a condition precedent to their employment. Therefore, plaintiffs contend, the [\*500] signers of the covenants are not technically employees of Guardsmark at the time they sign the agreements. Plaintiffs' contention is without merit.

The covenant specifically refers to the signers as "employee" and becomes applicable only upon termination from employment with Guardsmark. Although the individuals may technically be applicants rather than employees at the time they sign the covenants, they are not acting as independent economic forces with any reason to restrain trade. Therefore, defendant is entitled to summary judgment on plaintiffs' claim under S.1 of the Sherman Antitrust Act.<sup>5</sup>

#### **[\*\*15] THE COVENANTS ARE VALID UNDER KENTUCKY AND TENNESSEE LAW**

Plaintiffs contend that the covenants must be evaluated under Kentucky law, but the defendant claims that Tennessee law is applicable. However, the court need not make this determination because -- after careful consideration and research -- the court concludes that the covenant at issue is valid regardless of which state's law is applied.

Where, as here, the covenants not to compete are signed by employees who lack a great deal of bargaining power, the enforcement of those covenants presents a conflict between fundamental legal policies. As noted in one recent article:

Every time a noncompetition clause is litigated, the court is forced to grapple with two conflicting policies. The first policy is the freedom to contract, which has been protected by American courts since the early nineteenth century. This doctrine has existed to "encourage individual entrepreneurial activity" and has "been extolled as one of the great boons of modern democratic civilization, as one of the principal causes of prosperity and comfort." In the noncompetition clause setting, strict adherence to this doctrine would result in complete [\*\*16] enforcement of all noncompetition clauses. The second doctrine, "one of the oldest and best established . . . [contract] policies developed by courts," is the doctrine against contractual restraints of trade. This doctrine holds that parties may not make contracts which overly restrict the fundamental right to practice a trade. Noncompetition clauses clearly are restraints on trade. Strict adherence to this doctrine, then, would result in judicial rejection of all noncompetition clauses. Obviously, these two fundamental principles of contract law are in direct conflict. The courts might have resolved this conflict by consistently striking a balance between the two principles.

*A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. Corp. L. 483 (Spring, 1990) (footnotes omitted).

Until the last several decades, courts exhibited great reluctance to enforce such covenants against employees whose services were not unique in some way. This was true unless the employee had access to trade secrets or customer lists or could appropriate customer good will upon leaving his or her employment.

Thus, Walsh observed:

The negative promise not to engage [\*\*17] in like service for another will not be enforced unless the services to be rendered by the defendant are unique in the sense that the services of another person equally qualified cannot be readily secured. Therefore such a contract made by a salesman or by an actor without outstanding

<sup>5</sup> The parties agree that the Kentucky Consumer Protection Act is virtually identical to the Sherman Antitrust Act and has been interpreted as such. Therefore, if the defendant is entitled to summary judgment on the Sherman Antitrust Act claim, it is also entitled to summary judgment on the Kentucky Consumer Protection Act claim.

merit and reputation, will not be enforced in equity. For this reason a contract by an employe [sic] of the usual type not to engage in a similar line of employment with a competitor for a stated time after his employment is ended will not be specifically enforced, as the remedy at law is adequate, though if it appear that he has been entrusted with secrets of the employer's business he may be enjoined from using such secrets in competition with his former employer, either [\*501] in a business of his own or in the employ of any other person.

Walsh, *A Treatise on Equity*, 338 (1930)(footnotes omitted).

Furthermore, it is stated in [42 Am.Jur. 2d, Injunctions § 109](#), at 110:

#### **Character of services to be performed.**

An adult who has bound himself by contract to render special, unique, or extraordinary personal services or acts, or to render services which are intellectual, or peculiar [\*18] and individual in their character, or who has special, unique, or extraordinary qualifications, may be restrained from breaching the negative covenant in his contract of employment not to render services to another. On the other hand, such relief will be denied if the services are ordinary, mechanical, without special merit, and can be readily supplied or obtained from others without much difficulty or expense. The result is that in the case of contracts to render services which require no special skill or qualifications, a breach by an employee will not be enjoined even though the employee has expressly agreed to work for no one else, or to devote all his time to the service of the complainant.

#### **Particular employments.**

The equity courts, in recognition and application of the rules underlying the assertion of their injunctive powers to prevent breaches of restrictive covenants in contracts for services or acts by those possessing special, unique, or extraordinary qualifications, have intervened by injunction to prevent breaches of employment contracts by newspaper writers and reporters; actors and actresses; singers; music teachers; professional athletes, including baseball, [\*19] football, and basketball players, and boxers; acrobats; and various others. But even in the case of singers, actors, or performers, injunction will not issue if the employee is not of such ability and reputation that his place cannot be readily filled.

*Id.* (citations omitted).

Plaintiffs here rely heavily on this line of authority. Cf. [Calhoun v. Everman, 242 S.W.2d 100 \(Ky. 1951\)](#) (lack of mutuality stressed). However, the more modern cases, including those in Kentucky, place more emphasis on the employer's investment in the employee and have evolved an approach balancing the importance of that factor against the hardship to the employee and the public interest.<sup>6</sup>

[\*\*20] Thus, in [Central Adjustment Bureau v. Ingram Assoc. Inc., 622 S.W.2d 681 \(Ky. Ct. App. 1981\)](#), the most recent Kentucky case on this subject, a two-year covenant was enforced against the former employee of a collection agency, whose services were in no way unique. Quoting from [Hammons v. Big Sandy Claims Service, Inc., 567 S.W.2d 313 \(Ky. Ct. App. 1978\)](#), in which a covenant not to compete was enforced against a claims adjuster, the *Central Adjustment* court said:

"It has been held [HN6](#) in Kentucky that an agreement in restraint of trade is reasonable if, on consideration and circumstances of the particular case, the restriction is such only as to afford fair protection to the interests of the covenantee and is not so large as to interfere with the public interests or impose undue hardship on the party restricted." [Ceresia v. Mitchell, Ky., 242 S.W.2d 359 \(1951\)](#).

<sup>6</sup> [HN5](#) The Tennessee Supreme Court has adopted a "rule of reasonableness." Under that rule, Tennessee courts -- absent bad faith by the employer -- will enforce covenants not to compete to the extent necessary to protect the employer's interests without imposing undue hardship on the employee as long as the public interest is not adversely affected. [Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28 \(Tenn. 1984\)](#).

Contrary to appellees' argument, we believe the proposition enunciated in the *Hammons* case supports our decision. CAB's business is highly specialized and competitive, and since clients sign no written contract they are free to change collectors almost overnight. *Thus, covenants not to compete are [\*\*21] about the only protection available to CAB to prevent employees from resigning and attempting to pirate away their clients after CAB has expended considerable time, effort, [\*502] and money in training those employees* in the collection business. Absent the training afforded by CAB, its employees would hardly be in a position to compete. Therefore, we are satisfied that CAB's covenants not to compete are a reasonable restriction affording CAB fair protection for its legitimate business interests.

[Central Adjustment Bureau v. Ingram Assoc. Inc., 622 S.W.2d at 685-86](#) (emphasis added). Indeed, the *Hammons* court stated as a general proposition that, if such covenants are "confined to a reasonable territory," they are enforceable, even if unlimited as to time.

Although the Kentucky Court of Appeals did not use the term in either of the above cases, it put heavy reliance on an employer's right to protect itself from "disintermediation." This is a twenty-dollar word meaning to cut out the middleman.

It is to be noted that the court places no weight on any unique quality of the employees in these cases. Indeed, they were ordinary debt collectors or claims adjusters, probably possessing [\*\*22] similar educational qualifications as the security guards in the case at bar.

Although considerable advocacy was utilized in the effort, plaintiffs here have not rebutted defendant's claim that Guardsmark, as the plaintiff in *Central Adjustment*, spent "considerable, time, effort and money in training" its employees. As set forth above, the guards spent two weeks in on-the-job training becoming familiar with the particularized security requirements of the client's site. It is not disputed that this was at Guardsmark's expense. Also, the guards became familiar with the culture of the client's firm and the client's own security personnel.

All of this made Guardsmark -- like the collection agency and claims adjustment companies in the above cases -- vulnerable to disintermediation. In [Consultants and Designers v. Butler Service Group, 720 F.2d 1553, 1558-59 \(11th Cir. 1983\)](#), the court emphasized that the interest of "the much maligned but time-honored middleman" is a legitimate one that deserves protection against disintermediation. The court observes that the middleman must find a contractual means to protect itself or the employees, clients or competitors will "opportunistically [\*\*23] appropriate" its work product "without paying it the full value of its services." *Id. at 1559*. The discussion of the court is highly persuasive to this court but too lengthy to quote in full. See also [Janice Doty Unlimited, Inc. v. Stoecker, 684 F. Supp. 973 \(N.D. Ill. 1988\)](#).

The legitimate interest of the employer must be balanced against hardship to the employee and the public. [Vencor, Inc. v. Webb, 33 F.3d 840 \(7th Cir. 1994\)](#). The covenant here has been carefully drawn to minimize such hardship, since it is applicable only to the specific client site where the employee worked and for which plaintiff trained him or her. The uncontradicted evidence demonstrated that the security guard positions are low level and the employees can easily find comparable employment elsewhere. Indeed, all the plaintiffs promptly found other employment. Thus, the employees' and public's interests are protected to the extent possible.

Therefore, the court being advised,

**IT IS ORDERED** as follows:

1. Guardsmark's motions for summary judgment (doc. # 193 in 94-169 and doc. # 83 in 95-124) are **granted** on plaintiffs' claims under [§ 1](#) of the Sherman Antitrust Act, the analogous section [\*\*24] of the Kentucky Consumer Protection Act, and Kentucky common law;
2. Borg-Warner's motion for summary judgment (doc. # 161 in 94-169) is **denied**;
3. The individual plaintiffs' motion for summary judgment (doc. # 57 in 95-124) is **denied**; and

946 F. Supp. 495, \*502L<sup>A</sup> 1996 U.S. Dist. LEXIS 18001, \*\*24

4. A separate Judgment shall enter concurrently herewith.

This 27th day of November, 1996.

WILLIAM O. BERTELSMAN, CHIEF JUDGE

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End of Document

## Gaebler v. New Mexico Potash Corp.

Appellate Court of Illinois, First District, Third Division

November 27, 1996, Decided

No. 1-95-2869

**Reporter**

285 Ill. App. 3d 542 \*; 676 N.E.2d 228 \*\*; 1996 Ill. App. LEXIS 898 \*\*\*; 221 Ill. Dec. 707 \*\*\*\*; 1996-2 Trade Cas. (CCH) P71,659

DAVID B. GAEBLER, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. NEW MEXICO POTASH CORPORATION, et al., Defendants-Appellees.

**Subsequent History:** [\*\*\*1] Rehearing Denied January 15, 1997. Released for Publication January 15, 1997.

**Prior History:** Appeal from the Circuit Court of Cook County. Honorable Michael B. Getty, Judge Presiding.

**Disposition:** Judgment affirmed.

## **Core Terms**

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Antitrust, Consumer Fraud Act, cause of action, practices, Sherman Act, potash, price discrimination, class action, trial court, Clayton Act, allegations, purchasers, consumers, indirect, sufficient to state, antitrust claim, circuit court, provisions, Deceptive, patterned, purported, pricing, unfair

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

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

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

### **HN1[] Public Enforcement, State Civil Actions**

The Antitrust Act, [15 U.S.C.S. §§ 1 et seq.](#), provides that no person other than the Attorney General of the State shall be authorized to maintain a class action in any court of the State for indirect purchasers asserting claims under that Act. 740 Ill. Comp. Stat. 10/7-2.

**Counsel:** For David B. Gaebler, APPELLANT: Clinton A. Krislov and Jonathan Nachsin, both of Chicago, Donald P. Alexander and Mark C. Rifkin, both of Haverford, Pennsylvania, Eugene Mikolajczyk and Kevin M. Prongay, both of Pacific Palisades, California, and Marguerite R. Goodman, of Wynnewood, Pennsylvania.

For New Mexico Potash Corporation, APPELLEES: Mitchell D. Raup, Antony S. Burt, and William T. Casey, all of Chicago, Richard J. Favretto, Marc Gary, Kerry Lynn Edwards, and Gary A. Winters, all of Washington, D.C., Stephen A. Marshall and Martin P. Michael, both of New York, N.Y.

**Judges:** PRESIDING JUSTICE TULLY delivered the opinion of the court. CERDA and GALLAGHER, JJ., concur.

**Opinion by:** TULLY

## Opinion

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[\*542] [\*\*\*\*708] [\*\*229] PRESIDING JUSTICE TULLY delivered the opinion of the court:

Plaintiff, David B. Gaebler, individually and on behalf of all others similarly situated, filed this purported class action against New Mexico Potash Corporation and other U.S. and Canadian corporations involved in the potash industry, alleging violations of the Consumer Fraud and Deceptive Business Practices Act (hereinafter the Consumer Fraud Act) ( [815 ILCS 505/1 et seq.](#) (West 1994)). The action purported to represent indirect purchasers of potash.

[\*543] Defendants moved to dismiss the action pursuant to [section 2-615](#) of the Code of Civil Procedure ( [735 ILCS 5/2-615](#) (West 1994)), which the trial court granted. It is from the order dismissing plaintiff's complaint that he now appeals to this court [\*\*\*2] pursuant to [section 6 of article VI of the Illinois Constitution \(Ill. Const. 1970, art. VI, § 6\)](#) and [Supreme Court Rule 301](#) (155 Ill. 2d R. 301).

On appeal, plaintiff in essence argues that the trial court erred in holding that plaintiff's complaint was essentially a claim under the Illinois Antitrust Act (hereinafter the Antitrust Act) ( [740 ILCS 10/1 et seq.](#) (West 1994)) that could not be brought pursuant to the Consumer Fraud Act. We note that the trial court's dismissal of this cause under [section 2-615](#) of the Code of Civil Procedure ( [735 ILCS 5/2-615](#) (West 1994)) is subject to our *de novo* review. [Noyola v. Board of Education, 284 Ill. App. 3d 128, 1996 Ill. App. LEXIS 740, 219 Ill. Dec. 635, 671 N.E.2d 802 \(1996\).](#)

In dismissing plaintiff's action, the trial court ruled that the gist of plaintiff's complaint was an Antitrust Act claim under the guise of a Consumer Fraud Act claim and that as such it was precluded by our supreme court's holding in [Laughlin v. Evanston Hospital, 133 Ill. 2d 374, 550 N.E.2d 986, 140 Ill. Dec. 861 \(1990\)](#). We agree with the circuit court.

In *Laughlin*, the trustees of two union health plans brought a class action on behalf of themselves and similar third-party payors who indemnify [\*\*\*3] or insure patients for the cost of hospital services, against 10 Chicago-area hospitals. The complaint alleged the defendants' pricing practices were illegal price discrimination in violation of the Consumer Fraud Act and the Antitrust Act. The supreme court held that the trustees allegation of price fixing was insufficient to state a cause of action under either the Antitrust Act or the Consumer Fraud Act.

In affirming the circuit court's dismissal of the Antitrust Act count, the *Laughlin* court found that the Antitrust Act was patterned after the landmark Sherman Antitrust Act ([15 U.S.C. § 1 et seq. \(1988\)](#)) alone ( [Laughlin, 133 Ill. 2d at 374](#)) and contains no direct counterpart to the Clayton Act ([15 U.S.C. § 12 et seq. \(1988\)](#)), as amended by the Robinson-Patman Act. The supreme court noted that the Clayton Act, which specifically prohibits, amongst other things, price discrimination, was enacted by Congress because the Sherman Act and other preexisting antitrust statutes did not cover such practices. [Laughlin, 133 Ill. 2d at 386](#). Thus, the supreme court held that in enacting the Antitrust Act the General Assembly's embrace of Federal antitrust law reached only [\*\*\*4] to anticompetitive practices prohibited by the Sherman Act and not to conduct proscribed by the Clayton Act. [Laughlin, 133 Ill. 2d at 386-88](#). Therefore, the court concluded that the trustees did not state a cause of action under the Antitrust Act.

[\*544] The *Laughlin* court then went on to hold that the Trustees' antitrust claims were not actionable under the Consumer Fraud Act and found that:

285 Ill. App. 3d 542, \*544 IL<sup>676</sup> N.E.2d 228, \*\*229 IL<sup>996</sup> Ill. App. LEXIS 898, \*\*\*4 IL<sup>221</sup> Ill. Dec. 707, \*\*\*\*708

"There is no indication that the legislature intended that the Consumer Fraud Act be an additional antitrust mechanism. The language of the Act shows that its reach was to be limited to conduct that defrauds or deceives consumers or others. The title of the Act is consistent with its content. The Consumer Fraud Act states that it was enacted to 'protect consumers and borrowers and businessmen against fraud, unfair methods of competition and unfair or deceptive acts or practices.' (Ill. Rev. Stat. 1987, ch. 121 1/2, par. 261.) Further indication that this is a statute directed against fraud and not one designed to be [\*\*\*709] [\*\*230] an additional antitrust enforcement mechanism is that every one of the specifically prohibited acts set out in the Act describes a situation where a buyer is being harmed [\*\*\*5] by overreaching or fraudulent conduct.

\*\*\*

The legislature in the Act declined to include provisions against price discrimination because the legislature found that the inclusion of such provisions would be undesirable. To construe the Consumer Fraud Act to give a cause of action for discriminatory pricing that the legislature refused to give under the Antitrust Act would be incongruous. Legislation is designed to be consistent. It would be inconsistent to provide that the very conduct which is not sufficient to state a cause of action under the Antitrust Act is sufficient to state a cause of action under the Consumer Fraud Act." [Laughlin, 133 Ill. 2d at 390-91](#).

In the case *sub judice*, we concur with circuit court's description of plaintiff's claims as classic antitrust allegations dressed in Consumer Fraud Act clothing." Our review of both the original complaint and the proffered amended complaint reveals that they repeatedly charge defendants with agreeing and conspiring to "fix," "maintain," or "stabilize" the price of potash. Such allegations are a classic example of price-fixing first outlawed by Congress over 100 years ago under [section 1](#) of the Sherman Act [\*\*\*6] ([U.S. v. Masonite Corporation, 316 U.S. 265, 86 L. Ed. 1461, 62 S. Ct. 1070 \(1942\)](#)), and by definition are covered by the Antitrust Act which "is patterned on the Sherman Act[.]" [Laughlin, 133 Ill. 2d at 382](#). Thus, such allegations, pursuant to *Laughlin*, must be brought under the Antitrust Act and not the Consumer Fraud Act. Therefore, we find plaintiff's complaint failed to state a cause of action under the Consumer Fraud Act. See *Laughlin*, 133 Ill. 2d 388-91.

In addition, we note that as plaintiff's case, a class action brought on behalf of indirect purchasers, is in actuality an antitrust claim [\*545] that can only be brought under the Antitrust Act, it is necessarily precluded by section 7(2) of [HN1](#) the Antitrust Act which provides "that no person other than the Attorney General of this State shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act." [740 ILCS 10/7\(2\)](#) (West 1994).

In light of the foregoing, the judgment of the [\*\*\*7] circuit court of Cook County is affirmed.

Judgment affirmed.

CERDA and GALLAGHER, JJ., concur.



## Brown v. Presbyterian Healthcare Servs.

United States Court of Appeals for the Tenth Circuit

November 29, 1996, Filed

No. 95-2293, No. 96-2013

### **Reporter**

101 F.3d 1324 \*; 1996 U.S. App. LEXIS 30912 \*\*; 1996-2 Trade Cas. (CCH) P71,639

ARLENE M. BROWN, M.D.; FAMILY PRACTICE ASSOCIATES, P.C., Plaintiffs-Appellees, v. PRESBYTERIAN HEALTHCARE SERVICES; VALERIE MILLER; VICKIE WILLIAMS, D.O., Defendants-Appellants, and SIERRA BLANCA MEDICAL ASSOCIATES, P.A.; GARY JACKSON, D.O., Defendants. ARLENE M. BROWN, M.D. FAMILY PRACTICE ASSOCIATES, P.C., Plaintiffs-Appellants, v. PRESBYTERIAN HEALTHCARE SERVICES, VALERIE MILLER, SIERRA BLANCA MEDICAL ASSOCIATES, P.A., VICKIE WILLIAMS, D.O., GARY JACKSON, D.O., Defendants-Appellees.

**Subsequent History:** Certiorari Denied April 14, 1997, Reported at: [1997 U.S. LEXIS 2457](#).

**Prior History:** [\*\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. (D.C. No. CIV-93-719-JP). D.C. Judge JAMES A. PARKER.

**Disposition:** REVERSED in part and AFFIRMED in part.

## **Core Terms**

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district court, damages, obstetrical, punitive damages, matter of law, privileges, peer review, jury award, patient, immune, tortious interference, vacating, databank, revocation, antitrust claim, antitrust, medical staff, award of punitive damages, contract claim, defendants', charts, compensatory damages, defamation claim, Health Care Quality Improvement Act, circumstances, Practitioner, malpractice, merits, treble, sufficient evidence

## **LexisNexis® Headnotes**

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Civil Procedure > Remedies > Damages > Punitive Damages

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

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

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

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

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

Torts > ... > Contracts > Intentional Interference > Remedies

## **HN1** [down arrow] Damages, Punitive Damages

A federal appellate court reviews a district court's order granting judgment as a matter of law de novo, applying the same standard as the district court.

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

Governments > Courts > Authority to Adjudicate

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

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

## **HN2** [down arrow] Summary Judgment, Opposing Materials

The legal standard for granting judgment as a matter of law is identical to the standard for granting summary judgment under Fed. R. Civ. P. 56. When applying this standard, a court is to examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion for summary judgment or judgment as a matter of law. Judgment as a matter of law should be affirmed only if the evidence is insufficient to permit a jury to properly return a verdict in the opposing party's favor.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

## **HN3** [down arrow] Private Actions, Remedies

In an antitrust case litigated under New Mexico law, the lack of certainty that will prevent a recovery is uncertainty as to the fact of damages, not as to the amount. Damages need not be computed with mathematical certainty, and recovery will not be denied where the evidence affords a reasonable basis for estimating plaintiff's loss. In reviewing a jury's award of damages, a court should sustain the award unless it is clearly erroneous or there is no evidence to support the award.

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

Evidence > Inferences & Presumptions > General Overview

## **HN4** [down arrow] Private Actions, Remedies

In an antitrust case, once an injured person establishes his business or transaction would have been profitable, it is not fatal to the recovery of substantial damages that he is unable to prove with definiteness the amount of the profits he would have made or the amount of harm that the defendant has caused. It is only essential that he present such evidence as might reasonably be expected to be available under the circumstances.

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

Civil Procedure > Judgments > Relief From Judgments > General Overview

101 F.3d 1324, \*1324LÁ1996 U.S. App. LEXIS 30912, \*\*1

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Remedies > Damages > Punitive Damages

#### **HN5** Standards of Review, Abuse of Discretion

A district court's [\*Fed. R. Civ. P. 59\(e\)\*](#) order setting aside a punitive damages award is reviewed for an abuse of discretion.

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

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

#### **HN6** Standards of Review, Abuse of Discretion

Under the abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. When an appellate court applies the "abuse of discretion" standard, it defers to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value.

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

#### **HN7** Private Actions, Remedies

See [15 U.S.C.S. § 15\(a\)](#).

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

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Punitive Damages > Measurement of Damages > Judicial Review

Civil Procedure > Remedies > Damages > General Overview

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

#### **HN8** Private Actions, Remedies

It is clearly improper to allow a plaintiff to recover punitive damages along with trebled damages on an antitrust claim. Punitive damages beyond the statutory trebled damages cannot be awarded for an antitrust violation. The enhancement of damages in an antitrust case is the damages trebled.

Civil Procedure > Remedies > Damages > Punitive Damages

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

101 F.3d 1324, \*1324LÁ1996 U.S. App. LEXIS 30912, \*\*1

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Jury Instructions

Torts > ... > Punitive Damages > Measurement of Damages > Judicial Review

## **HN9**[] **Damages, Punitive Damages**

An appellant may not generally complain on appeal of errors he has himself induced or invited.

Civil Procedure > ... > Jury Trials > Verdicts > Special Verdicts

Governments > Courts > Authority to Adjudicate

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

## **HN10**[] **Verdicts, Special Verdicts**

When a jury returns a special verdict in an antitrust case, the trial judge is obligated to apply appropriate legal principles to the facts found by the jury. It is for the court to decide upon the jury's answers what the resulting legal obligation is.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

## **HN11**[] **Relief From Judgments, Altering & Amending Judgments**

In determining whether to grant or deny a [Fed. R. Civ. P. 59\(e\)](#) motion to alter or amend the judgment, a district court is vested with considerable discretion. A district court may grant a motion to alter or amend the judgment where it is necessary to correct manifest errors of law.

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

Criminal Law & Procedure > Trials > Verdicts > Special Verdicts

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

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

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

## **HN12**[] **Jury Trials, Verdicts**

When a district court's decision to vacate the award of punitive damages serves to correct a manifest error of law and does not prejudice the plaintiff, an appellate court cannot say that it has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.

Antitrust & Trade Law > Regulated Industries > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

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

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

### **HN13** [ ] **Antitrust & Trade Law, Regulated Industries**

A federal appellate court reviews the denial of a motion for judgment as a matter of law de novo, applying the same legal standard used by the district court. Judgment as a matter of law should only be granted if the evidence, when viewed in the light most favorable to the party opposing the motion, could not support a verdict in that party's favor.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

### **HN14** [ ] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

Under the Health Care Quality Improvement Act, [42 U.S.C.S. §§ 1111\(a\)\(1\), 11112\(a\)](#), a peer review participant is immune from private damage claims stemming from the peer review action, provided the review action is taken: (1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the adequate-notice-and-hearing requirements.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Evidence > Inferences & Presumptions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

## **HN15** [blue document icon] **Substantial Evidence, Sufficiency of Evidence**

A peer review action is presumed to have met the standards necessary for immunity, pursuant to [42 U.S.C.S. § 11112](#). However, if a plaintiff challenging a peer review action proves, by a preponderance of the evidence, that any one of the requirements was not satisfied, the peer review body is no longer afforded immunity from damages under the Health Care Quality Improvement Act, [42 U.S.C.S. § 11112\(a\)](#). Courts apply an objective standard in determining whether a peer review action is reasonable under [§ 11112\(a\)](#).

Evidence > Inferences & Presumptions > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

## **HN16** [blue document icon] **Evidence, Inferences & Presumptions**

In determining whether a peer review participant is immune under the Health Care Quality Improvement Act, [42 U.S.C.S. § 11101 et seq.](#), the proper inquiry for the court is whether a physician provided sufficient evidence to permit a jury to find she overcame, by a preponderance of the evidence, any of the statutory elements required for immunity under [42 U.S.C.S. § 11112\(a\)](#).

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

## **HN17** [blue document icon] **Business Administration & Organization, Peer Review**

The Health Care Quality Improvement Act, [42 U.S.C.S. § 11101 et seq.](#), confers immunity on any person who makes a report to the National Practitioner Data Bank without knowledge of the falsity of the information contained in the report. [42 U.S.C.S. § 11137\(c\)](#). Thus, immunity for reporting exists as a matter of law unless there is sufficient evidence for a jury to conclude the report was false and the reporting party knew it was false.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

## **HN18** [blue document icon] **Private Actions, Remedies**

A private plaintiff seeking to invoke the antitrust laws must show the defendants caused her alleged injury. The key question in determining a defendant's ability to cause a restraint of trade to be imposed is whether the defendants had control over the decisionmaking process, or the ability to coerce or unduly influence the decision.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

## **HN19** [ ] **Private Actions, Remedies**

Where a reasonable jury could conclude from the evidence that a defendant controlled, coerced, or unduly influenced a decision that results in a restraint of trade, a genuine issue of material fact exists on the issue of causation.

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

Torts > Intentional Torts > Defamation > General Overview

## **HN20** [ ] **Defamation, Elements**

Under New Mexico law, a plaintiff must prove actual injury to state a claim for defamation; damages cannot be presumed in a defamation action. However, actual injury is not limited to out-of-pocket loss. The more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.

**Counsel:** ARLENE M. BROWN, M.D., FAMILY PRACTICE ASSOCIATES, P.C., Plaintiffs-Appellants.

Thomas C. Bird (David W. Peterson of Keleher & McLeod, P.A.; and Phil Krehbiel of Krehbiel, Bannerman, Horn & Hisey, P.A., Albuquerque, New Mexico, with him on the briefs) of Keleher & McLeod, P.A., Albuquerque, New Mexico, for Plaintiffs-Appellees.

Bruce Hall (Edward Ricco and Theresa W. Parrish with him on the briefs) of Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico, for Defendants-Appellants.

**Judges:** Before BRORBY, RONEY, \* and LOGAN, Circuit Judges.

**Opinion by:** BRORBY

## **Opinion**

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[\*1327] **BRORBY**, Circuit Judge.

Dr. Arlene Brown, a family physician, and her professional association, Family Practice Associates, P.C. (hereinafter collectively referred to as "Dr. Brown"), brought suit against Presbyterian Healthcare Services, Valerie Miller, Vickie Williams, D.O., Sierra Blanca Medical Associates, **[\*\*2]** P.A., and Gary Jackson, D.O., seeking injunctive relief and damages for violation of [Sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1](#) and [2 \(1994\)](#), unreasonable restraint of trade and unfair trade practices in violation of Section 57 of the New Mexico Annotated Statutes, bad faith breach of contract, intentional interference with contract, defamation, and *prima facie* tort. Dr. Brown's causes of action arose from the revocation of her obstetrical hospital staff privileges by Lincoln County Medical Center,<sup>1</sup> and from the hospital's subsequent report of this revocation to the National Practitioner Data

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\* The Honorable Paul H. Roney, Senior United States Circuit Judge for the Eleventh Circuit, sitting by designation.

<sup>1</sup> Defendant Presbyterian Healthcare Services, a nonprofit New Mexico corporation, manages and operates Lincoln County Medical Center under an agreement with Lincoln County, New Mexico.

Bank under the category of "Incompetence/ Malpractice/Negligence." According to Dr. Brown, the defendants' "anticompetitive motives" were at the heart of these actions.

After a three week jury trial, the jury rendered a verdict **[\*\*3]** in favor of Dr. Brown on the defamation claim, tortious interference with contract claim, and certain of her antitrust claims. Thereafter, the district court set aside the jury's awards of damages on the tortious interference with contract claim, and the jury's award of punitive damages against Dr. Williams on the antitrust claims. Dr. Brown and Defendants Presbyterian Healthcare Services, Ms. Miller and Dr. Williams appeal from the district court's order and amended judgment.

## I. Factual Background

Dr. Arlene Brown, a Board-certified family physician, began practicing family medicine in Ruidoso, New Mexico, in 1983. Dr. Brown joined the medical staff of Lincoln County Medical Center, and in 1992 she held clinical privileges at the hospital in obstetrics and other areas. Dr. Vickie Williams, a physician specializing in obstetrics and gynecology in Ruidoso, is an economic competitor of Dr. Brown.

In early 1992, Dr. Williams participated in an informal peer review of three patients treated by Dr. Brown. Dr. Williams expressed concerns about the quality of care reflected in the patients' charts and prepared typewritten comments on the charts. Valerie Miller, Lincoln County **[\*\*4]** Medical Center's Administrator, then referred the charts to specialists outside the hospital for review. The outside reviewing physicians' comments were submitted to Lincoln County Medical Center's Executive Committee. At a meeting of the Executive Committee on July 13, 1992, Dr. Brown agreed to a requirement to consult with an obstetrics specialist in treating high-risk obstetrical patients.

In February 1993, Valerie Miller instituted formal peer review proceedings against Dr. Brown by sending a complaint to the Medical Staff Executive Committee, charging Dr. Brown with failure to abide by the **[\*1328]** consultation agreement. The Executive Committee instituted formal peer review proceedings against Dr. Brown by appointing a panel of three physicians to conduct a hearing on the complaint. At the hearing in April 1993, the panel reviewed the charts of two patients treated by Dr. Brown and heard testimony from Dr. Williams and Dr. Brown. The next day, the hearing panel issued its report, concluding Dr. Brown breached her agreement to obtain appropriate consultation and recommending removal of Dr. Brown's obstetrical privileges. Thereafter, the Medical Executive Committee approved the panel's **[\*\*5]** recommendation and Lincoln County Medical Center's Board of Trustees adopted the recommendation.<sup>2</sup>

Following the Board of Trustees' disciplinary action, Lincoln County Medical Center submitted a report to the National Practitioner Data Bank concerning the revocation of Dr. Brown's obstetrical privileges.<sup>3</sup> Glenda Perry, the hospital's medical staff coordinator, prepared the report in collaboration with Ms. Miller. One blank on the report called for insertion of an "Adverse Action Classification Code." Ms. Perry and Ms. Miller settled on the code entitled "Incompetence/ Malpractice/ Negligence."

**[\*\*6]** When Dr. Brown received a copy of the hospital's data bank report, she submitted a report of her own to the National Practitioner Data Bank stating Lincoln County Medical Center never found her negligent, incompetent or guilty of malpractice. The National Practitioner Data Bank then notified Lincoln County Medical Center of Dr. Brown's objection to the report, and provided the hospital with an opportunity to revise its report. However, the hospital elected not to amend the data bank report.

<sup>2</sup> Dr. Brown subsequently appealed the Board of Trustees' decision. However, on May 20, 1993, the Board's Appeal Panel affirmed the Board of Trustees' decision, with one minor modification. The modification allowed Dr. Brown to reapply for privileges after fulfilling certain training requirements.

<sup>3</sup> The National Practitioner Data Bank is an organization created under the Health Care Quality Improvement Act to collect information on physicians, including reports of adverse peer review actions. See 45 C.F.R. Part 60 (1995). "Each health care entity must report to the Board of Medical Examiners ... any professional review action that adversely affects the clinical privileges of a physician." [45 C.F.R. § 60.9\(a\)](#). The Board of Medical Examiners must in turn report this information to the National Practitioner Data Bank. [45 C.F.R. § 60.9\(b\)](#).

Although unrelated to the revocation of Dr. Brown's obstetrical privileges, in 1992 a family practice physician named Dr. Mark Reib contacted a Presbyterian Healthcare Services recruiter to discuss family medicine practice opportunities in Ruidoso, New Mexico. When Dr. Reib expressed an interest in joining Dr. Brown's practice, the recruiter informed Dr. Reib the hospital would only offer him a financial recruitment package if he were to go to work for Lincoln County Medical Center or in direct competition with Dr. Brown. Dr. Reib chose not to join Dr. Brown's medical practice.

## **II. Trial and Subsequent Procedural History**

In March 1995, the trial of this action commenced before **[\*\*7]** a jury. Almost three weeks later, the jury returned a special verdict in Dr. Brown's favor on her defamation claim, intentional interference with contract claim, and on certain of her antitrust claims.<sup>4</sup> **[\*\*8]** The district court entered judgment in accordance with the jury's findings, trebling, as required by law,<sup>5</sup> the antitrust damages against Ms. Miller and Dr. Williams. Thereafter, pursuant to Fed. R. Civ. P. 50(b) and 59(c), the defendants filed a motion for judgment as a matter of law or to alter or amend the judgment or for a new trial. In a comprehensive **[\*1329]** and detailed "Memorandum Opinion and Order," the district court set aside the jury's award of compensatory and punitive damages against Presbyterian Healthcare Services on the intentional interference with contract claim, and the jury's award of punitive damages against Dr. Williams on the antitrust claim.<sup>6</sup> The district court rejected all of the defendants' remaining arguments and entered an amended judgment in conformity with its opinion.

Dr. Brown appeals the district court's amended judgment, raising two issues: (1) whether the district court erred in vacating the compensatory and punitive damages awards for tortious interference with contract and (2) whether the district court erred in vacating the punitive damages award against Dr. Williams. The appeal of Presbyterian Healthcare Services, Ms. Miller and Dr. Williams raises four issues: (1) whether the district court erred in determining the defendants were not immune as a matter of law from damages resulting from the revocation of Dr. Brown's obstetrical privileges; (2) whether the district court erred in determining the defendants were not immune as a matter of law from damages resulting from the data bank report; (3) whether the district court erred in denying the defendants' motion for judgment as a matter of law on the merits of Dr. Brown's antitrust claims; and (4) whether the district court erred in denying **[\*\*9]** the defendants' motion for judgment as a matter of law on the merits of Dr. Brown's defamation claim. After thoroughly reviewing the parties' briefs, the district court's Memorandum Opinion and Order, and all relevant statutes and case law, we conclude the district court erred in setting aside the jury's awards of damages on Dr. Brown's intentional interference with contract claim. However, with respect to the remaining issues raised by the parties on appeal, we find the district court's rulings were proper and in accordance with law.

## **III. Dr. Brown's Appeal**

Dr. Brown first contends the district court erred in vacating as a matter of law the jury's award of compensatory and punitive damages against Presbyterian Healthcare Services on the tortious interference with contract claim. **HN1** The Court reviews the district court's order granting judgment as a matter of law de novo, applying the same standard as the district court. *Thompson v. State Farm Fire & Casualty Co., 34 F.3d 932, 941 (10th Cir.*

<sup>4</sup> Specifically, the jury entered the following awards of damages: (1) \$ 112,000.00 against Ms. Miller and Dr. Williams on the antitrust claims; (2) \$ 30,000.00 against Ms. Miller on the defamation claim; (3) \$ 7,500.00 in compensatory damages and \$ 75,000.00 in punitive damages against Presbyterian Healthcare Services on the intentional interference with contract claim; (4) \$ 75,000.00 in punitive damages against Ms. Miller on the antitrust and defamation claims; and (5) \$ 75,000.00 in punitive damages against Dr. Williams on the antitrust claims. The jury found in favor of defendants Dr. Jackson and Sierra Blanca Medical Associates with respect to all claims against them.

<sup>5</sup> See *15 U.S.C. § 15(a) (1994)*.

<sup>6</sup> The court set aside the former pursuant to Fed. R. Civ. P. 50(b), and the latter pursuant to Fed. R. Civ. P. 59(e).

1994). **HN2**[

The legal standard for granting judgment as a matter of law is identical to the standard for granting summary judgment under Fed. R. Civ. P. 56. Pendleton v. Conoco, Inc., \*\*10 23 F.3d 281, 286 (10th Cir. 1994). When applying this standard, a court is to examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion for summary judgment or judgment as a matter of law. Wolf v. Prudential Ins. Co., 50 F.3d 793, 796 (10th Cir. 1995) (citing Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990)). Judgment as a matter of law should be affirmed only if the evidence is insufficient to permit a jury to properly return a verdict in the opposing party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1985).

In the present case, the jury found Presbyterian Healthcare Services liable for tortious interference with contract and awarded Dr. Brown \$ 7,500.00 in compensatory damages and \$ 75,000.00 in punitive damages on this claim. In its Memorandum Opinion and Order, however, the district court vacated the award of compensatory damages, concluding Dr. Brown had failed to present adequate proof of actual damages on this claim. Since the punitive damages award for tortious interference "was connected only to the jury's finding that [Presbyterian **\*\*11** Healthcare Services] intentionally interfered with plaintiffs' contractual relations," the district court also set aside the \$ 75,000.00 punitive damages award.

Dr. Brown claims the district court erred in vacating the awards of damages for tortious interference with contract because **[\*1330]** the record contains sufficient evidence to support the jury's awards. Presbyterian Healthcare Services, on the other hand, contends Dr. Brown did not establish damages for tortious interference with "reasonable certainty" and therefore, the district court properly set aside the jury's awards of damages on this claim. As noted by the district court, damages that are based on conjecture, speculation, or guesswork are not recoverable. Smith v. Babcock Poultry Farms, Inc., 469 F.2d 456, 459 (10th Cir. 1972) (citing United States v. Griffith, Gornall & Carman, Inc., 210 F.2d 11 (10th Cir. 1954)). However, the fact damages are difficult to ascertain will not necessarily bar recovery. *Id.* **HN3**[

Under New Mexico law, which is applicable in the present case, "the lack of certainty that will prevent a recovery is uncertainty as to the fact of damages, not as to the amount." Camino Real Mobile Home Park **\*\*12** Partnership v. Wolfe, 119 N.M. 436, 891 P.2d 1190, 1201 (N.M. 1995). Damages need not be computed with "mathematical certainty" and recovery will not be denied where the evidence "affords a reasonable basis for estimating [plaintiff's] loss." Archuleta v. Jacquez, 103 N.M. 254, 704 P.2d 1130, 1134 (N.M. Ct. App. 1985). In reviewing a jury's award of damages, the court should sustain the award unless it is clearly erroneous or there is no evidence to support the award. Hudson v. Smith, 618 F.2d 642, 646 (10th Cir. 1980).

Here, Dr. Brown's alleged damages for intentional interference with contract stem from Presbyterian Healthcare Services' interference with Dr. Brown's attempts to hire Dr. Mark Reib. In an effort to prove the hospital's interference with Dr. Reib caused her damages, Dr. Brown presented testimony at trial from Dr. Michael McDonald, an economic expert. Dr. McDonald testified regarding the additional patient receipts Dr. Steven Frey,<sup>7</sup> a family practitioner who joined Dr. Brown's practice in May 1992, brought in to Dr. Brown's practice in 1992 and 1993. According to Dr. McDonald, Dr. Frey's patient receipts averaged around \$ 6,000.00 per month in 1992, and almost \$ 15,000.00 per **\*\*13** month in 1993. Dr. McDonald also testified concerning the additional costs Dr. Brown would have incurred in obtaining additional patient revenues. Based on Dr. Brown's 1993 financial statements, Dr. McDonald determined Dr. Brown's costs would increase by 34.1 cents for every dollar of additional receipts. Hence, Dr. McDonald concluded "65.9 percent of any increment in patient receipts will go to the bottom line, the net income of [Dr. Brown's practice]."

Dr. George Rhodes, Jr., an **\*\*14** economist for the defense, also testified concerning the additional revenue Dr. Frey brought in to Dr. Brown's practice in 1992 and 1993. Dr. Rhodes testified the hiring of Dr. Frey increased the

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<sup>7</sup> The court notes the credentials and background of Dr. Frey and Dr. Reib are strikingly similar. Dr. Frey completed a family practice residency in 1983, while Dr. Reib completed a family practice residency in 1984. Following completion of their respective residency programs, Dr. Frey and Dr. Reib each spent three to four years in the Navy. Apparently, the two doctors were stationed together on Guam and became friends. Dr. Frey and Dr. Reib each entered a private family medicine practice after their respective stints in the Navy.

revenue to Dr. Brown's practice by \$ 15,000.00 to \$ 20,000.00 per month in 1993. Additionally, Dr. Rhodes firmly concluded the addition of another physician to Dr. Brown's practice would result in an increase in the practice's revenue.

From the above testimony, it is clear Presbyterian Healthcare Services' interference with the hiring of Dr. Reib caused financial harm to Dr. Brown's practice. Although the testimony of Dr. McDonald and Dr. Rhodes does not provide a precise model for determining the extent of Dr. Brown's damages, it does provide a reasonable basis for estimating the plaintiff's loss. From the testimony regarding the amount of additional revenue Dr. Frey brought into Dr. Brown's practice, the jury could have reasonably determined the hiring of Dr. Reib would have resulted in a similar increase in revenue. Such a determination finds support in New Mexico law (see, e.g., *Ranchers Exploration & Dev. Corp. v. Miles*, 102 N.M. 387, 696 P.2d 475, 477 (N.M. 1985) (historic profits [\*\*15] of established business may be considered in determining lost profits) (citing *J.R. Watkins Co. v. Eaker*, 56 N.M. 385, 244 P.2d 540, 544 (N.M. 1952)), and is particularly sound in light of the similar training and professional backgrounds of Dr. [\*1331] Frey and Dr. Reib, and the temporal proximity of the period in which Dr. Frey began his employment with Dr. Brown to the period in which Presbyterian Healthcare Services interfered with the hiring of Dr. Reib. Finally, from Dr. McDonald's testimony concerning the amount of additional costs Dr. Brown would have incurred from increased patient revenues, the jury could have reached a rational conclusion as to the amount of lost profits Dr. Brown's practice incurred due to Presbyterian Healthcare Services' tortious interference with contract.

As explained in Restatement (Second) of Torts, [HN4](#) once an injured person establishes his business or transaction would have been profitable,

it is not fatal to the recovery of substantial damages that he is unable to prove with definiteness the amount of the profits he would have made or the amount of harm that the defendant has caused. It is only essential that he present such evidence as might reasonably be [\*\*16] expected to be available under the circumstances.

[Restatement \(Second\) of Torts § 912\(d\)](#), at 483 (1979). Given the circumstances of this case, we believe the evidence concerning the increase in revenues resulting from the recruitment of Dr. Frey was a reasonable method of establishing damages. This is especially so in light of the fact that the certainty of damages "was 'made hypothetical by the very wrong' of the defendant." See Restatement (Second) of Torts § 774A comt. c (1979). We find the jury's award of compensatory damages to be reasonably based upon sufficient evidence in the record, and we therefore reverse the district court's order vacating this award.

Having reversed the district court's order vacating the jury's award of compensatory damages for tortious interference with contract, we must next determine whether its order setting aside the jury's award of punitive damages on this claim should stand. The district court set aside the punitive damages award solely because it was dependent on the jury's award of compensatory damages on the tortious interference claim. Since we have reinstated the compensatory damages award, the punitive damages award likewise [\*\*17] must be reinstated. We therefore reverse the district court's order vacating the jury's award of punitive damages on the tortious interference with contract claim.

Dr. Brown also contends the district court erred in setting aside the jury's award of punitive damages against Dr. Williams on the antitrust claim. [HN5](#) The district court did so pursuant to [Fed. R. Civ. P. 59\(e\)](#), which ruling we review for abuse of discretion. [Webber v. Mefford](#), 43 F.3d 1340, 1345 (10th Cir. 1994). [HN6](#) Under the abuse of discretion standard,

a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. When we apply the "abuse of discretion" standard, we defer to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value.

[Moothart v. Bell](#), 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting [McEwen v. City of Norman](#), 926 F.2d 1539, 1553-54 (10th Cir. 1991)). In this circuit, abuse of discretion is defined as "an arbitrary, capricious, whimsical, [\*\*18] or manifestly unreasonable judgment." [FDIC v. Oldenburg](#), 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting [United States v. Hernandez-Herrera](#), 952 F.2d 342, 343 (10th Cir. 1991)).

In the present case, the jury found Dr. Williams liable on the antitrust conspiracy claims and awarded punitive damages against her in the amount of \$ 75,000.00. Thereafter, in accordance with [15 U.S.C. § 15\(a\) \(1994\)](#),<sup>8</sup> the district court entered an award of treble damages against Dr. Williams on the antitrust claims. However, the district court vacated the jury's award of punitive damages against Dr. Williams, noting such an award would be duplicative because [\*1332] the treble damages provision already embodies punitive damages.

Dr. Brown now contends the district court erroneously set aside the punitive damages award because "the [\*\*19] Defendants proposed a verdict form calling for punitive damages for antitrust violations." According to Dr. Brown, the defendants "invited" the jury to erroneously award punitive damages against Dr. Williams, and consequently, the defendants are now precluded from seeking judicial review of this "invited error." As an initial matter, the court notes [HN8](#)[] it is clearly improper to allow a plaintiff to recover punitive damages along with trebled damages on an antitrust claim. "Punitive damages beyond the statutory trebled damages cannot be awarded for an antitrust violation. The enhancement of damages in an antitrust case is the damages trebled." *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1381 (8th Cir. 1983) (citing [Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580, 582](#) (8th Cir.) (treble damage provision encompasses both punitive and compensatory damages), cert. denied, 326 U.S. 734, 90 L. Ed. 437, 66 S. Ct. 42 (1945)). See also [Spence v. Southeastern Alaska Pilots' Ass'n, 789 F. Supp. 1014, 1029 \(D. Alaska 1992\)](#) ("punitive damages are not available on federal anti-trust claims").

Notwithstanding the patent impropriety of allowing a plaintiff to recover punitive damages on an antitrust claim, [\*\*20] Dr. Brown argues Dr. Williams' failure to object to the jury instructions and verdict sheet that permitted the recovery of such damages serves to preclude subsequent judicial review of the jury's award of punitive damages. As Dr. Brown points out, [HN9](#)[] an appellant may not generally complain on appeal of errors he has himself induced or invited. See, e.g., [Meredith v. Beech Aircraft Corp., 18 F.3d 890 \(10th Cir. 1994\)](#) (citing [Gundy v. United States, 728 F.2d 484, 488 \(10th Cir. 1984\)](#)). However, [HN10](#)[] where the jury has returned a special verdict, the trial judge is obligated to apply appropriate legal principles to the facts found by the jury. [Thedorf v. Lipsey, 237 F.2d 190, 193 \(7th Cir. 1956\)](#). "It is for the court to decide upon the jury's answers ... what the resulting legal obligation is." *Id.* Moreover, [HN11](#)[] in determining whether to grant or deny a [Rule 59\(e\)](#) motion to alter or amend the judgment, the district court is vested with considerable discretion. [Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350, 355 \(5th Cir. 1993\)](#) (citing [Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167, 174 \(5th Cir. 1990\)](#)). The district court may grant a motion to alter or amend the [\*\*21] judgment where it is necessary to correct manifest errors of law. Charles Alan Wright et al., *Federal Practice and Procedure: Civil* 2d § 2810.1, at 124-25 (1995).

In the case at bar, the jury instructions and special verdict form were exhaustive and labyrinthine. The jury's responsibilities included determining the liability of six defendants for as many as seven distinct claims. The special verdict form alone was twelve pages and contained more than thirty individual questions. Given the numerous parties, claims and overall complexity of the case, we do not believe the trial judge abused his discretion in vacating the jury's award of punitive damages against Dr. Williams. As stated in the district court's Memorandum Opinion and Order, "it would have been impractical and confusing to the jury to have drafted the special verdict to include all of the combinations of circumstances under which punitive damages could or could not have been awarded against various defendants." [HN12](#)[] The district court's decision to vacate the award of punitive damages served to correct a manifest error of law and did not prejudice Dr. Brown. Under these circumstances, we are *not* left with "a definite [\*\*22] and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." Hence, we affirm the district court's order vacating the award of punitive damages against Dr. Williams.

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<sup>8</sup> [15 U.S.C. § 15\(a\)](#) [HN7](#)[] provides in pertinent part, "any person who shall be injured ... by reason of anything forbidden in the antitrust laws ... shall recover threefold the damages by him sustained."

#### IV. Appeal of Presbyterian Healthcare Services, Dr. Williams and Ms. Miller

Presbyterian Healthcare Services, Dr. Williams and Ms. Miller contend the district court erred in: (1) failing to find the defendants immune, as a matter of law, from antitrust and defamation damages under the Health Care Quality Improvement Act and (2) failing to grant judgment as a matter of law in the defendants' favor on the merits of [\*1333] Dr. Brown's antitrust and defamation claims. As stated, [HN13](#)[<sup>13</sup>] we review the denial of a motion for judgment as a matter of law de novo, applying the same legal standard used by the district court. [Thompson, 34 F.3d at 941](#). Judgment as a matter of law should only be granted if the evidence, when viewed in the light most favorable to the party opposing the motion, could not support a verdict in that party's favor. [Anderson, 477 U.S. at 257](#).

First, the defendants argue the trial court erred in failing to find them immune, [\*\*23] as a matter of law, from damages resulting from the revocation of Dr. Brown's obstetrical privileges, under the Health Care Quality Improvement Act. In 1986, Congress adopted the Health Care Quality Improvement Act in response to "the increasing occurrence of medical malpractice and the need to improve the quality of medical care." See [42 U.S.C. § 11101\(1\), \(2\) \(1994\)](#). Recognizing "the threat of private money damage liability ... unreasonably discourages physicians from participating in effective professional peer review," see [42 U.S.C. § 11101\(4\)](#), Congress deemed it essential for the legislation to provide qualified immunity from damages actions for hospitals, doctors and others who participate in professional peer review proceedings. [Imperial v. Suburban Hosp. Ass'n, Inc., 37 F.3d 1026, 1028 \(4th Cir. 1994\)](#). Thus, [HN14](#)[<sup>14</sup>] under the Health Care Quality Improvement Act, a peer review participant is immune from private damage claims stemming from the peer review action provided the review action is taken:

- (1) in the reasonable belief that the action was in the furtherance of quality health care,
- (2) after a reasonable effort to obtain the facts of the matter,
- (3) [\*\*24] after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
- (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

[42 U.S.C. §§ 11111\(a\)\(1\), 11112\(a\) \(1994\)](#). [HN15](#)[<sup>15</sup>] A peer review action is presumed to have met the preceding standards necessary for immunity. [42 U.S.C. § 11112](#). However, if a plaintiff challenging a peer review action proves, by a preponderance of the evidence, any one of the four requirements was not satisfied, the peer review body is no longer afforded immunity from damages under the Health Care Quality Improvement Act. [42 U.S.C. § 11112\(a\)](#); see, e.g., [Islami v. Covenant Medical Center, Inc., 822 F. Supp. 1361, 1377-78 \(N.D. Iowa 1992\)](#) (review participants not entitled to immunity as matter of law because plaintiff presented sufficient evidence for a jury to conclude review participants did not provide plaintiff with fair and adequate process). Courts apply an objective standard in determining whether a peer review action was [\*\*25] reasonable under [42 U.S.C. § 11112\(a\)](#). See, e.g., [Mathews v. Lancaster Gen'l Hosp., 87 F.3d 624, 635 \(3d Cir. 1996\)](#); [Austin v. McNamara, 979 F.2d 728, 734 \(9th Cir. 1992\)](#).

In the present case, the formal peer review hearing was held to determine whether Dr. Brown had agreed to seek consultation for high-risk obstetrical patients and if so, whether Dr. Brown had breached this agreement. During the hearing, Ms. Miller outlined the hospital's position, and the Panel reviewed the charts of two patients Dr. Brown treated. Both Dr. Williams and Dr. Brown testified at the hearing. Following approximately two hours of deliberations, the review panel concluded Dr. Brown had breached her agreement to obtain appropriate consultation and recommended removal of Dr. Brown's privileges to practice obstetrics at Lincoln County Medical Center.

At trial, Dr. Brown presented sufficient evidence for a reasonable jury to find, by a preponderance of the evidence, the peer review action was not taken after a "reasonable effort to obtain the facts of the matter." Dr. Norman Lindley, a physician specializing in obstetrics and gynecology, testified on behalf of Dr. Brown. Dr. Lindley reviewed the [\*\*26] charts for every obstetrics patient Dr. Brown treated for the six-month period preceding her revocation and concluded Dr. Brown recognized high-risk obstetrics patients and obtained [\*1334] appropriate consultation

when necessary. Dr. Lindley also testified the peer review panel's review of only two charts prior to revoking Dr. Brown's obstetrical privileges was unreasonably narrow and did not provide a reasonable basis for concluding Dr. Brown posed a threat to patient safety.

Thus, from Dr. Lindley's testimony, a reasonable jury could have found the panel's review to be unreasonably restrictive and not taken after a "reasonable effort to obtain the facts." Such a finding removes the defendants from the qualified immunity provided by the Health Care Quality Improvement Act. Hence, we conclude the district court did not err in failing to find Presbyterian Healthcare Services, Ms. Miller and Dr. Williams immune, as a matter of law, from damages stemming from the revocation of Dr. Brown's obstetrical privileges.<sup>9</sup>

[\*\*27] Next, Ms. Miller argues the district court erred in failing to find her immune, as a matter of law, from damages on Dr. Brown's defamation claim. [HN17](#)<sup>↑</sup> The Health Care Quality Improvement Act confers immunity on any person who makes a report to the National Practitioner Data Bank "without knowledge of the falsity of the information contained in the report." [42 U.S.C. § 11137\(c\) \(1994\)](#). Thus, immunity for reporting exists as a matter of law unless there is sufficient evidence for a jury to conclude the report was false and the reporting party knew it was false.

Although the data bank report in this case listed the reason for Lincoln County Medical Center's disciplinary action as "negligence/incompetence/mal-practice," the record reveals neither the review panel nor the hospital's Board of Trustees ever found Dr. Brown negligent, incompetent or guilty of malpractice. Rather, the review panel merely determined Dr. Brown breached her agreement to obtain appropriate consultation. Although the panel members were "concerned that [Dr. Brown] does not recognize complicated obstetrics or is reluctant to refer such cases," the panel "felt that Dr. Brown was competent to do uncomplicated obstetrics." [\*\*28] Ms. Miller, who was involved in the preparation and review of the report, received a copy of the committee's written findings and was fully aware of the committee's conclusions and the Board of Trustee's action against Dr. Brown. Thus, the record contains sufficient evidence from which a reasonable jury could have concluded the data bank report was false and Ms. Miller knew of its falsity. We therefore affirm the district court's determination Ms. Miller is not immune from defamation damages, as a matter of law, under the Health Care Quality Improvement Act.

Presbyterian Healthcare Services, Ms. Miller and Dr. Williams also claim the district court erred in failing to enter judgment as a matter of law in their favor on the merits of Dr. Brown's antitrust claims. The jury in this case determined Ms. Miller and Dr. Williams joined in a conspiracy to exclude Dr. Brown from competing in the Ruidoso, New Mexico, market. However, the jury did not conclude Presbyterian Healthcare Services participated in the conspiracy. [\*1335] Since the decision to revoke Dr. Brown's medical privileges was made by an independent, nonconspirator (Lincoln County Medical Center's Board of Trustees), the defendants [\*\*29] contend Ms. Miller and Dr. Williams could not have proximately caused the revocation and, therefore, cannot be held liable for Dr. Brown's injuries.

<sup>9</sup>The defendants appear to argue the testimony of Dr. Lindley is irrelevant because the defendants presented evidence from a number of doctors who testified the review panel's actions satisfied the requirements of [42 U.S.C. § 11112\(a\)](#). According to the defendants, "a difference of opinion among experts" does not raise an issue as to the objective reasonableness of the inquiry. We are not persuaded by the defendant's view. Under its theory, a peer review participant would be absolutely immune from liability for its actions so long as it produced a single expert to testify the requirements of [42 U.S.C. § 11112\(a\)](#) were satisfied. This would be in direct contravention to Congress' intention to provide "qualified immunity." Moreover, to remove a plaintiff's claims from the jury simply because "a difference of opinion among experts" exists would abrogate the jury's responsibility to weigh the evidence and determine the credibility of witnesses. See, e.g., [Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 930](#) (10th Cir.) ("entire jury system is anchored to the jurors' determination of credibility of witnesses and the weight to be given their testimony"), cert. denied, [469 U.S. 853, 83 L. Ed. 2d 110, 105 S. Ct. 176](#) (1984). Thus, [HN16](#)<sup>↑</sup> in determining whether a peer review participant is immune under the Health Care Quality Improvement Act, the proper inquiry for the court is whether Dr. Brown has provided sufficient evidence to permit a jury to find she has overcome, by a preponderance of the evidence, any of the four statutory elements required for immunity under [42 U.S.C. § 11112\(a\)](#). See, e.g., [Austin, 979 F.2d at 734](#). In this case, we believe Dr. Brown presented sufficient evidence to overcome the presumption and allow the issue to be decided by the jury.

**HN18** [↑] A private plaintiff seeking to invoke the antitrust laws must show the defendants caused her alleged injury. *Todorov v. DCH HealthCare Authority*, 921 F.2d 1438, 1459 (11th Cir. 1991) (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)). The key question in determining the defendants' ability to "cause a restraint [of trade] to be imposed" is whether the defendants had control over the decisionmaking process, or the ability to coerce or unduly influence the decision. See *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 705-06 (4th Cir. 1991) (medical staff had no control where Board of Trustees requested and encouraged medical staff to take corrective action), cert. denied, 502 U.S. 1074, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992); *Weiss v. York Hosp.*, 745 F.2d 786, 819 n.57 (3d Cir. 1984) (given dominant role of medical staff and limited nature of review, evidence supported jury's finding medical staff violated antitrust laws), cert. denied, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985); *Islami v. Covenant Medical Center, Inc.*, 822 F. Supp. 1361, 1383 (\*\*301) (N.D. Iowa 1992) (medical staff had ability to coerce or unduly influence decision). **HN19** [↑] Where a reasonable jury could conclude from the evidence that the defendants controlled, coerced, or unduly influenced the decision that resulted in a restraint of trade, a genuine issue of material fact exists on the issue of causation. *Oksanen*, 945 F.2d at 705-06; *Weiss*, 745 F.2d at 819 n.57; *Islami*, 822 F. Supp. at 1383.

Here, neither Ms. Miller nor Dr. Williams voted on the decision to revoke Dr. Brown's obstetrical privileges. However, the record reveals both Ms. Miller and Dr. Williams played an influential role in bringing about the revocation. The jury heard evidence at trial which tended to show Dr. Williams, a competitor of Dr. Brown, and Teresa McCallum, a nurse who had made anti-semitic remarks about Dr. Brown in Dr. Williams' presence, were responsible for identifying all five of Dr. Brown's charts that were reviewed during the two peer review proceedings. Dr. Williams authored the criticisms that Ms. Miller sent to the outside reviewing physicians, and she testified against Dr. Brown at the revocation peer review proceeding. Ms. Miller asked Dr. Williams to prepare the summary [\*\*31] of criticisms that were attached to the cases sent to the outside reviewing physicians even though Dr. Brown had complained to Ms. Miller about a personality conflict between Dr. Williams and Dr. Brown. Furthermore, Ms. Miller instituted the formal peer review proceedings against Dr. Brown by sending a complaint to the Medical Staff Executive Committee, she presented the "hospital's position" at the formal review proceeding, and she served on the Board of Trustees.

Thus, the record is replete with evidence tending to show Ms. Miller and Dr. Williams were the catalysts behind, or played a crucial role in, every step of the proceedings against Dr. Brown. Viewing the entire evidence in the light most favorable to Dr. Brown, we believe a reasonable jury could have concluded Dr. Williams and Dr. Brown controlled, coerced or unduly influenced the decisionmaking process. We therefore affirm the district court's denial of the defendants' motion for judgment as a matter of law on the merits of Dr. Brown's antitrust claims.

Finally, Ms. Miller argues the district court erred in failing to grant judgment as a matter of law in her favor on the merits of Dr. Brown's defamation claim. According [\*\*32] to Ms. Miller, Dr. Brown failed to establish the data bank report caused actual injury to her reputation. **HN20** [↑] Under New Mexico law, a plaintiff must prove actual injury to state a claim for defamation; damages cannot be presumed in a defamation action. *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 773 P.2d 1231, 1236 (N.M. 1989) (citing *Poorbaugh v. Mullen*, 99 N.M. 11, 653 P.2d 511, 520 (N.M. Ct. App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (N.M. 1982)). However, actual injury is not limited to out-of-pocket loss. *Id.*; see also *Cowan v. Powell*, 115 N.M. 603, 856 P.2d 251, 253 (N.M. Ct. App. 1993). As stated by the New Mexico [\*1336] Supreme Court in *Newberry*, "the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." 773 P.2d at 1236 (quoting *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462, 470 (N.M. 1982)).

In the case at bar, the record reveals Dr. Brown sought to obtain obstetrical privileges at Gerald Champion Memorial Hospital after the revocation by Lincoln County Medical Center. Pursuant to federal regulations, every hospital that receives an application for clinical privileges must [\*\*33] check with the National Practitioner Data Bank for reports on the applicant. *45 C.F.R. § 60.10(a)(1) (1995)*. Thus, as part of the application process at Gerald Champion Memorial Hospital, Dr. Brown had to undergo a hearing and explain the reason Lincoln County Medical Center revoked her obstetrical privileges. As the district court found, we believe sufficient evidence exists for a jury to have concluded Dr. Brown suffered impairment of reputation and standing in the community or personal

humiliation when she had to explain why Lincoln County Medical Center revoked her privileges based on "negligence/incompetence/malpractice." Although Gerald Champion Memorial Hospital ultimately granted obstetrical privileges to Dr. Brown, "an opportunity for rebuttal seldom suffices to undo harm [sic] of defamatory falsehood." See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974). We therefore affirm the district court's decision to deny the defendants' motion for judgment as a matter of law on the merits of Dr. Brown's defamation claim.

## V. Conclusion

For the reasons stated above, we **REVERSE** the district court's order and judgment vacating the jury's award of compensatory [**\*\*34**] and punitive damages on Dr. Brown's tortious interference with contract claim. We **AFFIRM** the judgment of the district court in all other respects.

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## *Amarel v. Connell*

United States Court of Appeals for the Ninth Circuit

June 13, 1996, Argued, Submitted, San Francisco, California ; December 2, 1996, Filed

Nos. 94-15803, 95-16121

### **Reporter**

102 F.3d 1494 \*; 1996 U.S. App. LEXIS 34400 \*\*; 1996-2 Trade Cas. (CCH) P71,638; 97 Daily Journal DAR 569; 45 Fed. R. Evid. Serv. (Callaghan) 1390; 36 Fed. R. Serv. 3d (Callaghan) 1

J. WILLIAM AMAREL; JACK E. CARRICO and PAMELA FAWN CARRICO; REASON FARMS; STARKEY RANCH, INC.; DANLEY BROS., INC.; RODRICK RANCH, INC.; ALLEN ETCHEPARE; A. CHARLES ETCHEVARRY; SOHNREY RANCHES; JAY DEE GARR; MAXWELL SPYRES; MORLEY GREEN, aka NOR-CAL BROKERAGE; YUBA FARMS CO.; JOHNSON EQUITIES, INC.; LAMBIRTH, C. FARMS, INC.; MCKNIGHT, J.H. RANCH, INC.; LARRY E. MIDDLETON; HENRY C. MOORE, Plaintiffs-Appellants, v. GROVER CONNELL; CONNELL RICE AND SUGAR CO.; JOSEPH L. ALIOTO, Defendants-Appellees.

**Subsequent History:** [\*\*1] As Amended January 15, 1997.

**Prior History:** Appeal from the United States District Court for the Northern District of California. D.C. Nos. CV-89-00558-BAC, CV-89-00558-VRW. Barbara A. Caulfield, District Judge, Presiding in 94-15803. Vaughn R. Walker, District Judge, Presiding in 95-16121.

Original Opinion Previously Reported at: [1996 U.S. App. LEXIS 30966](#).

**Disposition:** Affirmed the judgment for defendants on plaintiffs' monopolization claims under [Section 2](#) of the Sherman Act and the California Unfair Practices Act. Reversed the judgment for defendants on plaintiffs' restraint of trade claims under [Section 1](#) of the Sherman Act and the California Cartwright Act, and remanded the case for a new trial solely on the restraint of trade claims. Reversed the district court's award of costs and direct the district court to await resolution of plaintiffs' restraint of trade claims before determining whether an award of costs is appropriate.

## **Core Terms**

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rice, plaintiffs', defendants', prices, district court, antitrust, farmers, costs, cooperatives, sham, restraint of trade, anticompetitive, lawsuit, competitors, cross-examination, tons, monopolize, monopoly, anti trust law, predatory, Sherman Act, matter of law, time limit, per ton, conspiracy, exhibits, allegations, boycott, markets, export

## **LexisNexis® Headnotes**

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

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

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

## **HN1** [down arrow] Private Actions, Standing

Antitrust standing is a question of law that an appeals court reviews de novo. The issue of antitrust standing may be raised at any stage of litigation. Whenever it appears that standing has not been established and has not been conceded, an element necessary for the plaintiff to prevail is lacking.

[Antitrust & Trade Law > Clayton Act > Remedies > Damages](#)

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Antitrust & Trade Law > Clayton Act > Remedies > General Overview](#)

[Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act](#)

## **HN2** [down arrow] Remedies, Damages

Section 4 of the Clayton Act, [15 U.S.C.S. § 15\(a\)](#), allows recovery of treble damages by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. The language of this provision is very broad and, read literally, could afford relief to all persons whose injuries are causally related to an antitrust violation. It is well-settled, however, that despite the sweeping language of § 4, Congress did not intend to provide a private remedy for all injuries that might conceivably be traced to an antitrust violation.

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Civil Procedure > ... > Justiciability > Standing > Injury in Fact](#)

[Commercial Law \(UCC\) > Sales \(Article 2\) > Remedies > General Overview](#)

[Civil Procedure > Preliminary Considerations > Justiciability > General Overview](#)

[Civil Procedure > ... > Justiciability > Standing > General Overview](#)

## **HN3** [down arrow] Private Actions, Standing

Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Torts > ... > Elements > Causation > General Overview](#)

[Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview](#)

## **HN4** [down arrow] Private Actions, Standing

Courts are to consider certain factors in determining whether a plaintiff, who has suffered an injury which bears a causal connection to the alleged antitrust violation, also satisfies the more demanding standard for antitrust

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standing. These factors are: (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 > ... > Private Actions > Standing > General Overview

#### **HN5** **Private Actions, Standing**

Antitrust standing involves a case-by-case analysis of the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. No single factor is decisive. The court must balance the factors.

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

#### **HN6** **Private Actions, Remedies**

It is well-settled that 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. As a corollary to the requirement that the alleged injury be related to anti-competitive behavior, the injured party must be a participant in the same market as the alleged malefactors.

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

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

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

#### **HN7** **Private Actions, Standing**

Losses a competitor suffers as a result of predatory pricing are a form of antitrust injury because predatory pricing has the requisite anticompetitive effect against competitors. When defendants engage in predatory pricing or other anticompetitive acts in an attempt to gain a monopoly, the competitor who is being driven out of the market is the party with standing.

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

Business & Corporate Law > Cooperatives > General Overview

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

#### **HN8** **Private Actions, Standing**

A competitor of an alleged attempted monopolist has standing where it is either driven out of business or suffers reduced profits because of the alleged anticompetitive acts of the attempted monopolist.

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

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Appeals > Standards of Review > Reversible Errors

### **HN9**[ **Standards of Review, Abuse of Discretion**

The appeals court reviews challenges to trial court management for abuse of discretion.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

### **HN10**[ **Judges, Discretionary Powers**

A district court is generally free to impose reasonable time limits on a trial. Time limits may be used to prevent undue delay, waste of time, or needless presentation of cumulative evidence.

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

Governments > Courts > Judges

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

### **HN11**[ **Standards of Review, Abuse of Discretion**

The appeals court reviews for abuse of discretion a district judge's decision to reconsider an interlocutory order by another judge of the same court.

Civil Procedure > Judicial Officers > Judges > General Overview

Governments > Courts > Authority to Adjudicate

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Governments > Courts > Judges

### **HN12**[ **Judicial Officers, Judges**

The interlocutory orders and rulings made pre-trial by a district judge are subject to modification by the district judge at any time prior to final judgment, and may be modified to the same extent if the case is reassigned to another judge.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Admissibility > Expert Witnesses

### [HN13](#) [blue download icon] Judges, Discretionary Powers

A district court is vested with broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial. Within a district court's broad discretion lies both the power to exclude or admit expert testimony, and to exclude testimony of witnesses whose use at trial is in bad faith or would unfairly prejudice an opposing party. In addition, the district court has broad discretion over the admission of rebuttal evidence.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

### [HN14](#) [blue download icon] Judges, Discretionary Powers

District courts should generally allow amendments of pre-trial orders provided three criteria are met: (1) no substantial injury will be occasioned to the opposing party, (2) refusal to allow the amendment might result in injustice to the movant, and (3) the inconvenience to the court is slight.

Civil Procedure > Trials > General Overview

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

### [HN15](#) [blue download icon] Civil Procedure, Trials

The factors a district court must consider where a party seeks to call a witness who does not appear on the witness list are: (1) the prejudice or surprise of the party against whom the excluded witness testifies; (2) the ability of that party to cure the prejudice; (3) the extent to which calling the witness would disrupt the orderly and efficient trial; and (4) bad faith or willfulness in failing to comply with the court's order.

Evidence > Types of Evidence > Demonstrative Evidence > General Overview

Evidence > Types of Evidence > Documentary Evidence > Summaries

### [HN16](#) [blue download icon] Types of Evidence, Demonstrative Evidence

See [Fed. R. Evid. 1006](#).

Evidence > Types of Evidence > Documentary Evidence > Summaries

Evidence > ... > Documentary Evidence > Writings > General Overview

### [HN17](#) [blue download icon] Documentary Evidence, Summaries

A proponent of a summary exhibit must establish a foundation that (1) the underlying materials on which the summary exhibit is based are admissible in evidence, and (2) those underlying materials were made available to the opposing party for inspection. The purpose of the availability requirement is to give the opposing party an opportunity to verify the reliability and accuracy of the summary prior to trial. Where a party fails to make available materials underlying a summary exhibit, that summary exhibit is inadmissible.

Criminal Law & Procedure > Appeals > Reversible Error > Evidence

Evidence > ... > Expert Witnesses > Credibility of Witnesses > Impeachment

Civil Procedure > Appeals > Standards of Review > General Overview

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Evidence > Admissibility > Expert Witnesses > Ultimate Issue

#### **HN18** [blue icon] **Reversible Error, Evidence**

Evidentiary rulings should not be reversed absent some prejudice.

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

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

#### **HN19** [blue icon] **Standards of Review, De Novo Review**

The appeals court reviews de novo the district court's grant of directed verdict.

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

#### **HN20** [blue icon] **Trials, Judgment as Matter of Law**

A directed verdict is proper when the evidence permits only one reasonable conclusion. The evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

#### **HN21** [blue icon] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine provides that those who petition government for redress are generally immune from antitrust liability. This general rule encompasses private actions that attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly, as well as the approach of citizens to administrative agencies and to courts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

## [\*\*HN22\*\*](#) Exemptions & Immunities, Noerr-Pennington Doctrine

Noerr-Pennington antitrust immunity does not apply, however, when the activity is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

## [\*\*HN23\*\*](#) Noerr-Pennington Doctrine, Sham Exception

To be a sham, a 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 the Noerr-Pennington doctrine, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively baseless may a court examine the litigant's subjective motivation.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

## [\*\*HN24\*\*](#) Exemptions & Immunities, Noerr-Pennington Doctrine

The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation, and is an absolute defense to allegations of sham litigation.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

## [\*\*HN25\*\*](#) Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine shields from antitrust liability efforts to influence legislators and members of the executive branch.

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

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

## [\*\*HN26\*\*](#) Standards of Review, Abuse of Discretion

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The appeals court reviews for abuse of discretion a district court's formulation of civil jury instructions.

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

**HN27** [blue icon] **Standards of Review, De Novo Review**

The appeals court reviews de novo the district court's decision to enter judgment as a matter of law, and must view conflicting evidence in the light most favorable to the non-movant, and determine whether the proffered result is the only reasonable conclusion.

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

**HN28** [blue icon] **Trials, Judgment as Matter of Law**

See [Fed. R. Civ. P. 50\(b\)](#).

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

**HN29** [blue icon] **Trials, Judgment as Matter of Law**

In directing the entry of judgment in the wake of a jury's failure to return a verdict, a district court must accept as true facts that necessarily were established by the jury's verdict.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

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

**HN30** [blue icon] **Sherman Act, Claims**

[Section 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#) 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. Claims for violation of [§ 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. Because [§ 2](#) claims require proof of a defendant's market power in the form of monopolistic control, they inevitably encompass a smaller pool of anticompetitive conduct.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts 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 > Claims

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

### [\*\*HN31\*\*](#) [] **Attempts to Monopolize, Elements**

To establish a violation of the Sherman Act Section, [15 U.S.C.S. § 2](#) 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) casual antitrust injury.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

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

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

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

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

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

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN32\*\*](#) [] **Tying Arrangements, Clayton Act**

The Sherman Act, [15 U.S.C.S. §1](#), broadly prohibits concerted action that unreasonably restrains trade. [Section 1](#) encompasses a wide variety of anticompetitive practices, including horizontal and vertical price fixing, horizontal and vertical restraints on such non-price factors as territories and customers, tying agreements, exclusive dealing agreements, and, finally, anticompetitive boycotts or concerted refusals to deal, as plaintiffs alleged in this case.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

### [HN33](#) [L] Sherman Act, Claims

Unlike Sherman Act [§2](#), [15 U.S.C.S. §2](#) claims, Sherman Act [§1](#), [15 U.S.C.S. §1](#), restraint of trade claims need not establish the threshold showing of monopoly control over a relevant market. To show a violation of [§1](#), a plaintiff must establish a contract, conspiracy or combination intended to restrain competition and which actually has an anticompetitive effect.

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

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

### [HN34](#) [L] Standards of Review, Abuse of Discretion

Because the decision to award costs ordinarily resides in the district court, the appeals court reviews such decisions for an abuse of discretion.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

### [HN35](#) [L] Private Actions, Costs & Attorney Fees

[Fed. R. Civ. P. 54\(d\)\(1\)](#) provides that costs shall be allowed as of course to the prevailing party unless the court otherwise directs. [Fed. R. Civ. P. 54\(d\)\(1\)](#) creates a presumption in favor of awarding costs to the prevailing party.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

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

Energy & Utilities Law > Taxation Issues

Civil Procedure > Appeals > Standards of Review > General Overview

### [HN36](#) [L] Private Actions, Costs & Attorney Fees

Where a reviewing court reverses a district court's judgment for the prevailing party, both the underlying judgment and the taxation of costs undertaken pursuant to that judgment are reversed.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

### **HN37** [blue icon] **Private Actions, Costs & Attorney Fees**

A party in whose favor judgment is rendered is generally the prevailing party for purposes of awarding costs under [Fed. R. Civ. P. 54\(d\)](#). In the event of a mixed judgment, however, it is within the discretion of a district court to require each party to bear its own costs.

**Counsel:** Howard I. Langer and Kenneth L. Fox, Berger & Montague, Philadelphia, Pennsylvania, for the plaintiffs-appellants.

Eugene Crew and Margaret C. McHugh, Townsend & Townsend, Khourie & Crew, San Francisco, California; and Mitchell Blumenthal, Alexander Anolik, San [\[\\*2\]](#) Francisco, California, for the defendants-appellees.

**Judges:** Before: Mary M. Schroeder and Michael Daly Hawkins, Circuit Judges, and James M. Fitzgerald, \* District Judge. Opinion by Judge Hawkins.

**Opinion by:** HAWKINS

## **Opinion**

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### **[\*1499] OPINION**

HAWKINS, Circuit Judge:

This appeal arose out of a complex, lengthy, and bitterly contested antitrust suit. Plaintiffs-appellants, independent California rice farmers, appeal the district court's March 1994 judgment for defendants-appellees, a rice exporter, its president, and its lawyer. That judgment was based in part on a jury verdict for defendants as to plaintiffs' [Section 2](#) Sherman Act conspiracy claims and violations of the California Unfair Practices Act, and in part on the district court's judgment as a matter of law for defendants as to plaintiffs' claims for conspiracy to restrain trade in violation of [Section 1](#) of the Sherman Act and California's Cartwright Act.

The litigants raise numerous procedural and substantive issues on appeal. Defendants insist plaintiffs lack standing to maintain this antitrust action. Plaintiffs [\[\\*3\]](#) allege several instances of trial error, challenge the district court's rulings involving antitrust immunity under the *Noerr-Pennington* doctrine, and argue that it was error for the district court to enter judgment as a matter of law as to the restraint of trade claims on which the jury was divided. Plaintiffs also appeal the district court's post-trial award to defendants of nearly \$ 100,000 in costs.

We have jurisdiction pursuant to [28 U.S.C. § 1291](#).<sup>1</sup>

### **[\*1500] FACTUAL AND PROCEDURAL HISTORY**

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\* Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

<sup>1</sup> Because the district court ordered separate trials of plaintiffs' claims and defendants' counterclaims, defendants' counterclaims remain pending in district court. Jurisdiction is nonetheless appropriate because the district court entered final judgment for defendants as to plaintiffs' claims, and certified the judgment for appeal pursuant to [Federal Rule of Civil Procedure 54\(b\)](#).

## *I. The Rice Industry*

### *A. Crisis in the World Rice Market*

The marketplace can be a harsh teacher and it certainly was here. **[\*\*4]** These events have their beginning in 1980, when a worldwide rice shortage drove prices on the international rice market to record highs. The following year, many rice farmers reacted to these abnormally high prices by substantially increasing rice production. This, in turn, resulted in an oversupply of rice and the collapse of world rice prices in 1981.

The 1980 shortage was especially severe in the Republic of Korea ("Korea"), which had experienced a domestic rice crop failure as a consequence of bad weather. To meet domestic demand, Korea needed to import large quantities of rice. In light of the Korean shortage, the United States agreed to the export of one million tons of rice from Japan to Korea. That decision invoked an emergency exception to a U.S.-Japan bilateral agreement, executed earlier in 1980, which prohibited Japan from "dumping" rice on markets to which U.S. companies exported rice.

In exchange for this exemption, Korea committed in early 1981 to the purchase of certain rice quotas from the United States: (1) 200,000 tons of 1980 U.S. Southern short grain rice,<sup>2</sup> (2) the remaining balance of the 1980 California rice crop,<sup>3</sup> and (3) 500,000 tons of the 1981 California **[\*\*5]** rice crop.

The current litigation was precipitated by the alleged actions of certain participants in the California rice market in responding to Korea's commitment to purchase rice from United States producers. The response transpired against a backdrop of continuing decline in rice prices occasioned by the 1981 world rice surplus.

### *B. The Parties*

Plaintiffs are nineteen<sup>4</sup> independent California rice farmers who grow California rice, harvest it in "rough" or "paddy" form, and sell it to a handful of independent rice mills: Pacific International Rice Mills, Inc. ("PIRMI"), Comet Rice of California, and Grosjean Rice Milling.<sup>5</sup> The independent rice mills then mill the rice and sell it in milled form. The independent rice growers generally sell paddy rice to the independent mills through **[\*\*6]** "participation contracts," under which they share profits from the sale of milled rice.

The original defendants in this action included two cooperatives of rice farmers, Farmers Rice Cooperative ("FRC") and Rice Growers Association of California ("RGA").<sup>6</sup> These cooperatives grow, mill, and sell rice. Plaintiffs allege that these cooperatives represent a vertical integration of all phases of rice production. Three defendants are still party to the action: Connell Rice & Sugar Company ("Connell Rice"), the export marketing agent for cooperatives RGA and FRC; Grover Connell, president of Connell Rice; and Joseph L. Alioto, a partner in the San Francisco law firm of Alioto & **[\*\*7]** Alioto, past president of RGA, and sometime legal counsel to RGA, FRC, and Connell Rice.

### *C. Rice Sales to Korea*

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<sup>2</sup> Southern short grain rice is grown in the southern United States and resembles the "japonica" rice grown in California and Japan and preferred by Korean consumers.

<sup>3</sup> "California" rice is a variety of "japonica" rice.

<sup>4</sup> Although both parties number plaintiffs at eighteen, nineteen plaintiffs are named, both in the second amended complaint and in the briefs on appeal. This discrepancy apparently stems from the second amended complaint, which lists a husband and wife as one plaintiff.

<sup>5</sup> None of the independent rice mills are parties to this action.

<sup>6</sup> RGA was voluntarily dismissed from this action, and FRC was never served and was dismissed.

1. 1981-82 rice sales to Korea pursuant to Korea's commitment to purchase 200,000 tons of 1980 U.S. Southern short grain rice

On December 12, 1980, defendant Connell Rice bid to sell Southern rice at \$ 515 per ton to Korea. Connell Rice was subsequently underbid, however, by an independent rice mill - PIRMI - which won the contract to [\*1501] supply Korea with 200,000 tons of 1980 Southern rice at \$ 449.50 per ton. A formal contract was executed January 23, 1981 by PIRMI and the Office of Supply of the Republic of Korea ("OSROK"), the Korean government agency responsible for the purchase of rice.

When it came time to perform, PIRMI had insufficient supplies to deliver on the entire 200,000 tons. PIRMI officials blamed this on two things: (1) Connell Rice's purchase of Southern rice (thereby depleting the [\*\*8] overall supply of such rice), and (2) Connell Rice's subsequent sale of that rice to OSROK, both occurring just a few days after PIRMI's January 23, 1981 contract with OSROK. On February 3, 1981, OSROK confirmed that it had purchased 120,000 tons of Southern rice from Connell Rice at \$ 449.90 per ton. PIRMI was able to deliver only 105,000 tons of Southern rice to Korea.

To make up for the shortfall on its promised delivery of Southern rice to OSROK, PIRMI offered to substitute 1981 California rice for the Southern rice. By letter of January 22, 1982, PIRMI's president offered to sell OSROK 70,000 tons of California rice at \$ 349.90 per ton, a decrease in price of \$ 100 per ton from the Southern rice PIRMI was unable to obtain.

On January 25, 1982, while PIRMI was still discussing this substitution with OSROK, Connell Rice, aware that OSROK was negotiating for the purchase of California rice, offered to sell 500,000 tons of California rice at \$ 260 per ton.<sup>7</sup>

[\*\*9] Plaintiffs later alleged in their lawsuit that defendants had conspired to depress the price of California rice, and that this conspiracy was part of a larger, prolonged effort to drive both the independent farmers and the independent mills out of business. They claimed they were damaged by defendants' alleged predatory pricing because this pricing reduced the return they earned on the paddy rice they sold to the independent mills for export to Korea.

At trial, plaintiffs attempted to establish that \$ 260 per ton was a predatorily low price. A PIRMI official and plaintiffs' expert witness, an agricultural economist, testified that \$ 260 was "below the [average] variable cost [of production]." Defendant Grover Connell testified, however, that \$ 260 was a competitive price, given the oversupply in the world market at the time.

Simultaneous with its \$ 260 bid, Connell Rice made other efforts to sell California rice to Korea. First, Connell Rice's attorney, defendant Joseph Alioto, sent several telegrams on Connell Rice's behalf to OSROK and other Korean officials, including the Korean ambassador to the United States, "requesting the opportunity to bid or negotiate on the competitive [\*\*10] merits of the impending sale of American rice to Korea." Alioto's telegrams also mentioned "disturbing reports that other American suppliers are attempting to persuade you to exclude Connell [Rice] from the business and to deny it even the opportunity to bid or negotiate competitively on the forthcoming sale," and warned that such conduct would be actionable under U.S. antitrust laws.

Second, Connell Rice president Grover Connell accused Korean government officials of having accepted bribes from PIRMI in exchange for rice sale contracts. Such statements sparked investigations of commercial bribery by both the U.S. State Department and the Korean National Assembly. When State Department officials asked Grover Connell why he suspected bribery, he cited the difference between the price PIRMI negotiated with OSROK in early

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<sup>7</sup> Connell Rice apparently provided the \$ 260 price quote in response to OSROK's January 19, 1982 request, by telephone, for a price quote from RGA. Because Connell Rice is RGA's export marketing agent, RGA directed OSROK to contact Connell about the quote.

1981 and the dramatically lower prices Connell Rice had bid, explaining that he inferred bribery from OSROK's alleged "overpayment" to PIRMI.<sup>8</sup> No evidence of bribery was ever found, however.

**[\*\*11] [\*1502]** PIRMI eventually negotiated a contract with OSROK for the sale of 70,000 tons of California rice to substitute for the undelivered Southern rice. The price was \$ 280 per ton, a sharp reduction in price from PIRMI's original offer of \$ 449.90 per ton. PIRMI officials testified at trial that the substitution of California rice at \$ 280 per ton for Southern rice at \$ 449.90 per ton caused them losses of \$ 12 million.

*2. 1981-82 rice sales to Korea in connection with Korea's commitment to purchase 500,000 tons of 1980 California rice*

Korea counted the 70,000 tons of California rice it bought from PIRMI toward its commitment to purchase 500,000 tons of the 1981 California rice crop; it also counted a 60,000-ton purchase from Agroprom, a Swiss company, toward that quota. By March 1982, therefore, Korea needed to purchase an additional 370,000 tons to meet its commitment.

In March 1982, OSROK solicited bids on its remaining 370,000 ton commitment. Connell Rice offered to supply all 370,000 tons at \$ 249 per ton; shortly thereafter, Connell Rice lowered its bid to \$ 246 per ton. Independent rice mill Comet later matched Connell Rice's \$ 246 per ton offer. At trial, plaintiffs attempted **[\*\*12]** to prove that Connell Rice's price was below the independent farmers' cost of production and therefore was a predatory price.

In May 1982, Comet was awarded the entire contract to supply Korea with rice at \$ 246 per ton. However, Comet had only 120,000 tons of California rice available to sell. Between May and November of 1982, Comet negotiated with rice cooperatives RGA and FRC in an attempt to purchase the 250,000 tons it needed to meet its commitment to Korea. Comet and the cooperatives were never able to agree on a price. Plaintiffs later alleged Connell Rice and the cooperatives had boycotted and refused to deal with Comet, while defendants insisted that Comet simply rejected the cooperatives' repeated offers. Comet eventually satisfied the contract by renegotiating with Korea to substitute 1982 California rice.

## *II. Origins of the Litigation*

In late 1985, plaintiffs brought federal antitrust claims and related state-law claims against several defendants: Connell Rice, Grover Connell, cooperatives FRC and RGA, Joseph Alioto, and James Robert Errecarte, former CEO of RGA.<sup>9</sup>

**[\*\*13]** Plaintiffs' first cause of action was for monopoly, attempted monopoly, and conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Plaintiffs alleged rice cooperatives FRC and RGA were vertically integrated operations that had conspired with the other defendants to monopolize all three markets in the California rice industry: the California paddy rice market, the market for the milling of California rice, and the California milled rice market.

First, plaintiffs alleged that FRC and RGA "acting jointly as a combination controlled over seventy-five per cent of all paddy rice grown in California" while the independent farmers controlled the remaining twenty-five per cent. They alleged that the two rice milling cooperatives operated a monopoly or, in the alternative, a combination posing a "dangerous probability" of achieving a monopoly.

<sup>8</sup>Several members of Congress apparently took seriously the charge that Korea had paid inflated prices for U.S. rice: 111 members of Congress signed a letter to the president of Korea, accusing the Korean government of "improprieties in the purchase of U.S. rice."

<sup>9</sup>The sole defendants to go to trial were Connell Rice, Grover Connell, and Joseph Alioto. RGA and Errecarte were voluntarily dismissed with prejudice in 1986. FRC was apparently never served and was dismissed in 1986.

Second, plaintiffs alleged that FRC and RGA "acting jointly as a combination controlled over seventy-five per cent of all milled California rice," while the three independent rice mills - Comet, PIRMI, and Grosjean - divided the remaining twenty-five per cent of the milled rice market. Plaintiffs alleged FRC and RGA were, **[\*\*14]** together, a monopoly or, in the alternative, a combination with a "dangerous probability" of achieving a monopoly. Third, plaintiffs alleged that FRC and RGA used their monopoly power in paddy rice and in milled rice to control the intervening market: the market for rice milling, the process whereby paddy rice is converted into milled rice. Finally, plaintiffs alleged that Connell Rice controlled over **[\*1503]** ninety per cent of the submarket for the export of California rice to Korea during the period 1968 through 1981, and alleged that this degree of control constituted a monopoly. Connell Rice was also alleged to have a monopoly in the market for the export of California rice under the P.L. 480 export scheme.

Also contained in plaintiffs' first cause of action was the claim that defendants had a contract, combination, or conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs alleged a far-reaching, decades-long conspiracy among defendants to "eliminate independent rice purchasers and independent rice mills from the market for milled California rice and to eliminate independent growers of California paddy rice by driving [the] growers **[\*\*15]** from the market or forcing them to become members of [one of the rice cooperatives]."

In support of their claim, the independent rice farmers alleged a long history of anticompetitive behavior by the rice cooperatives. They alleged the cooperatives had acquired several independent rice mills over the years; had used their alleged monopoly power to manipulate prices for paddy rice and milled rice with the aim of eliminating the independent farmers and mills; had refused to sell competitively priced paddy rice to the independent mills; had paid independent rice farmers discriminatorily high prices to prevent the sale of paddy rice to the independent mills; had refused to sell competitively priced milled rice to actual or potential customers of the independent mills; had charged predatorily low prices for milled rice to prevent the independent rice mills from selling their milled rice; and had excluded independent mills from California port facilities. Finally, with respect to the California rice export market to Korea, the independent rice farmers alleged the rice cooperatives had conspired to sell only the cooperatives' rice to Korea and had bribed Korean officials to obtain a monopoly **[\*\*16]** in the export market to Korea.

Defendants-appellees Connell Rice, Grover Connell, and Joseph Alioto, it was further alleged, had all acted "in concert" with FRC and RGA in their alleged efforts to eliminate the independent rice mills and independent rice farmers. Plaintiffs accused Alioto of having masterminded the alleged anticompetitive activities.<sup>10</sup>

#### **[\*\*17] A. Allegations of Anticompetitive Activities in 1981-82**

Plaintiffs alleged that by 1981, defendants had succeeded in eliminating every major independent rice mill in California except PIRMI and Comet, and in that year launched a final concerted effort to drive these last two independent mills out of the rice business and to eliminate all independent rice farmers by either driving them out of business or forcing them to join the rice cooperatives.

Plaintiffs alleged, first, that defendants used their monopoly power to drive down the price of California paddy rice in 1981 and 1982. Second, plaintiffs alleged that defendants boycotted independent rice mill Comet during this period by refusing to sell it paddy or milled rice. Finally, plaintiffs alleged defendants used their monopoly power to drive down the price of California milled rice from over \$ 500 in 1981 to under \$ 250 in 1982. Plaintiffs alleged that defendants' activities "destroyed PIRMI" and paved the way for RGA's attempted acquisition of PIRMI's mill

<sup>10</sup> Plaintiffs accused Alioto of masterminding and perpetrating the alleged monopolization conspiracy for over thirty years, and alleged Alioto had orchestrated defendants' alleged anticompetitive activities in 1981-82. Particular allegations were that Alioto attempted to obstruct Korean contracts with the independent mills by allegedly lying to Korean officials about the price of rice; falsely accusing independent mill PIRMI of bribery of Korean officials; knowingly serving illegal subpoenas on Korean diplomats to deter them from contracting with the independent rice mills; masterminding the alleged sham litigation and sham administrative proceedings aimed at obstructing the independent mills' efforts to sell rice to Korea; and concealing the nature of RGA's attempted purchase of the PIRMI mill in an attempt to evade U.S. Department of Justice antitrust review.

operations. That acquisition was later enjoined by a district court order.<sup>11</sup> In addition, [\*1504] plaintiffs alleged that defendants had instituted "sham litigation" during [\*18] this period. They claimed Connell Rice, Grover Connell, and Joseph Alioto had commenced lawsuits that they "knew to be without merit and which were prosecuted solely for the purpose of injuring competition." Plaintiffs also alleged defendants engaged in "false testimony, false submissions to government agencies and threats to government officials" as well as threats against competitors, in furtherance of their alleged conspiracy.

#### **[\*\*19] B. Injuries Alleged and Damages Sought**

The independent rice farmers alleged that defendants' actions caused them harm by: (1) restraining trade in the markets for California paddy rice, California milled rice, and the milling of California rice; (2) eliminating independent mills, thereby restricting the independent farmers' ability to sell paddy rice and reducing the number of mills selling California milled rice; (3) denying purchasers of California paddy rice and California milled rice of "the benefits of open and unrestricted competition;" and (4) causing plaintiff independent farmers "monetary injury to their business and property" by causing predatorily low prices for California paddy rice and California milled rice. Plaintiffs sought injunctive relief and treble damages of an unspecified amount.<sup>12</sup>

#### **[\*\*20] III. The Trial**

After several years of pre-trial skirmishes and reassignment to several district judges, the suit finally went to a jury trial before Judge Caulfield in 1992. Although defendants had filed various counterclaims,<sup>13</sup> the district court severed plaintiffs' claims from defendants' counterclaims, in view of the complexity of the litigation. The liability phase of the trial lasted approximately seven weeks, running from March 23 to May 14, 1992. The jury rendered its verdict on May 29, 1992. The following are aspects of the trial that are relevant to this appeal.

##### **A. Time Limit**

Over plaintiffs' pretrial objection, the district court imposed a time limit on the trial. For the liability phase of the trial, the court allowed each side forty hours for direct and cross-examination, [\*21] and allowed each party two hours for opening statements, two hours for closing arguments, and two-and-a-half hours for additional "commentary" to the jury. During the trial, the court granted each side six hours of supplemental time, after asking the lawyers for each side how much additional time they would need to finish trying the case.

<sup>11</sup> The United States Department of Justice, Antitrust Division, filed suit under Sections 7 and 15 of the Clayton Act, [15 U.S.C. §§ 18](#) and [25](#), seeking to enjoin RGA's acquisition of PIRMI assets. The district court entered judgment for the United States in 1986, finding that the attempted acquisition would result in a market concentration that could "substantially . . . lessen competition in the market for the purchase or acquisition for milling of paddy rice grown in California," and thus would violate Sections 7 and 15 of the Clayton Act. *United States v. Rice Growers Ass'n of California*, 1986-2 Trade Cases (CCH) [para] 67,287, 1986 WL 12562, \* 12 (E.D. Cal. 1986). The district court found that the transaction, which was directed to some extent by Joseph Alioto, appeared "structured so as to avoid the reporting requirements of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, [15 U.S.C. § 18\(a\)](#)." *Id.* at \* 13.

<sup>12</sup> Plaintiffs also brought monopoly and restraint of trade claims under the Cartwright Act, Calif. Bus. & Prof. Code § 16790 and the California Unfair Practices Act, [Calif. Bus. & Prof. Code §§ 17045](#)-17048 and 17200. Additionally, plaintiffs brought a claim suit under Section 7 of the Clayton Act, [15 U.S.C. § 18](#), alleging defendants' actions "lessened competition or [] tended to create a monopoly in a line of commerce in a section of the country."

<sup>13</sup> Connell Rice's counterclaims allege plaintiffs and the independent rice mills conspired to monopolize the California rice market through commercial bribery, and engaged in abuse of process in bringing their antitrust claims.

## B. Evidentiary Rulings

### 1. Admission of Defense Expert Testimony

In April 1991, during the discovery phase of the litigation, Chief Judge Henderson issued an order prohibiting defendants from introducing any expert testimony at trial. Judge Henderson's order described a series of discovery abuses by defendants. Defendants failed to respond to plaintiffs' July 1988 expert witness interrogatories. Plaintiffs moved twice to compel responses, and hearings were held before Magistrate Trumbull [\*1505] in October and November 1988. On November 10, 1988, Magistrate Trumbull ordered defendants to "produce the information regarding their expert witness on the same day as they decide on their expert." Defendants identified Dr. Merrill Bateman as their expert witness in Defendants' December 2, 1988 Pretrial Conference Statement. However, it was not until two [\*\*22] years later, in their December 3, 1990 Supplemental Responses to Plaintiffs' First Set of Interrogatories, that defendants furnished plaintiffs' counsel with the information they had requested about defendants' expert. On the basis of defendants' two-year delay in complying with Magistrate Trumbull's discovery order and their earlier discovery delays, Judge Henderson granted plaintiffs' Motion to Preclude Defendants from Adducing Expert Testimony. The order was a sanction for defendants' repeated discovery abuses. [Fed. R. Civ. P. 37.](#)

The parties' subsequent pre-trial conduct was consistent with Judge Henderson's order. Defendants' March 1992 pre-trial witness list made no mention of Dr. Bateman, and plaintiffs never deposed Dr. Bateman.

At trial, however, defendants sought to call Dr. Bateman as a "rebuttal expert," arguing that Dr. Bateman authored one of the reports plaintiffs' expert, Dr. Ronald D. Knutson, had analyzed during his testimony. Plaintiffs objected, arguing that Dr. Bateman was the very expert Judge Henderson had excluded in his order barring defense expert testimony, and that they had been deprived of the opportunity to conduct discovery of defendants' expert, having [\*\*23] learned only the night before of defendants' plan to call Dr. Bateman as a rebuttal expert.

Despite Judge Henderson's earlier order prohibiting defense expert testimony, Judge Caulfield allowed Dr. Bateman to testify, albeit for one purpose only: "to speak about how his report was used" by plaintiffs' expert.

### 2. Admission of Defendants' Summary Exhibits

During trial, the district court admitted two summary exhibits at issue in this appeal: Defense Exhibit 529A and 781A. Defense Exhibit 529A was a graph comparing a price-to-loan ratio with a stocks-to-use ratio. Defense Exhibit 781A summarized Thai rice prices and adjusted California rice prices, and summarized defendants' expert's findings based on that price information.

## C. Application of the Noerr-Pennington Doctrine

Among the allegations underlying plaintiffs' antitrust claims were plaintiffs' allegations that defendants had initiated various "sham" lawsuits and "sham" administrative proceedings as part of a conspiracy to monopolize and to restrain trade in the various rice markets alleged. During trial, the district court ruled that as a matter of law, defendants' actions were not objectively baseless and therefore [\*\*24] did not fall within the "sham" exception to the *Noerr-Pennington* doctrine of antitrust immunity for private efforts to influence government action. Because it concluded that defendants' actions were protected by the *Noerr-Pennington* doctrine, the district court excluded some evidence of the allegedly "sham" lawsuits, although it did admit some evidence concerning defendants' alleged anticompetitive conspiracy.

## D. Jury Instructions on Service of Subpoenas on Foreign Government Officials

Plaintiffs alleged Joseph Alioto mailed subpoenas to the Korean ambassador to the United States and to a Korean consular official in New York as part of the alleged "sham" litigation. Both subpoenas were quashed by the State Department. At trial, plaintiffs requested that the district court instruct the jury on aspects of the law governing the

service of subpoenas on foreign officials. Instead of reading plaintiffs' proposed instructions, however, the district court read provisions of the Vienna Convention, 23 U.S.T. 3227 (April 18, 1961), the Foreign Sovereign Immunities Act, [28 U.S.C. §§ 1602-11](#), and certain Federal Rules of Civil Procedure.

#### [\*1506] *E. Verdict*

On May 29, 1992, following [\*25] an eight-week trial before Judge Caulfield, the jury returned a special verdict for defendants on plaintiffs' claims of conspiracy to monopolize under [Section 2](#) of the Sherman Act and the California Unfair Practices Act. The jury was unable to reach a unanimous verdict, however, as to plaintiffs' claims for conspiracy in restraint of trade under [Section 1](#) of the Sherman Act and California's Cartwright Act.

### *IV. Post-Trial Proceedings*

#### *A. Directed Verdict for Defendants on Plaintiffs' Restraint of Trade Claims*

Eighteen months after the jury verdict, Judge Caulfield entered judgment as a matter of law as to plaintiffs' claims that defendants had conspired to restrain trade in violation of [Section 1](#) of the Sherman Act and the California Cartwright Act. *Amarel v. Connell*, 1994-1 Trade Cases Par. 70,632, 1993 WL 515885 (N.D. Cal. Nov. 30, 1993). In entering judgment for defendants on plaintiffs' remaining claims, the district court held that the jury verdict for defendants as to plaintiffs' monopolization claims precluded plaintiffs' restraint of trade claims, since "plaintiffs maintained in their amended complaint and in their presentation to the jury that it was defendants' [\*26] attempt to conspire to monopolize that allegedly restrained trade in the relevant market." *Amarel*, 1993 WL 515885, \* 2.

#### *B. Directed Verdict for Defendant Joseph Alioto*

After trial, defendant Joseph Alioto moved for judgment as a matter of law on grounds of attorney immunity from antitrust liability. Judge Caulfield granted the motion, finding in the record "no legally sufficient evidentiary basis" to support plaintiffs' antitrust claims against Alioto. *Amarel v. Connell*, 1994-1 Trade Cases Par. 70,632, 1993 WL 515885 (N.D. Cal. Nov. 30, 1993).

### *V. The District Court's Post-Judgment Award of Copying Costs*

Following Judge Caulfield's entry of judgment for defendants on all plaintiffs' claims, defendants applied for an award of costs. In December 1993, they filed two bills of costs totalling \$ 227,001.08: a bill of \$ 170,446.66 for Connell Rice and a bill of \$ 56,554.42 for Joseph Alioto.

Pending plaintiffs' appeal, Judge Caulfield stayed all proceedings, including the taxation of costs. After Judge Caulfield resigned, the case was reassigned to Judge Walker. Although plaintiffs contended the taxation of costs would be premature in view of the pending counterclaims [\*27] that remained to be tried, Judge Walker directed the clerk to tax costs.

The clerk taxed plaintiffs a total of \$ 129,695.01 in costs: \$ 108,853.01 of the costs sought by Connell Rice and \$ 20,842 of the costs sought by Alioto.

Both sides moved for reconsideration of the award. The day before the reconsideration hearing, Judge Walker entered an order directing defendants to present further documentation to support their claimed costs. At the May 5, 1995 hearing, counsel for defendants presented two affidavits and exhibits as further evidence of defendants' costs. Judge Walker ruled at the close of the three-hour hearing, awarding defendants \$ 96,441.65 in costs: \$ 75,599.65

for Connell Rice and \$ 20,842 for Joseph Alioto. Plaintiffs timely appealed the district court's award of costs, and that appeal was consolidated with plaintiffs' appeal on the merits.

## ANALYSIS

### *I. Standing*

On appeal, defendants renew <sup>14</sup> their contention that plaintiffs lack standing to maintain [\*1507] this antitrust action. They claim, first, that plaintiffs' alleged injury is "not the type of injury the antitrust laws were intended to prevent" and, second, that plaintiffs' alleged injury "is derivative [\*\*28] and indirect" and therefore not cognizable under the antitrust statutes.

Because [HN1](#) antitrust standing is a question of law, we review the issue de novo. [Exhibitors' Service, Inc. v. American Multi-Cinema, Inc.](#), 788 F.2d 574, 578 n.4 (9th Cir. 1986). The issue of antitrust standing may be raised at any stage of litigation. [R.C. Dick Geothermal Corp. v. Thermogenics, Inc.](#), 890 F.2d 139, [\\*\\*291](#) 145 (9th Cir. 1989) (en banc). In *R.C. Dick Geothermal*, we explained that "whenever it appears that [standing] has not been established and has not been conceded, an element necessary for the plaintiff to prevail is lacking." *Id.* (*citing* P. Areeda & H. Hovenkamp, [Antitrust Law](#) Par. 335.1b (Supp. 1987)).

[HN2](#) Section 4 of the Clayton Act allows recovery of treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." [15 U.S.C. § 15\(a\)](#). The language of this provision is very broad and, "read literally, 'could afford relief to all persons whose injuries are causally related to an antitrust violation.'" [Lucas v. Bechtel Corp.](#), 800 F.2d 839, 843 (9th Cir. 1986) (citation omitted). It is well-settled, however, that despite the sweeping language of Section 4, "'Congress did not intend to provide a private remedy for all injuries that might conceivably be traced to an antitrust violation.'" [Bubar v. Ampco Foods, Inc.](#), 752 F.2d 445, [448](#) (9th Cir.) (*citing* [Blue Shield of Virginia, Inc. v. McCready](#), 457 U.S. 465, 472-80, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)), cert. denied, 472 U.S. 1018, 105 S. Ct. 3481, 87 L. Ed. 2d 616 (1985). As the Supreme [\\*\\*30](#) Court has explained, [HN3](#) "harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." [Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters](#), 459 U.S. 519, 535, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). Courts have developed the doctrine of antitrust standing to determine the "class of persons entitled to obtain [Section 4] damages." [Los Angeles Memorial Coliseum Comm'n v. National Football League](#), 791 F.2d 1356, 1363 (9th Cir. 1986).

The Supreme Court has identified several factors [HN4](#) courts are to consider in determining whether a plaintiff, who has suffered an injury which bears a causal connection to the alleged antitrust violation, also satisfies the more demanding standard for antitrust standing. These factors are:

- (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

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<sup>14</sup> On two occasions below, the district court denied similar motions by defendants-appellees. First, in a pre-trial ruling in response to defendants' motion for summary judgment, which was based on plaintiffs' purported lack of standing and was therefore treated as a motion to dismiss, the district court held that plaintiffs had standing. *Amarel v. Connell*, 1986-2 Trade Cases Par. 67,233, 1986 WL 10613, \* 2-3 (N.D. Cal. Aug. 8, 1986). Second, in a post-trial order in response to defendants' motion for judgment as a matter of law, the trial judge summarily rejected defendants' contention that plaintiffs lacked standing.

(5) [\*\*31] the complexity in apportioning damages.

*Associated Gen. Contractors, 459 U.S. at 535.*

**HN5** Antitrust standing involves a case-by-case analysis of "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* We have held that in examining the factors set forth in *Associated Gen. Contractors*, "no single factor is decisive. The court must balance the factors." *R.C. Dick Geothermal, 890 F.2d at 146* (*citing Los Angeles Coliseum Comm'n, 791 F.2d at 1363*). We have also "rejected any [] implication [that] a favorable finding in each and every one of the [Associated Gen. Contractors] factors is a necessary precondition to a finding of antitrust standing." *Los Angeles Memorial Coliseum Comm'n, 791 F.2d at 1363*. We have said, however, that the nature of the plaintiff's alleged injury is of "tremendous significance" in determining whether a plaintiff has antitrust standing. *Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 n.3 (9th Cir. 1985)*. With these factors in mind, we address defendants' challenges to plaintiffs' standing.

#### [\*1508] A. The Nature of Plaintiffs' Alleged Injury

Defendants' first argument is [\*\*32] that plaintiffs' "claimed injury is not of the type the antitrust laws were intended to prevent." Undergirding this argument is defendants' characterization of plaintiffs' alleged injury as the failure of PIRMI and Comet "to get higher prices due to the cooperative's competitive, nonpredatory quotes."

**HN6** It is well-settled that 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)* (*quoting 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." *Atlantic Richfield, 495 U.S. at 334* (internal quotations and citations omitted). 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 [\*\*33] the alleged malefactors." *Bhan, 772 F.2d at 1470* (*citing Associated Gen. Contractors, 459 U.S. at 538-39*).

In considering whether plaintiffs' alleged injuries are "of the type the antitrust laws were intended to prevent" and "flow[] from that which makes defendants' acts unlawful," *Atlantic Richfield, 495 U.S. at 334 (1990)* (citation omitted), we begin by noting that plaintiffs' allegations of injury are far broader than defendants describe. Plaintiffs' complaint contained broad, albeit sometimes vague, allegations of a decades-long conspiracy to eliminate both plaintiffs, the independent farmers, and the independent rice mills, and to monopolize all phases of rice production. Alleged participants in the conspiracy were the rice cooperatives - which plaintiffs alleged are vertically integrated operations engaged in every stage of rice production - and various other parties, including defendants Connell Rice, Grover Connell, and Joseph Alioto. The complaint alleges that the plaintiff rice farmers are, in effect, competitors of the vertically integrated rice cooperatives, since the cooperatives compete at multiple levels of rice production.

Additionally, plaintiffs' [\*\*34] complaint contains specific allegations as to defendants' conduct between 1980 and 1982. First, plaintiffs alleged that defendants engaged in predatory pricing during 1981 and 1982, and plaintiffs introduced evidence at trial that defendants' prices were below defendants' cost of production and therefore predatory. Such predatory pricing, alleged plaintiffs, harmed them directly because it depressed the market in which they sold their rice. Second, plaintiffs alleged that defendants engaged in a lengthy boycott by refusing to sell rice to Comet. This behavior allegedly harmed plaintiffs because it threatened to eliminate one of two remaining independent mills through which plaintiffs sold their paddy rice.

We consider the nature of plaintiffs' alleged injury in the context of the antitrust standing doctrine.

**HN7** [↑] 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. *Atlantic Richfield, 495 U.S. at 339 (1990)* (holding plaintiff suffered no injury where it lost sales to a competitor charging *nonpredatory* prices pursuant to a vertical, maximum-price-fixing [\*\*35] scheme); accord *Matsushita Electrical Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582-83, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. "When defendants engage in predatory pricing or other anticompetitive acts in an attempt to gain a monopoly, the competitor who is being driven out of the market is the party with standing." *In re Air Passenger Computer Serv. Reservation Systems, 727 F. Supp. 564, 568-69 (C.D. Cal. 1989)*; see also Phillip E. Areeda and Herbert Hovenkamp, 2 *Antitrust Law* Par. 373d (revised ed. 1995) ("Standing is clear . . . when the plaintiff alleges that its rival engaged [\*1509] in an exclusionary practice designed to rid the market of the plaintiff . . . so that the defendant could maintain or create a monopoly.") An important rationale for condemning predatory pricing "is to protect competition from improper destruction. The injured competitor fits within that rationale and therefore suffers antitrust injury." *Id.*

Here, plaintiffs allege that they participated in the market for milled rice by virtue of their "participation contracts" with the independent mills, and that defendants' alleged predatory pricing harmed them because it depressed prices below their costs. Plaintiffs introduced [\*\*36] expert testimony at trial that Connell Rice's prices were below plaintiffs' average variable costs. This type of predatory pricing against a de facto competitor falls squarely within the category of antitrust injury.

Our conclusion is reinforced by previous decisions in which we have held that **HN8** [↑] a competitor of an alleged attempted monopolist had standing where it was either driven out of business or suffered reduced profits because of the alleged anticompetitive acts of the attempted monopolist. See *LaSalvia v. United Dairymen of Arizona, 804 F.2d 1113, 1116 (9th Cir. 1986)* (plaintiffs, independent dairy farmers, were competitors of dairy cooperative and therefore had standing to challenge cooperative's alleged anticompetitive conduct in suit for attempted monopolization), cert. denied, 482 U.S. 928, 96 L. Ed. 2d 699, 107 S. Ct. 3212 (1987), and *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1024 (9th Cir. 1981)* (antitrust suit premised on allegations that defendant used discriminatory and below-cost pricing to drive out competition from independent bakers in market for wholesale bread), cert. denied, 459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 57, 103 S. Ct. 58 (1982).

Another form of antitrust injury is "coercive [\*\*37] activity that prevents its victims from making free choices between market alternatives." *Associated Gen. Contractors, 459 U.S. at 528* (citation omitted). Such conduct "is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect." *Id.* This category of antitrust injury includes agreements to restrain trade. *Id.* In this case, plaintiffs alleged that defendants, acting in concert with the rice cooperatives, conspired to eliminate both the independent mills and the independent growers. Among the specific tactics alleged are that defendants boycotted Comet, refusing to sell it rice, in an effort to undermine Comet's ability to sell rice to Korea.

The Supreme Court has identified the anticompetitive effects that may flow from group boycotts and concerted refusals to deal. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*, the Court explained that such actions may "disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." In particular, such actions [\*\*38] may "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete." *Northwest Wholesale Stationers, 472 U.S. at 294* (citations omitted). In this case, Connell Rice was the marketing agent for the major rice cooperatives, and allegedly refused to supply one of the sole remaining independent mills with rice. That alleged refusal to deal by defendants directly harmed the farmers by harming competition in the market for milled rice.

Defendants also oppose plaintiffs' standing because, they assert, plaintiffs "are neither consumers nor competitors in the market claimed to have been affected by the allegedly depressed prices." We disagree with defendants' characterization of plaintiffs' role in the rice industry. Plaintiffs introduced evidence that they are "competitors" in the market for milled rice because they tender paddy rice to the independent mills under "participation contracts" which entitle them to a share of profits from the sale of milled rice. Because plaintiffs thus participate in the market for milled rice, defendants' alleged predatory pricing, if true, caused them a direct monetary loss.

Moreover, standing is appropriate in certain [\*\*39] cases where the plaintiff is "a supplier of goods or services who can prove [\*1510] that he suffered lower selling prices or diminished volume or other profit reduction as a result of illegal conduct by the defendant(s)." Areeda and Hovenkamp, *Antitrust Law* at Par. 375a. Although a plaintiff normally lacks standing where that plaintiff's customer is the immediate victim of the defendant's conduct, standing is appropriate where that plaintiff also competes with the defendant. *Id.*; see also *Associated Gen. Contractors, 459 U.S. at 542-44*. The plaintiff supplier's injury is sufficiently direct where that supplier "both competes with defendants and is their target." Areeda and Hovenkamp, *Antitrust Law* at Par. 375d.

Such was the case in *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158 (9th Cir. 1991), cert. denied, 504 U.S. 913, 118 L. Ed. 2d 552, 112 S. Ct. 1947 (1992)*. Plaintiffs in that case were consulting firms that advised businesses on the form and content of yellow page advertisements. They also ordered, placed and processed advertisements for those businesses. Defendants were publishers of yellow page directories, but they also advised businesses on how to use yellow page [\*\*40] advertising. Defendants included the cost of that advice in the fees they charged for yellow page advertisements. When defendants ended their practice of allowing the consultants to order, place, and process yellow page advertisements on behalf of advertisers, that policy change induced some of plaintiffs' customers to cancel their contracts with plaintiffs because it was less convenient to deal with both the consultants and the publishers. Plaintiffs brought suit under *Section 2* of the Sherman Act, claiming that the yellow page publishers were attempting to use their alleged monopoly power in the yellow page publishing market to achieve a monopoly in the market for consultation about that market. Plaintiffs also brought a *Section 1* claim, alleging that the publishers' refusal to deal with the consultants restrained trade in the market for consultation services.

The defendant publishers claimed plaintiffs lacked standing because defendants and plaintiffs did not compete in the same market. On appeal, we held that the plaintiffs and defendants *did* compete in the same market: the market for advising yellow page advertisers as to the form, content, and cost of yellow page advertising. [\*\*41] Although the plaintiffs and the defendants did not offer exactly the same service, since they offered somewhat different advice and had different fee structures, we concluded that they nonetheless competed in one important respect: both offered advice to purchasers of yellow page advertisements. *Yellow Pages Cost Consultants, 951 F.2d at 1161*. We explained that for purposes of antitrust standing analysis, "the field of competition [includes] . . . the group or groups of sellers who have actual or potential ability to deprive each other of significant levels of business." *Id. at 1162* (citing *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989)*). We also noted that the consultants, in competing with the publishers' advice service, served a key function as competitors: "imposing 'an essential discipline on producers and sellers of goods to provide the consumer with a better product at a lower cost. . . .'" *Yellow Pages Cost Consultants, 951 F.2d at 1162* (citing *United States v. Syufy Enterprises, 903 F.2d 659, 662-63 (9th Cir. 1990)*).

This situation is similar: plaintiffs and defendants, while not identical entities, are nonetheless [\*\*42] competitors in a particular market segment: the market for milled rice. Here, Connell Rice, the marketing agent for the rice cooperatives, was alleged to play a key role in predatory pricing and in refusing to deal with Comet. The plaintiffs supply paddy rice to the mills, and yet they also participate in the market for milled rice because their contractual arrangement with the independent mills gives them a share of the profits from the sale of milled rice. Moreover, plaintiffs insist that defendants' alleged conspiracy to restrain trade in various segments of the rice industry had as a central aim the elimination of the independent rice farmers. Because the plaintiffs "both compete[] with defendants and [are] their target," they have standing. Areeda and Hovenkamp, *Antitrust Law* at Par. 375d.

The Second Circuit reached a similar result in *Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290 (2nd I\*1511 Cir. 1983)*. The defendants in *Crimpers Promotions* were two companies alleged to dominate the business of buying cable television programming from producers and selling it to cable television stations. The plaintiff organized a trade show to facilitate direct [\*\*43] contact between producers of programming and cable television stations that purchased such programming. One of the plaintiff's goals in organizing the trade show was to reduce the producers' and the stations' dependence on the defendants, who allegedly dominated the market for the sale of cable television programming. The plaintiff brought an antitrust suit, alleging that the defendants attempted to ruin the trade show by pressuring producers and cable system operators and threatening to boycott

producers who attended the show. The plaintiff further alleged that defendants' tactics succeeded in keeping attendance far below plaintiffs' projections.

The defendants in *Crimpers* insisted that the plaintiff lacked standing because it did not compete directly with the defendants in the market for the purchase and sale of programming, and therefore was harmed only derivatively. The Second Circuit disagreed, concluding that the plaintiff had suffered antitrust injury because it was attempting to compete against the defendants' alleged monopoly in the market for the purchase and sale of cable television programming, and the defendants took anticompetitive action against the plaintiff. The [\*\*44] Second Circuit reasoned that "Crimpers was not just a 'supplier' of a competitor, . . ." but instead was "endeavoring to forge a link in a chain of the sale of programming . . . that would compete with defendants in their role as middlemen." *Crimpers Promotions*, 724 F.2d at 294. The plaintiff's injury "was the precisely intended consequence of defendants' boycott," and was "inextricably intertwined with the injury the defendants sought to inflict on producers and television stations in the cable programming market." *Id. at 294-95*.

Similarly, plaintiffs here allege defendants attempted to destroy competition at several levels of the rice industry. They alleged that defendants' predatory pricing and their boycott of Comet worked anticompetitive harms similar to those alleged in *Crimpers Promotions*: These actions allegedly thwarted plaintiffs' attempts to compete with defendants in the market for the export of California rice to Korea.

In arguing that plaintiffs are neither their competitors nor their consumers, defendants rely heavily on *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538 (9th Cir. 1987). In that case, plaintiffs were crewmembers on fishing vessels who caught [\*\*45] fish that was sold by vessel owners to tuna canneries. The crewmembers attempted to bring antitrust claims against the tuna canneries for allegedly conspiring to depress tuna prices, conduct the crewmembers insisted harmed them by reducing their wages and reducing their employment opportunities. We held that the crewmembers lacked standing because they were neither consumers nor competitors in the market for tuna but instead were employees of the entities that were directly injured: the owners of the fishing vessels. *Id. at 541*. Although the plaintiffs in *Eagle* insisted that they were "sellers along with the vessel owners" because their contracts with the vessel owners allowed them a share of the profits from the sale of tuna, we disagreed. We concluded that the plaintiff crewmembers were not sellers because they had no control over the vessel or the selling price of the fish, and "because the alleged anticompetitive conduct was directed at the vessel owners, not the crewmembers of the union." *Id.*

Here, in contrast, defendants' alleged anticompetitive conduct - predatory pricing and the refusal to sell rice to Comet - was allegedly directed at both the independent farmers [\*\*46] and the independent mills. Unlike the canneries in *Eagle*, which allegedly directed their anticompetitive conduct at the vessel owners, defendants in this case allegedly had a broader aim: the elimination of independent entities in the California rice industry.

#### B. The Directness of the Injury

Defendants next assert that plaintiffs' alleged harm is merely "derivative and indirect" because it "derived from the lower prices supposedly obtained for milled rice as [\*\*1512] a result of defendants' acts." We disagree. Plaintiffs allege that defendants conspired to eliminate the independent farmers and independent mills. Among the particular injuries, plaintiffs allege, are depressed earnings caused by predatorily low prices and restraint of trade in the milled rice market resulting from defendants' refusal to supply rice to mills like Comet.

The Seventh Circuit recently addressed the "directness of the injury" requirement in the context of similar facts. In *Sanner v. Board of Trade of Chicago*, 62 F.3d 918 (7th Cir. 1995), soybean farmers sued the Chicago Board of Trade, alleging that they were injured by a Board of Trade emergency resolution ordering holders of "long" positions in soybean [\*\*47] futures to liquidate their positions. The Board of Trade's resolution allegedly caused a price decline in the soybean futures market, which caused a corresponding decline in the soybean cash market. The plaintiff farmers were sellers in the soybean cash market who alleged that the emergency resolution harmed them because it depressed prices in the soybean cash market. The plaintiffs also claimed that the Board of Trade resolution was an illegal restraint of trade which caused them to suffer losses in the soybean cash market.

The Seventh Circuit concluded that because the farmers were sellers in the cash market who claimed injury caused by an unlawful action in the closely related futures market, the plaintiffs had antitrust standing. *Id. at 927*. It also found the injury alleged sufficiently direct to form a basis for antitrust standing. The court rejected the contention that the price depression in the soybean cash market was an "indirect" result and "derivative" of the price decline in the soybean futures market because it rejected the view that there was a "disjunction . . . between the cash market and the futures market for soybeans." *Id. at 928*. Acknowledging that there [\*\*48] were differences between the two markets, the Seventh Circuit concluded that the two markets were not "unrelated for the purposes of antitrust standing analysis" since a significant price change in the futures market generally correlated with a similar price change in the cash market. *Id. at 929*. This close relationship between the two markets offered a basis for antitrust standing: "Since [the cash market] tends to move in lockstep with [the futures market], participants in the cash market can be injured by anticompetitive acts committed in the futures market." *Id.* Given the "close and continuous link" between the two markets, the injury was not too indirect and derivative to support antitrust standing. *Id.*

We face a strikingly similar situation here. Given the close ties between the paddy rice market and the milled rice market, and given that plaintiffs' profits were, in part, a function of profits in the milled rice market, defendants' alleged predatory pricing in the market for milled rice "predictably would have impacted" the price of paddy rice. *Id.*

Defendant's alleged boycott also caused direct injury to plaintiffs. The Supreme Court has suggested that, [\*\*49] for purposes of standing analysis, the antitrust laws are concerned with the effect on direct victims of boycotts and secondary boycott victims. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982), the Supreme Court stated in dicta that a plaintiff would have antitrust standing to challenge a concerted refusal to deal where that plaintiff was sufficiently affected by that refusal. It hypothesized that if a group of psychiatrists conspired to boycott a bank until that bank stopped making loans to competing psychologists, antitrust standing would exist not only for the bank, the target of the primary boycott, but also for the psychologists, "against whom the secondary boycott was directed." *Blue Shield of Virginia*, 457 U.S. at 484 n.21.

Like the defendants in *Blue Shield of Virginia*, the defendants here allegedly intended to have an impact on both the milled rice and paddy rice markets. Given the interdependence between independent mills and independent farmers, harming one was tantamount to harming the other. Injuring the farmers was thus "an integral [] aspect of the conspiracy alleged." *Blue Shield of Virginia*, 457 U.S. at 479; see also *Sanner*, 62 F.3d at 929 [\*\*50] (intent to harm soybean futures market could suggest intent to harm soybean cash market); *Yellow Pages* [\*1513] *Cost Consultants*, 951 F.2d at 1162-63 (close link between defendants' actions [refusal to allow plaintiff consultants to process customer advertisements] and plaintiffs' loss of customers is sufficient for antitrust standing).

In concluding that plaintiffs were sufficiently direct victims of the defendants' alleged anticompetitive activities, we distinguish cases in which we have held injuries too indirect to support the standing of putative plaintiffs where those plaintiffs were not within the "identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement." *Lucas*, 800 F.2d at 845. Cf. *Vinci v. Waste Management Inc.*, 80 F.3d 1372, 1375-76 (9th Cir. 1996) (shareholder and former employee of defendant lack standing to sue defendant for alleged antitrust conspiracy); *R.C. Dick Geothermal*, 890 F.2d at 147 (loss of royalties for lessor of property producing geothermal steam, caused by alleged conspiracy among lessees to conceal the property's steam capacity, was indirect injury); *Lucas*, [\*51] 800 F.2d at 844-45 (union electricians working on construction project did not suffer sufficiently direct injury from alleged conspiracy between contractor and unions to monopolize the market in design and construction of such plants; electricians' alleged injury - depressed wages - were merely indirect consequence of alleged monopoly); *Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co.*, 39 F.3d 951, 954 (9th Cir. 1994), cert. denied, 131 L. Ed. 2d 304, 115 S. Ct. 1420 (1995) (consultants to tort plaintiffs did not suffer antitrust injury where life insurance carriers allegedly blocked tort plaintiffs from gaining access to annuity price information, since blocking tort plaintiffs' access did not cause injury to consultants).

## II. Time Limit

Plaintiffs contend that the district court committed reversible error by imposing a time limit on the trial. [HN9](#) [↑] We review such challenges to trial court management for abuse of discretion. [General Signal Corp. v. MCI Telecommunications Corp.](#), 66 F.3d 1500, 1507 (9th Cir. 1995).

[HN10](#) [↑] A district court is generally free to impose reasonable time limits on a trial. [Id. at 1507](#) (citing [Deus v. Allstate Ins. Co.](#), 15 F.3d 506, 520 (5th [\*\*52] Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 115 S. Ct. 573, 130 L. Ed. 2d 490 (1994)). Time limits may be used to "prevent undue delay, waste of time, or needless presentation of cumulative evidence." [Monotype Corp. v. International Typeface Corp.](#), 43 F.3d 443, 450 (9th Cir. 1994) (citing [Johnson v. Ashby](#), 808 F.2d 676, 678 (8th Cir. 1987)). Rigid and inflexible hour limits on trials, however, are generally disfavored. [Monotype Corp.](#), 43 F.3d at 450-51 (citing [Flaminio v. Honda Motor Co.](#), 733 F.2d 463, 473 (7th Cir. 1984)).

We conclude that the time limits imposed by the district court were reasonable. We begin by observing that the district court based the time limits, in part, on the parties' estimates of trial length. Plaintiffs' counsel estimated that he would need four weeks to put on the liability portion of the case. After the court proposed a six-week trial, with forty hours per side for witness examination, plaintiffs' counsel asked the court for ten more hours - or fifty hours total - to try the liability issue. Although the court initially rejected this suggestion, it subsequently reconsidered and gave each side an six additional hours for witness examination. This adjustment brought [\*\*53] the total hours to forty-six - close to plaintiffs' counsel's original request.

In implementing the time limits, moreover, the district court was flexible. It granted each side six additional hours for witness examination, which was even more time than the parties themselves estimated. Indeed, the district court told plaintiffs' counsel that she was granting him more supplemental time than the four hours he had requested because she thought he had underestimated the time needed. Additionally, the district court allowed counsel to use some of their allotted commentary time for witness examination.

Plaintiffs advance several specific challenges to the district court's time management during the trial.

Plaintiffs argue that the times imposed were arbitrary because they did not allow for [\*1514] delays caused by dilatory witnesses and sidebar discussions. This argument is flawed in two respects. First, it overlooks the district court's willingness to extend the time limits for each side, which was not arbitrary but based on the parties' own estimates of time. Second, it ignores the nature of trials, which are typically fraught with delays the parties cannot control. Especially in trials with [\*\*54] time limits, trial counsel are responsible for case management and frequently must make strategic decisions to adjust for unforeseen delays.

Plaintiffs also contend that the district court's decision to permit each party to use commentary time for witness examination was prejudicial because it gave defendants - who tried the case as two parties - additional time to examine witnesses, while depriving plaintiffs of the right of cross-examination.

Plaintiffs' account of the trial mischaracterizes the record. The district court did not, as plaintiffs allege, "arbitrarily cut" plaintiffs' final fifteen minutes of witness examination time and give defendants additional time for cross-examination. Plaintiffs' time was not cut; instead, the district court's own timekeeping indicated that plaintiffs had only fifteen minutes remaining. Moreover, defendants' time was not increased; the court's timekeeping indicated defendants had another five minutes remaining for cross-examination.

More importantly, plaintiffs are flatly incorrect in their assertion that they "did not cross-examine [defendants' expert] Bateman," since the record reflects that plaintiffs did, in fact, cross-examine Bateman [\*\*55] at the very end of trial. They are also mistaken in their contention that they "had to forego any cross-examination of [defense witness] Errecarte." After defense counsel's direct examination of Errecarte, plaintiffs' counsel still had time remaining, but explicitly declined the opportunity to cross-examine Errecarte.

Plaintiffs were not "denied" the opportunity to cross-examine witnesses. Indeed, the district court allowed both sides additional time for cross-examination by allowing them to use their commentary time for cross-examination. Cf. [General Signal Corp.](#), 66 F.3d at 1508 (citing [Harries v. United States](#), 350 F.2d 231, 236 (9th Cir. 1965)) (stating

that a limitation on cross-examination denies due process only if it is "so severe as to constitute a denial" of the right to cross-examine)). Plaintiffs, though cognizant of the time limitations, used their supplemental time for other things, such as to recall their expert witness.

The record indicates that throughout the trial, plaintiffs' counsel was acutely aware that he would have limited time to cross-examine defendants' witnesses. Even before the trial got underway, plaintiffs' counsel predicted that under the [\*\*56] forty-hour limit, "there will be virtually no time left when we come to cross-examine the defendants." Just one week after the district court had granted the parties additional time, plaintiffs' counsel complained that the five hours he then had remaining would force him to choose between conducting further examination of his expert and cross-examining defendants' witnesses, and notified the court that he would ask the court for "proper cross-examination time" after he finished direct examination of his expert. The next day, when plaintiffs' counsel had virtually depleted his time, the district court offered to let counsel use his remaining commentary time for witness cross-examination. The court refused to grant plaintiffs' counsel additional time, however, explaining:

The defendants have abided by the time rules that have been set down, and the court makes the finding that for me to give you additional time other than your commentary time would be injust [sic] to them, as they have also shortcircuited some things in order to live up to their own estimate of the time.

Plaintiffs are mistaken in their contention that the time limits deprived them of their due process right to [\*\*57] confront witnesses. The case law makes clear that where a district court has set reasonable time limits and has shown flexibility in applying them, that court does not abuse its discretion. Moreover, to overturn a jury verdict based on a party's failure to use its limited time for witness cross-examination would be to invite parties to exhaust their time limits without completing cross-examination, then appeal on due [\*1515] process grounds. Such a result would undermine the discretion of district courts to manage time during trials.

### *III. Evidentiary Rulings*

#### *A. Admission of Defense Expert Testimony*

Plaintiffs challenge Judge Caulfield's decision to allow testimony by defense expert Dr. Merrill Bateman, which contravened Judge Henderson's earlier order sanctioning defendants' repeated discovery. [HN11](#)[] We review for abuse of discretion a district judge's decision to reconsider an interlocutory order by another judge of the same court. *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1481 (9th Cir. 1987) (citation omitted), cert. denied, 486 U.S. 1054, 108 S. Ct. 2819, 100 L. Ed. 2d 921 (1988).

We begin by acknowledging that [HN12](#)[] "the interlocutory orders and rulings made pre-trial by a district judge are subject to modification [\*\*58] by the district judge at any time prior to final judgment, and may be modified to the same extent if the case is reassigned to another judge." *In re United States*, 733 F.2d 10, 13 (2nd Cir. 1984). There is "no imperative duty to follow the earlier ruling - only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs." *Id.* (citing *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131, 134-35 (2nd Cir.), petition for cert. dismissed, 352 U.S. 883, 77 S. Ct. 104, 1 L. Ed. 2d 82 (1956)).

Moreover, [HN13](#)[] a district court is vested with "broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial." *Campbell Industries v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980). Within a district court's broad discretion "lies both the power to exclude or admit expert testimony," and "to exclude testimony of witnesses whose use at trial is in bad faith or would unfairly prejudice an opposing party." *Campbell Industries*, 619 F.2d at 27 (citations omitted). In addition, the district court has broad discretion over the admission of rebuttal evidence. *Trust Services of America, Inc. v. United States*, 885 F.2d 561, 569 [[\\*\\*591](#)] (9th Cir. 1989) (citation omitted). In *Campbell Industries*, for example, we upheld a district court's order - much like Judge Henderson's order in this case - that sanctioned a party's "flagrant violation" of the discovery rules by barring the testimony of that party's witness. *Campbell Industries*, 619 F.2d at 27.

We are confronted here with the delicate problem of two district court judges exercising their "broad discretion" over evidentiary rulings in different phases of the same case and reaching contradictory results. Judge Henderson exercised his discretion in sanctioning defendants' discovery violations by prohibiting defendants from introducing expert testimony. The propriety of that decision is uncontested here. See *id.* Judge Caulfield exercised her discretion to allow rebuttal testimony by the excluded defense expert.

In evaluating whether Dr. Bateman's testimony should have been admitted, we are guided by other limitations on the district court's rulings. We have made it clear [HN14](#)[] that district courts "should generally allow amendments of pre-trial orders" provided three criteria are met: (1) "no substantial injury will be occasioned to the opposing party," [\[\\*60\]](#) (2) refusal to allow the amendment "might result in injustice to the movant," and (3) the "inconvenience to the court is slight." [Id. at 27-28](#) (internal quotation and citation omitted); see also [United States v. First Nat'l Bank of Circle, 652 F.2d 882, 887 \(9th Cir. 1981\)](#) (factors to consider in deciding whether to modify pre-trial order include: prejudice to movant of a refusal to modify; prejudice to non-movant of modification; impact of modification on orderly conduct of case; and degree of wilfulness, bad faith, or excusable neglect on the part of the movant).

We have applied this principle to a district court's decision to amend a pre-trial order to allow parties to add witnesses. [HN15](#)[] The factors a district court must consider where a party seeks to call a witness who does not appear on the witness list are: (1) the prejudice or surprise of the party against whom the excluded witness testifies; (2) the ability of that party to cure the prejudice; (3) the extent to which calling the witness would [\[\\*1516\]](#) disrupt the orderly and efficient trial; and (4) bad faith or wilfulness in failing to comply with the court's order. [Price v. Seydel, 961 F.2d 1470, 1471 \(9th Cir. 1992\)](#) (citations [\[\\*61\]](#) omitted).

Applying that authority to the facts of this case, we conclude that Judge Caulfield's decision to allow Dr. Bateman to testify was not error. Judge Caulfield apparently concluded that the reference to a writing by Dr. Bateman during the examination of plaintiffs' own expert constituted a sufficiently changed circumstance as to justify a limited response. We will not second guess the exercise of the considerable discretion allowed her, particularly where the result was to allow limited testimony on an issue (plaintiffs' damages) which the jury never reached.

#### *B. Admission of Defendants' Summary Exhibits*

Plaintiffs challenge the admission of two of defendants' summary exhibits on grounds that defendants failed to provide plaintiffs with the materials underlying those exhibits. Evidentiary rulings are reviewed for an abuse of discretion and should not be reversed absent some prejudice. [City of Long Beach v. Standard Oil Co., 46 F.3d 929, 936 \(9th Cir. 1995\)](#).

[Federal Rule of Evidence 1006](#) governs the admissibility of summary exhibits. It provides in relevant part:

[HN16](#)[] The contents of voluminous writings, recordings, or photographs which cannot conveniently be [\[\\*62\]](#) examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time or place.

#### [Fed. R. Evid. 1006.](#)

[HN17](#)[] A proponent of a summary exhibit must establish a foundation that (1) the underlying materials on which the summary exhibit is based are admissible in evidence, and (2) those underlying materials were made available to the opposing party for inspection. [Paddock v. Dave Christensen, Inc., 745 F.2d 1254, 1259 \(9th Cir. 1983\)](#). The purpose of the availability requirement is "to give the opposing party an opportunity to verify the reliability and accuracy of the summary prior to trial." [Id. at 1261](#). Accord [Intel Corp. v. Terabyte Int'l. Inc., 6 F.3d 614, 623 \(9th Cir. 1993\)](#) (under adversary system, opposing party entitled to see materials that form basis for summary). Where a party fails to make available materials underlying a summary exhibit, that summary exhibit is inadmissible. [United States v. Miller, 771 F.2d 1219, 1238 \(9th Cir. 1985\)](#) (summaries inadmissible under [Federal Rule of Evidence 1006](#)

where government failed to [\*\*63] provided defendants with copy of underlying documents before summary was introduced into evidence).

Defense Exhibit 781A summarized two types of price information: California rice prices that had been adjusted by defendants' expert, and Thai rice prices. Additionally, it summarized defendants' expert's regression analysis of that price information. During his testimony, defendants' expert used Defense Exhibit 781A to criticize plaintiffs' expert's study, which contained a similar regression analysis but relied on different data: round grain rice prices from the Food and Agricultural Organization ("FAO") and unadjusted California rice prices.

Defense Exhibit 529A was a graph comparing a price-to-loan ratio to a stocks to use ratio for California rice. In preparing Defense Exhibit 529A, defendants' expert used a formula contained in a graph offered by plaintiffs' expert, but used "different values of the stocks-to-use ratio and different values of the farm price-to-loan ratio."

Plaintiffs urge that the admission of Defense Exhibit 781A and Defense Exhibit 529A violated Federal Rule of Evidence 1006 because defendants allegedly "never produced the underlying data or computations" relating [\*\*64] to those summary exhibits.

When plaintiffs objected at trial to the admission of Defense Exhibit 781A on grounds they were not furnished with the underlying information, the district court overruled plaintiffs' objection, finding that Exhibit 781A is the same analysis that your expert went through, except they're using a different [\*1517] price, which is the Thai price instead of the FAO price. So it's exactly your model, alternatively presented in surrebuttal on the issue of credibility of the expert as well as authenticity of methodology.

Although plaintiffs failed to object when defense counsel questioned defendants' expert about Defense Exhibit 529A, they raised a blanket objection when defense counsel moved for admission of all the exhibits defendants' expert discussed in his testimony. Plaintiffs objected on grounds that "they were summary exhibits for which none of the underlying materials were ever provided." The district court overruled plaintiffs' blanket objection to the admission of defendants' summary exhibits, however, explaining:

All of the calculation testimony testified to by [defense expert] Dr. Bateman was testimony derived from the expert testimony of [plaintiffs' \*\*65] expert] Dr. Knutson and [] the testimony is clear that it is the same calculations done with different foundational numbers.

The district court's explanations unfortunately ignore the requirement - embodied in the mandatory language of Federal Rule of Evidence 1006 and explicitly required by our *Paddock* decision, that a party must make available to the opposing party the materials that have gone into preparing the summary exhibit. Under Federal Rule of Evidence 1006, defendants had an obligation to make available to plaintiffs the information relied on in Defense Exhibit 781A (the adjusted California prices and the Thai prices) and the information relied on in Defense Exhibit 529A (defendants' values for the stocks-to-use ratio and for the price-to-loan ratio). Admission of these summary exhibits violated this mandatory provision.

Defendants defend the admission of Exhibit 781A by insisting that "the underlying materials upon which the summaries were based were *formulae used* by plaintiffs' own expert." This argument, however, ignores that the summary exhibit contained *raw data* - Thai prices and adjusted California prices - never provided to plaintiffs. Although defendants [\*\*66] insist that this information was made available to plaintiffs "in defendants' pretrial motion and in their exhibits," they offer no support from the record as to the former and cite only to unadmitted exhibits as to the latter.

Our ultimate question, however, is whether the erroneous admission of these summary exhibits was prejudicial, since HN18[] evidentiary rulings should not be reversed absent some prejudice. City of Long Beach, 46 F.3d at

[936](#). We conclude under the unusual circumstances here, including impeaching evidence given by plaintiff's expert in rebuttal, that the error was not prejudicial and therefore does not require reversal.<sup>15</sup>

#### [\*\*67] IV. Application of the Noerr-Pennington Doctrine

Plaintiffs challenge the district court's application of the *Noerr-Pennington* doctrine and its evidentiary rulings with respect to conduct of defendants alleged to underlie plaintiffs' antitrust injury. [HN19](#) We review de novo the district court's grant of directed verdict.<sup>16</sup> [Berry v. Bunnell](#), 39 F.3d 1056, 1057 (9th Cir. 1994). [HN20](#) A directed verdict is proper when the evidence permits only one reasonable conclusion. "The evidence must [[\\*1518](#)] be viewed in the light most favorable to the nonmoving party," and "all reasonable inferences must be drawn in favor of that party." *Id.*

[\*\*68] [HN21](#) The *Noerr-Pennington* doctrine provides that "those who petition government for redress are generally immune from antitrust liability." [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). This general rule encompasses private actions that "attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly," *id.* (*citing* [Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.](#), 365 U.S. 127, 136, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)), as well as "the approach of citizens . . . to administrative agencies . . . and to courts," *id.* (*citing* [California Motor Transport Co. v. Trucking Unlimited](#), 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)).

[HN22](#) *Noerr-Pennington* antitrust immunity does not apply, however, when the activity "is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." [Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.](#), 365 U.S. 127, 144, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961). The Supreme Court's latest articulation of the parameters of the "sham" litigation exception to *Noerr-Pennington* immunity is contained in its *Professional Real Estate* [\[\\*\\*69\]](#) *Investors* decision.<sup>17</sup> There, the Court held that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." [Professional Real Estate Investors](#), 508 U.S. at 60. The Court outlined a two-part definition of "sham" litigation:

First, [HN23](#) 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 baseless may a court examine the litigant's subjective motivation.

<sup>15</sup> Under [Federal Rule of Evidence 703](#), these exhibits were inadmissible "as general proof of the truth of the underlying matter," [Paddock](#), 745 F.2d at 1261 (internal quotations and citations omitted). Nonetheless, even had the district court not admitted Defense Exhibit 781A and Defense Exhibit 529A into evidence, defendants' expert could have discussed the information contained in Defense Exhibits 781A and 529A as a basis for criticizing plaintiffs' expert's analysis under [Federal Rule of Evidence 703](#). Actually admitting the data into evidence was therefore not prejudicial. We disagree, moreover, with plaintiffs' contention that their expert was "unable to respond" to defendants' expert's testimony. This argument mischaracterizes the record. In fact, plaintiffs' expert did offer specific arguments to rebut defendants' expert's criticism of his models.

<sup>16</sup> Plaintiffs characterize the district court's *Noerr-Pennington* rulings as a judgment as a matter of law pursuant to [Federal Rule of Civil Procedure 50\(a\)](#). Because it appears from the record that the district court ruled during trial that defendants failed to meet the legal standard necessary to invoke the "sham" litigation exception to the *Noerr-Pennington* doctrine, we analyze the rulings under the standard of review for a directed verdict.

<sup>17</sup> The district court made its ruling before the Supreme Court had issued its decision in *Professional Real Estate Investors*. We must apply that decision to this appeal, since a federal civil rule of law applies retroactively to appeals pending at the time the rule is announced. [Harper v. Virginia Dept. of Taxation](#), 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

*Id. at 60* (emphasis added).

[\*\*70] In formulating the standard, the Court made clear that in the first step, the litigant's subjective purpose is irrelevant, explaining that "the legality of objectively reasonable petitioning . . . is not at all affected by any anticompetitive purpose [the litigant] may have." *Id. at 59* (citing *Noerr, 365 U.S. at 140*). Indeed, the Court stated that HN24 [+] "the existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation," and is an "absolute defense" to allegations of "sham litigation." *Professional Real Estate Investors, 508 U.S. at 62-63*. It defined "probable cause to institute civil proceedings" as the mere "reasonable belief that there is a chance that [a] claim may be held valid upon adjudication." *Id.* (citations omitted).

If the plaintiff succeeds in establishing that the lawsuit is "objectively baseless," as required in the first step of *Professional Real Estate Investors*, then a court "may . . . examine the litigant's subjective motivation." *Id.* This second step requires the court to determine "whether the baseless lawsuit conceals 'an attempt to interfere directly with the business" [\*\*71] relationships of a competitor . . .' through the 'use [of] the governmental process . . . as an anticompetitive weapon.'" *Id.* (citations omitted).

Plaintiffs urge that *Professional Real Estate Investors* is an inappropriate test to apply in this case, insisting that the proper test is set forth in our recent decision in *USS-POSCO Industries v. Contra Costa County Bldg. and Constr. Trades Council, 31 F.3d 800 (9th Cir. 1994)*. In *USS-POSCO Industries*, we recognized that "where the defendant is accused of bringing a whole [\*1519] series of legal proceedings" as opposed to a "single action," as was the case in *Professional Real Estate Investors*, the analysis is different. As we explained in *USS-POSCO Industries*, "the question is not whether any one of [the legal proceedings] has merit . . . but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." In other words, we must ask, "were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment." [\*\*72] *USS-POSCO Industries, 31 F.3d at 811*. In *USS-POSCO Industries*, we held that the plaintiff could not substantiate its "sham" litigation claim because more than half of the twenty-nine lawsuits and arbitration actions filed by the defendants were successful. Given that success rate, we concluded that the plaintiff could not establish that the defendants "were filing lawsuits and other actions willy-nilly without regard to success." *Id.*

The distinction we drew in *USS-POSCO Industries* reflects the distinction alluded to by the Supreme Court in *Professional Real Estate Investors*. There, the Court explained that in determining whether a challenged action falls within the "sham" exception, "a reviewing court [must] 'discern[] and draw[]' the 'difficult line' separating *objectively reasonable claims* from 'a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused.'" *Professional Real Estate Investors, 508 U.S. at 58* (citing *California Motor Transport, 404 U.S. at 513*) (emphasis added). This distinction may be traced back to *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*, which fell within the latter category: the "abuse of [] process[] [that] effectively barred [the plaintiffs] from access to the agencies and courts." *California Motor Transport, 404 U.S. at 513*.

This case does not concern "a whole series of legal proceedings," *USS-POSCO Industries, 31 F.3d at 811*, or a "pattern of baseless, repetitive claims," *Professional Real Estate Investors, 508 U.S. at 58* (citing *California Motor Transport, 404 U.S. at 513*), that would require us to apply the standard set forth in *USS-POSCO Industries*. Here, plaintiffs cite only two lawsuits, not a "series" or a "pattern" of them. Although we do not attempt to define here the number of legal proceedings needed to allege a "series" or "pattern" of litigation as required in *USS-POSCO Industries, 31 F.3d at 811*, we distinguish this case from *USS-POSCO Industries*, which involved twenty-nine legal proceedings. We do not consider the third "sham" litigation alleged, since that was simply a counterclaim in this litigation, and contained essentially the same allegation as one of the two alleged "sham" lawsuits.

Plaintiffs next argue [\*\*74] that, even if *USS-POSCO Industries* is inapposite, the district court erred when it ruled that plaintiffs failed to meet "the standard [for a] baseless lawsuit [brought] without probable cause." With this contention in mind, we examine the legal and administrative proceedings plaintiffs insist fell within the "sham" exception to the *Noerr-Pennington* antitrust immunity doctrine. We note that to invoke the "sham" exception, "the

two-tiered process [in *Professional Real Estate Investors*] requires the plaintiff to disprove the challenged lawsuit's legal viability." [\*Professional Real Estate Investors, 508 U.S. at 61.\*](#)

#### A. The Alleged "Sham" Lawsuits

Plaintiffs alleged that in 1981, defendants Connell Rice, Grover Connell, and Joseph Alioto instituted a "sham" lawsuit against PIRMI in the name of Louisiana rice farmer Larry Lyons. See *Lyons v. PIRMI Delta*, No. 811951 (W.D. La. October 28, 1981). The complaint in that suit alleged that PIRMI had violated United States Department of Agriculture ("USDA") reporting regulations pertaining to rice sales and had violated various antitrust laws. Plaintiffs alleged defendants surreptitiously sponsored the lawsuit "for [\*\*75] the purpose of harassing and embarrassing actual and potential purchasers of California paddy rice and California milled rice who were defendants in that action." [\*1520] Connell Rice and Joseph Alioto denied having had any involvement with the *Lyons* suit before it was filed, although Alioto's law firm subsequently represented Lyons in the suit. The *Lyons* suit was subsequently dismissed on a motion for summary judgment.

The next "sham" litigation plaintiffs alleged was a lawsuit brought by FRC and RGA, but allegedly sponsored by Connell Rice. That lawsuit accused PIRMI and Agroprom, a Swiss company, of bribing Korean officials to secure rice contracts. See *Rice Growers Ass'n and Farmers Rice Cooperative v. Pacific Int'l Rice Mills, Inc., et al.*, No. C-82-0872 SC (N.D. Cal. 1982). Plaintiffs alleged that the suit was instigated by Grover Connell and Joseph Alioto, who acted "with knowledge that the suit lacked merit," and was financed in part by Connell Rice. Plaintiffs claimed the suit was commenced "for the purpose of embarrassing actual and potential purchasers of California paddy rice and California milled rice." That suit eventually settled without compensation.

The third [\*\*76] "sham" litigation plaintiffs allege is defendant Connell Rice's counterclaim against PIRMI in separate litigation, the essential allegations of which were repeated in the instant lawsuit.

We conclude that plaintiffs failed to establish that the lawsuits were "objectively baseless" under the *Professional Real Estate Investors* standard, since they have not adduced evidence to "disprove the challenged lawsuit[s'] legal viability." [\*Professional Real Estate Investors, 508 U.S. at 61.\*](#)

We first note that the plaintiff in *Lyons* alleged defendants had violated USDA reporting requirements. Although the court handling the litigation later held that the plaintiff there lacked standing to sue for USDA regulatory violations, nonetheless there was evidence in the record tending to show PIRMI's failure to comply with USDA reporting regulations.

Next, we note that defendants' involvement in the *Rice Growers* lawsuit was based on their suspicion that PIRMI was bribing Korean officials to secure an exclusive opportunity to bid on the limited quota of rice sales to Korea. Although there was no direct evidence of such bribery, the absence of direct evidence does not preclude probable [\*\*77] cause to institute litigation. They relied instead on circumstantial evidence - the price differential between PIRMI's bid prices and Connell Rice's bid price. Moreover, given defendants' concerns that PIRMI was on the verge of blocking them out of bidding, defendants had good reason to expedite the litigation. We conclude that defendants had probable cause to bring the *Rice Growers* suit, and for the same reasons had probable cause to bring the similar counterclaim in the instant litigation.

#### B. The Alleged "Sham" Administrative Proceedings

Plaintiffs also accused defendants of petitioning State Department officials and Korean officials in an effort to influence rice exports to Korea. In our view, defendants' efforts to influence various American and Korean officials - from State Department officials to members of Congress - was legitimate private action in response to defendants' suspicions of bribery. [HN25↑](#) The *Noerr-Pennington* doctrine shields from antitrust liability efforts to influence legislators and members of the executive branch. [\*Noerr, 365 U.S. at 136.\*](#)

#### V. Refusal to Instruct Jury on the Law of Service of Subpoenas on Foreign Government Officials

Plaintiffs [\*\*78] appeal the district court's refusal to adopt plaintiffs' proposed instructions to the jury with respect to the serving of subpoenas on foreign diplomatic officials. [HN26](#)[<sup>↑</sup>] We review for abuse of discretion a district court's formulation of civil jury instructions. [Fikes v. Cleghorn, 47 F.3d 1011, 1013 \(9th Cir. 1995\)](#).

Although the district court did not adopt plaintiffs' proposed jury instructions with respect to the law of subpoenaing diplomatic officials, the district court's instructions to the jury did not constitute an abuse of discretion. By the time it instructed the [\*1521] jury, the district court had already entered judgment as a matter of law for defendants on plaintiffs' claims of "sham" litigation, meaning the district court's instructions to the jury on this peripheral question were of little or no import.

#### VI. The District Court's Judgment as a Matter of Law on Plaintiffs' [Section 1](#) and California Cartwright Act Claims

Plaintiffs contend it was error for the district court to enter judgment for defendants on the claims on which the jury was hung: claims brought under [Section 1](#) of the Sherman Act and the California Cartwright Act. [HN27](#)[<sup>↑</sup>] We review de novo the district court's [\*\*79] decision to enter judgment as a matter of law, and must "view conflicting evidence in the light most favorable to the non-movant, and determine whether the proffered result is the only reasonable conclusion." [Forro Precision, Inc. v. International Business Machines Corp., 673 F.2d 1045, 1058 \(9th Cir. 1982\)](#).

[Federal Rule of Civil Procedure 50\(b\)](#) provides that [HN28](#)[<sup>↑</sup>] "if no verdict was returned, the court may, in disposing of the renewed motion [for judgment as a matter of law] direct the entry of judgment as a matter of law." We have held that [HN29](#)[<sup>↑</sup>] in directing the entry of judgment in the wake of a jury's failure to return a verdict, a district court "must accept as true facts that necessarily were established" by the jury's verdict.

The district court's entry of judgment as a matter of law is premised on the district court's characterization of plaintiffs' theory of the case. The district court interpreted plaintiffs' complaint and "their presentation to the jury" to articulate the following theory of the case: that "it was defendants' attempt to conspire to monopolize that allegedly restrained trade in the relevant market." [Amarel, 1993 WL 515885, \\* 2](#).

An examination of plaintiffs' [\*\*80] claims suggests, however, that the jury's verdict for defendants as to the [Section 2](#) monopoly claim does not, standing alone, preclude plaintiffs' [Section 1](#) restraint of trade claim.

First, as a general matter, [Section 1](#) and [Section 2](#) of the Sherman Act proscribe two separate and distinct statutory offenses: [Section 1](#) prohibits restraints of trade and [Section 2](#) prohibits monopoly.

Significantly, [Section 2](#) claims tend to encompass a narrower range of anticompetitive behaviors specifically defined as monopolization and attempts to monopolize. [HN30](#)[<sup>↑</sup>] [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](#). 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 \(1966\)](#). Because [Section 2](#) claims require proof of a defendant's market power in the form of monopolistic control, they inevitably encompass a smaller pool of anticompetitive [\*\*81] conduct. [HN31](#)[<sup>↑</sup>] 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 at accomplishing that purpose; (3) a dangerous probability of achieving 'monopoly power'; and (4) causal antitrust injury. [Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1432-33 \(9th Cir. 1995\)](#) (citing [McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 \(9th Cir. 1988\)](#)).

[HN32](#)[<sup>↑</sup>] [Section 1](#), in contrast, broadly prohibits concerted action that "unreasonably" restrains trade. [Section 1](#) has been construed to encompass a wide variety of anticompetitive practices, including horizontal and vertical price

fixing, horizontal and vertical restraints on such non-price factors as territories and customers, tying agreements, exclusive dealing agreements, and, finally, anticompetitive boycotts or concerted refusals to deal, as plaintiffs alleged in this [\*1522] case. William C. Holmes, *Antitrust Law* Handbook 188 (Clark Boardman Callaghan: 1996). **HN33** Unlike [Section 2](#) claims, [Section 1](#) restraint of trade claims need not establish the [\*\*82] threshold showing of monopoly control over a relevant market. To show a violation of [Section 1](#), a plaintiff "must establish a contract, conspiracy or combination intended to restrain competition and which actually has an anticompetitive effect." *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1365 (9th Cir.), cert. denied, 506 U.S. 908, 113 S. Ct. 305, 121 L. Ed. 2d 228 (1992).

Second, in this particular case, plaintiffs' theory of the case, though inartfully pleaded, does not condition recovery under [Section 1](#) on recovery under [Section 2](#). Although plaintiffs pleaded the two claims within a single cause of action, plaintiffs' complaint alleges several other instances of anticompetitive conduct in addition to the monopolistic behavior alleged. In particular, plaintiffs alleged defendants engaged in boycotts and refusals to deal in order to restrain trade in the markets for milled rice as well as for paddy rice.

For these reasons, it was improper for the district court to enter judgment for defendants on the restraint of trade claims under [Section 1](#) of the Sherman Act and the California Cartwright Act. We therefore reverse the district court's judgment for defendants as to plaintiffs' restraint [\*\*83] of trade claims and remand for a new trial as to these claims only.

#### *VII. Antitrust Immunity for Defendant Joseph Alioto*

Plaintiffs challenge the district court's entry of judgment as a matter of law for defendant Joseph Alioto, which accorded him antitrust immunity on the ground that he was defendants' lawyer. We review de novo the district court's judgment as a matter of law, and thus must "view conflicting evidence in the light most favorable to the non-movant, and determine whether the proffered result is the only reasonable conclusion." *Forro Precision, Inc.*, 673 F.2d at 1058.

We outlined the test for determining whether a lawyer is entitled to antitrust immunity in *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1033 (9th Cir. 1989), aff'd, 500 U.S. 322, 114 L. Ed. 2d 366, 111 S. Ct. 1842 (1991). In *Pinhas*, we held that "an attorney is not immune from antitrust liability if he becomes an active participant in formulating policy decisions with his client to restrain competition." *Pinhas*, 894 F.2d at 1033 (citing *Tillamook Cheese and Dairy Ass'n v. Tillamook County Creamery Ass'n*, 358 F.2d 115, 118 (9th Cir. 1966)) (emphasis added).

Implicit in this rule is a corresponding requirement: [\*\*84] Where a plaintiff seeks to impose antitrust liability on an attorney, that plaintiff must establish that the attorney "exerted [his] influence over [a client] so as to direct [the client] to engage in the complained of acts for an anticompetitive purpose." *Pinhas*, 894 F.2d at 1033. As the Sixth Circuit recently explained, Individual liability under the antitrust laws can be imposed only where corporate [attorneys] are actively and knowingly engaged in a scheme designed to achieve anticompetitive ends. To support a determination of liability under this standard, the evidence must demonstrate that a defendant exerted his influence so as to shape corporate intentions.

[\*Brown v. Donco Enterprises, Inc.\*, 783 F.2d 644, 646 \(6th Cir. 1986\).](#)

In bringing their lawsuit, plaintiffs alleged Alioto masterminded and perpetrated defendants' alleged conspiracy to monopolize and restrain trade in the rice industry for over thirty years, and, in particular, orchestrated the anticompetitive activities in 1981 in an attempt to prevent PIRMI and Comet from competing in the market for the export of California rice to Korea. On appeal, plaintiffs repeat these allegations, placing special [\*\*85] emphasis on Alioto's role in defendants' alleged "sham" litigation. However, plaintiffs offer no evidence from the record to support [\*1523] such accusations, and therefore fail to establish that Alioto "exerted [his] influence over [his clients] so as to direct [the clients] to engage in the complained of acts for an anticompetitive purpose." *Pinhas*, 894 F.2d at 1033.

We therefore conclude that Joseph Alioto was entitled to judgment as a matter of law on grounds of attorney immunity from antitrust liability.

#### VIII. Award of Costs to Defendants-Appellees

Plaintiffs appeal the district court's award of costs to defendants. [HN34](#)<sup>↑</sup> Because "the decision to award costs ordinarily resides in the district court," we review such decisions for an abuse of discretion. *National Information Services, Inc. v. TRW, Inc.*, 51 F.3d 1470, 1471 (9th Cir. 1995).

[Federal Rule of Civil Procedure 54\(d\)\(1\)](#) provides that costs [HN35](#)<sup>↑</sup> "shall be allowed as of course to the prevailing party unless the court otherwise directs." We have construed [Federal Rule of Civil Procedure 54\(d\)\(1\)](#) to create a presumption in favor of awarding costs to the prevailing party. *National Information Services*, 51 F.3d at 1471. [\*\*86]

[HN36](#)<sup>↑</sup> Where a reviewing court reverses a district court's judgment for the prevailing party, however, both the underlying judgment and the taxation of costs undertaken pursuant to that judgment are reversed. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 13 L. Ed. 2d 248, 85 S. Ct. 411 (1967), disapproved of on other grounds by *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 443, 96 L. Ed. 2d 385, 107 S. Ct. 2494 (1987). In *Farmer*, the district court entered a directed verdict for the defendant when the jury could not reach a decision as to the plaintiff's wrongful discharge claim. When the defendant, as the prevailing party, moved for an award of costs, the district court approved the clerk's taxation of costs against the plaintiff. The Second Circuit subsequently reversed the directed verdict and remanded for a new trial. In describing the Second Circuit's decision to reverse the directed verdict and remand for a new trial, the Supreme Court noted that the Second Circuit's decision to reverse the judgment "thereby upset[] the judgment and the taxation of costs." *Farmer*, 379 U.S. at 229 (emphasis added). Similarly, our reversal of the district court's judgment as a matter of law with respect to plaintiffs' claim under [\*\*87] [Section 1](#) of the Sherman Act therefore operates to reverse the district court's award of costs incurred in defending against that claim.

We acknowledge that our decision to reverse the district court's judgment for defendants on plaintiffs' [Section 1](#) claim does not affect the jury verdict for defendants as to plaintiffs' [Section 2](#) claim. In view of their success in defending against plaintiffs' [Section 2](#) claim, defendants may very well be entitled to an award of the costs they incurred defending the [Section 2](#) claim. On remand, however, we direct the district court to await resolution of plaintiffs' [Section 1](#) claim before determining whether an award of costs is appropriate for either claim.

Our rationale is two-fold: First, the outcome of plaintiffs' [Section 1](#) claim will bear on whether an award of costs is appropriate, since it will influence the district court's determination of whether defendants are the "prevailing parties" in the overall action. We have explained that [HN37](#)<sup>↑</sup> "[a] party in whose favor judgment is rendered is generally the prevailing party for purposes of awarding costs under [Rule 54\(d\)](#)." *d' Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977). In the event [\*\*88] of a mixed judgment, however, it is within the discretion of a district court to require each party to bear its own costs. *Testa v. Village of Mundelein*, 89 F.3d 443 (7th Cir. 1996) (requiring each party to bear its own costs where plaintiff prevailed on one claim and defendant prevailed on federal claim) (citations omitted). In the event that plaintiffs prevail on their [Section 1](#) claim on remand, the resultant mixed judgment may warrant that each party bear its own costs. We express no opinion on this matter, which will fall within the discretion of the district court following the new trial.

[\*1524] Second, it would be difficult at this juncture to separate the costs incurred on the [Section 1](#) claim from those incurred on the [Section 2](#) claim: In awarding costs below, the district court did not distinguish the costs incurred in defending the [Section 1](#) claim from the costs incurred in defending the [Section 2](#) claim, since defendants prevailed on both claims. Instead of attempting to award partial costs at this juncture, the district court should await the outcome of the [Section 1](#) claim to ascertain whether allocation of costs is necessary. See *Farmer*, 379 U.S. at 232-33 (dicta stating [\*\*89] that where the district court's judgment and taxation of costs were both upset by the Court of Appeals' reversal of the first trial judgment, "it became the duty of the clerk to tax costs for both trials *only* when judgment was finally entered for the [defendant].") (emphasis added).

## CONCLUSION

We affirm the judgment for defendants on plaintiffs' monopolization claims under Section 2 of the Sherman Act and the California Unfair Practices Act. We reverse the judgment for defendants on plaintiffs' restraint of trade claims under Section 1 of the Sherman Act and the California Cartwright Act, and we remand the case for a new trial solely on the restraint of trade claims. We reverse the district court's award of costs and direct the district court to await resolution of plaintiffs' restraint of trade claims before determining whether an award of costs is appropriate.

## ORDER

Appellants' Motion to Correct and Amend Opinion is denied in part and granted in part. The Opinion filed December 2, 1996, is amended as follows:

On slip Opinion page 15199, change the first sentence in the first full paragraph to read: "The third 'sham' litigation plaintiffs allege is defendant Connell [\*\*90] Rice's counterclaim against PIRMI in separate litigation, the essential allegations of which were repeated in the instant lawsuit."

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## **Classic Communs. v. Rural Tel. Serv. Co.**

United States District Court for the District of Kansas

December 3, 1996, Decided ; December 3, 1996, FILED; December 4, 1996, ENTERED ON THE DOCKET

CIVIL ACTION Case No. 96-2166-DES

### **Reporter**

956 F. Supp. 896 \*; 1996 U.S. Dist. LEXIS 19682 \*\*; 1997-2 Trade Cas. (CCH) P71,865

CLASSIC COMMUNICATIONS, INC.; CLASSIC TELEPHONE, INC.; and CLASSIC CABLE, INC., Plaintiffs, v. RURAL TELEPHONE SERVICE CO., INC.; VISION PLUS, INC.; LARRY E. SEVIER; MERLIN DENNIS; BARNEY HICKERT; F. C. BRUNGARDT; DOUGLAS ZIEGLER; CHARLEY MINIUM; MARION OTTER; GLENN LAMBERT; ROBERT E. McCALL; SHANE BRADY; KENNETH CLARK; CITY OF HILL CITY, KANSAS; CITY OF BOGUE, KANSAS; CITY OF QINTER, KANSAS; CITY OF MORLAND, KANSAS; CITY OF NORCATUR, KANSAS; CITY OF GORHAM, KANSAS; CITY OF DAMAR, KANSAS; CITY OF PALCO, KANSAS; and CITY OF LOGAN, KANSAS, Defendants.

**Disposition:** [\*\*1] Defendants' motions granted in part and denied in part.

### **Core Terms**

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Cable, immunity, franchise, state action, Communications, motion to dismiss, cable television, anti trust law, attorney's fees, antitrust claim, municipality, entitlement, Telephone, antitrust, allegations, preempted, defeat, preemption, broadcast, appears, amended complaint, plaintiffs', constitutional right, property interest, federal statute, television, damages, doctrine of immunity, cable franchise, state statute

### **LexisNexis® Headnotes**

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

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

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

The court may not dismiss a cause of action for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#) unless it appears beyond doubt that the claimant can prove no set of facts supporting its claim which would entitle it to relief. In considering a [rule 12\(b\)\(6\)](#) motion, the court must assume as true all well-pleaded facts, and must draw all reasonable inferences in favor of the nonmovant. The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support its claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

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

## [\*\*HN2\*\*](#) [down] **Affirmative Defenses, Immunity**

A motion to dismiss is appropriate where allegations clearly indicate the existence of an affirmative defense. In such cases, the complaint is said to have a built-in defense and is essentially self-defeating. Privilege and immunity are examples of built-in affirmative defenses that are properly considered on a motion to dismiss.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

## [\*\*HN3\*\*](#) [down] **Standing, Injury in Fact**

A party meets the minimum constitutional requirements for standing when (1) it has suffered an injury in fact, (2) there is a causal connection between the injury and the conduct complained of, and (3) it is likely that the injury will be redressed by a favorable decision. However, a plaintiff need only support the elements of standing with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss the court presumes that general allegations embrace those specific facts that are necessary to support the claim.

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

Communications Law > ... > Regulated Practices > Franchises > General Overview

## [\*\*HN4\*\*](#) [down] **Justiciability, Standing**

If the plaintiff is himself an object of the challenged action, there is ordinarily little question that the action or inaction has caused him injury.

Business & Corporate Law > Foreign Corporations > General Overview

Governments > Local Governments > Claims By & Against

## [\*\*HN5\*\*](#) [down] **Business & Corporate Law, Foreign Corporations**

*Kan. Stat. Ann. § 17-7307* provides in pertinent part that a foreign corporation which has done business in this state without authority shall not maintain any action. A corporation is "doing business" in Kansas if it has an office or place of business within this state, or a distributing point herein, or delivers wares or products to resident agents in this state for sale, delivery or distribution. *Kan. Stat. Ann. § 17-7303*. By its plain meaning, *§ 17-7303* does not appear to include merely applying for a franchise as "doing business." Nor do any cases hold as such. Under Kansas law, then, applying for a franchise, without more, is not "doing business" such that *§ 17-7307* would apply.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > State & Territorial Governments > Claims By & Against

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

956 F. Supp. 896, \*896LÁ996 U.S. Dist. LEXIS 19682, \*\*1

## [\*\*HN6\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

To acquire the protection of state action immunity, a municipality must show the state legislature both authorized the challenged action and intended to displace competition with regulation.

Communications Law > Federal Acts > Telecommunications Act > Federal Preemption

Constitutional Law > Supremacy Clause > General Overview

Governments > Local Governments > Claims By & Against

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

## [\*\*HN7\*\*](#) Telecommunications Act, Federal Preemption

Neither state nor local laws may be enforced or implemented in such a way as to frustrate the objectives of federal law.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

## [\*\*HN8\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

The fundamental objective of the Parker immunity doctrine is to protect state action from federal antitrust scrutiny. Federalism principles demand that antitrust goals yield to state action if Congress has not plainly indicated a contrary result.

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

Governments > Local Governments > Duties & Powers

## [\*\*HN9\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

Without an element of fraud or illegality, allegations of conspiracy, self-dealing, and overstepping statutory authority are not enough to invoke an abuse of authority exception to state action immunity.

Governments > State & Territorial Governments > Relations With Governments

## [\*\*HN10\*\*](#) State & Territorial Governments, Relations With Governments

Municipal governments are not sovereign, and the same concerns that affect the relationship between the state and national governments are not present between a state and its municipalities.

956 F. Supp. 896, \*896L<sup>A</sup>996 U.S. Dist. LEXIS 19682, \*\*1

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

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 > Parker State Action Doctrine > General Overview

Governments > Local Governments > Claims By & Against

#### **HN11** [blue icon] Exemptions & Immunities, Parker State Action Doctrine

Parker immunity protects states and state supervised municipalities from federal antitrust scrutiny, and is based on federalism principles. In contrast, the Noerr-Pennington doctrine protects from antitrust liability those who petition the government for redress, and is based on the constitutional right to associate and to petition the government. By definition, the Noerr-Pennington doctrine is not applicable to the government actor.

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

Constitutional Law > Supremacy Clause > General Overview

Governments > Legislation > Interpretation

#### **HN12** [blue icon] Communications, Sherman Act

Federal statutory schemes do not preempt independently existing constitutional rights.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

#### **HN13** [blue icon] Elements, Color of State Law

To state a claim under [42 U.S.C.S. § 1983](#), a plaintiff must allege both the deprivation of a federal right and that the alleged action was taken under color of state law.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

#### **HN14** [blue icon] Procedural Due Process, Scope of Protection

To establish a property interest in a particular benefit, one must have a legitimate claim of entitlement to it. An abstract need or desire for it or a unilateral expectation is insufficient. In deciding if the requisite property interest is present, a court must determine whether the applicable state law conferred such a property interest. Moreover,

956 F. Supp. 896, \*896LÁ996 U.S. Dist. LEXIS 19682, \*\*1

when analyzing whether a plaintiff presents a legitimate claim of entitlement, a court must focus on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome.

Communications Law > ... > Regulated Practices > Franchises > General Overview

Governments > State & Territorial Governments > Licenses

#### **HN15** [ ] **Regulated Practices, Franchises**

*Kan. Stat. Ann. § 12-2006* expressly grants a city the discretionary right to permit or prohibit anyone from furnishing cable television services within its corporate limits.

Communications Law > ... > Regulated Practices > Franchises > General Overview

Governments > State & Territorial Governments > Licenses

#### **HN16** [ ] **Regulated Practices, Franchises**

*Kan. Stat. Ann. § 12-2007* provides that no person may provide cable services or conduct a cable business without first obtaining a franchise from the local city. However, it does not impose any requirement that a city actually grant such a franchise. In fact, *§ 12-2007* expressly provides that a city has the discretion to grant or not to grant cable television franchises.

Business & Corporate Law > Distributorships & Franchises > Remedies > General Overview

Communications Law > ... > Regulated Practices > Franchises > Authorities

Governments > Local Governments > Claims By & Against

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Communications Law > ... > Regulated Practices > Franchises > General Overview

#### **HN17** [ ] **Distributorships & Franchises, Remedies**

*47 U.S.C.S. § 541* provides in part that a franchising authority may not unreasonably refuse to award an additional competitive franchise. If a franchise is unreasonably refused, *47 U.S.C.S. § 555* provides the potential franchisee with a private cause of action.

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

Governments > Local Governments > Claims By & Against

#### **HN18** [ ] **Defenses, Demurrs & Objections, Motions to Dismiss**

To survive a motion to dismiss, a plaintiff need only state a claim for which relief may be granted unless it appears beyond doubt that the claimant can prove no set of facts supporting its claim.

**Counsel:** For CLASSIC COMMUNICATIONS, INC., plaintiff: Victor A. Davis, Jr., David P. Troup, Weary, Davis, Henry, Struebing & Troup, Junction City, KS. Gordon D Gee, Paul G Schepers, Rachel H Baker, Susan S. Goldammer, Seigfreid, Bingham, Levy, Selzer & Gee, Kansas City, MO. Cary Ferchill, Mark D Goranson, Brian F Antweil, Winstead, Sechrest & Minick, P.A., Austin, TX. For CLASSIC TELEPHONE, INC., plaintiff: Victor A. Davis, Jr., (See above). David P. Troup, (See above). Gordon D Gee, (See above). Paul G Schepers, (See above). Rachel H Baker, (See above). Susan S. Goldammer, (See above). Cary Ferchill, (See above). Mark D Goranson, (See above). Brian F Antweil, (See above). For CLASSIC CABLE, INC., plaintiff: Victor A. Davis, Jr., (See above). David P. Troup, (See above). Gordon D Gee, (See above). Paul G Schepers, (See above). Rachel H Baker, (See above). Susan S. Goldammer, (See above). Cary Ferchill, (See above). Mark D Goranson, (See above). Brian F Antweil, (See above).

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**Judges:** DALE E. SAFFELS, United States District Judge

**Opinion by:** DALE E. SAFFELS

## Opinion

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## **[\*900] MEMORANDUM AND ORDER**

This matter is before the court on the motions to dismiss of defendants City of Palco (Doc. 43), City of Damar (Doc. 44), City of Morland (Doc. 45), City of Norcatur (Doc. 48), and City of Gorham (Doc. 50). **[\*\*5]** For the reasons set forth below, defendants' motions are granted in part and denied in part.

### **[\*901] I. BACKGROUND**

The following facts are uncontested or, where controverted, construed in a manner most favorable to the plaintiffs as the non-moving parties.

In 1992, Classic Communications, Inc. initiated efforts to expand its telecommunications business into western Kansas. Classic Communications' telephone subsidiary, Classic Telephone, Inc., attempted to purchase telephone exchange systems in the region and its cable television subsidiary, Classic Cable, Inc., attempted to expand its cable television service into the Cities of Palco, Damar, Morland, Norcatur, and Gorham (collectively the "Cable Cities" or "Cities"). In each of the Cable Cities, Rural Telephone Service Co., Inc. ("Rural"), or its wholly-owned subsidiary, Vision Plus, Inc. ("Vision"), was already operating a local telephone exchange or a cable television system, or both.

In order to operate a cable television system in Kansas, a business is required to obtain a franchise from the city to be serviced in order to use streets and rights-of-way. Classic Cable applied for a competitive cable television franchise **[\*\*6]** in each of the Cable Cities, and each city denied Classic Cable's application without, according to plaintiffs, providing any valid reason.

Classic Cable subsequently notified the Cable Cities that, under [47 U.S.C. § 541](#) of the 1992 Cable Act, they were not permitted to deny a cable franchise for competitive reasons and Classic Cable requested additional information in an effort to find a "legitimate explanation" for the denial. According to plaintiffs, none of the Cable Cities responded with a legitimate explanation and all continue to refuse to grant franchises to Classic Cable.

Plaintiffs contend that these denials are a result of a conspiracy between Rural and the Cable Cities to deny Classic the opportunity to compete in the provision of telecommunications services.

### **II. [RULE 12\(B\)\(6\) MOTION TO DISMISS STANDARD](#)**

**HN1** The court may not dismiss a cause of action for failure to state a claim under [Fed. R. Civ. P. Rule 12\(b\)\(6\)](#) unless it appears beyond doubt that the claimant can prove no set of facts supporting its claim which would entitle it to relief. [H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50, 106 L. Ed. 2d 195, 109 S. Ct. 2893 \(1989\)](#).

In **[\*\*7]** considering a [Rule 12\(b\)\(6\)](#) motion, the court must assume as true all well-pleaded facts, and must draw all reasonable inferences in favor of the nonmovant. [Housing Auth. of the Kaw Tribe v. City of Ponca City, 952 F.2d 1183, 1187 \(10th Cir. 1991\)](#); [Swanson v. Bixler, 750 F.2d 810, 813 \(10th Cir. 1984\)](#). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support its claim. [Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 \(1974\)](#).<sup>1</sup>

**[\*\*8] HN2**

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<sup>1</sup> Plaintiffs contend that motions to dismiss antitrust claims should be more disfavored than motions to dismiss other types of claims. The court disagrees. Under present law, motions to dismiss for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#), including those directed at antitrust claims, are greatly disfavored by the federal courts. [NL Indus., Inc. v. Gulf & Western Indus., 650 F. Supp. 1115, 1122 \(D. Kan. 1986\)](#). Enhancing the 12(b)(6) movant's already difficult burden would accomplish little more than transforming the dismissal into an impractical formality, and would virtually eliminate a procedural tool, which, when used cautiously, can promote the liberal rules of pleading and protect the interests of justice.

A motion to dismiss is appropriate where allegations "clearly indicate the existence of an affirmative defense." 5A C. WRIGHT, A. MILLER & M. KANE, *Federal Practice and Procedure* § 1357. In such cases, "the complaint is said to have a built-in defense and is essentially self-defeating." *Id.* Professors Wright and Miller note that privilege and immunity are examples of built-in affirmative defenses that are properly considered on a motion to dismiss. *Id.*

### **III. DISCUSSION**

#### **A. Standing**

The Cable Cities move to dismiss plaintiffs' action for lack of standing. [HN3](#) A party meets the minimum constitutional requirements for standing when (1) it has suffered an injury in fact, (2) there is a causal connection between the injury and the conduct complained of, and (3) it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); *Skrzypczak v. Kauger*, 92 F.3d 1050, 1052-53 (10th Cir. 1996). However, a plaintiff need only support the elements of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* [\*\*9] "At 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 . . . .'" *Id. at 561* (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)).

The Cable Cities appear to contest the second, or causation, prong of the *Lujan* standing requirements. The crux of their argument is since they did not deal with all of the plaintiff corporations, not all of the plaintiff corporations can trace their alleged injuries to the challenged actions of the Cable Cities, and thus not all of the plaintiffs can have standing.

The court agrees that Classic Telephone's connection to the Cable Cities is negligible. According to plaintiffs' first amended complaint (Doc. 89), Classic Telephone sought no franchises from the Cable Cities. Nor did Classic Telephone conduct any other form of business with the Cable Cities. The court is not convinced, in light of plaintiffs' factual allegations and all reasonable inferences drawn therefrom, that plaintiffs can establish [\*\*10] a causal connection between Classic Telephone's injury and the Cable Cities' challenged conduct. Accordingly, the court determines that Classic Telephone does not have standing to sue the Cable Cities.

Classic Cable, on the other hand, does have standing. According to plaintiffs' first amended complaint, Classic Cable was the particular Classic corporation that attempted to obtain cable franchises from the Cable Cities. Classic Cable was also the corporation intended by plaintiffs to operate the cable systems should the franchises have been granted. The Supreme Court has noted that [HN4](#) if "the plaintiff is [itself] an object of the [challenged] action . . . there is ordinarily little question that the action or inaction has caused him injury . . . ." *Lujan*, 504 U.S. at 561. Here, Classic Cable, as the franchise applicant, was clearly an object of the Cities' rejection of the franchise requests; Classic Cable's inability to operate cable television systems in the Cable Cities, its alleged injury, is directly traceable to the Cities' challenged conduct, the Cities' rejection of Classic Cable's franchise requests.

The question of Classic Communications' standing to sue the Cable [\*\*11] Cities is more problematic. Classic Communications, as the parent corporation, has a discrete corporate existence and is treated independently of its subsidiaries in the absence of extraordinary circumstances. *18 Am. Jur. 2d Corporations* § 55 (1985). See *Quarles v. Fuqua Indus. Inc.*, 504 F.2d 1358, 1362-63 (10th Cir. 1974). Thus, in order for Classic Communications to have standing to sue, it must allege the Cable Cities caused it, as a separate and distinct corporation, to suffer some redressable injury to an enforceable legal right. Injury that arises solely out of harm done to a subsidiary corporation, however, is insufficient to confer standing to sue on a parent corporation. *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1154 (10th Cir. 1985); *RTC v. Fleischer*, 848 F. Supp. 917, 923 (D. Kan. 1994).

Plaintiffs' amended complaint is somewhat vague concerning the causal connection between Classic Communications' injury and the Cable Cities' challenged conduct. However, in drawing all reasonable inferences in favor of Classic Communications, the court cannot say beyond doubt that plaintiffs' can prove no set of facts

connecting Classic Communications' alleged **[\*\*12]** harm to the Cable Cities' challenged conduct. There is insufficient factual development, at this early stage of litigation, to properly dismiss Classic Communications for lack of standing.

The Cable Cities also contend that Classic Communications is statutorily barred **[\*903]** by [Kan. Stat. Ann. § 17-7307](#) from pursuing claims against the cities. [HN5](#)<sup>↑</sup> [Kan. Stat. Ann. § 17-7307](#) provides that "a foreign corporation . . . which has done business in this state without authority shall not maintain any action . . ." (Emphasis added). A corporation is "doing business" in Kansas if it "has an office or place of business within this state, or a distributing point herein, or deliver[s] wares or products to resident agents in this state for sale, delivery or distribution . . ." [Kan. Stat. Ann. § 17-7303](#). By its plain meaning, [Kan. Stat. Ann. § 17-7303](#) does not appear to include merely applying for a franchise as "doing business." Nor do any cases hold as such. Under Kansas law, then, applying for a franchise, without more, is not "doing business" such that [Kan. Stat. Ann. § 17-7307](#) would apply. Accordingly, [Kan. Stat. Ann. § 17-7307](#) does not prevent Classic from pursuing its claims against **[\*\*13]** the Cable Cities.

The Cable Cities further contend that, even if the statutory bar of [Kan. Stat. Ann. § 17-7307](#) is inapplicable, the fact that Classic Communications is not registered to conduct business in Kansas is fatal to its claims against the cities. The gist of this argument appears to be that Classic Communications cannot claim injury, and hence lacks standing, because it never was authorized to conduct any sort of business in Kansas to begin with. The court disagrees. There is no reason why Classic could not first seek the required franchises before registering to do business. Nor is there any reason to believe that Classic would have been unable to obtain the right to conduct business in Kansas. Without some reasonable basis to show that Classic Communications was unable or unwilling to conduct its cable business should it have been granted a franchise, Classic Communications' allegation that the cities were the cause of its lost business suffices, at this juncture, to establish standing to sue.<sup>2</sup>

#### **[\*\*14] B. Recovery of Damages**

The Cable Cities next move to dismiss any claims for money damages made pursuant to federal and state antitrust laws. The Cities contend that their immunity from antitrust claims for damages is absolute and that such immunity is set forth in [15 U.S.C. § 35](#) and [Kan. Stat. Ann. § 12-205](#). Classic Cable's response does not address the Cities' claimed immunity from damages, and Classic offers no legal authority to refute what appear to be clear statutory bars to such claims. Therefore, to the extent Classic is attempting to assert against the Cities any claims for damages, costs, attorneys' fees or interest under federal **antitrust law**, or any claims for damages under Kansas **antitrust law**, such claims fail to state a claim for which relief may be granted and are dismissed. The validity of plaintiff's claims for injunctive relief under state and federal **antitrust law** will be addressed next.

#### **C. Sherman Act Claim**

The Cable Cities move to dismiss Count Two of plaintiff's amended complaint, the Sherman antitrust claim. The Cities assert immunity from the antitrust claim under the state action doctrine first announced in [Parker v. Brown](#), [317 U.S. 341](#), **[\*\*15]** [87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#) and extended to municipalities in [Allright Colorado v. City and County of Denver](#), [937 F.2d 1502 \(10th Cir. 1991\)](#). [HN6](#)<sup>↑</sup> To acquire the protection of state action immunity, a municipality must show the state legislature both authorized the challenged action and intended to displace competition with regulation. [Allright Colorado](#), [937 F.2d at 1506](#). The Cities contend they meet these requirements because they acted pursuant to authority clearly articulated by state statute, and the Kansas legislature contemplated anticompetitive regulation when it enacted [Kan. Stat. Ann. § 12-2001, et seq.](#) Therefore, the Cities argue, they are entitled to *Parker* state action immunity from plaintiffs' antitrust claim.

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<sup>2</sup> For the remainder of this Memorandum and Order, the terms "Classic" and "plaintiff" denote Classic Cable, Inc.

In response, Classic Cable does not dispute the existence of the elements of *Parker* state action immunity. Classic instead attempts to defeat the Cities' state [\*904] action defense by advancing a rather novel preemption argument, which appears to have two premises. The first premise is Classic's theory that "if a local statute, which on its face is consistent with federal law, is enforced in such a way that the results are inconsistent with a federal [\*\*16] statute, that local statute is preempted by the federal statute." The second premise is that *Parker* immunity is not a valid defense where the challenged action was performed pursuant to a state statute that has been preempted by federal law. In reply, the Cities appear to misconstrue the first premise of Classic's argument as an argument for implied conflict preemption. The Cities assert that the Kansas statutes are not preempted and, logically, never reach the second premise of Classic Cable's argument.

Classic Cable cites *Livadas v. Bradshaw*, 512 U.S. 107, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994) in support of the first premise of its preemption theory. The force of that case as precedent, however, is questionable. *Livadas* dealt exclusively with the preemption of state labor law by the National Labor Relations Act. 114 S. Ct. at 2068. It did not address the effect of federal preemption on state action immunity. *Id.* Nor did it involve antitrust claims, *Parker* immunity, the Cable Act, or the Telecommunications Act. *Id.*

Classic would point out that *Livadas* was cited for the particular legal principle that a policy interpreting a valid state statute may [\*\*17] be preempted by federal law. Nonetheless, the connection to the present case is tenuous. The *Livadas* Court merely recognized that a policy made to explain or enforce a valid state statute may be preempted where that policy conflicts with federal law. *114 S. Ct. at 2068*. It did not suggest that the state statute under which the offending policy was promulgated is also preempted. *Id.*

Classic also cites *Chambers v. Capital Cities/ABC*, 851 F. Supp. 543 (S.D.N.Y. 1994) in support of the first premise of its preemption theory. The court finds *Chambers* unconvincing. While we agree with the *Chambers* court that HN7[<sup>1</sup>] neither state nor local laws may be enforced or implemented in such a way as to frustrate the objectives of federal law, we do not agree that a municipality should incur antitrust liability simply for contravening some unrelated federal statute. Violations of, say, the federal Cable Act or Telecommunications Act should be pursued as just that-violations of independent federal statutes. Such violations should not also neutralize a municipality's immunity to federal **antitrust law**.

In addition to its lack of convincing precedent, Classic's preemption argument is inconsistent [\*\*18] with the objectives of *Parker* immunity. HN8[<sup>1</sup>] The fundamental objective of the *Parker* immunity doctrine is to protect state action from federal antitrust scrutiny. *Hallie v. City of Eau Claire*, 471 U.S. 34, 44 n. 7, 85 L. Ed. 2d 24, 105 S. Ct. 1713, (1985). Federalism principles demand that antitrust goals yield to state action if Congress has not plainly indicated a contrary result. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56-57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985). Classic's preemption theory would undermine these principles by depriving a municipality of its protection from federal antitrust scrutiny whenever its conduct could be construed to be in conflict with a federal statute.

Classic also proposes that state action immunity is not a valid defense where a municipality exceeds or abuses its statutory grant of authority. The Cable Cities disagree with Classic's statement of the law and contend that this court has previously considered and rejected such a limit on state action immunity in *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, Kansas*, 715 F. Supp. 1000 (D. Kan. 1989), aff'd, 927 F.2d 1111 (10th Cir. 1991). [\*19] In *Jacobs*, we stated that "once it is established that defendants are entitled to state action immunity, any further inquiry into the motives or reasons for defendants' decision is irrelevant." *715 F. Supp. at 1009*. The Cities argue the *Jacobs* "no further inquiry" rule should apply in this case to preclude the court from considering whether the Cities exceeded or abused their statutory grant of authority.

[\*905] The court agrees with Cable Cities that in *Jacobs* we declined to examine the subjective motives or reasons behind the decisions of the city council. Nevertheless, we are not convinced that certain improper conduct might not defeat state action immunity. Although the Tenth Circuit Court of Appeals affirmed our decision in *Jacobs*, it did not hold that exceeding or abusing authority could never defeat state action immunity. *927 F.2d at 1111*. On the contrary, the Appeals Court only held that the plaintiff's allegations were insufficient, "in the situation presented," to defeat *Parker* immunity. *Id.* That court expressly qualified its analysis by noting at the outset that "appellants do not

allege that the city commissioners engaged in illegal or fraudulent actions." [\*\*20] *Id. at 1122*. Indeed, it appears that the Appeals Court left open the possibility that, given certain improper conduct, a local government's actions could fall outside the state action immunity doctrine.

However, even assuming the Tenth Circuit would recognize an exception to *Parker* immunity, we disagree with Classic that such exception would be so broad as to be triggered whenever a municipality oversteps its statutory grant of authority. Rather, it appears from *Jacobs* that such an exception would be quite narrow, and probably limited to certain illegal or fraudulent acts. Allegations of self-dealing, standing alone, would be unlikely to defeat state action immunity. Likewise, no exception would exist for alleged conspiracies. See *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1984). See, also, *Buckley Construction v. Shawnee Civic and Cultural Development Authority*, 933 F.2d 853 (10th Cir. 1991).

Moreover, the policy underlying the state action doctrine also weighs against recognizing a broad exception to doctrine. The fundamental policy of the *Parker* exception is to immunize state action from federal antitrust scrutiny. [\*\*21] *Hallie*, 471 U.S. at 44 n. 7. To allow such scrutiny whenever it is alleged that state or local decisionmakers have exceeded or abused their authority would defeat the purpose of the state action doctrine. As a general rule, then, it is best to leave the scrutiny of such misconduct to the state courts. *Jacobs*, 715 F. Supp. at 1010. See Areeda, *Antitrust Immunity for State Action after Lafayette*, 95 Harv. L. Rev. 435, 449-50 (1981).

The court finds that the allegations of misconduct detailed in Classic's amended complaint and response are insufficient to defeat the Cable Cities' state action immunity. Plaintiff's amended complaint merely alleges "a combination or conspiracy" between Rural and the Cable Cities. But as already noted, allegations of conspiracy are not enough to defeat state action immunity. Nor are plaintiff's allegations that "Rural and several of the Cities' council members were one and the same" or that one of the Cities "overstepped its statutory authority" enough to defeat state action immunity. **HN9** Without an element of fraud or illegality, allegations of conspiracy, self-dealing, and "overstepping statutory authority" are not enough to invoke an abuse of [\*\*22] authority exception to state action immunity.

Both of Classic's arguments fall short of convincing the court to dilute the state action immunity doctrine. Accordingly, the Cities' motions to dismiss Count Two of plaintiff's amended complaint are granted.<sup>3</sup>

#### D. Kansas Antitrust Claim

The Cable Cities also assert *Parker* state action immunity as a defense to Count Three of Classic's complaint, the Kansas antitrust claim. Although the Cities acknowledge the absence of Kansas cases applying *Parker* immunity to Kansas antitrust laws, they argue that the Kansas Supreme Court would likely adopt the *Parker* immunity doctrine if presented with the opportunity. The court [\*\*23] disagrees.

As the court noted above, the fundamental purpose of the state action doctrine is to immunize state action from federal antitrust [\*906] scrutiny. *Hallie*, 471 U.S. at 44 n. 7. Where, as here, federal antitrust laws are not implicated, the purpose behind state action immunity disappears. Even the underlying policy of state action immunity is inapplicable to the relationship between a state and its municipalities. The *Parker* immunity doctrine was founded on federalism grounds as a means to protect the delicate relationship between the federal and state governments, both of which are sovereign. *Parker*, 317 U.S. at 341. In contrast, **HN10** municipal governments are not sovereign, and the same concerns that affect the relationship between the state and national governments are not present between a state and its municipalities.

The Cities assert that *Parker* immunity has been applied in cases arising under similar state antitrust laws. In support, the Cities cite *Aurora Cable Communications v. Jones Intercable*, 720 F. Supp. 600 (W.D. Mich. 1989).

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<sup>3</sup> In dismissing Classic Cable's Sherman antitrust claim, the court assumed as true Classic's allegation that Rural and several of the Cities' council members "were one and the same." Therefore, no purpose would be served by permitting Classic Cable to conduct additional discovery concerning Rural's influence on the Cities' decisions.

The court finds *Aurora Cable* unhelpful to the Cities' position. *Aurora Cable* involved the application of the *Noerr-Pennington* [\*\*24] doctrine to state antitrust laws. [720 F. Supp. at 600](#). It did not concern *Parker* immunity. *Id.* Indeed, the *Aurora Cable* court did not even mention *Parker* immunity or state action immunity. *Id.* An argument by analogy would also be unhelpful, as the two doctrines are fundamentally different. [HN11](#)[] *Parker* immunity protects states and state supervised municipalities from federal antitrust scrutiny, and is based on federalism principles. See [Parker, 317 U.S. at 341](#). See, also, [Allright Colorado v. City and County of Denver, 937 F.2d 1502 \(10th Cir. 1991\)](#). In contrast, the *Noerr-Pennington* doctrine protects from antitrust liability those who petition government for redress, and is based on the constitutional right to associate and to petition government. See [Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#). See, also, [Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#). By definition, then, the *Noerr-Pennington* doctrine is not applicable to the government actor.

The court finds the Cable Cities' state action immunity defense to Classic's Kansas antitrust [\*\*25] claim without merit. Accordingly, the Cities' motions to dismiss Count Three are denied.

#### E. Section 1983 Claim

The Cable Cities contend that Classic's [42 U.S.C. § 1983](#) claims are precluded by the existence of a comprehensive scheme of remedies available under the Cable Act and the federal antitrust laws. In support of this contention, the Cities cite [Middlesex County Sewerage Auth. v. National Sea Clammers Assoc., 453 U.S. 1, 20, 69 L. Ed. 2d 435, 101 S. Ct. 2615](#), (1981). The *Sea Clammers* court held that "when the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under [§ 1983](#)." The court disagrees, however, that the rule announced in *Sea Clammers* applies in this case.

As the Sixth Circuit stated in *Lillard v. Shelby County Bd. of Educ.*, the *Sea Clammers* doctrine "speaks only to whether federal statutory rights can be enforced both through the statute itself and through [section 1983](#)"; it does not "stand for the proposition that a federal statutory scheme can preempt independently existing constitutional rights, which have contours distinct [\*\*26] from the statutory claim." [76 F.3d 716, 723 \(6th Cir. 1996\)](#) (emphasis in original). The Tenth Circuit recently adopted this rationale in [Seamons v. Snow, 84 F.3d 1226](#), (10th Cir. 1996). Here, Classic is not attempting to predicate its [42 U.S.C. § 1983](#) action on violations of the Cable Act or Sherman Antitrust Act. Instead, Classic is using [42 U.S.C. § 1983](#) as a vehicle to vindicate rights arising independently under the Constitution. Since, by *Seamons*, [HN12](#)[] federal statutory schemes do not preempt independently existing constitutional rights, the remedial schemes available under the Cable Act and the Sherman Act do not preempt the independently existing constitutional rights upon which Classic bases its [42 U.S.C. § 1983](#) claim. The next step, then, is to examine the merits of the alleged constitutional [\*907] violations that support Classic's [42 U.S.C. § 1983](#) claim.

[HN13](#)[] To state a claim under [42 U.S.C. § 1983](#), a plaintiff must allege both the deprivation of a federal right and that the alleged action was taken under color of state law. [Jacobs, Visconti & Jacobs v. City of Lawrence, 927 F.2d 1111, 1115 \(10th Cir. 1991\)](#). The parties do not dispute that the Cities acted under color of [\*\*27] state law. Therefore, the court need only address whether Classic was deprived of a federal right when the Cities denied the franchise requests. Classic bases its [42 U.S.C. § 1983](#) claim on two allegations: 1) deprivation of due process as guaranteed by the [Fourteenth Amendment to the United States Constitution](#); and 2) infringement of its right to free speech as guaranteed by the [First Amendment to the United States Constitution](#).<sup>4</sup>

#### 1. Due Process

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<sup>4</sup> Unlike Plaintiff's original complaint, plaintiff's first amended complaint contains no allegations of equal protection violations.

Classic contends it was denied procedural due process because the Cable Cities arbitrarily refused Classic's cable television franchise request. As an initial matter, however, Classic must show it had a property interest sufficient to invoke procedural protections. [Curtis Ambulance v. Board of County Commissioners, 811 F.2d 1371, 1375 \(10th Cir. 1987\)](#). [HN14](#)<sup>14</sup> To establish a property interest in a particular benefit, one must have [\[\\*\\*28\]](#) a "legitimate claim of entitlement" to it. [Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 \(1972\)](#). "An abstract need or desire for it" or a "unilateral expectation" is insufficient. *Id.* In deciding if the requisite property interest is present, a court must determine whether the applicable state law conferred such a property interest. *Id.*; [Jacobs, Visconsi & Jacobs, 927 F.2d 1111 \(10th Cir. 1991\)](#). Moreover, when analyzing whether a plaintiff presents a legitimate claim of entitlement, a court must focus on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome. [Jacobs, 927 F.2d at 1111](#), citing [Carey v. Piphus, 435 U.S. 247, 266, 55 L. Ed. 2d 252, 98 S. Ct. 1042 \(1978\)](#).

Classic Cable contends it has a property interest in the award of the requested franchise. This entitlement, Classic argues, "arises out of the very provisions regulating their disbursement." Thus, the court must look to those Kansas statutes which regulate the granting of municipal cable television franchises, [Kan. Stat. Ann. §§ 12-2006](#) and 2007, to decide whether Kansas law creates a legitimate [\[\\*\\*29\]](#) expectation of entitlement to a cable franchise. [HN15](#)<sup>15</sup> [Kan. Stat. Ann. § 12-2006](#) expressly grants a city the discretionary right to permit or prohibit anyone from furnishing cable television services within its corporate limits. That statute's discretionary language, however, is not consistent with the creation of any expectation of entitlement to a cable franchise. Moreover, the statute does not contain any limitations on the city's exercise of its discretionary right to permit or deny an applicant's cable franchise which might otherwise give rise to a reasonable expectation of entitlement. See, e.g., [Jacobson v. Hannifin, 627 F.2d 177, 180 \(9th Cir. 1980\)](#) (finding no protected property interest, where gaming statute gave board "full and absolute power and authority" to grant or deny gaming licenses).

[Kan. Stat. Ann. § 12-2007](#) is also unhelpful to Classic's argument. [HN16](#)<sup>16</sup> That statute provides that no person may provide cable services or conduct a cable business without first obtaining a franchise from the local city. However, it does not impose any requirement that a city actually grant such a franchise. In fact, [Kan. Stat. Ann. § 12-2007](#) expressly provides that a city has the discretion [\[\\*\\*30\]](#) to grant or not to grant cable television franchises. Finally, the court agrees with the Cable Cities in that the mere fact that a city's decision in granting or denying franchises must be "reasonable" and in accordance with state and federal guidelines, is insufficient to confer upon franchise applicants a legitimate claim of entitlement. See [Jacobs, 927 F.2d at 1111](#) (holding the requirement that a city's zoning decisions be [\[\\*908\]](#) reasonable and based upon legally determined factors was insufficient to confer upon an applicant for a zoning change a legitimate entitlement to a zoning change). See, also, [Buckley Construction v. Shawnee Civic & Cultural Development Auth., 933 F.2d 853 \(10th Cir. 1991\)](#) (holding that the lowest bidder for a city contract does not have a legitimate expectation of receiving the contract since the applicable statute granted the city the discretionary right to decide who was the lowest "responsible" bidder). For these reasons, the court finds that Classic has no reasonable expectation of entitlement to a cable franchise, and Classic may not, therefore, rest its [42 U.S.C. § 1983](#) claim on a violation of due process.

## 2. [First Amendment](#) Claim

Classic [\[\\*\\*31\]](#) Cable contends that the Cities violated its [First Amendment](#) rights by wrongfully rejecting its cable television franchise requests. In response, the Cities suggest that Classic's allegation is not sufficient to withstand their motions to dismiss. The Cities point out that the Tenth Circuit, in [Community Communications Co v. City of Boulder, Colo., 660 F.2d 1370 \(10th Cir. 1981\)](#), recognized that certain mediums, like cable television, require the use of a limited, invaluable part of the public domain. The Cities further point out that the *Community Communications* court held "no individual disseminator has the constitutional right to be the particular person who obtains the privilege to use the medium." Thus, the Cities argue, they did not violate Classic's [First Amendment](#) rights because, under *Community Communications*, Classic has no constitutional right to use the public domain to disseminate its messages by cable television.

The court disagrees with the Cities' application of *Community Communications*. In addition to factual dissimilarities, the law of *Community Communications* is not helpful to the Cities' argument. That court premised its holding on what it perceived [\*\*32] as a likeness between cable and broadcast television. [Community Communications, 660 F.2d at 1370](#). The *Community Communications* court noted that "inherent limitations on the number of speakers who can use a medium to communicate has been given as a primary reason why extensive regulation of wireless broadcasting is constitutionally permissible." *Id.* Thus, that court reasoned, since cable television is also inherently limited by the number of speakers, extensive regulation of cable television is likewise constitutionally permissible. The validity of the *Community Communications* court's premise, however, has become questionable in light of a more recent Supreme Court decision which appears to eliminate the "scarcity" argument for treating cable television like broadcast television. In *Turner Broadcasting Systems v. FCC*, the Court stated that "the broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium." [114 S. Ct. 2445 \(1994\)](#). Absent any comparable limitations, the *Community Communications* court's analogy between cable and broadcast television loses much [\*\*33] of its force, and its holding should have little impact on the present case.

Also unhelpful to the Cities' argument are several Supreme Court decisions clearly indicating that restrictions on cable television operators implicate the free speech and press clauses of the [First Amendment](#). In *City of Los Angeles v. Preferred Communications*, the Court recognized that a municipal ordinance restricting cable franchising raises a cognizable [First Amendment](#) claim. [476 U.S. 488, 494-95 \(1986\)](#). This notion was later repeated by the Court in [Leathers v. Medlock, 499 U.S. 439, 113 L. Ed. 2d 494, 111 S. Ct. 1438 \(1991\)](#), and most recently applied in *Turner Broadcasting Systems*, 114 S. Ct. at 2445 ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the [First Amendment](#)").

At this juncture, facing as we do an incomplete factual record, and an area of law that is at best unsettled, the court is unable to find beyond doubt that Classic can prove no set of facts supporting its claim which would entitle it to relief. The Cities' motions to [\*909] dismiss Classic's [42 U.S.C. § 1983](#) claim based on the [\*\*34] deprivation of its free speech rights are therefore denied.

#### F. Cable Act Claim

Next, the Cities move to dismiss Classic's claim under [47 U.S.C §§ 541](#) and [555](#) of the Cable Act. [HN17](#) [47 U.S.C § 541](#) provides in part that "a franchising authority may not . . . unreasonably refuse to award an additional competitive franchise." If a franchise is unreasonably refused, [47 U.S.C § 555](#) provides the potential franchisee with a private cause of action. The Cities contend that they did not "unreasonably refuse" to grant franchises to Classic. Thus, the Cities argue, since only unreasonable denials of franchises are actionable, and since the facts establish that its denial was not unreasonable, they are entitled to dismissal of Classic's Cable Act claim.

The court disagrees with the Cities' reasoning. Whether the Cities' refusal was unreasonable is not an issue at this stage of the litigation. [HN18](#) To survive a motion to dismiss, a plaintiff need only state a claim for which relief may be granted unless it appears beyond doubt that the claimant can prove no set of facts supporting its claim. [H.J. Inc., 492 U.S. at 249-50](#). In the present case, Classic alleges a violation of the Cable Act which, [\*\*35] if proven, would entitle it to relief. Moreover, the facts are insufficiently settled to find beyond doubt that Classic Cable can prove no set of facts supporting its claim. It would be improper for the court, at this early stage of the litigation, to deny Classic Cable the opportunity to offer evidence in support of its claim. Defendant's motions to dismiss Classic's Cable Act claim are denied.

#### G. Attorneys' Fees

Classic asserts that it is entitled to recover attorneys' fees for its federal antitrust claims. The Cable Cities contend that, pursuant to [15 U.S.C. § 35](#), it is immune from claims for attorneys' fees made under federal [antitrust law](#).

Classic's response does not address the Cities' claimed immunity from attorneys' fees, and Classic offers no legal authority to refute what appears to be a clear statutory bar to such claims. Any claim for attorneys' fees made under federal antitrust law against the Cities is therefore dismissed.

Classic also asserts that it is entitled to recover attorneys' fees under 42 U.S.C. § 1988, which applies to claims brought pursuant to 42 U.S.C. § 1983. The Cities do not contest the application of 42 U.S.C. § 1988, but only suggests that [\*\*36] Classic's claims for attorneys' fees should be dismissed along with its underlying 42 U.S.C. § 1983 claims. As discussed above, however, the court denied the Cities' motions to dismiss and upheld Classic's 42 U.S.C. § 1983 claim based on Classic's allegations of free speech violations. Accordingly, the Cities' motions to dismiss Classic's claims for attorneys' fees brought under 42 U.S.C. § 1983 is denied.

Finally, Classic seeks recovery of attorneys' fees under Kan. Stat. Ann. § 50-108, which applies to claims brought pursuant to the Kansas Antitrust Act. The Cable Cities argue that this claim for attorneys' fees should be dismissed along with the entire state antitrust claim. Since the court has denied the Cities' motions to dismiss Classic's entire antitrust claim, any claim for attorneys' fees brought pursuant to that claim is also denied.

**IT IS THEREFORE BY THE COURT ORDERED** that the motions to dismiss of defendants City of Palco (Doc. 43), City of Damar (Doc. 44), City of Morland (Doc. 45), City of Norcatur (Doc. 48), and City of Gorham (Doc. 50) are granted in part and denied in part. Defendants' motions are granted as to the issue of damages claimed pursuant to [\*\*37] federal and state antitrust law, the Sherman antitrust claim, and the claim for attorneys' fees under federal antitrust law. Defendants' motions are denied as to the Cable Act claim, the Kansas antitrust claim, the 42 U.S.C. § 1983 claim, and as to claims for attorneys' fees under Kansas antitrust law and 42 U.S.C. § 1983. With regard to the question of standing, defendants' motions are granted with respect to Classic Telephone.

Dated this 3 day of December, 1996, at Topeka, Kansas.

**/s/ DALE E. SAFFELS**

United States District Judge

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## **Hairston v. Pacific 10 Conf.**

United States Court of Appeals for the Ninth Circuit

February 6, 1996, Argued, Submitted, Seattle, Washington ; December 3, 1996, Filed

No. 95-35309

**Reporter**

101 F.3d 1315 \*; 1996 U.S. App. LEXIS 33158 \*\*; 96 Cal. Daily Op. Service 8710; 96 Daily Journal DAR 14419

RUSSELL HAIRSTON; FRANK GARCIA; JAIME WEINDL; JOVAN MCCOY; KYLE ROBERTS; SCOREBOARD, INC., a Washington Corporation; TEAM SPIRIT, INC., a Washington corporation; GRAHAM S. ANDERSON, Plaintiffs-Appellants, v. PACIFIC 10 CONFERENCE, an unincorporated association; NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, Defendants-Appellees.

**Subsequent History:** [\[\\*\\*1\]](#) As Amended December 19, 1996.

**Prior History:** Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-93-01763-BJR. Barbara J. Rothstein, District Judge, Presiding.

Original Opinion Previously Reported at: [1996 U.S. App. LEXIS 30997](#).

**Disposition:** Affirmed

## **Core Terms**

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antitrust, players, athletes, football, sanctions, antitrust violation, damages, conspiracy, lawsuit, parties, bowl, athletic program, summary judgment, district court

## **LexisNexis® Headnotes**

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

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

[\*\*HN1\*\*](#) **Standards of Review, De Novo Review**

A district court opinion granting summary judgment is reviewed de novo.

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

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

[\*\*HN2\*\*](#) **Private Actions, Standing**

101 F.3d 1315, \*1315LÁ1996 U.S. App. LEXIS 33158, \*\*1

When a court concludes that no violation has occurred, it has no occasion to consider antitrust standing.

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

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

### **HN3** [] **Private Actions, Standing**

The antitrust injury element of standing demands that the plaintiff's alleged injury result from the threat to competition that underlies the alleged violation.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

### **HN4** [] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The Sherman Act, [15 U.S.C.S. § 1, et seq.](#), requires, at a minimum, that a plaintiff prove that the defendant's actions had an anticompetitive effect. In order to establish a claim under [§ 1](#), a party must demonstrate: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.

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

Evidence > Burdens of Proof > General Overview

### **HN5** [] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the rule of reason, the fact-finder examines the restraint at issue and determines whether the restraint's harm to competition outweighs the restraint's procompetitive effects. The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within the relevant product and geographic markets. If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects. The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

## **HN6** Burdens of Proof, Scintilla Rule

A plaintiff's burden of proof at the summary judgment stage of the proceedings is not high; all they need to do is present more than a mere scintilla of evidence to support its case.

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 > General Overview

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

## **HN7** Standards of Review, De Novo Review

A dismissal for failure to state a claim pursuant to [\*Fed. R. Civ. P. 12\(b\)\(6\)\*](#) is reviewed de novo.

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

## **HN8** Beneficiaries, Claims & Enforcement

Under Washington law, to create a third-party beneficiary contract, the parties must intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract. The test of intent is an objective one; the key is not whether the contracting parties had an altruistic motive or desire to benefit the third party, but rather whether performance under the contract would necessarily and directly benefit that party. To determine the contracting parties' intent, the court should construe the contract as a whole, in light of the circumstances under which it was made.

**Counsel:** James L. Magee, Graham & Dunn; and Michael D. Hunsinger, Neubauer & Hunsinger, Seattle, Washington, for the plaintiffs-appellants.

Richard J. Wallis, Bogle & Gates, Seattle, Washington, for the defendants-appellees.

**Judges:** Before: Eugene A. Wright, Cynthia Holcomb Hall and Stephen S. Trott, Circuit Judges. Opinion by Judge Hall; Separate Concurrence by Judge Trott.

**Opinion by:** HALL

## **Opinion**

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[\*1317] OPINION

HALL, Circuit Judge:

Plaintiffs-appellants Russell Hairston, Frank Garcia, Jovan McCoy and Kyle Roberts appeal the district court's order granting summary judgment in favor of defendant-appellee, the Pacific-10 Conference ("Pac-10"). The district court had jurisdiction over this matter pursuant to [15 U.S.C. §§ 15](#) and [26](#), and [28 U.S.C. § 1367](#). We have jurisdiction over this timely appeal pursuant to [28 U.S.C. § 1291](#). We affirm.

*I.*

Appellants are former and current University of Washington ("UW") football players. [\*\*2] Appellee, the Pacific-10 Conference ("Pac-10"), is an unincorporated association of ten universities situated in California, Arizona, Oregon and Washington,<sup>1</sup> formed for the purpose of "establishing an athletic program to be participated in by the members."

On November 5, 1992, the Seattle Times reported that UW's star quarterback, Billy Joe Hobert, had received three loans totalling \$ 50,000 from an Idaho businessman. After investigating the allegations, UW officials suspended Hobert and declared him permanently ineligible to play amateur football. One month later, the *Los Angeles Times* published a series of articles alleging that UW's football program had violated several NCAA rules. At [\*\*3] this time, UW, in conjunction with Pac-10 officials, began investigating these alleged irregularities.

After conducting an eight-month investigation into the allegations of recruiting improprieties, the Pac-10 placed the UW football team on probation for recruiting violations. The levied sanctions included: (1) a two-year bowl ban covering the 1993 and 1994 seasons; (2) a one-year television revenue ban; (3) a limit of 15 football scholarships each for the 1994-95 and the 1995-96 academic years; (4) a reduction in the number of permissible football recruiting visits from 70 to 35 in 1993-94 and to 40 in 1994-95; and (5) a two-year probationary period.

The imposition of penalties on the UW Huskies devastated both the players and their fans. In an effort to have the sanctions rescinded, appellants filed a complaint against the Pac-10. In their complaint, appellants alleged antitrust violations under Section One of the Sherman Act, [15 U.S.C. § 1](#), and breach of contract. They argued that the penalties were "grossly disproportionate to the University's violations" and evidence of a conspiracy engineered by UW's Pac-10 competitors to sideline UW's football program and thereby improve [\*\*4] their own records and odds of winning a post-season bowl game berth. Besides injunctive relief appellants also sought damages, which would include the cost of air fare, lodging, meals and expenses related to a trip to play in a post-season bowl game.<sup>2</sup>

The Pac-10 responded by filing a motion to dismiss all claims. In its motion, the Pac-10 contended that the players lacked constitutional and antitrust standing. The Pac-10's motion was granted in part as to certain plaintiffs not included in this appeal, but denied as to the issue of the players' standing. [Hairston v. Pacific-10 Conference, 893 F. Supp. 1485 \(W.D. Wash. 1994\)](#) ("Hairston I"). The district court found that because [\*1318] the players had demonstrated direct antitrust injury, they could pursue their antitrust claims. [\*Id. at 1491-92\*](#). However, the court dismissed the players' breach of contract claim because it found that the players were [\*\*5] not intended third-party beneficiaries of the contract between and among Pac-10 member schools. [\*Id. at 1494\*](#).

The Pac-10 then filed a motion for summary judgment alleging that appellants had failed to present any evidence of anticompetitive conspiracy among Pac-10 members or between the Pac-10 and the NCAA. The court agreed and granted the Pac-10's motion. [Hairston v. Pacific-10 Conference, 893 F. Supp. 1495, 1496 \(W.D. Wash. 1995\)](#) ("Hairston II").

This appeal then followed.<sup>3</sup>

<sup>1</sup>The Pac-10 includes: the University of Washington, Washington State University, University of Oregon, Oregon State University, University of California, Berkeley, Stanford University, University of California, Los Angeles, University of Southern California, Arizona State University and the University of Arizona.

<sup>2</sup>Because the penalty period imposed on UW has ended, the appellants' claims for injunctive relief are moot.

II.

**HN1**[] A district court opinion granting summary judgment is reviewed de novo. [Warren v. City of Carlsbad](#), [58 F.3d 439, 441 \(9th Cir. 1995\)](#), cert. denied, 134 L. Ed. 2d 209, 116 S. Ct. 1261 (1996).

III.

On appeal, the Pac-10 contends that the motion for summary judgment should be affirmed because appellants lack antitrust standing under [Section 4](#) of the Clayton Act, [15 U.S.C. § 4](#). Although we are not persuaded by the reasoning in the district court's opinion, [Hairston I](#), [893 F. Supp. at 1490-92](#), 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:

**HN2**[] 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, **HN3**[] 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, [\\*\\*7 Antitrust Law](#) Par. 360f, at 202-03 (rev. ed. 1995) (footnotes omitted); accord [Levine v. Central Florida Medical Affiliates, Inc.](#), [72 F.3d 1538, 1545 \(11th Cir. 1996\)](#) (declining to reach the issue of standing because appellant had failed to demonstrate existence of antitrust violation); see [Sicor Ltd. v. Cetus Corp.](#), [51 F.3d 848, 855 n.10](#) (9th Cir.) cert. denied, 133 L. Ed. 2d 111, 116 S. Ct. 170 (1995) (choosing not to reach standing issue because appellant had not made out claim of antitrust injury); see also [McCormack v. Nat'l Collegiate Athletic Assoc.](#), [845 F.2d 1338, 1343 \(5th Cir. 1988\)](#) (putting on standing issue and reaching merits of antitrust claim). 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.

IV.

[Section 1](#) of the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States[.] . . ." [15 U.S.C. § 1](#). **HN4**[] In order to establish a claim under [Section 1](#), the players must demonstrate: "(1) that there was a contract, combination, or [\\*\\*8](#) conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." [Bhan v. NME Hospitals, Inc.](#), [929 F.2d 1404, 1410](#) (9th Cir.), cert. [[\\*1319](#)] denied, 502 U.S. 994, 112 S. Ct. 617, 116 L. Ed. 2d 639 (1991) (citation omitted).

The first and third elements of this test are not at issue. The Pac-10 members' agreement to sanction UW fulfills the "contract, combination, or conspiracy" prong. See [NCAA v. Board of Regents of Univ. of Okla.](#), [468 U.S. 85, 99, 104 S. Ct. 2948, 82 L. Ed. 2d 70 \(1984\)](#) ("NCAA member institutions have created a horizontal restraint - an agreement among competitors on the way in which they will compete against each other."). The parties do not dispute that the

<sup>3</sup> Prior to filing this appeal, the players stipulated to the dismissal of the NCAA as a defendant. Thus, only the Pac-10 remains as a defendant-appellee.

agreement affects interstate commerce. Thus, the only issue is whether the sanctions constituted an unreasonable restraint of trade. We analyze this question using the rule of reason analysis. *Id. at 103.*

**HN5** Under the rule of reason, the fact-finder examines the restraint at issue and determines whether the restraint's harm to competition outweighs the restraint's procompetitive effects. *Bhan, 929 F.2d at 1413.* The plaintiff bears the initial **[\*\*9]** burden of showing that the restraint produces significant anticompetitive effects within the relevant product and geographic markets. If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects. The plaintiff must then show that "any legitimate objectives can be achieved in a substantially less restrictive manner." *Id.*

Here, the plaintiffs met their initial burden by showing that the Pac-10 members banned UW from participating in bowl games for two years. The Pac-10 replied with evidence showing that there are significant procompetitive effects of punishing football programs that violate the Pac-10's amateurism rules.<sup>4</sup> The burden then returned to the athletes to show that the Pac-10's procompetitive objectives could be achieved in a substantially less restrictive manner. **HN6** The players' burden of proof at the summary judgment stage of the proceedings was not high, all they had to do was present more than a "mere scintilla of evidence to support its case." *City of Vernon v. Southern Cal. Edison Co., 955 F.2d 1361, 1369* (9th Cir.), cert. denied, 506 U.S. 908, 121 L. Ed. 2d 228, 113 S. Ct. 305 (1992). This they failed to do.

**[\*\*10]** The athletes claim that the Pac-10's penalties were grossly disproportionate to UW's violations. However, they do not offer even the thinnest reed of support for this proposition. They point to the testimony of Robert Aronson, a law professor at the University of Washington, who analyzed the sanctions imposed against the UW compared to sanctions imposed against similar institutions. Aronson, however, testified that the penalties were within the range of appropriate penalties. The players also claim that the NCAA's report on the Pac-10's sanctions concludes that the penalties were disproportionate. It does not. The report actually states that the Pac-10's penalties were too lenient, not that they were too harsh. In short, the athletes have presented no evidence that would allow a jury to find in their favor, hence summary judgment was proper.

## V.

Appellants also argue that the district court erred in dismissing their breach of contract claim. **HN7** A dismissal for failure to state a claim pursuant to *Rule 12(b)(6)* is reviewed de novo. *Stone v. Travelers Corp., 58 F.3d 434, 436-37 (9th Cir. 1995).*

**[\*1320]** In their complaint, the players alleged that the Pac-10's Constitution, Bylaws and **[\*\*11]** Articles created a contract between the conference and its members, and that the players were third-party beneficiaries of this contract. The players further contend that the Pac-10 breached this contract when it levied unreasonable sanctions against UW, thereby injuring the players as beneficiaries.

<sup>4</sup> As the Supreme Court explained in *NCAA*,

The NCAA seeks to market a particular brand of football - college football. The identification of this "product" with an academic tradition differentiates college football and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend classes, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice - not only the choices available to sports fans but also those available to athletes - and hence can be viewed as procompetitive.

**HN8** Under Washington law, to create a third-party beneficiary contract, the parties must intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract. *Postlewait Constr. Inc. v. Great American Ins.*, 106 Wash. 2d 96, 720 P.2d 805, 806 (Wash. 1986). "The test of intent is an objective one; the key is not whether the contracting parties had an altruistic motive or desire to benefit the third party, but rather whether performance under the contract would necessarily and directly benefit that party." [720 P.2d at 806-07](#). To determine the contracting parties' intent, the court should construe the contract as a whole, in light of the circumstances under which it was made. [Id. at 807](#).

To support their claim, appellants point to the language of the Pac-10 Constitution. Under its "Statement of Purpose," the conference notes that its goal is "to enrich [\*\*12] and balance the athletic and educational experiences of student-athletes at its member institutions, [and] to enhance athletic and academic integrity among its members."

By joining the Pac-10, members are obligated to "administer [an] athletic program in accordance with the Constitution, Bylaws, and other legislation of the Conference," "conduct [their] intercollegiate athletic program in keeping with the highest recognized standards and in a manner which will enhance the reputation for integrity of the Pacific-10 Conference," "assure the intercollegiate athletic program is maintained as an integral part of the educational objectives and programs on the campus of each Pacific-10 Conference member institution," and "participate in the sports of football and basketball."

The ultimate goal of the conference is realization of certain values including: "academic and athletic achievement of student-athletes," "increased educational opportunities for young people," "quality competitive opportunities for student-athletes," and "amateurism in intercollegiate athletics."

In dismissing appellants' contract claim, the district court found that this language largely consisted of "vague, [\*\*13] hortatory pronouncements in the contract" and that "by themselves, these pronouncements are not sufficient to support the players' claims that the Pac-10 intended to assume a direct contractual obligation to every football player on a Pac-10 team." [Hairston I, 893 F. Supp. at 1494](#). We agree.

The key here is that appellants have not demonstrated that the parties intended to create direct legal obligations between themselves and the students. Other than the statements from the Pac-10's Constitution, By-laws and other legislation, appellants have failed to provide any evidence that the parties intended to create a contractual obligation; accordingly, we find their claim without merit.

## VI.

Appellants have failed to show that the penalties the Pac-10 imposed constituted an unreasonable restraint of trade. As a result, no antitrust violation occurred. Appellants also have failed to allege a breach-of-contract claim since no language in the contract shows the Pac-10 and its members intended to assume a direct obligation to the students. For these reasons, we AFFIRM.

**Concur by:** Trott

## Concur

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Trott, Circuit Judge, Concurring in the result.

I concur wholeheartedly in Judge Hall's excellent [\*\*14] analysis of the merits of the appellants' failed attempt to mount an antitrust case against the NCAA and the Pac-10. I write separately, however, to point out that there is yet another significant reason to affirm the district court's dismissal of this case: Hairston and his colleagues manifestly lack antitrust standing to bring this lawsuit, and thus cannot even qualify as valid plaintiffs. By not deciding this

threshold issue, [\*1321] I'm concerned that we might encourage other potential litigants to limber up their bats to take unwarranted swings at targets legally beyond their reach. My concern is aroused because we leave intact and on the books the district court's holding that these plaintiffs do have antitrust standing, a holding which I respectfully believe is demonstrably erroneous. See *Hairston v. Pacific-10 Conference*, 893 F. Supp. 1485 (W.D. Wash. 1994).

The district court's flawed analysis may encourage antitrust lawsuits such as this one every time a player feels injured by a conference sanction. In my judgment, this case presents an appropriate opportunity to advise such potential litigants that they do not have standing to come into court with these kinds of alleged [\*\*15] injuries. The fact that these plaintiffs have struck out on the merits is no assurance that the next group of distant plaintiffs denied a free vacation will be dissuaded from filing equally frivolous lawsuits. Such entirely self-referential forays into court unnecessarily tax the time, resources, and energy of their targets, not to mention those of the court. Thus, I offer my interpretation of the majority's unexplained statement that they "are not persuaded by the reasoning in the district court's opinion" regarding the antitrust standing issue.

"Establishment of [antitrust] standing, logically, precedes the presentation of a plaintiff's case." *R.C. Dick Geothermal v. Thermogenics, Inc.*, 890 F.2d 139, 152 (9th Cir. 1988) (en banc). In fact, in *Thermogenics* we likened antitrust standing to the need to get to first base before one can score a home run. *Id. at 145*. But this unremarkable principle is based on more than logic: it is based also on the intent of Congress as expressed in Supreme Court precedent. As the Court has explained, Congress, in enacting *section 4* of the Clayton Act, "did not intend the antitrust laws to provide a remedy in damages for all injuries that [\*\*16] might conceivably be traced to an antitrust violation." *Associated Gen. Contractors of Cal., Inc. v. Cal. St. Council*, 459 U.S. 519, 534, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) (internal quotation omitted). Thus, "in such case . . . the alleged injury [of a plaintiff] must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall." *Id. at 539*.

Antitrust standing is different, of course, from standing in the constitutional sense. *Associated Gen. Contractors*, 459 U.S. at 535 n.31. The plaintiff's ability to fulfill the requirements of antitrust standing is an essential threshold element of an antitrust case whereas constitutional standing is essential to the jurisdiction of the court. *Thermogenics*, 890 F.2d at 145. In order to have antitrust standing, the plaintiff must show that he or she has suffered "antitrust injury." If this burden is met, the plaintiff must also show that he or she is an appropriate antitrust plaintiff. It is on this second ground that the instant plaintiffs' lawsuit surely fails. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109 n.5, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); see also *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) [\*\*17] (limiting the *section 4* remedy to "particular class of persons . . . for redress of particular forms of injury."); *Exhibitors' Serv., Inc. v. American Multi-Cinema*, 788 F.2d 574, 576 n.1 (9th Cir. 1986) (substituting "proper party" for "antitrust standing").

The inquiry as to whether a litigant is a proper antitrust plaintiff looks both at how connected the players' injuries are to the alleged antitrust violation, see *Associated Gen. Contractors*, 459 U.S. at 534 ("An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.") (internal quotation omitted), and whether the players appropriately fulfill the private attorneys' general function of the Clayton Act. See *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 542 (9th Cir. 1987) (applying private attorneys' general theory to determine whether plaintiffs had antitrust standing). In order to determine if a plaintiff is proper, we look at several factors, none of which is controlling: 1) the character of the damages, including the risk of duplicative recovery, the complexity [\*\*18] of apportionment, and whether the damages' character makes them too speculative; [\*1322] 2) the specific intent of the alleged conspiracy; 3) the directness of the injury; and 4) the existence of other, more appropriate plaintiffs. See *Thermogenics*, 890 F.2d at 146.<sup>1</sup>

To start our analysis of these factors, we look first to the character of the damages alleged. The minimal damages at issue here are not difficult to apportion because the players seek only damages related to an all-expense paid

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<sup>1</sup> In *Thermogenics*, 890 F.2d at 146, we also looked at "the nature of the plaintiff's claimed injury." However, this factor is more properly considered when performing the "antitrust injury" analysis.

trip to a bowl game, including air fare, lodging and meals. Separating these damages from the loss suffered by the school is easy. There certainly is no need for "long and complicated proceedings involving massive evidence and complicated theories." [Associated Gen. Contractors, 459 U.S. at 544](#). Accordingly, this factor **[\*\*19]** does not cut against the plaintiffs.

The specific intent of the Pac-10 query, however, does work against the athletes. No one alleges that the Pac-10 was out to punish the athletes, and even the players admit in their brief that "the penalties were imposed by competitors who did not . . . consider the impact on the players."

Nor can the athletes show a direct causal connection between the alleged violation and the alleged injury sufficient to satisfy the third prong of the test. The players argue they were the direct victims because barring the UW football team from playing in a postseason bowl game prohibits them from participating in that game. However, the players' position is analogous to that of the employees in [Eagle, 812 F.2d 538](#). In *Eagle*, the plaintiffs were crewmembers on fishing vessels whose wages were tied to the value of their catch. The defendants were canneries accused of setting the price of tuna artificially low. The court held that only the vessel-owners were directly injured, and that any injury suffered by the crewmembers was derived from the vessel owners' loss. [Id. at 541](#). Likewise, only the University of Washington was directly injured here, and **[\*\*20]** the players' injuries derived from that loss.

The biggest flaw in the plaintiffs' case, however, is that another, more appropriate plaintiff exists: the University of Washington. The antitrust injury that the plaintiffs allege - loss of the trip to San Antonio - is insignificant in comparison to the millions of dollars the University allegedly lost because of these sanctions. Therefore, it seems unlikely that denying the athletes antitrust standing would "leave a significant antitrust violation undetected or unremedied." [Associated Gen. Contractors, 459 U.S. at 544](#).

The players argue unpersuasively that the UW is not a more appropriate antitrust plaintiff because it has a strong incentive not to sue the Pac-10. If the players are not permitted to bring this suit, they say, any antitrust violation the Pac-10 committed would go unpunished. However, other colleges have challenged college sporting associations and have still remained a part of the association after the litigation. See, e.g., [NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 \(1984\)](#). Moreover, as this court said in [Exhibitors' Serv., Inc. v. American Multi-Cinema, 788 F.2d 574, 581 \(9th Cir. 1986\)](#), **[\*\*21]** "we cannot agree with [the] premise that every restraint must become the subject of a private antitrust action even when those directly injured do not choose to make it so."

Finally, the practical consequences of allowing the players to bring this lawsuit after their university - which has suffered enormous economic losses - has agreed to the sanctions, demonstrates that the players are not the proper antitrust plaintiffs. If we were to hold that these four players had antitrust standing to alter the sanctions against the UW, we would invite numerous groups of indirectly injured parties to bring antitrust lawsuits and argue that the Pac-10 should have imposed different sanctions or remedies. For example, freshmen players would want sanctions to be immediately imposed so that they could be free of them in the later **[\*1323]** years when they are more likely to play. Senior players would want deferred penalties so that they could finish school before the penalties took effect. Football players would want their schools to pay monetary fines and not be prohibited from televised games or postseason play. But monetary fines would adversely affect funding of other athletic programs and harm other **[\*\*22]** athletes. Other players might then complain that their interests had been violated. The sanctioned university is in the best position to balance these competing interests, and, if necessary, bring an antitrust action.

After balancing the different factors, I conclude that the players have failed utterly to show that they are proper antitrust plaintiffs. Therefore, because the players lack antitrust standing, I would reverse the district court's published order of May 20, 1994 which held to the contrary. In all other respects, I concur in Judge Hall's opinion.

#### ORDER AND AMENDED OPINION

#### ORDER

The concurring opinion of Trott, Circuit Judge, filed in this case on December 3, 1996 is hereby ordered amended as follows:

1. On page 15224 of the slip opinion, the final line of the first paragraph shall be changed to read: "Accordingly, this factor does not cut against the plaintiffs."
2. On page 15224 of the slip opinion, the first sentence of the second paragraph shall be changed to read: "The specific intent of the Pac-10 query, however, does work against the athletes."

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End of Document

## Pharmacare v. Caremark

United States District Court for the District of Hawaii

December 12, 1996, Decided ; December 12, 1996, FILED

CIVIL NO. 96-00474 ACK

**Reporter**

965 F. Supp. 1411 \*; 1996 U.S. Dist. LEXIS 20504 \*\*; 1997-1 Trade Cas. (CCH) P71,698

PHARMACARE, et. al, Plaintiffs, vs. CAREMARK, et. al, Defendants

**Disposition:** [\[\\*\\*1\]](#) Defendants' Motion to Dismiss concerning Plaintiffs' [§ 1962\(a\)](#) claim and mail and wire fraud claims GRANTED. Remainder of Defendants' Motion to Dismiss DENIED.

## Core Terms

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Plaintiffs', enterprise, Defendants', bribery, mail, mail fraud, motion to dismiss, patients, bribes, predicate act, wire fraud, racketeering, therapy, racketeering activity, competitors, injunction, predicates, customers, allegations, infusion, fulfill, site, fiduciary duty, restitution, intangible, referrals, deprived, purposes, Travel, entity

## LexisNexis® Headnotes

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

### [HN1](#) [down arrow] Motions to Dismiss, Failure to State Claim

Under [Fed. R. Civ. P. 12\(b\)\(6\)](#), in determining whether a motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept as true the plaintiff's allegations contained in the complaint and view them in a light most favorable to the plaintiff. The complaint must stand unless it appears beyond doubt that the plaintiff has alleged no facts that would entitle him to relief. A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory. The issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims. The court must determine whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of plaintiffs' claims.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

### [HN2](#) [down arrow] Racketeering, Racketeer Influenced & Corrupt Organizations Act

To establish a claim under the Racketeer Influenced and Corrupt Organizations Act, a plaintiff must establish: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

### **HN3** [] Crimes Against Persons, Coercion & Harassment

The Racketeer Influenced and Corrupt Organizations Act (RICO) defines the term pattern of racketeering activity as requiring at least 2 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\(5\)](#). 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. 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. See [18 U.S.C.S. 1965\(c\)](#). And if so, whether the predicate acts were related in manner such that they created a threat of continued unlawful activity.

Criminal Law & Procedure > ... > Bribery > Public Officials > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

### **HN4** [] Bribery, Public Officials

The predicate acts which may form the basis for a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), are found at [18 U.S.C.S. § 1961\(1\)](#). [Section 1961\(1\)](#) lists five different categories of criminal offenses that could potentially constitute predicate acts. Subsection (A) provides that any act or threat involving a variety of criminal offenses which are chargeable under state law may serve as a RICO predicate. [18 U.S.C.S. § 1961\(1\)\(A\)](#). Subsection (B) provides that any act which is indictable under any of a variety of enumerated federal criminal statutes may serve as a RICO predicate. [18 U.S.C.S. § 1961\(1\)\(B\)](#).

Criminal Law & Procedure > ... > Racketeering > Travel Act > Elements

International Trade Law > General Overview

Criminal Law & Procedure > ... > Racketeering > Travel Act > General Overview

### **HN5** [] Travel Act, Elements

To establish a Travel Act violation, a plaintiff need only prove that the defendant used any facility in interstate or foreign commerce, including the mail, with intent to carry on bribery in violation of the laws of the United States. [18 U.S.C.S. § 1952\(a\)\(3\)](#) and [\(b\)](#).

Banking Law > ... > Criminal Offenses > Bank Fraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

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Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

## **HN6** [down] **Criminal Offenses, Bank Fraud**

To establish a claim for mail or wire fraud, a plaintiff needs to establish that defendants (1) formed a scheme or artifice to defraud; (2) used the United States mails or, for wire fraud, the use of wire, radio, or television communications; (3) with the specific intent to deceive or defraud. [18 U.S.C.S. §§ 1341, 1343](#), and [1346](#). Mail fraud also requires the intent to defraud someone of money or property.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN7** [down] **Racketeer Influenced & Corrupt Organizations Act, Elements**

To establish a pattern under the Racketeer Influenced and Corrupt Organizations Act (RICO), it must be shown that the predicate acts themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity. 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. 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.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN8** [down] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

To have standing to assert a claim under the Racketeer Influenced and Corrupt Organizations Act, a plaintiff must establish a defendant's predicate acts actually and proximately caused the plaintiff's financial loss.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN9** [down] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The Racketeer Influenced and Corrupt Organizations Act defines an "enterprise" as either (1) any individual, partnership, corporation, association, or other legal entity or (2) any union or group of individuals associated in fact although not a legal entity associated-in-fact enterprise. [18 U.S.C.S. § 1961\(4\)](#). To adequately plead the associated-in-fact enterprise, a plaintiff must prove: (1) that the enterprise has an existence beyond that which is merely necessary to commit the predicate acts of racketeering; and (2) the enterprise must have some sort of structure for the making of the decisions, whether it be hierarchical or consensual.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

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## [HN10](#) [blue icon] Racketeer Influenced & Corrupt Organizations Act, Elements

The minimum requirement for an associated in fact enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO) requires a RICO enterprise to have an ascertainable structure separate and apart from the racketeering activity; the enterprise as a whole to have a separate existence, not merely one player in the enterprise to have a separate existence.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## [HN11](#) [blue icon] Racketeering, Racketeer Influenced & Corrupt Organizations Act

An enterprise must have an existence beyond that which is merely necessary to commit the predicate acts of racketeering and some sort of structure for the making of the decisions, but this requirement may be fulfilled by the simple inclusion of a corporation as a participant in the enterprise.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## [HN12](#) [blue icon] Racketeer Influenced & Corrupt Organizations, Claims

A plaintiff seeking civil damages for a violation of [18 U.S.C.S. § 1962\(a\)](#) must allege facts tending to show that he or she was injured by the use or investment of racketeering income.

Business & Corporate Law > Agency Relationships > Fiduciaries > Fiduciary Duties

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

Governments > Fiduciaries

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Business & Corporate Law > Agency Relationships > Fiduciaries > General Overview

## [HN13](#) [blue icon] Fiduciaries, Fiduciary Duties

Section 2(c) of the Robinson-Patman Act applies to cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent involving the sale or purchase of goods. Competitors of a seller involved in commercial bribery have standing under § 2(c) if they suffer economic injury. To fulfill the economic injury tenet, the competitor must establish a physical and economic nexus between the alleged violation and the harm to the plaintiff.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

965 F. Supp. 1411, \*1411Â¹ 996 U.S. Dist. LEXIS 20504, \*\*1

#### **HN14** [blue icon] **Types of Price Discrimination, Brokerage, Commissions & Compensation**

See [15 U.S.C.S. § 13\(c\)](#).

Business & Corporate Law > ... > Remedies > Equitable Relief > Injunctions

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Restitution

#### **HN15** [blue icon] **Equitable Relief, Injunctions**

Under the [Cal. Bus. & Prof. Code § 17203](#), remedies are strictly limited to injunctive relief and restitution, which may include disgorgement of illicit profits to injured parties.

Business & Corporate Law > ... > Remedies > Equitable Relief > Injunctions

#### **HN16** [blue icon] **Equitable Relief, Injunctions**

See [Cal. Bus. & Prof. Code § 17203](#).

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > General Overview

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

#### **HN17** [blue icon] **Standing, Injury in Fact**

To have standing, a plaintiff must prove: (1) injury in fact; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision.

**Counsel:** For PHARMACARE, Incorporated as, A Hawaii Corporation aka Value Drug, Ltd., CREATIVE HEALTH CARE SERVICES, INC., an Arizona Corporation, HOME PARENTERAL CARE, INC., an Oregon Corporation, On Behalf of Themselves and All Others Similarly Situated, plaintiffs: Michael K. Livingston, Davis & Levin, Honolulu, HI. Sharon R. Himeno, Price Okamoto Himeno & Lum, Honolulu, HI. Bonny E. Sweeney, Leonard B. Simon, Kevin P. Roddy, Stephen H. Swartz, Dennis Stewart, Milberg Weiss Bershad Hynes & Lerach, San Diego, CA.

For CAREMARK, INC., a California Corporation, CAREMARK INTERNATIONAL, INC., a Delaware Corporation, BAXTER INTERNATIONAL, INC., a Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation, defendants: Robert J. Hackman, Goodsill Anderson Quinn & Stifel, Honolulu, HI. Howard M. Pearl, Winston & Strawn, Chicago, IL.

**Judges:** Alan C. Kay, Chief United States District Judge

**Opinion by:** Alan C. Kay

## **Opinion**

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**[\*1413] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS. THE COURT GRANTS DEFENDANTS' MOTION [\*\*2] TO DISMISS WITH LEAVE TO AMEND REGARDING: (1) PLAINTIFFS' WIRE AND MAIL FRAUD CLAIMS; AND (2) PLAINTIFFS' § 1962(a) CLAIM. THE COURT DENIES THE REMAINDER OF DEFENDANTS' MOTION TO DISMISS**

## **BACKGROUND**

This case concerns the alternate site infusion therapy industry. Alternate site infusion therapies consist of services involving the administration of medication, nutritional solutions and fluids to a patient outside of a hospital. The most common therapies include total parental nutrition, enteral nutrition, antibiotic, antiviral and antifungal therapies, chemotherapy, pain management therapy, human growth therapy and treatments for hemophilia and HIV/AIDS. Due to their medical nature, alternative site infusion therapies are typically prescribed by a patient's doctor. From February 1986 until April 1995, when it sold its alternate site infusion therapy business, Caremark, Inc. ("Caremark") was the largest company in this industry.

During this time, Caremark underwent certain corporate transformations. Prior to 1987, Caremark was known as Home Health Care of America. From approximately August 1987 to about November 1992, Caremark was owned by Baxter Healthcare Corporation [\*\*3] ("Baxter Healthcare"), a Delaware Corporation with its principal place of business in Illinois. Baxter Healthcare is a subsidiary of Baxter International, Inc ("Baxter"), a Delaware corporation with its headquarters in Illinois. In November, 1992, Caremark became a subsidiary of Caremark International, Inc. (collectively Caremark, Caremark International, Inc., Baxter Healthcare and Baxter referred to as "Defendants").

This case came about because of two plea agreements entered into by Caremark in the District of Minnesota ("Minnesota plea") and [\*1414] the Southern District of Ohio ("Ohio plea"). In the Minnesota plea, entered into on June 20, 1995, Caremark pled guilty to one count of mail fraud in violation of [18 U.S.C. § 1341](#) and agreed to pay a fine of \$ 9,000,000. Two days later on June 22, 1995, Caremark entered into the Ohio plea where it pled guilty to mail fraud and paid a \$ 20,000,000 fine. The basis for these agreements was Caremark's improper payments to physicians in exchange for the physicians' referrals of patients.

The significance and scope of these agreements constitute the gist of this action. The Defendants argue that the agreements merely establish wrongdoing with regard [\*\*4] to two doctors <sup>1</sup> in the Minneapolis and Columbus area concerning the Federal Employees Health Benefit Program ("FEHBP") and the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"), two federal programs.

Caremark's competitors disagree. They argue that these agreements evidence a nationwide scheme of commercial bribery. In fact, three competitors <sup>2</sup> ("Plaintiffs") filed a nationwide class action on May 20, 1996 against the Defendants. The complaint asserts that Defendants' scheme violated four different statutes: (1) Clayton Act § 2(c) as amended by the Robinson-Patman Act, [15 U.S.C. § 13\(c\)](#) ("§ 2(c)"); (2) RICO [18 U.S.C. § 1962\(a\)](#) and [\(d\)](#) ("§ 1962(a)"); (3) RICO [18 U.S.C. § 1962\(c\)](#) and [\(d\)](#) ("§ 1962(c)"); and (4) the [California Business & Professions Code § 17200](#) concerning unfair and fraudulent business practices ("pendent claim"). For these violations, Plaintiffs seek general damages (trebled [\*\*5] as provided by law), attorney's fees, an injunction prohibiting the Defendants from continuing their actions, restitution of Defendants' ill-gotten gains, and the imposition of a constructive trust.

On August 26, 1996, the Defendants filed a motion to dismiss. With regard to the RICO claims, Defendants argue that Plaintiffs' complaint fails to: (1) adequately establish the predicate acts of racketeering; (2) satisfy RICO's proximate cause and standing requirement; (3) establish the existence of an enterprise necessary for [§ 1962\(c\)](#); and (4) establish that Plaintiffs were injured by Defendants' use of income derived from racketeering activity as required by [§ 1962\(a\)](#). As to Plaintiffs' § 2(c) claim, Defendants argue that dismissal is appropriate because: (1)

<sup>1</sup> The doctors are Dr. Neufeld of Columbus, Ohio and Dr. Brown of Minneapolis, Minnesota.

<sup>2</sup> The competitors are (1) Value Drug, Ltd., a Hawaii corporation; (2) Creative Health Care Services, an Arizona corporation; and (3) Home Parenteral Care, Inc., an Oregon corporation.

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Plaintiffs lack the requisite standing; (2) Doctors do not owe their **[\*\*6]** patients a commercial duty; and (3) Plaintiffs failed to plead that doctors provided no services in return for the alleged payments. Finally, with regard to the pendent claim, Defendants sought dismissal on the grounds that: (1) the injunction sought is unnecessary; (2) the Plaintiffs lack standing; and (3) the relief sought would violate the *Commerce Clause of the Federal Constitution*.

Plaintiffs responded to all these arguments in their October 31, 1996 opposition. The Defendants filed a reply on November 7, 1996.

## **STANDARD OF REVIEW**

### **1. Motion to Dismiss**

**HN1** [↑] Under Fed. R. Civ. P. 12(b)(6), in determining whether a motion to dismiss for failure to state a claim upon which relief can be granted, this Court must accept as true the plaintiff's allegations contained in the complaint and view them in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974); Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332, 334 (9th Cir. 1990); Shah v. County of Los Angeles, 797 F.2d 743, 745 (9th Cir. 1986). Thus, the complaint must stand unless it appears beyond doubt that the plaintiff has alleged no facts **[\*\*7]** that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal **[\*1415]** theory or (2) insufficient facts under a cognizable legal theory. Balistreri, 901 F.2d at 699; Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984).

In essence, as the Ninth Circuit has stated, "the issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims." De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir.), cert. denied, 441 U.S. 965, 60 L. Ed. 2d 1072, 99 S. Ct. 2416 (1979). The Court must determine whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of plaintiffs' claims. *Id.*

## **DISCUSSION**

Although the Plaintiffs' class has not been certified, the Court will decide the issues presented in this motion. See Wright v. Schock, **[\*\*8]** 742 F.2d 541 (9th Cir. 1984) (citing cases which have allowed a court to decide a motion to dismiss before certification.) The Court, however, will assume that the suit is a class action for purposes of this motion.<sup>3</sup> See City Of Inglewood, 451 F.2d 948 (9th Cir. 1972) (holding that the district court was proper in assuming that suit was class action for purposes of deciding a Fed. R. Civ. P. § 12(b)(1) motion.) With that said, the Court will discuss the claims in the order the Defendants attacked them in their motion to dismiss.<sup>4</sup>

### **[\*\*9] I. Plaintiffs' have established all the elements required for their 1962(c) claim**

**HN2** [↑] To establish its RICO § 1962(c) claim, the Plaintiffs must establish: (1) conduct,<sup>5</sup> (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. Sedima v. Imrex Co. Inc., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S.

<sup>3</sup> If the class is ultimately not certified, therefore, this order, or portions thereof, may no longer be applicable. The Court is mindful that pursuant to Fed. R. Civ. P. 23(c)(1) the issue of class certification must be ruled on "as soon as practicable." See e.g. Wright, 742 F.2d at 543.

<sup>4</sup> Defendants did not specifically challenge Plaintiffs' § 1962(d) claims which alleged that Defendants conspired to violate § 1962(c) and § 1962(a). See Plaintiffs' Complaint at P 48, 55. The Court, therefore, will not address Plaintiffs' 1962(d) claims.

<sup>5</sup> Defendants do not argue that Plaintiffs' failed to establish this element.

Ct. 3275 (1985). Defendants first argue that Plaintiffs have failed to plead the third and fourth elements, i.e. a pattern of racketeering activity.

#### A. Plaintiffs' Have Adequately Established a Pattern of Racketeering Activity

**HN3** [↑] 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." RICO, 18 U.S.C. § 1961(5). Aside from the minimal requirement of showing two predicate acts existed, RICO nowhere addresses the meaning of the [\*\*10] term "pattern" as used throughout the statute. In *H.J. Inc. v. Northwestern Bell Telephone Company*, the United States Supreme Court sought to develop a meaningful concept 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, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985), the Supreme Court divined from RICO's legislative history a two-pronged framework for analysis: "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 within the meaning of the RICO statute. See 18 U.S.C. § 1965(c). And if so, whether the predicate acts were related in manner such that they created a threat of continued unlawful activity. Northwestern Bell, 492 U.S. at 239-43.

##### [\*1416] 1. Predicate Acts

[\*\*11] Congress has enumerated **HN4** [↑] the predicate acts which may form the basis for a RICO claim in 18 U.S.C. § 1961(1). Section 1961(1) lists five different categories of criminal offenses that could potentially constitute predicate acts. Subsection (A) provides that "any act or threat" involving a variety of criminal offenses "which [are] chargeable" under state law may serve as a RICO predicate. 18 U.S.C. § 1961(1)(A) (emphasis added). Subsection (B) provides that "any act which is *indictable*" under any of a variety of enumerated federal criminal statutes may serve as a RICO predicate. 18 U.S.C. § 1961(1)(B) (emphasis added). Plaintiffs rely on subsection (B) to establish its RICO predicates claiming that Defendants committed various acts in violation of the following statutes delineated in subsection (B): (1) bribery or attempted bribery in violation of 18 U.S.C. § 201; (2) mail fraud in violation of 18 U.S.C. § 1341; (3) wire fraud in violation of 18 U.S.C. § 1343; and (4) interstate and/or foreign travel in violation of 18 U.S.C. § 1952.<sup>6</sup>

[\*\*12] a. Doctors involved with the CHAMPUS and FEHPB Programs Qualify as 'Public Officials' for purposes of the federal bribery statute

Defendants argue that 18 U.S.C. § 201 only applies to bribery of public officials or bribery connected to testimony to be given at trial and thus does not apply to the facts alleged by Plaintiffs. See Defendants' Motion to Dismiss at pgs. 6-7. In response, Plaintiffs argue that although 18 U.S.C. § 201 applies only to federal officials, the Supreme Court has defined that term to include any "person [who] occupies a position of public of trust with official federal responsibilities." Dixson v. United States, 465 U.S. 482, 496, 79 L. Ed. 2d 458, 104 S. Ct. 1172 (1942). Under this expansive definition, Plaintiffs argue that Defendants' bribery of public officials.

The Court finds that Plaintiffs' argument has merit. In *Dixson*, the Supreme Court found that the Petitioner occupied a position of official responsibility because he "allocated federal resources, pursuant to complex statutory and regulatory guidelines, in the form of [federal] contracts." Id. at 497. For purposes of a motion to dismiss, that this precisely the purpose [\*\*13] to dismiss, that is precisely the authority the doctors were given this case. See De la Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978) (holding that motion to dismiss inappropriate unless Plaintiff cannot establish claim "under any set facts.") Under a generous reading of the facts, the doctors who worked with these

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<sup>6</sup>The Court will not address Plaintiffs' state law bribery claims because it finds that the complaint does not allege them. See Plaintiffs' Complaint P 47 ("defendants have engaged in . . . (a) bribery, or attempted bribery, in violation of 18 U.S.C. § 201.) If the Plaintiffs want to allege state law bribery, they can amend their complaint.

programs "allocated federal resources" in referring the federal employees' alternative site infusion therapy contracts to Caremark. Moreover, once the federal employee chose the only referred company, i.e. Caremark, a "federal contract" <sup>7</sup> was created between Caremark and the FEHBP and CAMPUS programs. Therefore, when the doctors accepted "bribes to influence their official decisions," they violated the [18 U.S.C. § 201](#). *Id.* Accordingly, the Court finds that Plaintiffs have established the commission of two predicate acts of bribery for purposes of surviving a motion to dismiss.<sup>8</sup>

**[\*\*14] b. Because the Court has found that the Plaintiffs have established the predicate acts of bribery, a Travel Act violation can be established by merely alleging that Defendants' used the mail to bribe the physicians**

**[HN5](#)** To establish a Travel Act violation, the plaintiff need only prove that the defendant used any facility in interstate or foreign commerce, **including the mail**, with intent to . . . (3) carry on . . . bribery . . . in violation of the laws . . . of the United States." [18 U.S.C. § 1952\(a\)\(3\)](#) and [\(b\)](#). **[\*1417]** The Court has already determined that accepting Plaintiffs allegations as true, the Plaintiffs have established a violation of the federal bribery laws. To establish a Travel Act violation, therefore, the Plaintiffs need only prove that Defendants used the mail with the intent to commit those acts of bribery.

Through the plea agreements incorporated into the Complaint,<sup>9</sup> Plaintiffs have clearly met this burden. By pleading guilty to mail fraud, the Defendants acknowledged that they "intended to devise a scheme" -- which the Court has found could be indictable under the bribery statute -- and "used the United States Postal Service for the purpose of executing the **[\*\*15]** scheme." See Minnesota Plea at pg. 3-4. Or in other words, Defendants admitted to using the mail with the intent to commit bribery, which is a violation of the Travel Act. Accordingly, the Court finds that the Plaintiffs have established at least two Travel Act violations for purposes of surviving a motion to dismiss.

**c. Plaintiffs' mail and wire fraud **[\*\*16]** claims do not allege that Defendants' purported scheme or artifice deprived Plaintiff of any property protected by the mail or wire fraud statutes**

**[HN6](#)** To establish a claim for mail or wire fraud,<sup>10</sup> the Plaintiffs need to establish that Defendants (1) formed a scheme or artifice to defraud; (2) used the United States mails (or, for wire fraud, the use of wire, radio, or television communications); (3) with the specific intent to deceive or defraud. [18 U.S.C. § 1341, § 1343, § 1346](#); see also [Sun Savings and Loan Association v. Dierdorff, 825 F.2d 187 \(9th Cir. 1987\)](#). "Mail fraud also requires the intent to defraud someone of money or property." [United States v. Carpenter, 95 F.3d 773, 776 \(9th Cir. 1996\)](#).

At first glance, the Plaintiffs' complaint appears to fulfill these criteria. In the complaint, Plaintiffs allege that Defendants formed a scheme of bribery and **[\*\*17]** kickbacks to doctors in exchange for their referrals. The complaint also states, through its incorporation of the plea agreements, that Caremark used the United States mails in furtherance of the scheme and that the Defendants had the intent to deceive.<sup>11</sup> See Complaint at P 32.

<sup>7</sup> Defendants would provide the therapy to the employee in exchange for payment from the federal government.

<sup>8</sup> This analysis, however, applies only to scenarios involving federal insurance programs.

<sup>9</sup> Exhibits submitted with the complaint may be considered as part of the complaint for purposes of a motion to dismiss without converting it into a summary judgment motion. See [Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1555 \(9th Cir. 1990\)](#). However, other evidence submitted by the parties such as newspaper articles would convert this motion into one for summary judgment. For that reason, this Court has decided to exercise its discretion and disregard that evidence so as not to transform this motion into one for summary judgment. See e.g. [Skyberg v. United Food & Commercial Workers Int'l Union, 5 F.3d 297, 302 fn.2 \(5th Cir. 1993\)](#).

<sup>10</sup> Because the analysis for these counts is identical, the Court will address them together. See [Dischner, 974 F.2d at 1518 n. 16](#).

<sup>11</sup> Defendants' argument that Plaintiffs misconstrue the plea agreements is misplaced. The Court reminds the Defendants that at this juncture, the Court must accept as true the Plaintiffs' allegations contained in the complaint and view them in a light most favorable to the Plaintiffs. [Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 \(1974\)](#). Therefore,

Plaintiffs fail, however, to allege that the Defendants' scheme deprived them of property protected by the mail fraud statute. Plaintiffs argue that Defendants' scheme deprived [\*\*18] them of two separate property rights: (1) the right to a level playing field; and (2) the right of the physicians' patients to honest services. See Plaintiffs' Opposition at pg. 47.

In response to Plaintiffs' first argument, Defendants rely upon the Ninth Circuit's decision in *Lancaster Community Hospital v. Antelope Valley Hospital*, 940 F.2d 397, 405 (9th Cir. 1991), cert. denied, 502 U.S. 1094, 117 L. Ed. 2d 414, 112 S. Ct. 1168 (1992), in arguing that "market share" <sup>12</sup> is not a property right protected by the mail and/or wire [\*\*1418] fraud statute. In *Lancaster*, the Ninth Circuit stated that:

'Market share' is neither tangible or intangible property; its loss is far too amorphous a blow to support a claim of mail fraud under the reasoning of *McNally*, 483 U.S. at 356-60, 107 S. Ct. at 2779-82, and *Carpenter*, 484 U.S. at 26, 108 S. Ct. at 321 (newsmatter a commodity traded like any other). Put differently, it might be said that defendants hoped to 'steal' Lancaster's customers. But it cannot be said that these customers were Lancaster's property.

The 'fraud' Lancaster alleges is in reality nothing more or less than unalloyed anticompetitive conduct. This conduct [\*\*19] may be unacceptable, but it is not 'fraud.'

*Id. at 406*. On the surface, this language would seem to control. Plaintiffs allege that they were deprived of potential customers, i.e. market share, because Defendants engaged in a nationwide scheme to defraud. However, two factors prevent the Court from blindly following *Lancaster*.

First, it is unclear whether the language above comprised the holding of the case or was just dicta. Arguably, before exploring the confines of the mail fraud statute, the Ninth Circuit already disposed of the mail fraud claim on the grounds that the Plaintiff had failed to establish a second [\*\*20] mailing required to plead a "pattern" of racketeering activity. *Id. at 405*.

Second, the Ninth Circuit in *Lancaster* relied on a case, *McNally v. United States*, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987), which had been superseded; and a statute, 18 U.S.C. § 1341, which had been amended. *Id.* at fn. 15. Specifically, on November 18, 1988, Congress enacted 18 U.S.C. § 1346 which included a "scheme or artifice to deprive another of the intangible right of honest services" within the purview of the mail fraud statute. In light of this amendment, therefore, *Lancaster* may not be the strongest precedent for the acts which occurred after November 18, 1988. However, Plaintiffs' complaint seems to include dates as early as February 1986. For these dates (February, 1986 to November, 1988), the Court finds that the reasoning in *Lancaster*, albeit dicta, applies. See *U.S. v. Olano*, 62 F.3d 1180, 1198 (9th Cir. 1995) (holding that section 1346 lacks retroactive force). Accordingly, the Court dismisses Plaintiffs' mail and wire fraud claims that precede November, 1988 finding that the Defendants' actions did not come within the mail and wire fraud statutes. [\*\*21] <sup>13</sup>

The question remains, however, whether § 1346's amendment of the mail fraud statute altered the reasoning of *Lancaster* by including "market share" within the purview of the statute. The Court does not think so. *Section 1346*,

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absent the pleas, the Court still has to accept as true Plaintiffs' allegations concerning a national scheme to defraud. *But see Fed. R. Civ. P. 9(b); footnote 17, infra.*

<sup>12</sup> The Court reads "market share" and the "right to a level playing field" to only have semantic differences. After all, in *Lancaster*, the behavior Plaintiffs accused Defendant of -- engaging in kickbacks to gain customers -- certainly deprived the Plaintiff of the "right to a level playing field," but the Ninth Circuit instead addressed it as "market share." *940 F.2d at 405*.

<sup>13</sup> The Court is also unpersuaded by the fact that the acts alleged constituted a pattern because whether they were a pattern or not, Congress "cannot criminalize conduct that has already occurred, *U.S. Const., Art. I § 9 cl. 3*, and mail [and wire] fraud is a criminal offense." *Lancaster*, 940 F.2d at 405; but see *United States v. Paradies*, 98 F.3d 1266, 1284 (11th Cir. 1996) (upholding conviction under § 1346 when scheme spanned from 1985 to 1990); *United States v. Garfinkel*, 29 F.3d 1253, 1259-60 (8th Cir. 1994); *United States v. Hammen*, 977 F.2d 379, 385 (7th Cir. 1992).

965 F. Supp. 1411, \*1418 (1996 U.S. Dist. LEXIS 20504, \*\*21

as interpreted by the Ninth Circuit, simply nullified the *McNally* decision and reinstated the pre-*McNally* jurisprudence. See *United States v. Dischner*, 960 F.2d 870, 886 n. 16 (1992); [\*\*22] *United States v. Thomas*, 32 F.3d 418, 419 (9th Cir. 1994); *United States v. DeFries*, 310 U.S. App. D.C. 56, 43 F.3d 707 (D.C. Cir. 1995); but see *United States v. Brumley*, 79 F.3d 1430 (5th Cir. 1996) (holding that § 1346 did not reinstate pre-*McNally* jurisprudence with regard to state actors.)

A review of the pre-*McNally* jurisprudence, moreover, leads to the conclusion that the property rights asserted by the Plaintiff are not covered by the statute. Before *McNally*, "intangible property rights" <sup>14</sup> only encompassed four distinct areas. See *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 2883-84, 97 L. Ed. 2d 292 (1987) (Stevens, J. dissenting); *United States v. Brumley*, 79 F.3d 1430, 1433-34 (5th Cir. 1996). These areas included: (1) the "right [\*1419] to honest services of their governmental officials;" (2) the "right to an honest election;" (3) the right of employers or unions to have "purchasing agents, brokers, union leaders, and other with **clear fiduciary duties** . . . [not] accept[] kickbacks or sell[] confidential information;" and (4) an individuals "right to privacy and other nonmonetary rights." Of these four, only the latter two could [\*\*23] conceivably apply to this case.

None of these areas, however, go so far as to create a property right in market share. In fact, no case creating such a right has been put forward by the Plaintiffs <sup>15</sup>, or been found by the Court, except for one district court case which held that the mail fraud statute protects the intangible right to a level playing field. *Pearlstine Distributors v. Freixenet*, 678 F. Supp. 133, 136 (D.S.C. 1988). Plaintiffs' reliance on *Pearlstine*, however, does not change the Court's result. The *Pearlstine* case was decided before the enactment of § 1346. Consequently, the Court there was analyzing the same law that the Ninth Circuit analyzed in *Lancaster*. The Ninth Circuit, however, found that the pre - § 1346 mail fraud statute did not protect [\*\*24] market share. Given a choice between following the Ninth Circuit or the district court of South Carolina, the Court obviously follows the Ninth Circuit.

Plaintiffs also assert a property interest in the physicians' patients right to honest services. For this assertion, Plaintiffs rely upon *United States v. Neufeld*, 908 F. Supp. 491 (S.D. Ohio 1995), a case concerning one of the doctors involved in Defendants' scheme. *Neufeld*, however, undermines Plaintiffs' argument. In *Neufeld*, the Defendant moved to dismiss the indictment which included three mail fraud counts based on the intangible rights theory. After noting the machination [\*\*25] of the statute under *McNally* and 18 U.S.C. § 1346, the court dismissed the counts as they pertained to federal and state agencies. *Id. at 499-500*. It did so because "the intangible rights theory of mail and wire fraud is only cognizable, however, when there exists a fiduciary relationship between the victim and the accused," and Dr. Neufeld did not owe any duty to the agencies. *Id. at 499*.

That same reasoning applies here. The doctors alleged to have participated in Defendants' scheme owed a fiduciary duty to the patients but not to the Plaintiffs. Therefore, under the statute, the Plaintiffs did not have an "intangible property" interest in the doctors' actions. Accordingly, even if Defendants' scheme deprived the patients of their doctors' fiduciary duty, the Plaintiffs have not set forth a claim for mail fraud because they hold no property interest in that duty. Accordingly, the Court dismisses Plaintiffs' mail and wire fraud claims <sup>16</sup> [\*\*26] finding that

<sup>14</sup> Clearly, neither of the rights asserted -- a level playing field or the doctors' fiduciary duty -- concern tangible property. Accordingly, they will be analyzed under the "intangible property" portion of the mail fraud statute.

<sup>15</sup> Plaintiffs try to portray *In re American Honda Motor Co., Inc.*, 1996 W.L. 534796, as support for a "market share" theory although the Court did not rely on such a theory. Instead, the Court relied on the Plaintiffs' "contractual rights" to cars. *Id.* at 13-14 fn. 21. Here, however, Plaintiffs try to assert a property right over the patients absent any contract.

<sup>16</sup> The Court recognizes the irony in holding that a nationwide class of Plaintiffs have failed to establish their mail fraud claims when the Defendants have pled guilty to two counts of mail fraud. The pleas however concern the taking of tangible property, i.e. money, from the government. See e.g. Plaintiffs Complaint, Minnesota Plea Agreement Joint Stipulation of Facts ("Defendant did knowingly devise and intend to devise a scheme and artifice to defraud the FEHBP and CHAMPUS programs and to **obtain money and property** by false and fraudulent premises . . .")

Defendants purported scheme or artifice did not deprive Plaintiffs of any property protected by the mail or wire fraud statutes.<sup>17</sup>

**[\*\*27] [\*1420] 2. Plaintiffs have met the "pattern" requirement with regard to the predicate acts**

According to *Northwestern Bell*, [HN7](#) 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." [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*

"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](#).

Here, the alleged predicates [\[\\*\\*28\]](#) occurred over nine years. See Plaintiff's complaint at P 16. Such a period of time clearly qualifies as a "substantial period of time." See e.g. [United States v. Dischner, 974 F.2d 1502, 1510-11 \(9th Cir. 1992\)](#) (finding three years to be a "substantial period of time" for a bribery scheme). In addition, the predicates that the Plaintiffs have alleged -- the violation of the bribery and Travel Act statutes -- are all related to the scheme Plaintiffs allege: the bribing of doctors in exchange for referrals.<sup>18</sup>

**II. Plaintiffs have standing to pursue their RICO claims**

[HN8](#) To have standing to assert its RICO claim, Plaintiffs must establish that Defendants' predicate acts actually and proximately caused Plaintiffs' financial loss. See [Holmes v. Securities \[\\*29\] Investor Protection Corp., 503 U.S. 258, 268-270, 117 L. Ed. 2d 532, 112 S. Ct. 1311 \(1992\)](#).

Defendants rely on two Ninth Circuit decisions in arguing that the Plaintiffs do not have standing to assert their RICO claims. See [Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 928 \(9th Cir. 1994\)](#); [Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1311 \(9th Cir. 1992\)](#). In their reply, Defendants even go so far to say that "Imagineering is directly on point." See Defendants' Reply at pg. 25. The Court disagrees.

In *Imagineering*, a class of minority and women owned businesses ("MWBEs") brought a RICO action against various prime contractors alleging that the prime contractors engaged in a scheme to avoid federal set aside

<sup>17</sup> Any effort by Plaintiffs to amend their complaint should bear in mind that Fed. R. Civ. P. [§ 9\(b\)](#) requires that mail and wire fraud RICO claims be pleaded "with particularity [as to] the time, place and manner of each act of fraud, plus the role of each defendant in each scheme." [Lancaster Community Hospital v. Antelope Valley Hosp. D., 940 F.2d 397, 405 \(9th Cir. 1991\)](#). Only two mailings, however, need be established with particularity. *Id.*

The present Complaint has clearly established the two mailings with regard to the mail fraud action. In the Ohio and Minnesota Pleas, Caremark admits to using the mails twice at a certain time, place and manner in violation of the mail fraud statute. See Plaintiff's Complaint, Exhibits B and D. The agreements, however, do not refer to Caremark's commission of wire fraud. Consequently, the Complaint does not plead the wire fraud claim with the requisite particularity. Perhaps, this case could justify a relaxation of the standard but at this time such a determination would be premature. [Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 \(9th Cir. 1987\)](#) (relaxing the 9(b) particularity requirement concerning "matters peculiarly within the opposing party's knowledge . . . [because] in cases of corporate fraud, the plaintiffs cannot be expected to have personal knowledge of the facts constituting the wrongdoing.") *Id.*

<sup>18</sup> Finally, in their 120 pages of papers filed in support of this motion, the Defendants do not contest the fact that if the Plaintiffs established the existence of predicate acts, the requirement for a pattern would not also be fulfilled.

regulations. *Imagineering Inc.*, 976 F.2d at 1307. The district court dismissed their claims for lack of standing and the Ninth Circuit affirmed. According to the Defendants, this result should decide this case. What Defendants overlook is that the class in *Imagineering* were **not** competitors of the Defendants. Rather, the class consisted of **subcontractors** who still needed to be chosen by a prime contractor before receiving [\*\*30] a contract. *Id. 1310-1311*. Thus, the Plaintiffs in *Imagineering* were asserting a two-tier injury, i.e. if Defendant did not act improperly, Firm A would have been picked and in turn Firm A would have picked us. In this case, however, the class consists of direct competitors of the Defendants. Thus, [\*1421] there is only a one-tier injury, i.e. if Defendants did not act improperly, Plaintiff may have received the alternative site infusion therapy business. For *Imagineering* to apply, a beneficiary of the Plaintiffs -- like a pharmaceutical supplier -- asserting the loss of greater sales would have to be bringing the suit. That is not the case here<sup>19</sup>

[\*\*31] Nevertheless, the Plaintiffs' causation requirement is a bit attenuated. Actual causation is not so difficult to find; "but for" the Defendants paying doctors for their referrals, some of the Plaintiffs would have received alternative infusion site therapy contracts.

The "proximate causation" component, however, is somewhat more difficult. The Supreme Court has held that common law notions of proximate cause apply in civil RICO claims. *Holmes*, 503 U.S. 258, 268-69, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). Applying common law principles, it can be argued that the laws Defendants allegedly violated were enacted to protect the patients, not its competitors. See *Israel Travel Advisory v. Israel Iden. Tours*, 61 F.3d 1250, 1257 (7th Cir. 1995); *Lancaster*, 940 F.2d at 405 (9th Cir. 1991).

The Court, however, finds this view myopic. Instead the Court believes that the common law notion of foreseeability should control. See *Mid A. Telecom v. Long Distance Services*, 18 F.3d 260, 263 ("in conducting the traditional common law proximate cause analysis, therefore, the courts should focus on the temporal and circumstantial relationship between the defendant's conduct and the injury suffered by the plaintiff, [\*\*32] and the foreseeability that intervening events would cause injury.") Applying foreseeability principles, Defendants' alleged perpetration of fraud on its patients could foreseeably affect the Plaintiffs who are also trying to entice those same customers.

In addition, Plaintiffs have pled that they were the targets of the fraud. With regard to this argument, the Court notes that "given the opportunity to engage in discovery, . . . [Plaintiffs] may be able to show that while the scheme was initially aimed only at defrauding [Defendants'] customers, [Defendants] broadened the sweep of intrigue to include [Plaintiffs] as a direct target (i.e., to obtain an unfair competitive advantage in recruiting [Plaintiffs'] customers.)" *Id.*

Accordingly, the Court finds that Plaintiffs have established the causation/standing requirement set out by *Holmes*.  
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[\*\*33] III. *Plaintiffs have fulfilled the requirements for pleading an "enterprise"*

**HNG** RICO defines an "enterprise" as either (1) "any individual, partnership, corporation, association, or other legal entity" or (2) "any union or group of individuals associated in fact although not a legal entity ("associated-in-fact enterprise")." 18 U.S.C. § 1961(4); see also *United States v. Turkette*, 452 U.S. 576, 581-582, 69 L. Ed. 2d 246,

<sup>19</sup> Defendants' other case, *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924 (9th Cir. 1994), also involved a two-tiered or "pass on" scenario. In *Pillsbury*, the plaintiffs, a law firm, sued various entities over a raise in their rent which they alleged was due to a money laundering and mail fraud scheme involving the likes of Michael Milken. *Id.* The Court found that the law firm lacked standing because it was a subtenant of the building. *Id.* Its rent increase, therefore, depended on the tenant "passing on" its rent increase to the plaintiffs. *Id. at 928-9*. Thus, *Pillsbury* is not applicable to this case, which only involves a one-tiered injury.

<sup>20</sup> Moreover, in discussing the need for establishing proximate cause in a Civil RICO action, the Supreme Court relied on causation principles enunciated in antitrust cases. *Holmes*, 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311; see also *Mid A. Telecom v. Long Distance Services*, 18 F.3d at 263; but see *Israel Travel Advisory Service v. Israel Iden. Tours*, 61 F.3d 1250, 1257.

101 S. Ct. 2524 (1981). In their complaint, Plaintiffs invoke the latter theory by pleading that: (1) Caremark, Baxter Healthcare, Baxter and the doctors who received bribes constitute an "associated-in-fact enterprise;" or (2) Caremark, Baxter Healthcare, and Baxter constitute an "associated-in-fact enterprise."

To adequately plead the "associated-in-fact enterprise", the Plaintiffs must prove: (1) that the enterprise has "an existence beyond [\*1422] that which is merely necessary to commit the predicate acts of racketeering;" and (2) the enterprise must have "some sort of structure for the making of the decisions, whether it be hierarchical or consensual." Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996).

1. Under Ninth Circuit case law, the association-in-fact [\*\*34] consisting of the Defendants and the doctors fulfills the requirement that the entity have a separate existence

Defendants argue that the "associated-in-fact enterprise" consisting of Caremark, Baxter Healthcare, Baxter and the doctors fails because it does not distinguish between the enterprise and the pattern of racketeering. This argument has merit.

In rebuttal, Plaintiffs argue that the "daily activities of the enterprise include the physicians' referral of patients to providers of alternate site infusion therapy." See RICO case statement P 8. Yet, the only physicians in the enterprise are the "doctors to whom Baxter and/or Caremark paid bribes or kickbacks." See Plaintiffs' Complaint at P 53. Thus, the physicians' referrals comprise the very act that Plaintiffs allege constitutes the racketeering activity, i.e. the doctors' referral of patients in exchange for bribes.

In their opposition, Plaintiffs put forward a second distinction why their enterprise has a separate existence other than the racketeering activity, namely, that Caremark is a corporation. Plaintiffs' Opposition at pg. 24. As Defendants point out, however, to accept this argument is to accept a *per* [\*\*35] rule that any enterprise that contains a corporation fulfills the distinction requirement. Such a rule would seem to fly in the face of *Chang*, other Circuits' application of rule that *Chang* adopts, and the reasons for the "distinction" rule.

In *Chang*, the Ninth Circuit addressed HN10↑ the "minimum requirement for an associated in fact enterprise." 80 F.3d at 1297. After surveying other Circuits' approach, the Court adopted a rule that "requires a **RICO enterprise** to have an ascertainable structure separate and apart from the racketeering activity." *Id.* (emphasis added). This Court interprets that holding to require the "associated-in-fact" enterprise as a whole to have a separate existence, not merely one player in the enterprise to have a separate existence.

The cases followed by the Ninth Circuit in *Chang* support this interpretation. Id. at 1297-1298. For instance in Atkinson v. Anadarko Bank and Trust Co., 808 F.2d 438, 441 (5th Cir. 1987), a cattle business (and customer of the bank) sued the bank, its holding company and three bank employees in a civil RICO action for mail fraud committed when they overcharged interest on certain loans. Id. I\*\*361 at 439. The jury awarded the customer \$ 2,899,796.63 which the district court set aside on a j.n.o.v. motion. Id. at 440-41. The Fifth Circuit affirmed. It found that

Plaintiffs wholly failed to establish the existence of any entity separate and apart from the bank. In this case, the alleged racketeering activity forming the predicate of the RICO charge was mail fraud -- the mailing of false statements requesting payment of interest in excess of the agreed amount. The mailing of loan statements was an activity of the bank. **There is no evidence of any other activity on behalf of the enterprise.**

In addition, there was no evidence presented that the five associates functioned as a continuing unit or formed an ongoing association. No connection was shown between the three individuals and the holding company.

This analysis squarely applies to this case. Here was a bank which undoubtedly had other customers -- or a separate existence other than the racketeering -- but the Fifth Circuit disregarded that and looked solely to whether the enterprise, as a whole, had a separate existence. Finding that it did not, the Fifth Circuit found the "enterprise" element [\*\*37] unproved and affirmed dismissal of the Civil Rico claim.

Finally, the reasons behind *Chang* also cut against the Plaintiffs' argument. The *Chang* court did not want to "render the enterprise element superfluous." 80 F.3d at 1298. Instead, it wanted to respect the "centrality of the enterprise element in the statutory [RICO] scheme." *Id.* To find the enterprise [\*1423] element fulfilled simply by including a

corporation, however, would lead to the very results the Ninth Circuit hoped to avoid. No matter how decentralized or brief the actors involvement may have been, they could become an enterprise under RICO if one of the actors is a corporation.

Nevertheless, in another decision, the Ninth Circuit seems to clearly state that "the participation of a corporation in a racketeering scheme is sufficient, of itself, to give the enterprise a structure separate from the racketeering activity: "corporate entities have a legal existence separate from their participation in the racketeering, and the very existence of a corporation meets the requirement for a separate structure." *Webster v. Omnitrition Intern. Inc.*, 79 F.3d 776, 786 (9th Cir. 1996), cert. denied, 136 L. Ed. 2d 115, [\*\*38] 117 S. Ct. 174. Although this case seems to contradict principles underlying *Chang*, the cases can be harmonized. Read together, *Webster* and *Chang* set forth the following rule: [HN11](#) [↑] an enterprise must have "an existence beyond that which is merely necessary to commit the predicate acts of racketeering" and "some sort of structure for the making of the decisions," but this requirement may be fulfilled by the simple inclusion of a corporation as a participant in the enterprise. According to this conflicted rule, the Court finds that the Plaintiffs have established the enterprise element.<sup>21</sup>

**[\*\*39] IV. Plaintiffs' 1962(a) is dismissed without prejudice because Plaintiffs have failed to allege facts that show they have been injured by the investment of racketeering income**

[Section 1962\(a\)](#) addresses entirely different behavior than [§ 1962\(c\)](#). The latter provision merely prohibits racketeering conduct through an enterprise whereas [§ 1962\(a\)](#) prohibits the income derived from such activity to be invested in the operation of any entity. See [18 U.S.C. § 1962](#).

Acknowledging the distinction between the two provisions, the Ninth Circuit has created two different standards. [HN12](#) [↑] "[A] plaintiff seeking civil damages for a violation of [section 1962\(a\)](#) must allege **facts** tending to show that he or she was injured by the use or investment of racketeering income." *Nugget Hydroelectric v. Pacific Gas and Electric*, 981 F.2d 429, 437 (9th Cir. 1992). In an effort to abide by this standard, the Plaintiff in *Nugget* "alleged that PG&E received racketeering income and used it in a way that injured Nugget." *Id.* The Ninth Circuit rejected these allegations finding them "general, conclusory, and vague." *Id.*

Plaintiffs' allegations do not fare much better. In [\[\\*\\*40\]](#) their complaint, Plaintiffs allege that Defendants "derived substantial income through the pattern of racketeering activity detailed herein . . . and used or invested such income, or the proceeds of such income, in the establishment of and operation of the above-referenced enterprises." Plaintiffs' Complaint at P 48. It is hard to imagine a claim less devoid of facts. Accordingly, under *Nugget*, the Court finds that Plaintiffs have failed to state a claim under [§ 1962\(a\)](#) but grants the Plaintiffs leave to amend so they can meet the Ninth Circuit's specificity requirements.

## V. Robinson-Patnam Act

Defendants do not deny that [HN13](#) [↑] § 2(c) of the Robinson-Patnam Act applies to cases of "commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent . . . involving the sale or purchase of goods." *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 858 (9th Cir. 1965). Instead, the Defendants seek dismissal because: (1) the Plaintiffs lack standing; (2) the physicians do not owe the type of duty required for a claim under 2(c); and (3) Plaintiffs fail to plead that doctors provided no services in return for the payments.

**[\*1424] 1. [\*\*41] At the pleading stage, Plaintiffs' allegations of economic injury confer standing because Plaintiffs have no way of knowing the scope of Defendants' scheme**

<sup>21</sup> This enterprise fulfills another requirement that the defendant must be different than the enterprise. The Ninth Circuit clearly allows some defendants to also be members of the alleged association-in-fact enterprise. *River City Markets v. Fleming Foods West*, 960 F.2d 1458, 1461 (9th Cir. 1992) ("in multiple-defendant RICO cases, some of the individual defendants may also be identified as members of the alleged association-in-fact enterprise).

Competitors of a seller involved in commercial bribery have standing under 2(c) if they suffer economic injury. See [Rangen, Inc. v. Sterling Nelson & Sons, Inc.](#), [351 F.2d 851, 858 \(9th Cir. 1965\)](#); [Larry R. George Sales Co. v. Cool Attic Corporation](#), [587 F.2d 266, 272 \(5th Cir. 1979\)](#) (holding that only competitors of the firm which bribed a buyer's agent would have standing); [Bunker Ramo Corporation v. Cywan](#), [511 F. Supp. 531 \(N.D. Ill. 1981\)](#) (holding that only competitors of the company paying bribes had standing); [Municipality of Anchorage v. Hitachi Cable](#), [547 F. Supp. 633 \(D. Alaska 1982\)](#) (expanding on Larry R.'s standing discussion to include that company can sue when company's agents are bribed); [NL Industries, Inc. v. Gulf & Western Industries, Inc.](#), [650 F. Supp. 1115, 1123](#) (holding that competitor who suffered commercial disadvantage because of bribes made to buyer had standing). To fulfill the economic injury tenet, the competitor must establish a "physical and economic nexus" between the alleged [\\*\\*42](#) violation and the harm to the plaintiff." [NL Industries](#), [650 F. Supp. 1115, 1123](#) (quoting [Blue Shield of Virginia v. McCready](#), [457 U.S. 465, 478, 73 L. Ed. 2d 149, 102 S. Ct. 2540 \(1982\)](#)).

The Plaintiffs have alleged that Defendants' behavior has caused them "lost sales which they otherwise would have made and, as a result, have been injured in their business or property and have suffered multi-million dollar damages." Plaintiffs' Complaint at P 37. Although Plaintiffs' allegations of injury will never be accused of being overly specific, the Court notes the Supreme Court's credo that "in antitrust cases, where the 'proof is largely in the hands of the alleged conspirators,' [citations omitted], dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." [Hospital Building Co. v. Trustees of Rex Hospital](#), [425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 \(1976\)](#). This credo has particular application to this case. Without knowing how many physicians Defendants bribed, the Plaintiffs cannot know which sales they lost to natural competition and which they lost to the corrupting influence of bribery. Accordingly, at this juncture, the Court finds Plaintiffs' [\\*\\*43](#) allegations of economic injury confer standing to pursue their 2(c) claim.

## *2. The physicians owe a fiduciary duty that 2(c) was intended to address*

As noted above, the Ninth Circuit expanded 2(c) to encompass only claims where bribery corrupts the fiduciary relationship between a buyer and its agent involving the sale or purchase of goods. [Rangen, Inc. v. Sterling Nelson & Sons, Inc.](#), [351 F.2d 851, 858 \(9th Cir. 1965\)](#). In their motion to dismiss, Defendants construe *Rangen* to apply only to a fiduciary duty in a commercial sense, not a medical one. The Defendants further argue that a physician only owes the latter, thus 2(c) does not apply to this case.

The Defendants read *Rangen* too narrowly. In *Rangen*, the bribed official -- Grimes -- was "the superintendent of the state's fish hatchery at hagerman, [sic] Idaho . . . [with] the authority in the Department with respect to the safe utilization and nutritional value of fish foods and with respect to fish food formulae." [Id. at 854](#). Grimes did not have the responsibility for purchasing the goods. Instead, the court found "that Grimes did **influence** the responsible officials of the state to purchase [\\*\\*44](#) substantially all of its fresh food requirements from the [bribing entity]." *Id.*

In short, Grimes was not a purchasing agent, but a scientist. A scientist whose responsibilities included ensuring that the state's fish hatcheries received fish food with adequate nutrition. In fact, Grimes' defense to the bribery charge consisted of the scientific explanation that he was merely conducting scientific experiments in exchange for the monies paid. [Id. at 855](#). Yet, the Ninth Circuit still held that Grimes owed a fiduciary duty whose violation rose to 2(c) liability.

The Court finds that this analysis applies to the doctors who accepted bribes. Like Grimes, the doctors were not purchasing [\\*\\*1425](#) agents *per se* for the patients who utilized the Defendants. Yet, like Grimes, they were professional experts whose advice would exert great influence on the "buyers'" decision. Moreover, unlike Grimes, buyers in this case -- the patients -- probably had no knowledge of other sellers whereas the purchasing agents for Idaho's Department of Fish and Game most certainly knew of other fish food sellers. Considering the patients lack of information, therefore, the physicians' advice certainly exerted [\\*\\*45](#) more influence than that exerted by

Grimes. Accordingly, following *Rangen*, the Court finds that the physicians owe a fiduciary duty that 2(c) was intended to address.<sup>22</sup>

[\*\*46] 3. The "services provided" exception does not apply when the Plaintiffs plead that no services were furnished

Defendants' final attempt to dismiss Plaintiffs' 2(c) claim hinges on the "services rendered" exception in the provision.<sup>23</sup> [\*\*47] In pleading their 2(c) claim, however, Plaintiffs clearly state that: "such commissions or other compensation were not paid for services rendered by doctors to their patients in connection with the sale or purchase of goods, wares, or merchandise. See Plaintiffs' Complaint at P 40. Accepting this fact as true, the "services rendered exception" does not apply.<sup>24</sup>

#### VI. Defendants' arguments concerning the Plaintiffs' pendent claim lack merit

Plaintiffs' fourth claim asserts that Defendants' business practices violated the *California Business and Professions Code § 17200 et. seq.*. The statute concerns the prevention of unfair business practices. See Cal. Bus. & Prof. § 17203. In the motion to dismiss, Defendants proffer three arguments why this claim should be dismissed: (1) any injunction Plaintiffs [\*\*48] seek is unnecessary under California law; (2) Plaintiffs lack the standing necessary to assert a claim in federal court; and (3) the relief sought in this claim violated the *Commerce Clause* of the United States.<sup>25</sup>

##### [\*1426] 1. Injunction Unnecessary

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<sup>22</sup> Defendants reliance on *Harris v. Duty Free Shoppers Limited Partnership*, 940 F.2d 1272 (1991) to establish the contrary is misplaced. In *Harris*, the "intermediary" between the buyer and the seller -- the tour bus -- did not have any particular expertise that would convince the tourists that they should buy from the Defendant. *Id.* at 1275 (relying on the fact that "the tour guides were not shopping 'experts'"). Here, however, the doctors are clearly experts of the goods they sold.

Moreover, the *Harris* court also relied on the fact that "the tourists are free to purchase their souvenirs and gift items anywhere; in fact, they are free not to purchase at all." *Id.* That is not the case here. Patients with such diseases as AIDS and cancer that require alternate site infusion therapies are not "free not to purchase," nor can they purchase anywhere if they are not informed of other providers. Unlike a duty-free store, one does not just come across an alternative site infusion therapy store. For these reasons, the Court finds *Harris* inapposite.

<sup>23</sup> [HN14](#) [↑] 2(c) in its entirety states:

(c) 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, merchandise, either 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.

[15 U.S.C. § 13\(c\)](#) (emphasis added).

<sup>24</sup> At the hearing for this motion, Plaintiffs seemed to concede that the doctors performed some services in exchange for Defendants' payments. Nevertheless, Plaintiffs allege that the payments were far above fair market value for the services performed. The latter allegation alone would seem to make the "services rendered" exception as defined by the Ninth Circuit inapplicable: "a price allowance or discount to compensate for the **reasonable** value of such services would come within the exception of section 2(c) and would not be unlawful." *Federal Trade Commission v. Washington Fish & Oyster Co.*, 282 F.2d 595, 599 (9th Cir. 1960).

<sup>25</sup> The Court notes that Defendants do not claim that Plaintiffs have not stated a substantive claim under the statute. Instead, they argue standing, lack of necessity, and constitutional infirmities. The Court concurs in Defendants' decision finding that bribery, mail fraud and antitrust violations, if true, would constitute an unfair business practice. See *People v. McKale*, 25 Cal. 3d 626, 602 P.2d 731 (1979) (holding that statute applies to wrongful business conduct in whatever context.)

The only relevant statute to this action is [HN15](#) [↑] [Cal. Bus. & Prof. Code § 17203](#).<sup>26</sup> Its "remedies are strictly limited to injunctive relief and restitution, which may include disgorgement of illicit profits to injured parties." [Mai Systems Corp. v. UIPS, 856 F. Supp. 538 \(ND. Cal. 1994\)](#); [\[\\*\\*49\]](#) see also [People v. Thomas Shelton Powers, M.D., Inc., 2 Cal. App. 4th 330, 340 \(1992\)](#). In its opposition, Plaintiffs do not argue that they are entitled to injunctive relief,<sup>27</sup> instead they argue that they are entitled to restitution.

[\[\\*\\*50\]](#) In their reply, Defendants argue that restitution should not be granted because it was not pled in the complaint. This argument is erroneous: "plaintiffs pray for judgment as follows: . . . (5) . . . restitution of defendants' ill-gotten gains from the acts complained herein." See Plaintiffs' Complaint at pg. 22. Accordingly, the Court finds that the Plaintiffs have pled a cause of action for restitution under California Business and Professions Code.<sup>28</sup>

## 2. Defendants' constitutional challenges to the pendent claim lack merit

The Defendants put forward two constitutional [\[\\*\\*51\]](#) arguments that supposedly merit dismissing the California claim: (1) Plaintiffs lack Article III standing; (2) a nationwide injunction would violate the Commerce Clause of the United States Constitution.

With regard to the latter argument, the Plaintiffs' failure to state a claim for injunctive relief necessarily moots the constitutionality of a nationwide injunction based on state law.

Plaintiffs also clearly have standing. [HN17](#) [↑] To have standing, Plaintiffs must prove: (1) "injury in fact;" (2) "a causal relationship between the injury and the challenged conduct;" and (3) "a likelihood that the injury will be redressed by a favorable decision." [Northeastern Florida Contractors v. Jacksonville, 508 U.S. 656, 113 S. Ct. 2297, 2302, 124 L. Ed. 2d 586 \(1993\)](#). As stated, Plaintiffs have adequately pled that Defendants' behavior inflicted economic harm on the Plaintiffs. Plaintiffs also fulfill the causal requirement because if Defendants did not bribe physicians, its competitors would have obtained more clients. Finally, if Plaintiffs obtain restitution under the statute, their economic injury will be redressed. Accordingly, the Court finds that the Plaintiffs have standing.

## CONCLUSION

[\[\\*\\*52\]](#) For the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss concerning Plaintiffs' [§ 1962\(a\)](#) claim and Plaintiffs' mail and wire fraud claims but gives Plaintiffs 30 days leave to amend their complaint. The Court DENIES the remainder of Defendants' Motion to Dismiss. IT IS SO ORDERED

DATED at Honolulu, *Hawaii* Dec 12 1996

Alan C. Kay

<sup>26</sup> [HN16](#) [↑] [Cal Bus & Prof Code § 17203](#) states as follows

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

<sup>27</sup> Even if Plaintiff did pursue the argument, clearly the Defendants withdrawal from the business obviates the need for an injunction. See [Donald v. Cafe Royale, Inc., 218 Cal. App. 3d 168, 184, 266 Cal. Rptr. 804](#) (finding that injunction unnecessary when Defendants no longer in business).

<sup>28</sup> The Court does not interpret Plaintiffs' claim under this provision as one for damages, but rather for disgorgement of Defendants' profits. See [People v. Powers, 2 Cal. App. 4th 330, 340 \(1992\)](#) ("although there are few cases which have examined the remedies sanctioned by [section 17203](#), there is little question but that the broad range of remedies provided for therein includes restitution and/or disgorgement of profits.")

965 F. Supp. 1411, \*1426L 1996 U.S. Dist. LEXIS 20504, \*\*52

Chief United States District Judge

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## Westport News v. Minuteman Press

Superior Court of Connecticut, Judicial District of Fairfield, At Bridgeport

December 13, 1996, Decided ; December 16, 1996, Filed

CV 95-0319189S

**Reporter**

1996 Conn. Super. LEXIS 3295 \*; 1996 WL 737526

Westport News, Inc. v. Minuteman Press, Inc.

**Notice:** [\*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

**Disposition:** Plaintiff's motion to strike defendant's counterclaim and prayer for relief related thereto GRANTED.

### **Core Terms**

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counterclaim, advertising, allegations, special defense, summary judgment, circulation, pricing

### **LexisNexis® Headnotes**

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

Healthcare Law > ... > Actions Against Facilities > Defenses > General Overview

#### **HN1[] Summary Judgment, Entitlement as Matter of Law**

A defendant may move for summary judgment on the merits of a special defense where success on the defense will lead to a judgment against a plaintiff on the claim to which the special defense applies.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

International Trade Law > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

## **HN2** [down arrow] Trade Practices & Unfair Competition, State Regulation

The Connecticut Unfair Trade Practices Act (CUTPA) prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. [Conn. Gen. Stat. § 42-110b\(a\)](#). The legislature did not codify a comprehensive list of "unfair or deceptive acts or practices," but rather, articulated its intent that in construing the scope of the statutory prohibition, the courts shall be merely guided by the interpretations given by the Federal Trade Commission and the federal courts to the Federal Trade Act. The federal courts have determined that an act or practice is deceptive if three requirements are met. First, there must be a representation, omission, or other practice likely to mislead consumers; second, the consumer must interpret the message reasonably under the circumstance; and third, the misleading representation, omission, or practice must be material, i.e., likely to affect consumer decisions or conduct. Although the theory of "predatory pricing" may be well defined under federal law, a complaint under CUTPA is not limited to federally defined causes of action in bringing an action under state law.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

## **HN3** [down arrow] Pleadings, Crossclaims

Conn. Super. Ct. R. 116 permits a party to assert a counterclaim to a plaintiff's claim provided that counterclaim arose out of the transaction, or one of them, which is the subject of the plaintiff's complaint. To arise out of the same transaction, the allegations of the counterclaim must be so corrected with the matter in controversy that its consideration is necessary for a full determination of the rights of the parties relative to the matter in controversy under the complaint. Where the facts of the counterclaim arise subsequent to the institution of the action, the counterclaim ordinarily cannot arise out of that transaction that preceded it.

**Judges:** Melville, J

**Opinion by:** Melville

## **Opinion**

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### MEMORANDUM OF DECISION

This matter concerns the defendant's motion for summary judgment and plaintiff's motion to strike defendant's counterclaim. On January 10, 1996, the plaintiff, Westport News, Inc., (Westport) filed an amended and revised multi-count complaint against the defendant, Minuteman Press, Inc. (Minuteman), alleging, inter alia, violations of CUTPA and interference with business and contractual relations. The pertinent allegations assert that Westport and Minuteman are newspapers competing for circulation and advertising revenue; that Minuteman distributed a chart comparing the circulation and advertising rates of the two newspapers which intentionally misrepresented Westport's total circulation as being lower than it actually was in order to induce businesses to advertise with Minuteman rather than Westport.

On August 23, 1996, Minuteman filed an answer [**\*2**] (# 126) that included five special defenses and a three-count counterclaim. On September 6, 1996, Minuteman followed with a motion for summary judgment (# 128) on its second special defense. Thereafter, on September 11, 1996, Westport filed a motion to strike Minuteman's counterclaim (# 130). Both these motions are now before the court. Minuteman is thus seeking, in effect, to preclude Westport from proceeding on the 1st and 2nd counts of its complaint while Westport is seeking to preclude Minuteman from proceeding on its entire counterclaim.

Defendant's Motion for Summary Judgment on 2nd count of Special Defense

It is well settled that [HN1](#) a defendant may move for summary judgment on the merits of a special defense where success on the defense will lead to a judgment against the plaintiff on the claim to which the special defense applies. See, e.g., [Burns v. Hartford Hospital, 192 Conn. 451, 455, 472 A.2d 1257 \(1984\)](#); [Boucher Agency, Inc., v. Zimmer, 160 Conn. 404, 409, 279 A.2d 540 \(1979\)](#); [Ney v. Brandi, Superior Court, Judicial Dist of New Haven, 1995 Conn. Super. LEXIS 2742](#), Docket No. 368932 (Sept. 27, 1995) (Hodgson, J.)

Minuteman's second special defense [\*3] alleges that the plaintiff's allegations under paragraphs 8 in the first and second counts of its complaint allege that Minuteman sold advertising at a random and arbitrary rates below its published rate card rates, without a criteria or categorical rate structure and it priced its advertising below its cost to eliminate competitors and reduce competition fails to state a claim under CUTPA because these allegations still lack the necessary elements to establish a cause of action for "predatory pricing." Westport counters that it is not necessary to allege a specific theory of recovery such as "predatory pricing" in order to state a cause of action under CUTPA. This court agrees.

[HN2](#) CUTPA prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. [Sec. 42-110b\(a\) CGS](#). The legislature did not codify a comprehensive list of "unfair or deceptive acts or practices," but rather, articulated its intent that in construing the scope of the statutory prohibition, the courts shall be merely *guided by* the interpretations given by the Federal Trade Commission and the federal courts to the Federal Trade Act. [Caldor, Inc., v. \[\\*4\] Heslin, 215 Conn. 590, 598, 577 A.2d 1009](#), cert. den., 498 U.S. 1088, 111 S. Ct. 966, 112 L. Ed. 2d 1053 (1990). This relaxation from strict adherence to guidance was presumably intended by the legislature to permit practices which had not yet been specifically declared unlawful by federal authorities to be nevertheless unlawful under CUTPA. *Id.* citing [Bailey Employment System, Inc. v. Hahn, 545 F. Supp. 62, 71](#) (D.Conn., 1982). The federal courts have determined that an act or practice is deceptive if three requirements are met. First, there must be a representation, omission, or other practice likely to mislead consumers; second, the consumer must interpret the message reasonably under the circumstance; and third, the misleading representation, omission, or practice must be material, i.e., likely to affect consumer decisions or conduct. [Caldor, Inc., v. Heslin, supra, 215 Conn. 590, 597](#) quoting [Figgie International, Inc., 107 FTC 313, 374 \(1986\)](#). Although the theory of "predatory pricing" may be well defined under federal law, as Minuteman argues, a complaint under CUTPA is not limited to federally defined causes of action in bringing an action under state law. [\*5] [Caldor, Inc., v. Heslin, supra;](#); [Bailey Employment System, Inc. v. Hahn, supra.](#)

Notwithstanding that plaintiff's revised and amended complaint fails to allege the essential elements of a "predatory pricing" cause of action, its allegations do bring it within the parameters of the three requirements set forth above. Plaintiff alleges that Minuteman made a misrepresentation of fact concerning Westport's circulation rates. Giving the allegations an interpretation most favorable to the nonmoving party, it was reasonable for advertisers to interpret this message to mean that placing an advertisement with Minuteman would reach more readers, and therefore, more prospective purchasers of the advertiser's product, than placing the same advertisement with Westport. The plaintiff further alleges that Minuteman's misrepresentation of its circulation rate had the effect of inducing prospective advertisers to change their advertising decisions. Since plaintiff has alleged facts sufficiently to bring it under the CUTPA act, defendant's legal position as stated in its second special defense is clearly undermined. Accordingly motion for summary judgment on that defense must be DENIED.

#### [\*6] Motion to Strike Counterclaim and Prayer for Relief

All three claims in Minuteman's counterclaim allege conduct by Westport which either amounted to a violation of the state's [Antitrust law](#) (Chapter 624, CGS) or a violation of CUTPA. All of the conduct complained of in the counterclaim allegedly occurred subsequent to the bringing of the instant action by Westport as well as subsequent to the acts complained of in the complaint. Accordingly, Westport moves to strike this counterclaim as not arising out of the same transaction or occurrence as that alleged in its complaint. The court agrees.

**HN3** [↑] Section 116 of our Rules of Practice permit a party to assert a counterclaim to the plaintiff's claim provided that counterclaim arose out of the transaction, or one of them, which is the subject of the plaintiff's complaint. To arise out of the same transaction, the allegations of the counterclaim must be so corrected with the matter in controversy that its consideration is necessary for a full determination of the rights of the parties relative to the matter in controversy under the complaint. [\*Springfield-DeWitt Gardens v. Wood, 143 Conn. 708, 711-12, 125 A.2d 488 \(1956\)\*](#). Where [\*7] the facts of the counterclaim arise subsequent to the institution of the action, the counterclaim ordinarily cannot arise out of that transaction that preceded it. See, [\*The Fulfillment CTR, Inc v. Steven H. Cote, et al., Superior Court, Hartford/New Britain JD at Hartford, 1990 Conn. Super. LEXIS 618\*](#), Docket No. 35 31 19 (May 15, 1990) (Purtill, J.); [\*Anthony Giordano, et al v. Cary M. Richitelli, Superior Court, New Haven JD at New Haven, Docket No. 29 68 79 \(Sept. 13, 1990\) \(Downey, J.\) and Daniel Lasprogato v. Brian Liddy, et al., Superior Court, Stamford/Norwalk JD at Stamford, 1991 Conn. Super. LEXIS 1850\*](#), Docket No. CV88 0092642S (Aug 15, 1991) (Ryan, J.).

Although the parties are locked in competition for a relatively small print-advertising market and have been so apparently ever since Minuteman began publishing, the incidents giving rise to the complaint and counterclaim are isolated in time and nature. Consequently, the transactions in question could not logically be a part of an ongoing transaction although they may be part of an ongoing battle. Accordingly, plaintiff's motion to strike defendant's counterclaim and prayer for relief related thereto is GRANTED.

[\*8] BY THE COURT

Melville, J

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## Paddock Publs. v. Chicago Tribune Co.

United States Court of Appeals for the Seventh Circuit  
November 8, 1996, Argued ; December 16, 1996, Decided  
No. 96-2058

**Reporter**

103 F.3d 42 \*; 1996 U.S. App. LEXIS 32937 \*\*; 1996-2 Trade Cas. (CCH) P71,647; 25 Media L. Rep. 1187

PADDOCK PUBLICATIONS, INC., doing business as The Daily Herald, Plaintiff-Appellant, v. CHICAGO TRIBUNE COMPANY, et al., Defendants-Appellees.

**Subsequent History:** [\[\\*\\*1\]](#) Rehearing Denied January 21, 1997, Reported at: [1997 U.S. App. LEXIS 994](#).

**Prior History:** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 7493. David H. Coar, Judge.

**Disposition:** AFFIRMED

## **Core Terms**

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features, news service, Advertising, newspaper, motion picture, contracts, papers, supplemental, Syndicate, rivals, subscribes, antitrust, stories, Sherman Act, theaters, district court, firms, tacit, exclusive contract, distributor, collusion, Stations, columns, smaller, notice, rights, terms

## **LexisNexis® Headnotes**

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Antitrust & Trade Law > Sherman Act > General Overview

### **[HN1](#) [down arrow] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

The existence of three competing facilities not only means that none is an essential facility but also means that each of the three is entitled to sign an exclusive contract with a favored user.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

## [\*\*HN2\*\*](#) [] Antitrust & Trade Law, Sherman Act

Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe.

Antitrust & Trade Law > Sherman Act > General Overview

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

## [\*\*HN3\*\*](#) [] Antitrust & Trade Law, Sherman Act

Collusion, tacit or express, requires some horizontal cooperation, or at least forbearance from vigorous competition among rivals.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

## [\*\*HN4\*\*](#) [] Trade Practices & Unfair Competition, Federal Trade Commission Act

The unfair methods of competition which are condemned by the Federal Trade Commission Act, [15 U.S.C.S. § 45](#)§ 5(a), are not confined to those that were illegal at common law or that are condemned by the Sherman Antitrust Act, [15 U.S.C.S. § 1 et seq.](#)

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN5\*\*](#) [] Public Enforcement, US Federal Trade Commission Actions

A district court lacks the Federal Trade Commission's power to go beyond the limits of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#).

103 F.3d 42, \*42L<sup>A</sup>1996 U.S. App. LEXIS 32937, \*\*1

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

Business & Corporate Law > Distributorships & Franchises > Disclosure & Registration > Requirements

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

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

#### **HN6** Exclusive & Reciprocal Dealing, Exclusive Dealing

An exclusive dealing contract obliges a firm to obtain its inputs from a single source. An exclusive distributorship, by contrast, does not restrict entry at either level.

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

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN7** Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Even exclusive dealing contracts are lawful if limited to a year's duration.

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

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN8** Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

A termination clause works just like a stated time limit in facilitating competition for the contract.

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**Judges:** Before EASTERBROOK, MANION, and ROVNER, Circuit Judges.

**Opinion by:** EASTERBROOK

## Opinion

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[\*43] EASTERBROOK, *Circuit Judge*. Newspapers' content has many sources. To the work of their own staff, papers add dispatches from syndicated news services such as the Associated Press and Reuters that station reporters or stringers across the globe. Leading newspapers such as the *New York Times*, the *Los Angeles Times*, the *Washington Post*, the *Chicago Tribune*, and the *Wall Street Journal* have set up supplemental news services. The New York Times News Service carries that paper's stories; the Los Angeles Times/Washington Post News Service combines stories from those papers; the Knight-Ridder/Tribune Information Service pools stories from the *Tribune* and the Knight-Ridder chain's papers. Subscribers can reprint the originating paper's stories (and those of other papers that contribute to the supplemental service) in the subscribers' home markets. Cartoons, op-ed pieces, book reviews, chess columns, [\*3] puzzles, and other features are available from syndicators such as United Press Syndicate, United Features Syndicate, King Features Syndicate, Creators Syndicate, and Tribune Media Services.

Supplemental news services and features syndicators offer exclusive contracts to subscribers in each metropolitan area. Because the *Chicago Tribune* subscribes to the New York Times News Service, stories from the *Times* are unavailable to the *Chicago Sun-Times* and smaller newspapers in the Chicago area; the *Sun-Times* subscribes to the Los Angeles Times/Washington Post News Service, which therefore is unavailable to the *Tribune* and smaller papers. News services and features syndicates charge by the circulation of the subscribing paper, and they therefore strive to sign up the largest paper in each market. Exclusivity is one valuable feature the service offers, for a paper with exclusive rights to a service or feature is both more attractive to readers and more distinctive from its rivals. When selling to smaller papers, however, the supplemental news services and features syndicates generally do not offer exclusivity--for they still hope to interest the larger, and therefore more [\*4] lucrative, papers in the market (which can sign up later with exclusive rights against all but the original customer).

As a rule, the larger papers subscribe to the more popular services and features; or perhaps it is the very fact that a feature runs [\*44] in a market's larger papers that makes it "more popular." Causation need not concern us. No matter which way it runs, smaller papers perceive that they get the crumbs. This suit, by the *Daily Herald*, the number three general-interest paper in the Chicago area (with 6.7 percent of average weekly readership), contends that the pattern of exclusive distribution rights violates [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C. § 1](#), by making it harder for small papers to grow. Like the district court, we assume without deciding that "general-interest-newspaper readership in the Chicago SMSA" is a market. According to the complaint, the *Chicago Tribune* and the *Chicago Sun-Times* have locked up the "most popular" or "best" supplemental services and features, *injuring consumers by frustrating competition*. (We assume that "the best" services and features can constitute a market, although it sounds more like an aesthetic judgment; no [\*5] one would say that "the best film of 1996" has a monopoly of any market just because there can be only one "best" film.) The Daily Herald views the Knight-Ridder/Tribune Information Service as a distant third to the supplemental news services the *Tribune* and *Sun-Times* use, and even it is unavailable because the *Tribune* will not license its stories to a competitor in its home market. The *Herald* concedes that the Associated Press, Reuters, and many quality comics and features are available to it (for example, it publishes *Dilbert*, one of today's most-followed comic strips) but insists that the best ones are committed to its larger rivals. After assuming that all of the *Herald*'s allegations are true, the district court dismissed the complaint for failure to state a claim on which relief may be granted. 1995-2 Trade Cas. P 71,255.

The Herald does not contend that the *Tribune* has conspired with the *Sun-Times* to bring about this state of affairs. Compare [Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 \(1945\)](#) (holding that the Associated Press, a consortium of newspapers, must eliminate an exclusivity feature that could be traced to agreement among [\*6] horizontal rivals). Nor does it contend that the supplemental news services and features syndicators (or their contributing papers and authors) have agreed among themselves. It concedes that each has

adopted its method of doing business independently; they take the same approach to distribution because each has discovered that it is the most profitable way to do business. All of the contracts between services and newspapers are terminable at will or on short notice (usually 30 days, although some features require a year's notice). Instead of seeing whether money could persuade a supplemental news service to cut off one of the larger papers--the *Herald* has never tried to outbid the *Tribune* or *Sun-Times*, either on a total compensation basis or a per-subscriber basis--it asked the district court to declare that the antitrust laws entitle it to receive the leading supplemental news services and features without regard to the contractual exclusivity that the *Tribune* and *Sun-Times* currently enjoy. At times the *Herald* suggests that it would be happy with rights to articles from the *New York Times*, *Los Angeles Times*, and *Washington Post* that the *Tribune* [\*\*7] and *Sun-Times* do not reprint; "there's plenty for all" is a theme of its brief. But this won't work well for news (must the *Tribune* give the *Herald* advance notice of its contents?) or at all for features, which are sold one at a time. For example, King Features Syndicate does not sell its entire portfolio to one paper per market; the *Tribune*, *Sun-Times*, and *Herald* each publish some of its comics and columns. So the *Herald* necessarily argues that it is entitled to run *Peanuts* and *Dick Tracy* even though these comic strips also appear in the *Tribune*.

This is fundamentally an "essential facilities" claim-- but without any essential facility. There are three supplemental news services that the *Herald* is willing to acknowledge as major competitors (and others besides, though the *Herald* denigrates them). There are hundreds, if not thousands, of opinion and entertainment features; a newspaper deprived of access to the *New York Times* crosswords puzzles can find others, even if the *Times* has the best known one. Unlike [United States v. Terminal Railroad Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 \(1912\)](#), the granddaddy of these cases, in [\*45] which the Court held that [\*\*8] a bottleneck facility that could not feasibly be duplicated must be shared among rivals, this case does not involve a single facility that monopolizes one level of production and creates a potential to extend the monopoly to others. We have, instead, competition at each level of production; no one can "take over" another level of production by withholding access from disfavored rivals. [Flip Side Productions, Inc. v. JAM Productions, Ltd., 843 F.2d 1024, 1032-34 \(7th Cir. 1988\)](#), holds that [HN1](#)[ the existence of three competing facilities not only means that none is an "essential facility" but also means that each of the three is entitled to sign an exclusive contract with a favored user. Other firms that want to enter the market can do so by competing at intervals for these contracts.

[HN2](#)[ Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common. Every year or two, General Motors, Ford, and Chrysler invite tire manufacturers to bid for exclusive rights to have their tires used in the manufacturers' cars. Exclusive contracts make the market hard to enter in mid-year but cannot stifle competition over the longer run, and competition [\*9] of this kind drives down the price of tires, to the ultimate benefit of consumers. Just so in the news business--if smaller newspapers are willing to bid with cash rather than legal talent. In the meantime, exclusive stories and features help the newspapers differentiate themselves, the better to compete with one another. A market in which every newspaper carried the same stories, columns, and cartoons would be a less vigorous market than the existing one. And a market in which the creators of intellectual property (such as the *New York Times*) could not decide how best to market it for maximum profit would be a market with less (or less interesting) intellectual property created in the first place. No one can take the supply of well researched and written news as a given; legal rulings that diminish the incentive to find and explicate the news (by reducing the return from that business) have little to commend them.

In what way could the news services' practices harm consumers? Tacit collusion (economists' term for "shared monopoly") could be a source of monopoly profits and injury to consumers even if none of the stages of production is monopolized. Some distribution arrangements [\*\*10] might be objectionable because they facilitate tacit collusion. But [HN3](#)[ collusion, tacit or express, requires some horizontal cooperation, or at least forbearance from vigorous competition among rivals. See Herbert Hovenkamp, *Federal Antitrust Policy* § 4.4 (1994). Compare Richard A. Posner, [\*Antitrust Law: An Economic Perspective\*](#) 42-77 (1976), with Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962). Although the newspaper market is concentrated on the readers' side, the inputs to newspaper production are unconcentrated and therefore do not facilitate tacit collusion in the more concentrated market. The *New York Times* News Service competes for column inches of ink not only with other supplemental news services but also with the Associated Press, Reuters, and the reporters of the subscribing papers. Markets here are less concentrated, and

use fewer of the devices that facilitate oligopolistic interdependence, than the markets in [E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128 \(2d Cir. 1984\)](#), where an antitrust claim was nonetheless rejected. The *Herald* does not argue that the [\*\*11] practices at hand facilitate tacit collusion.

What the *Herald* does argue is that a mixture of fewness of firms, exclusive contracts, and relations between suppliers and users of news that endure despite short contract terms, hampers the growth of small rivals even though each market is competitive. Such an argument does not come within any of the economic approaches to tacit collusion--but it does, the *Herald* insists, come within the holding of [FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 97 L. Ed. 426, 73 S. Ct. 361 \(1953\)](#). The *Herald* relies as well on [Standard Oil Co. v. United States, 337 U.S. 293, 93 L. Ed. 1371, 69 S. Ct. 1051 \(1949\)](#) (Standard Stations), and [United States v. Loew's Inc., 371 U.S. 38, 9 L. Ed. 2d 11, 83 S. Ct. 97 \(1962\)](#), but rightly treats *Motion Picture Advertising Service* as its best case.

[\*46] Four companies signed approximately 75 percent of the nation's motion picture theaters to exclusive-dealing contracts for advertisements to be displayed along with the films. Having signed with one supplier of ads, a theater could not display ads furnished by another. The Federal Trade Commission concluded that these arrangements, in the aggregate, stifled competition by firms that wanted to enter the business of furnishing [\*\*12] advertising to theaters, and therefore violated § 5 of the Federal Trade Commission Act, [15 U.S.C. § 45](#): as the Supreme Court phrased the FTC's conclusion, "due to the exclusive contracts, respondent and the three other major companies have foreclosed to competitors 75 percent of all available outlets for this business throughout the United States." [344 U.S. at 395](#). According to the *Herald*, the same kind of thing now has occurred in the news industry, making it equally appropriate to aggregate the market shares of the firms without proof of horizontal collaboration (for there was none in *Motion Picture Advertising Service*). The district court was not impressed, for the approach of *Motion Picture Advertising Service*--which depends on "foreclosure" of sales to competitors without proof of injury to consumers--reflects a bygone day in antitrust analysis. But the district court properly did not rely entirely on a belief that the opinion is a derelict. See [Khan v. State Oil Co., 93 F.3d 1358, 1362-64 \(7th Cir. 1996\)](#) (implementing another antique antitrust opinion that is unlikely to be reaffirmed if the Supreme Court revisits the subject). It held that *Motion Picture* [\*\*13] *Advertising Service* is not controlling even if it remains authoritative.

First, *Motion Picture Advertising Service* was decided under § 5 of the FTC Act. The Commission has the authority under that provision to forbid practices that pose risks to effective competition, even when they do not violate the Sherman Act. The Court remarked on this in *Motion Picture Advertising Service*: [HN4](#) [↑] "The 'unfair methods of competition,' which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act." [344 U.S. at 394](#). [HN5](#) [↑] A district court lacks the FTC's power to go beyond the limits of the Sherman Act. Similarly, *Standard Stations* was decided under § 3 of the Clayton Act, [15 U.S.C. § 14](#), and does not assist the plaintiff in a Sherman Act case that cannot be characterized as involving tie-in sales. Granted, the Court remarked in *Motion Picture Advertising Service* that "a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act", [344 U.S. at 395](#), but this bald and unreasoned assertion is not conclusive. Poorly reasoned holdings bind the inferior [\*\*14] courts; unreasoned dictum does not--and this statement was obiter dictum, for the Court had emphasized only a paragraph before that it was deferring to the FTC's findings as § 5 of the FTC Act requires. No subsequent case has read *Motion Picture Advertising Service* to abolish the requirement of concerted action under [§ 1](#) of the Sherman Act.

Second, *Motion Picture Advertising Service* involved exclusive *dealing*, while this case involves exclusive *distributorships*. Despite the similarity in nomenclature, there is a difference--one vital to the theory of *Motion Picture Advertising Service* itself. See generally Hovenkamp, *Federal Antitrust Policy* § 10.8. [HN6](#) [↑] An exclusive dealing contract obliges a firm to obtain its inputs from a single source. Each of the theaters was committed to one distributor for all of its ads. This was the genesis of the concern about foreclosure. A new advertising distributor could not find outlets. An exclusive distributorship, by contrast, does not restrict entry at either level. None of the newspapers in Chicago (or anywhere else) has promised by contract to obtain all of its news from a single source--and the sources have not locked all [\*\*15] of their output together (unlike the "block booking" involved in *Loew's*). A new entrant to the supplemental news service business could sell to every newspaper in the United States, if it chose to do so. Existing features syndicates sell to multiple firms in the same market (although most features go to

one paper per city; this is the exclusive distribution aspect of the contracts). So vendors can and do sell news and features to multiple customers, and customers can and [\*47] do buy news and features from multiple vendors. "Foreclosure" of the kind about which *Motion Picture Advertising Service* was concerned does not occur under exclusive distribution contracts.

Third, the FTC and the Supreme Court concluded that [HN7](#)[<sup>↑</sup>] even exclusive dealing contracts are lawful if limited to a year's duration. [344 U.S. at 395-96](#). The Commission saw that exclusivity can promote competition by making it feasible for firms to invest in promoting their products-- for these costs would not be recoverable if the contracts were of very short terms, or if rivals could exhibit the same films and obtain the benefit of this promotional activity. Moreover, with year-long contracts, the entire market is up for grabs. [\*\*16] A new entrant can sell to a twelfth of the theaters in the first month, a sixth of all theaters by the end of the second month, and so on; competition for the contract makes it possible to have the benefits of exclusivity and rivalry simultaneously. Things work similarly in the newspaper business. Contract terms are short, so competition for the contract can flourish. Meanwhile, exclusive distribution of news or features through a single paper in a city helps the paper distinguish itself from, and compete with, its rivals. The *SunTimes* will not promote a readership for a particular columnist if the *Tribune* and the *Herald* carry the same column; free-riding would spoil the investment and thwart this aspect of competition.

Contracts in the news business, unlike those in the motion picture advertising business, are of indefinite duration, and either side may terminate after giving the required advance notice. According to the *Herald*, this makes all the difference, but we don't see why. [HN8](#)[<sup>↑</sup>] A termination clause works just like a stated time limit in facilitating competition for the contract. The FTC did not insist that dealings between a distributor and a theater cease [\*\*17] after a year; the parties were free to renew their arrangement for successive years; it was enough that there be an option to change distributors or renegotiate once a year. That option exists in the newspaper business. Both sides to these contracts enjoy an annual (or more frequent) right to negotiate new terms or change partners. To this the *Herald* responds, in essence: The contracts aren't terminated in fact, so the legal terms do not matter; the contracts should be treated as perpetual. Yet for all we can tell renewal was (and remains) the norm in the motion picture business. As long as arrangements serve the interests of both parties, they will continue, whether that means signing another in a series of one-year contracts or declining to exercise an annual option to cancel a contract. Enduring exclusive distribution contracts characterize markets that are recognized as competitive: for example, Babylon 5 appears exclusively on WPWR-TV (Channel 50) in Chicago, and almost all other shows are exhibited exclusively on one channel per locale, sticking with that station for their entire original production run, even though no one thinks that individual stations or producers have [\*\*18] market power. Cf. *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992); [Capital Cities/ABC, Inc. v. FCC](#), 29 F.3d 309 (7th Cir. 1994). The FTC and the Supreme Court in *Motion Picture Advertising Service* wanted to ensure that dealings continued only while they remained in the interests of both distributors and theaters--which meant that someone else could come along with a better deal and get the business. Likewise someone with a better offer can get or sell news on short notice. The *Herald* has never tried to make a better offer, and we conclude that it has come to the wrong forum. It should try to outbid the *Tribune* and *Sun-Times* in the marketplace, rather than to outmaneuver them in court.

AFFIRMED



## Philip Morris Inc. v. Blumenthal

United States District Court for the District of Connecticut

December 23, 1996, Decided ; December 23, 1996, filed

Civil No. 3:96CV1221 (PCD)

### **Reporter**

949 F. Supp. 93 \*; 1996 U.S. Dist. LEXIS 19426 \*\*; 1997-2 Trade Cas. (CCH) P71,899

PHILIP MORRIS INC., R.R REYNOLDS TOBACCO CO., BROWN & WILLIAMSON TOBACCO CO., LORILLARD TOBACCO CO., Plaintiffs, -vs- RICHARD BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT, Defendant.

**Disposition:** **[\*\*1]** Defendant's renewed motion to dismiss (doc 44), dated October 10, 1996, granted.

## **Core Terms**

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Tobacco, important state interest, state court, abstention, proceedings, attorney general, present action, antitrust, state proceeding, federal court, injunctive, state court action, ongoing, enjoin, cases, subject matter jurisdiction, unfair trade practice, criminal proceeding

## **LexisNexis® Headnotes**

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Constitutional Law > Relations Among Governments > Full Faith & Credit

Governments > State & Territorial Governments > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Constitutional Law > Supremacy Clause > General Overview

Governments > Courts > Judicial Comity

### **HN1 Relations Among Governments, Full Faith & Credit**

Federalism requires comity, which is defined as a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Governments > Courts > Judicial Comity

### **HN2 Federal & State Interrelationships, Abstention**

The normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions. The principals of comity mandate extreme caution before enjoining certain kinds of state civil proceedings as well as state criminal proceedings.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

### **HN3** **Federal & State Interrelationships, Abstention**

Abstention is appropriate when there is an ongoing state proceeding; an important state interest is implicated; and the plaintiff has an avenue open for review of constitutional claims in the state court. When those conditions are met, abstention is obligatory.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

### **HN4** **Federal & State Interrelationships, Abstention**

The abstention doctrine applies in cases where the federal action was filed preemptively.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

### **HN5** **Federal & State Interrelationships, Abstention**

Federal courts need not abstain under Younger if there is no pending state proceeding, lest the hapless plaintiff find himself between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding. However, Steffel applies when there is no pending state proceeding.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

### **HN6** **Federal & State Interrelationships, Abstention**

Younger applies to certain types of civil actions. Hicks applies to civil proceedings to the same extent that Younger does.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview

Civil Procedure > Attorneys > General Overview

### **HN7** **Federal & State Interrelationships, Abstention**

Abstention is proper under Younger in civil cases only if the proceedings implicate important state interests. Civil actions by the state which are akin to a criminal prosecution have been held important state interests. State enforcement of attorney disciplinary rules are another example. Phrased more generally, important state interests

include proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

#### **HN8** [blue download icon] **Public Enforcement, State Civil Actions**

The existence of an important state interest for Younger purposes does not depend on whether the relief sought is monetary or injunctive. Rather, it depends on the nature of the claim brought in the underlying state court action. It is therefore irrelevant that similar relief was sought under different laws, since it is the claim, not the relief, which determines the existence of an important state interest.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

#### **HN9** [blue download icon] **Federal & State Interrelationships, Abstention**

The fact that the plaintiff's complaint only seeks to enjoin state court imposition of monetary, as opposed to injunctive, relief is irrelevant for abstention purposes. The important state interest element of Younger does not depend on the relief sought by the federal plaintiff. Nor does it turn on whether the state court action seeks monetary or injunctive relief.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

#### **HN10** [blue download icon] **Federal & State Interrelationships, Abstention**

When a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

#### **HN11** [blue download icon] **Federal & State Interrelationships, Abstention**

When absolutely necessary for the protection of constitutional rights, courts of the United States have the power to enjoin state officers from instituting criminal actions.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

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

#### **HN12** [blue download icon] **Federal & State Interrelationships, Abstention**

Younger abstention is based on federalism, not on lack of subject matter jurisdiction. Thus when an action is brought pursuant to *Ex Parte Young*, but falls within the requirements of *Younger* and its progeny, abstention is appropriate.

**Counsel:** Attorneys for Plaintiff, Philip Morris, Inc.: Benjamin A. Solnit, Esq., Margaret A. Little, Esq., William R. Murphy, Esq., Robert K. Ciulla, Esq., Tyler, Cooper & Alcorn, New Haven, Connecticut. Peter C. Hein, Esq., Barbara Robbins, Esq., Ben M. Germana, Esq., Wachtell, Lipton, Rosen & Katz, New York, New York. Attorneys for Plaintiff, R.J. Reynolds Tobacco Co.: Edward F. Hennessey, Esq., David T. Ryan, Esq., Brien P. Horan, Esq., Dennis F. Kerrigan, Jr., Esq., Robinson & Cole, Hartford, Connecticut. Donald B. Ayer, Esq., Robert F. McDermott, Jr., Esq., Jones, Day, Reavis & Pogue, Washington, D.C. Attorneys for Plaintiff, Brown & Williamson Tobacco Corp.: Andrew R. McGaan, Esq., David M. Bernick, Esq., Kirkland & Ellis, Chicago, Illinois. Francis H. Morrison, III, Esq., James H. Rotondo, Esq., Athena Roxene Tsakanikas, Esq., Day, Berry & Howard, Hartford, Connecticut. Marjorie Press Lindblom, Esq., Kirkland & Ellis, New York, New York. Attorneys for Plaintiff, Lorillard Tobacco Co.: William R. Murphy, Esq., Tyler, Cooper & Alcorn, New Haven, Connecticut. James R. Fogarty, Esq., Lawrence F. Reilly, Esq., [\*\*2] Andrew P. Nemiroff, Esq., Epstein Fogarty Cohen & Selby, Greenwich, Connecticut. Gael Mahony, Esq., Hill & Barlow, Boston, Massachusetts.

Attorneys for Defendant, Richard Blumenthal, Attorney General: David S. Golub, Esq., Jonathan M. Levine, Esq., Silver, Golub & Teitel, Stamford, Connecticut. Gregory T. D'Auria, Esq., Jane R. Rosenberg, Esq., Eliot D. Prescott, Esq., Attorney General's Office, Hartford, Connecticut. Andrew P. Nemiroff, Esq., Epstein Fogarty Cohen & Selby, Greenwich, Connecticut. Stephen R. Park, Esq., Attorney General's Office, Anti-Trust, Consumer Protection, Hartford, Connecticut. William M. Rubenstein, Esq., Attorney General's Office, Hartford, Connecticut.

**Judges:** Peter C. Dorsey, Chief United States District Judge

**Opinion by:** Peter C. Dorsey

## Opinion

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### [\*94] RULING ON MOTION TO DISMISS

Defendant moves to dismiss under the *Younger v. Harris*, 281 F. Supp. 507, abstention doctrine and pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283. For the reasons below, defendant's motion is granted.

#### I. BACKGROUND

Plaintiffs ("Tobacco Companies") filed suit in district court (the "present action") to enjoin defendant (the "Attorney General") from filing an impending suit in state court. Shortly [\*\*3] after the present action was filed, the Attorney General in fact filed suit in Connecticut Superior Court. The state court action seeks damages and injunctive relief for alleged violations of state antitrust law, state unfair trade practice law, and state common law. The Tobacco Companies removed the state court action to district court. The removed case came before the Honorable Janet Bond Arterton. The Attorney General moved to dismiss the present action and to remand the removed case to state court where originally filed, arguing that removal was improper due to a lack of subject matter jurisdiction.

The motion to dismiss the present action was denied without prejudice pending resolution of the subject matter jurisdiction issue in the removed case. On October 9, 1996, the removed case was remanded to state court for lack of subject matter jurisdiction. The Attorney General then renewed the motion to dismiss the present action.

#### II. ANALYSIS

##### A. Abstention Under *Younger v. Harris*

The Tobacco Companies' action raises the issue of federal court interference with pending state litigation. The Supreme Court has noted that "since the beginning of this country's history Congress [\*\*4] has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." [Younger v. Harris, 401 U.S. 37, 43, 27 L. Ed. 2d 669, 91 S. Ct. 746 \(1971\)](#). [HN1](#) Federalism requires comity, which Justice Black defined as:

a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism" . . .

[\*95] [Id. at 44](#). Therefore, "[HN2](#) the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." [Id. at 45](#). Although [Younger](#) addressed federal actions to enjoin state criminal proceedings, the same principals of comity mandate extreme caution before enjoining certain kinds of state civil proceedings as well. See, e.g., [Huffman v. Pursue, Ltd., 420 U.S. 592, 604, 43 L. Ed. 2d 482, 95 S. Ct. 1200 \(1975\)](#); [Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 73 L. Ed. 2d 116, 102 S. Ct. 2515 \(1982\)](#). [\*\*5]

[HN3](#) Abstention under [Younger](#) is appropriate when: "1) there is an ongoing state proceeding; 2) an important state interest is implicated; and 3) the plaintiff has an avenue open for review of constitutional claims in the state court." [Hansel v. Town Court For Town Of Springfield, 56 F.3d 391, 393 \(2d Cir. 1995\)](#). When these conditions are met, abstention is obligatory. See [Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800, 816 n.22, 47 L. Ed. 2d 483, 96 S. Ct. 1236 \(1976\)](#).

### 1. Ongoing State Proceeding

There clearly is an ongoing state proceeding in the present case. The question is whether this element requires that the state proceeding be brought *before* the federal action. The typical scenario, as in [Younger](#), is that the state action came first. However, the Supreme Court has held that [HN4](#) [Younger](#) also applies in cases where the federal action was filed preemptively. [Hicks v. Miranda, 422 U.S. 332, 45 L. Ed. 2d 223, 95 S. Ct. 2281 \(1975\)](#).

The Tobacco Companies argue that [Steffel v. Thompson, 415 U.S. 452, 39 L. Ed. 2d 505, 94 S. Ct. 1209 \(1974\)](#), not [Hicks](#), controls. Under [Steffel](#), [HN5](#) federal courts need not abstain under [Younger](#) if there is no pending state proceeding, lest "the hapless plaintiff [find himself] between the Scylla [\*\*6] of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." [Steffel, 415 U.S. at 463](#). However, [Steffel](#) applies *when there is no pending state proceeding*. The Supreme Court in [Hicks](#) specifically distinguished that scenario from one in which there is a pending state proceeding which, in a race to the courthouse, happened to be filed second:

Neither [Steffel v. Thompson, 415 U.S. 452, 39 L. Ed. 2d 505, 94 S. Ct. 1209 \(1974\)](#), nor any other case in this Court has held that for [Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669](#), to apply, the state criminal proceedings must be pending on the day the federal case is filed. Indeed, the issue has been left open; and we now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of [Younger v. Harris](#) should apply in full force.

[Hicks, 422 U.S. at 349](#) (footnote omitted).

The Tobacco Companies attempt to distinguish [Hicks](#) on several other grounds. First they argue [\*\*7] that [Hicks](#) applies only to criminal, not civil, proceedings. This argument is without merit. As discussed above, [HN6](#) [Younger](#) applies to certain types of civil actions. [Hicks](#) applies to civil proceedings to the same extent that [Younger](#) does.

Second, the Tobacco Companies distinguish Hicks on the grounds that the state proceedings brought in that case could only have been brought in state court, not in federal court. However, the only reason why the claims in Hicks could have been brought uniquely in state court is that they were criminal charges. The distinction therefore is irrelevant and merely rehashes the argument that Hicks only applies to state criminal proceedings. Furthermore, the cases cited do not support this argument.

Finally, the Tobacco Companies argue that "comity works both ways": Respect for federalism would have the state, not the federal, court abstain. However the only case cited, Chaulk Services v. Massachusetts Commission Against Discrimination, 70 F.3d 1361 (1st Cir. 1995), must be distinguished. In Chaulk the state administrative action interfered with a federal statutory and administrative [\*96] system constitutionally adopted by [\*\*8] congress. There is no such federal administrative preemption in the present action.

Accordingly, there is an "ongoing proceeding" for Younger purposes.

## 2. Important State Interest

**HN7** Abstention is proper under Younger in civil cases only if the proceedings implicate "important state interests." Middlesex Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423, 432, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982). Civil actions by the state which are "akin to a criminal prosecution" have been held important state interests. Huffman, 420 U.S. at 604 (civil enforcement of anti-obscenity laws). State enforcement of attorney disciplinary rules are another example. Middlesex, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515. Phrased more generally, important state interests include "proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system." Id. at 432.

The Attorney General's claims under the Connecticut Unfair Trade Practices Act ("CUTPA") and under Connecticut antitrust law are important state interests. Both claims are under statutory schemes which contemplate civil enforcement actions by state authorities to effect state policy. See C.G.S. § 42-110m(a) (Commissioner [\*\*9] of Consumer Protection can ask Attorney General to sue in name of the state under CUTPA); C.G.S. § 35-32(a) ("The attorney general, in the name of the state and on behalf of the people of the state, shall enforce [the Connecticut Antitrust Act]"). These laws are mechanisms for the state to enforce its important interest in fair trade in Connecticut.

The Tobacco Companies urge following Philip Morris v. Harshbarger, 946 F. Supp. 1067, 1996 U.S. Dist. LEXIS 18438, 1996 WL 676807 (D.Mass.). In Harshbarger Tobacco Companies also preemptively filed suit to enjoy a state court action by the Massachusetts Attorney General. The Massachusetts District Court declined to abstain under Younger because it did not find an important state interest. The Massachusetts Attorney General's action, which sought reimbursement for Medicaid expenditures, was found to be "classically in the nature of subrogation," and accordingly not an important state interest. However, Harshbarger must be distinguished because the Massachusetts Attorney General's suit in state court did not allege violations of state unfair trade practice and antitrust law, as does the Connecticut state court action. It is therefore unnecessary to address the merits [\*\*10] and applicability of Harshbarger, since the Attorney General's CUTPA and antitrust claims do implicate an important state interest.

The Tobacco Companies attempt to gloss over the absence of unfair trade practice and antitrust claims in the Massachusetts case by pointing out that the underlying state complaints in the two cases are "predicated on virtually identical factual allegations." Surreply Mem. at 2. This is irrelevant. The Attorney General has alleged an important state interest by invoking CUTPA and Connecticut antitrust laws, not merely by the nature of the factual allegations.

The Tobacco Companies argue that Harshbarger controls because the Massachusetts attorney general sought non-monetary relief similar to the present action, although without alleging unfair trade practice or antitrust claims. This argument misses the point. **HN8** The existence of an important state interest for Younger purposes does not depend on whether the relief sought is monetary or injunctive. Rather, it depends on the nature of the claim brought in the underlying state court action. It is therefore irrelevant that similar relief was sought under different

laws, since it is the claim, not **[\*\*11]** the relief, which determines the existence of an important state interest. As discussed above, the Connecticut state court action's allegations constitute an important state interest.

**HN9**<sup>↑</sup> The fact that the Tobacco Companies' complaint in the present action only seeks to enjoin state court imposition of monetary, as opposed to injunctive, relief is also irrelevant for abstention purposes. The important state interest element of Younger does not depend on the relief sought by the federal plaintiff. Nor does it turn on whether the **[\*97]** state court action seeks monetary or injunctive relief.

Accordingly, the important state interest element of Younger is satisfied.

### 3. Avenue Of Review For Constitutional Claims In State Court

The Supreme Court has held that "**HN10**<sup>↑</sup> when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil v. Texaco*, 481 U.S. 1, 15, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987). The Tobacco Companies do not challenge this element of Younger. Pl.'s Mem. in Opp. at 10. Since there are no doubts regarding the adequacy **[\*\*12]** of the Tobacco Companies' avenue of review for constitutional claims in Connecticut state court, this element of Younger is satisfied.

### B. Other Arguments Raised By The Tobacco Companies

The Tobacco Companies mischaracterize the relationship between the Younger abstention doctrine and *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), which "established the doctrine that **HN11**<sup>↑</sup> when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions." *Fenner v. Boykin*, 271 U.S. 240, 243, 70 L. Ed. 927, 46 S. Ct. 492 (1926). Ex Parte Young held that there is the requisite subject matter jurisdiction for such suits. **HN12**<sup>↑</sup> Younger abstention is based on federalism, not on lack of subject matter jurisdiction. Thus when an action is brought pursuant to Ex Parte Young, but falls within the requirements of Younger and its progeny, abstention is appropriate. See Younger, 401 U.S. at 45.

The Tobacco Companies make a puzzling argument that claims in the federal action which seek injunctions against imposition of liability for future, as opposed to past, sales of tobacco should not be barred under Younger, **[\*\*13]** This argument is based on mis-cited cases and faulty logic. *Wooley v. Maynard*, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977), does not stand for the proposition that ongoing state proceedings can somehow be severed for Younger purposes into past and future liability. In Wooley, there were no ongoing state proceedings at issue -- only failure to seek state appellate review of prior convictions under the same law (covering up New Hampshire's "Live Free or Die" motto on a car license plate). Wooley is thus irrelevant.

There is furthermore no logical base to this argument. Nothing indicates that the state court would take the unprecedented step of imposing liability for sales which have not yet occurred. The outcome of the state litigation, whatever that may be, will affect future liabilities under the familiar doctrine of *res judicata*. Injunctions are always prospective. But these truisms have no bearing on Younger abstention.

The Tobacco Companies also argue that abstention analysis in this case should be governed by Pullman, not Younger, abstention. See *R.R. Comm'n of Texas v. Pullman*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941). However, these doctrines are not mutually exclusive. Since abstention **[\*\*14]** is appropriate under Younger, as discussed above, Pullman analysis is thus unnecessary.

### III. CONCLUSION

Defendant's renewed motion to dismiss (doc 44), dated October 10, 1996, is **granted**.

SO ORDERED.

Dated at New Haven, Connecticut, December 23, 1996.

949 F. Supp. 93, \*97L996 U.S. Dist. LEXIS 19426, \*\*14

Peter C. Dorsey

Chief United States District Judge

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## Watts v. Clark Assocs. Funeral Home

Supreme Court of New York, Appellate Division, Second Department

November 25, 1996, Submitted ; December 23, 1996, Decided

95-11740

### **Reporter**

234 A.D.2d 538 \*; 651 N.Y.S.2d 585 \*\*; 1996 N.Y. App. Div. LEXIS 13238 \*\*\*

H. Joseph Watts, Appellant, v. Clark Associates Funeral Home, Inc., et al., Respondents.

**Prior History:** [\*\*\*1] In an action, *inter alia*, to recover damages for breach of contract and antitrust violations, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Westchester County (Fredman, J.), entered November 17, 1995, as granted those branches of the defendants' motions pursuant to [CPLR 3211](#) which were to dismiss the third, fourth, and fifth causes of action.

**Disposition:** ORDERED that the order is affirmed insofar as appealed from, with one bill of costs to the respondents appearing separately and filing separate briefs.

## **Core Terms**

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cause of action, Donnelly Act, conspiracy, punitive damages, restraint of trade, seller and buyer, economic impact, relevant market, rescission, asserting, funeral, buyer

## **LexisNexis® Headnotes**

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

### [\*\*HN1\*\*](#) **Regulated Practices, Price Fixing & Restraints of Trade**

A party asserting a violation of the Donnelly Act must identify the relevant market, describe the nature and effects of the purported conspiracy, allege how the economic impact of that conspiracy does or could restrain trade in the market, and set forth a conspiracy or reciprocal relationship between two or more legal or economic entities.

**Counsel:** Addesso, Merovitch & Lane, Mt. Vernon, N.Y. (Jack A. Addesso of counsel), for appellant.

Lawrence N. Martin, Jr., White Plains, N.Y. (Janice S. Altizio of counsel), for respondents Clark Associates Funeral Home, Inc., Estate of Eugene H. Lanoway, Eugenia Ann Lanoway, and Seymour Kaplan.

Foley, Hickey, Gilbert & O'Reilly, New York, N.Y. (Terrence P. O'Reilly of counsel), for respondents Daniel B. McManus and McManus and Clark, Inc.

**Judges:** Bracken, J. P., Thompson, Pizzuto and Luciano, JJ., concur.

## **Opinion**

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[\*538] [\*\*586] Ordered that the order is affirmed insofar as appealed from, with one bill of costs to the respondents [\*\*\*2] appearing separately and filing separate briefs.

The plaintiff brought this action against the corporate and individual sellers and the corporate and individual buyers of a funeral home business, alleging, among other things, violations of New York's antitrust law, known as the Donnelly Act ([General Business Law § 340](#)). The court granted those branches of the motions of the sellers and buyers which were to dismiss four of the five causes of action asserted in the complaint. The plaintiff now contends that the court erroneously dismissed his third cause of action asserting a violation of the Donnelly Act, his fourth cause of action seeking punitive damages, and his fifth cause of action seeking rescission of the agreement between the sellers [\*\*587] and buyers as well as specific performance of his own agreement with the individual buyer.

The Supreme Court properly concluded that the plaintiff's allegations were insufficient to state a cause of action under [General Business Law § 340](#). [HN1](#)[<sup>↑</sup>] A party asserting a violation of the Donnelly Act must identify the relevant market, describe the nature and effects of the purported conspiracy, allege how the economic impact of that conspiracy [\*\*\*3] does or could restrain trade in the market, and set forth a conspiracy or reciprocal relationship between two or more legal or economic entities (see, [Anand v Soni, 215 AD2d 420, 421](#)). Here, the plaintiff's contention that he was precluded from purchasing an interest in one of the few existing funeral parlor businesses within Northern Westchester County does not adequately allege impairment of competition within a relevant market or show how the economic impact of the alleged conspiracy restrains trade in the market (see, [Constant v Hallmark Cards, 172 AD2d 641, 642](#); [Van Dussen-Storto Motor Inn v Rochester Tel. Corp., 63 AD2d 244, 252](#)).

The plaintiff's fourth cause of action seeking punitive damages [\*539] based on his allegation that the defendants "exhibited an evil and wrongful motive and/or acted willfully and intentionally towards [him]" was properly dismissed, insofar as there is no separate cause of action for punitive damages ( [Rocanova v Equitable Life Assur. Socy., 83 NY2d 603, 616](#); [Hubbell v Trans World Life Ins. Co., 50 NY2d 899, 901](#)). Further, because the fifth cause of action for rescission was based on the Donnelly Act claim, dismissal [\*\*\*4] of that count of the complaint was properly granted.

The plaintiff's remaining contention is without merit.

Bracken, J. P., Thompson, Pizzuto and Luciano, JJ., concur.



## Hawaii Newspaper Agency v. Bronster

United States Court of Appeals for the Ninth Circuit

November 5, 1996, Argued, Submitted, Honolulu, Hawaii ; December 24, 1996, Filed

No. 96-15142

### **Reporter**

103 F.3d 742 \*; 1996 U.S. App. LEXIS 33462 \*\*; 1996-2 Trade Cas. (CCH) P71,658; 96 Cal. Daily Op. Service 9365; 96 Daily Journal DAR 15438; 25 Media L. Rep. 1175

HAWAII NEWSPAPER AGENCY, a Delaware Limited Partnership; GANNETT PACIFIC CORPORATION, a Hawaii corporation dba The Honolulu Advertiser; LIBERTY NEWSPAPERS LIMITED PARTNERSHIP, as Arkansas Limited Partnership dba The Honolulu Star-Bulletin, Plaintiffs-Appellees, v. MARGERY S. BRONSTER, in her official capacity as Attorney General of the State of Hawaii, Defendant-Appellant.

**Prior History:** [\[\\*\\*1\]](#) Appeal from the United States District Court for the District of Hawaii. D.C. No. CV-95-00635-SPK. Samuel P. King, Senior District Judge, Presiding.

**Disposition:** AFFIRMED

## **Core Terms**

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newspapers, preempted, attorney general, ripe, Advertiser, regulation, antitrust immunity, state law, editorial, preemption, preemption claim, antitrust, exempting, state regulation, district court, conditions, hardship

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

[\*\*HN1\*\*](#) [\*\*\[down arrow\]\*\*](#) **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

See [15 U.S.C.S. §§ 1801-1804.](#)

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Governments > State & Territorial Governments > Legislatures

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

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

**HN2** [down] Exemptions & Immunities, Exempt Cartels & Joint Ventures

The Newspaper Preservation Act (NPA), [15 U.S.C. §§ 1801-1804](#), provides that joint operating agreements (JOA) entered into prior to the law's passage will automatically receive antitrust immunity. [15 U.S.C. § 1803\(a\)](#). [Section 1803\(a\)](#) shields joint operating agreements existing prior to July 24, 1970, if at the time at which such arrangement was first entered into 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. Newspapers that execute JOAs after the effective date of the NPA are required to obtain the consent of the Attorney General of the United States in order to receive the same immunity. [15 U.S.C. § 1803\(b\)](#). The NPA also provides that JOA participants are not exempt from laws which prohibit certain practices that would be unlawful if committed by a single entity. [15 U.S.C. § 1803\(c\)](#). The law reinstated any JOA that had been declared unlawful under antitrust laws. [15 U.S.C. § 1804\(a\)](#).

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Justiciability > Ripeness > General Overview

**HN4** [down] Jurisdiction, Jurisdictional Sources

The ripeness doctrine precludes federal courts from exercising their jurisdiction over an action that is filed before a real dispute exists between the parties. Nevertheless, it is a court's duty to consider *sua sponte* whether the preemption issue is ripe, because the question of ripeness goes to subject matter jurisdiction to hear the case.

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

Civil Procedure > ... > Justiciability > Ripeness > General Overview

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

**HN5** [down] Subject Matter Jurisdiction, Federal Questions

In *Abbott Laboratories*, the United States Supreme Court held that a claim's ripeness depended on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. Under the two-part test in *Abbott*, the preemption claim is ripe for review when first, the preemption challenge is fit for judicial decision. Legal questions that require little factual development are more likely to be ripe. The issue of whether a federal law occupies the field and thereby preempts state law is purely legal. Second, the threat of hardship if the court withholds consideration in this situation is both real and immediate, not conjectural or hypothetical.

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

**HN6** [down] State & Local Taxes, Administration & Procedure

See [Haw. Rev. Stat. § 235-116](#) (1995).

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

Constitutional Law > Supremacy Clause > Federal Preemption

Constitutional Law > Supremacy Clause > General Overview

Constitutional Law > Supremacy Clause > Supreme Law of the Land

## **[HN7](#) [down] Subject Matter Jurisdiction, Federal Questions**

Under the [Supremacy Clause of the United States Constitution](#), federal law is the supreme law of the land. [U.S. Const. art. VI cl. 2](#). A state law is preempted when (1) congress has expressly superseded state law, (2) congress has regulated a field so extensively that a reasonable person would infer that congress intended to supersede state law, and (3) when there is a conflict between federal and state laws.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Constitutional Law > Supremacy Clause > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

## **[HN8](#) [down] Exemptions & Immunities, Exempt Cartels & Joint Ventures**

Congress has preempted the field of regulations that are based on a newspaper's involvement in a joint operating agreements (JOA). Congress has set forth all the conditions governing their formation and qualification for antitrust immunity. Both the statute's language and its legislative history indicate that congress intended its regulation of newspapers in JOAs to be exclusive. Congress expressly reserved a field of permissible state regulation in [15 U.S.C.S. § 1803\(c\)](#). The Newspaper Preservation Act's, [15 U.S.C.S. §§ 1801-1804](#), language and structure precludes states from directly or indirectly regulating JOAs.

Constitutional Law > Supremacy Clause > General Overview

## **[HN9](#) [down] Constitutional Law, Supremacy Clause**

When the federal government completely occupies a given field or an identifiable portion of it, the test of preemption is whether the matter on which the state asserts the right to act is in anyway regulated by the federal act.

**Counsel:** Girard D. Lau, Deputy Attorney General, Honolulu, Hawaii, for the defendant-appellant.

Jeffrey S. Portnoy (on the briefs), Cades Schutte Fleming & Wright, Honolulu, Hawaii; Robert C. Bernius, Nixon, Hargrave, Devans & Doyle, Washington D.C., for the plaintiffs-appellees.

**Judges:** Before: J. Clifford Wallace, Mary M. Schroeder, and Arthur L. Alarcon, Circuit Judges. Opinion by Judge Alarcon.

**Opinion by:** ALARCON

## Opinion

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### [\*743] OPINION

ALARCON, Circuit Judge:

Margery S. Bronster, in her official capacity as Attorney General of Hawaii, appeals from the district court's grant of summary judgment in favor of the Hawaii Newspaper Agency, Gannett Pacific Corp. (Honolulu Advertiser), and Liberty Newspapers (Honolulu Star-Bulletin). Attorney General Bronster contends that the district court erred in concluding that the Newspaper Preservation Act [\*744] preempted Hawaii's Act 243, that the plaintiffs presented a ripe *First Amendment* claim, and that Act 243 violated the *First Amendment*, the Due Process Clause, as well as the *Equal Protection Clause*. We [\*\*2] affirm because we conclude that the Newspaper Preservation Act preempted the field of the regulation of joint operating agreements between newspapers.

I.

In 1962, the Honolulu Advertiser was experiencing 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 Honolulu 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 ("HNA") to carry out the JOA. The effect of the JOA was to cut costs and preserve two independent editorial voices in Honolulu.

In *Citizen Publishing Co. v. United States*, 394 U.S. 131, 22 L. Ed. 2d 148, 89 S. Ct. 927 (1969), the Supreme Court affirmed a district court's conclusion that a similar JOA between two newspapers in Tucson, Arizona violated federal antitrust laws. *Id. at 135*. The Court also held that the Tucson newspapers' "only real defense" was the "failing company" defense, which applies only when one party to a JOA can prove it was facing a liquidation [\*\*3] and had no available purchasers. *Id. at 136-39*. The Tucson newspapers failed to meet this burden. *Id. at 139*.

In response to that decision, Congress passed the Newspaper Preservation Act, [15 U.S.C. §§ 1801-1804](#) ("NPA").

<sup>1</sup> H.R. Rep. No. 91-1193, 91st Cong., 2nd Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 3547. Congress explained

<sup>1</sup> [HN1](#) [↑] The Newspaper Preservation Act provides in pertinent part:

#### [§ 1803](#). Antitrust exemptions

(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*.

#### [§ 1804](#). Reinstatement of joint operating arrangements previously adjudged unlawful under antitrust laws

that JOAs were necessary to maintain "a newspaper press editorially and reportorially independent and competitive in all parts of the United States." *Id.* at 3547. Congress found that "economic conditions have created a situation in which a large majority of American communities have already become one owner newspaper communities." *Id.* at 3548 (quoting remarks of Rep. [\*745] Matsunaga). 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." *Id.*

[\*\*4] **HN2** The NPA provides that JOAs entered into prior to the law's passage will automatically receive antitrust immunity. [15 U.S.C. § 1803\(a\)](#). Section 1803(a) shields joint operating agreements existing prior to July 24, 1970, "if at the time at which such arrangement was first entered into . . . 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." Newspapers that execute JOAs after the effective date of the NPA are required to obtain the consent of the Attorney General of the United States in order to receive the same immunity. [15 U.S.C. § 1803\(b\)](#). The NPA also provides that JOA participants are not exempt from laws which prohibit certain practices that would be unlawful if committed by a single entity. [15 U.S.C. § 1803\(c\)](#). The law reinstated any JOA that had been declared unlawful under antitrust laws. [15 U.S.C. § 1804\(a\)](#).

Hawaii has made several unsuccessful attempts to regulate or dismantle the Honolulu Advertiser and the Honolulu Star-Bulletin's JOA. In 1974 and 1979, members of the state legislature introduced legislation that would have regulated the JOA as a public utility. [\*5] This proposed legislation did not pass. In addition, the city and county of Honolulu challenged the newspapers' exemption from federal antitrust laws in federal court proceedings. In [City and County of Honolulu v. Hawaii Newspaper Agency, Inc., 559 F. Supp. 1021 \(D. Haw. 1983\)](#), the district court granted the newspapers' motion for a directed verdict. The court held that the 1962 JOA was entitled to the protection of section 1803 because the evidence demonstrated that the Honolulu Advertiser was in "serious financial trouble" and that the Honolulu Advertiser's management had a "good faith belief" that joint action "was necessary in order to preserve the Advertiser's editorial staff as an editorial voice in the community separate and apart from that of the Star-Bulletin." [Id. at 1032](#).

In 1995, the Hawaii Legislature passed Act 243.<sup>2</sup> In section 1 of Act 243, the Hawaii legislature stated "that the original justification for the monopoly granted by the public in 1962 may no longer be true." 1995 Haw. Sess. Laws,

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 1803(a) of this title.

(b) The provisions of section 1803 of this title shall apply to the determination of any civil or criminal action pending in any district court of the United States [sic] on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

<sup>2</sup> **HN3** Act 243 § 2 provides in pertinent part:

§ -1 General definitions. As used in this chapter:

"Media" means any printed publication of general distribution in the state issued once or more per year that is a party to the Mutual Publishing Plan Agreement as executed on May 31, 1962, and any subsequent amendments.

§ -2 Disclosure. (a) The media shall submit to the attorney general, no later than thirty days after December 31 of the reporting year, an income tax return filed pursuant to section 235-4.

(b) Any media filing an annual income tax return pursuant to subsection (a) shall also furnish to the attorney general, in forms and at times that the attorney general deems necessary or expedient in the interest of the general public, special or supplementary reports covering information disclosed in subsection (a).

(c) Any report submitted pursuant to subsection (a) or (b) shall be a public record for the purposes of chapter 92F.

Act 243 § 1. The legislature also found "that it is in the public interest to review the income tax returns of organizations granted special operating powers to carry [\*\*6] out its responsibilities to the people of Hawaii." *Id.* Act 243 requires the Honolulu Advertiser and the Honolulu Star-Bulletin to submit their income tax returns to the attorney general within thirty days after December 31 of the reporting year. Act 243 § 2-2(a). The statute also requires the Honolulu Advertiser and the Honolulu Star-Bulletin to furnish any "special or supplementary reports" that the attorney general "deems necessary or expedient." Act 243 § 2-2(b). Act 243 makes this information a public record. Act 243 § 2-2(c). Once the attorney general compiles this information, he or she must "submit an annual report to the United States Department of Justice." Act 243 § 2-3.

[\*\*7] The Honolulu Advertiser, the Honolulu Star-Bulletin, and the HNA filed this action on August 3, 1995, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2200. In their complaint, the plaintiffs alleged that Act 243 was preempted by the NPA, violated the *First Amendment*, the *Equal Protection Clause*, the Due Process Clause, and was a bill of attainder. The newspapers moved for summary judgment on October 31, 1995 and the Hawaii Attorney General filed a cross-motion for summary judgment on November 9, 1995.

The district court granted the plaintiffs' motion for summary judgment on January 3, 1996. The court held that (1) the NPA preempted the State of Hawaii's attempt to regulate the JOA, (2) the plaintiffs presented a ripe *First Amendment* claim, (3) Act 243 violated the *First Amendment*, (4) Act 243 violated the Due Process Clause,<sup>3</sup> and (5) Act 243 was not a bill of attainder. Judgment was entered on January 11, 1996. Attorney General Bronster filed a timely notice of appeal on February 6, 1996.

## [\*\*8] II.

**HN4** [↑] The ripeness doctrine precludes federal courts from exercising their jurisdiction over an action that is filed before a real dispute exists between the parties. *Poe v. Ullman*, 367 U.S. 497, 507, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961); *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89, 91 L. Ed. 754, 67 S. Ct. 556 (1947). Attorney General Bronster argues that the district court erred in concluding that the newspapers presented a ripe *First Amendment* claim. In their briefs before this court, however, neither party addressed whether the newspapers' preemption claim is ripe for review. Nevertheless, it is our duty to consider *sua sponte* whether the preemption issue is ripe, because "the question of ripeness goes to our subject matter jurisdiction to hear the case." *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375, 377 (9th Cir.), cert. denied, 488 U.S. 851, 102 L. Ed. 2d 106, 109 S. Ct. 134 (1988); see also *Southern Pacific v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990), cert. denied, 502 U.S. 943, 116 L. Ed. 2d 333, 112 S. Ct. 382 (1991) (holding that the ripeness issue "may be raised *sua sponte* if not raised by the parties"). **HN5** [↑] In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), the Supreme Court held that a claim's ripeness depended on [\*\*9] "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id. at 149*. Under the two-part test in *Abbott*, the newspapers' preemption claim is ripe for review.

First, the newspapers' preemption challenge is fit for judicial decision. "Legal questions that require little factual development are more likely to be ripe." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1434 (9th Cir. 1996). In *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (9th Cir. 1993), we held that the issue of whether a federal law "occupies the field" and thereby preempts state law is 'purely legal.'" *Id. at 454*. We are presented with a similar situation in this matter. We can decide the newspapers' claim without further factual development.

Second, the threat of hardship to the newspapers if the court withheld consideration in this situation is both "'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 75 L. Ed. 2d 675,

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§ -3 Annual report. The attorney general shall submit an annual report to the United States Department of Justice with regard to the information provided in section -2.

<sup>3</sup> Although the district court's order declares that Act 243 violates the Due Process Clause, Judge King analyzed the law under the *Equal Protection Clause*. Plaintiffs did not address the Due Process Clause in their brief before this court.

103 S. Ct. 1660 (1983) (citations omitted). In fact, "the inevitability of the operation of [the] statute against certain individuals is patent." Regional Rail Reorganization Act Cases, I\*\*101 419 U.S. 102, 143, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974). There can be no doubt that the Star-Bulletin and the Advertiser will violate the law if they do not comply with the Attorney General's request for financial information "no later than thirty days after December 31 of the reporting year." Act 243 § 2-2(a). Attorney General Bronster's argument in this matter clearly indicates her intention to enforce Act [\*747] 243 against the newspapers. Thus, the facts presented in this matter are clearly distinguishable from the circumstances in *Poe*. In that case, the Supreme Court determined that a constitutional challenge to Connecticut's contraceptives regulations was not ripe because there was no evidence that state officials intended to prosecute violators. Poe, 367 U.S. at 507-08. Here, the threat of enforcement is imminent.

In addition, compliance itself will cause a significant injury. Hawaii law makes it a crime for a public official to disclose a tax return or information related to that return. Haw. Rev. Stat. § 235-116 (1995).<sup>4</sup> As noted above, however, Act 243 provides that a newspaper's tax returns and accompanying financial data shall be a public record and directs the state attorney general to submit [\*\*\*11] the information in an annual report to the United States Department of Justice. Act 243 §§ 2-2(c), 2-3. As a result, any interested party, including business competitors, can gain access to information concerning the newspapers' financial status which, but for Act 243, would be confidential.

[\*\*12] The newspapers' failure to comply with Act 243 does not affect our conclusion that there is a ripe preemption claim. In *Sayles*, we held that a party presented a ripe preemption claim even though it had not completed a state permit process. 985 F.2d at 453-54. In that case, the federal government granted Sayles Hydro Associates a license under the Federal Power Act to construct and operate a hydroelectric power plant. The California State Water Resources Control Board, however, would not issue a permit to Sayles allowing it to begin its operation. Instead, the state requested "a shifting, expanding range of reports and studies" regarding the project's environmental impacts. Id. at 453. Sayles refused to conduct additional studies and challenged the law on federal preemption grounds. We concluded that Sayles's preemption claim was ripe even though Sayles had not fully complied with the state requirements. Id. at 454. We held that Sayles's preemption claim was fit for judicial decision because it was a "purely legal" question. *Id.* We also determined that withholding judicial consideration of the state requirements would impose a sufficient hardship on Sayles because of [\*\*\*13] the costs and uncertainty resulting from "undue process." *Id.* The hardship did not result from the state's denial of a permit. Rather, we concluded that "the hardship is the process itself." *Id.*

Our reasoning in *Sayles* applies with equal force to the circumstances present in this case. If the newspapers must comply with Act 243 before they can mount a constitutional challenge, they will have already suffered an irreparable injury from the "undue process" of having to produce the requested information and the public disclosure of their financial records.

There is no doubt that Hawaii's Attorney General will seek to enforce the requirements of Act 243 against the Hawaii Newspaper Agency. Not only will this law saddle the plaintiffs with a burden applicable solely to the Honolulu Advertiser and the Honolulu Star-Bulletin, it will also force them to reveal confidential financial information to the public. Due to the threat of imminent enforcement and the serious injury that would flow from compliance, the

<sup>4</sup> HN6 [↑] Section 235-116 provides:

All tax returns and return information required to be filed under this chapter shall be confidential, including any copy of any portion of a federal return which may be attached to a state tax return, or any information reflected in the copy of such federal return. It shall be unlawful for any person, or any officer or employee of the State to make known intentionally information imparted by any income tax return or estimate made under sections 235-92, 235-94, 235-95, and 235-97 or wilfully to permit any income tax return or estimate so made or copy thereof to be seen or examined by any person other than the taxpayer or the taxpayer's authorized agent, persons duly authorized by the State in connection with their official duties, the Multistate Tax Commission or the authorized representative thereof, except as provided by law, and any offense against the foregoing provisions shall be punished by a fine not exceeding \$ 500 or by imprisonment not exceeding one year, or both.

newspapers' only two options were to bring this action or break the law. These circumstances demonstrate that the plaintiffs' preemption claim is ripe.

### [\*748] III.

**HN7** Under the [\*\*14] *Supremacy Clause of the United States Constitution*, federal law is the supreme law of the land. *U.S. Const. art. VI, cl. 2*. A state law is preempted when (1) Congress has expressly superseded state law, (2) Congress has regulated a field so extensively that a reasonable person would infer that Congress intended to supersede state law, and (3) when there is a conflict between federal and state laws. See *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). In passing the NPA, Congress did not expressly preempt state law. As we explain below, we agree with the district court that Act 243 violated the *Supremacy Clause* because Congress preempted the field in enacting the NPA. We review *de novo* a district court's application of the doctrine of preemption. *Inland Empire Chapter of Associated Gen. Contractors v. Dear*, 77 F.3d 296, 299 (9th Cir. 1996).

We must decide whether Congress intended to preempt any state laws regulating JOAs. Attorney General Bronster argues that "the scheme of federal regulation under the NPA is not so pervasive as to make reasonable the inference that Congress left no room for supplemental regulation." Defendant-Appellant's Opening [\*\*15] Brief at 11. Rather, she contends that the NPA merely preempts state laws that directly remove or modify the newspapers' antitrust immunity. The newspapers' maintain that the NPA is a "complete strategy for validating newspaper joint operating agreements." Appellees' Brief at 16. Accordingly, the newspapers assert that the NPA precludes all state attempts to regulate newspapers due to their involvement in a JOA. To determine the preemptive effect, if any, of the NPA, we must look to congressional intent. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985).

Three factors illustrate Congress's intention to preempt any state regulation that is based on a newspaper's involvement in a JOA. First, in exempting participants to a JOA from the reach of antitrust laws, Congress adopted a comprehensive solution to the problems facing newspapers struggling to survive economically. The NPA sets forth each of the requirements that JOA participants must satisfy in order to receive antitrust immunity. *15 U.S.C. § 1803 (a)-(b)*. Once a JOA application satisfies the threshold requirements, "nothing more is required; nothing in the statute or its history indicates otherwise." Committee for [\*\*16] an *Independent P-I v. Smith*, 549 F. Supp. 985, 994 (W.D. Wash. 1982), aff'd in part and rev'd in part, *704 F.2d 467* (9th Cir.), cert. denied, 464 U.S. 892, 104 S. Ct. 236, 78 L. Ed. 2d 228 (1983). The NPA contains no temporal limitation. The NPA does not require that JOA participants disclose their financial information, or authorize the Attorney General of the United States to oversee participants' finances in order to determine whether a JOA is still necessary. The only post-formation requirement in the NPA is that parties to pre-existing JOAs must submit to the Department of Justice the terms of any agreement that would renew or amend their arrangement. *15 U.S.C. § 1803(a)*. The NPA's language makes clear that the nature of a newspaper's financial status following formation of a JOA is irrelevant to a JOA's antitrust immunity. The text of the NPA is simple and direct, yet pervasive. The statute's plain language leaves nothing for states to regulate. By exempting JOAs from any additional requirements that would limit a newspaper's antitrust immunity for entering into a JOA, we can infer that Congress did not intend that a state could pass laws imposing separate conditions on newspapers that receive antitrust [\*\*17] immunity because they have entered into a JOA.

Second, Congress found that participation in JOAs without antitrust regulation was necessary to ensure that there was more than one newspaper in a community. Congress recognized that it had become nearly impossible for more than one newspaper to survive in any major market due to a variety of economic factors unique to the newspaper industry. See S. Rep. No. 535 at 4, 91st Cong., 1st Sess. (1969); Committee for an *Independent P-I v. Hearst Corp.*, 704 F.2d 467, 473-74 (9th Cir.), cert. denied, 464 U.S. 892, 78 L. Ed. 2d 228, 104 S. Ct. 236 (1983). [\*749] These unique economic conditions "necessitated allowing newspapers to enter joint agreements before they reached the point of distress required by *Citizen Publishing*." *704 F.2d 467 at 474*. Congress chose this strategy because it had proven to be effective in the past at maintaining separate editorial voices in markets unable to support more than one paper. H.R. Rep. No. 91-1193 at 3, reprinted in 1970 U.S.C.C.A.N. at 3548. A state's imposition of burdensome conditions on JOA participants, including requiring disclosure of financial records to

competitors, would frustrate Congress's intent to ensure the economic [\*\*18] survival of newspapers and guarantee the expression of conflicting views on social and political issues. Congress's comprehensive solution to the unique economic problems which threatened many newspapers' survival demonstrates that Congress intended JOAs to remain unregulated even after participating newspapers again operate profitably.

Finally, Congress further indicated an intent to preempt supplemental state regulation of JOAs by expressly enumerating the types of state laws that can be applied to JOAs. [Section 1803\(c\)](#) withholds antitrust immunity from "predatory pricing, any predatory practice, or any other conduct" that would be unlawful if committed by a "single entity." Thus, except for laws controlling these prohibited activities, a state may not enact statutes that regulate a newspaper solely because of its participation in a JOA. Given the NPA's comprehensive scheme, a reasonable person could infer that Congress intended that state regulation of JOAs be limited to the exemptions listed in [section 1803\(c\)](#).<sup>5</sup>

[\*\*19] We hold that [HN8](#)<sup>↑</sup> Congress has preempted the field of regulations that are based on a newspaper's involvement in a JOA. Congress has set forth all the conditions governing their formation and qualification for antitrust immunity. Both the statute's language and its legislative history indicate that Congress intended its regulation of newspapers in JOAs to be exclusive. Congress expressly reserved a field of permissible state regulation in [section 1803\(c\)](#). The NPA's language and structure precludes states from directly or indirectly regulating a newspaper's participation in a JOA unless the conduct of a newspaper comes within these specific exceptions.

We next consider whether Act 243 falls within the preempted field. [HN9](#)<sup>↑</sup> When the federal government completely occupies a given field or an identifiable portion of it, . . . the test of preemption is whether 'the matter on which the state asserts the right to act is in anyway regulated by the Federal Act.' [Pacific Gas & Elec. Co. v. State Energy Comm'n](#), 461 U.S. 190, 212-13, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983) (quoting [Rice v. Santa Fe Elevator Corp.](#), 331 U.S. 218, 236, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)). In her opening brief, Attorney General Bronster characterizes Act 243 as a "supplemental [\*\*20] regulation" to the NPA. Defendant-Appellant's Opening Brief at 11. Although Act 243 does not expressly remove or modify the newspapers' antitrust immunity, it requires the Star-Bulletin and the Advertiser to release their financial records to the public solely because they are operating under a JOA. Act 243 §§ 2-1, 2-2(a)-(c). Thus, Act 243 is unquestionably a state regulation of newspapers because they have entered into a JOA. Because Act 243 thus intrudes upon a field preempted by Congress, the Act is preempted by the NPA.

Our conclusion that the NPA preempts Act 243 is strengthened by the fact that Congress expressly considered Hawaii's primary interest in protecting the public from a JOA's harmful anticompetitive effects. See [Sayles, 985 F.2d at 456](#) (conclusion of field preemption "strengthened" where federal government addressed and took steps to protect state interests). Although Congress knew that the NPA would affect competition, "it believed those possibly harmful effects were outweighed by other considerations and sufficiently [\*750] alleviated by the requirements of the Act." [Independent P-I, 704 F.2d at 482](#). [Section 1803\(c\)](#) reflects Congress's consideration of concerns [\*\*21] such as those expressed in Act 243. This section's purpose was "to protect the competitive position of newspapers which share the market with a joint operating arrangement." S. Rep. No. 535 at 5, quoted in [Independent P-I, 704 F.2d at 481](#). Having considered the NPA's potentially harmful effects, Congress made a rational policy choice in favor of "the more important objective of preserving separate editorial voices." H.R. Rep. No. 91-1193 at 4, reprinted in 1970 U.S.C.C.A.N. at 3549 (quoting remarks of Rep. Matsunaga). The field preemption doctrine prevents Hawaii from interfering with this congressional policy through legislative regulation of a newspaper's involvement in a JOA.

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<sup>5</sup> Hawaii correctly notes that the NPA does not preempt generally applicable laws that may have a negative financial impact on parties to a JOA, such as corporate taxes, utility rates, or minimum wage laws. Appellant's Opening Brief at 19. Act 243, however, is not a generally applicable law. A determination that Act 243 is preempted will have no effect on the application of general laws to the newspapers.

Attorney General Bronster argues that the district court's decision will prevent states from gathering information that can be used to lobby Congress to make changes in the NPA or remove the antitrust exemption in specific markets. Under the NPA, however, Congress does not need special state laws to assist it in discovering whether the NPA should be amended to exclude newspapers that are financially sound and no longer need antitrust immunity. Prior to the enactment of the NPA, Congress collected financial **[\*\*22]** information from participants in pre-existing JOAs in part to assess their financial condition when they entered into the JOA. H.R. Rep. No. 91-1193 at 8-9, *reprinted in* 1970 U.S.C.C.A.N at 3552-53. Newspapers who now seek approval of a new JOA must submit relevant financial data to the Attorney General of the United States. If Congress desires more information, it can order the newspapers to disclose it.

Hawaii is free to request Congress to order newspapers to submit financial data to determine whether the NPA should be amended or repealed. Since Congress has preempted any attempt by a state to regulate a newspaper's participation in a JOA, Hawaii cannot impose discriminatory burdens on such newspapers for the purpose of gathering information for legislative reform by Congress.

Because field preemption alone is a sufficient basis to hold that Act 243 is invalid, we do not consider the validity of the newspapers' remaining constitutional claims.

AFFIRMED

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## Columbia Steel Casting Co. v. Portland GE

United States Court of Appeals for the Ninth Circuit

May 3, 1995, Argued, Submitted, Portland, Oregon ; December 27, 1996, Filed

No. 93-35902, No. 93-35958

**Reporter**

111 F.3d 1427 \*; 1996 U.S. App. LEXIS 39499 \*\*; 97 Cal. Daily Op. Service 2503; 97 Daily Journal DAR 4457

COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellee, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation, Defendant-Appellant. COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff-Appellant, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; PUBLIC UTILITY COMMISSION OF THE STATE OF OREGON, Defendants-Appellees.

**Subsequent History:** [\[\\*\\*1\]](#) As Amended on Denial of Rehearing April 3, 1997.

**Prior History:** Opinion Withdrawn December 27, 1996. Appeals from the United States District Court for the District of Oregon. D.C. No. CV-90-00592-HJF. D.C. No. CV-90-00524-HJF. Helen J. Frye, District Judge, Presiding.

Original Opinion Previously Reported at: [1996 U.S. App. LEXIS 33863](#).

**Disposition:** Partial summary judgment holding PGE liable to Columbia Steel under [§ 1](#) of the Sherman Act AFFIRMED. Partial summary judgment awarding Columbia Steel \$ 508,425 in treble damages VACATED and the case is remanded. Columbia Steel's motion for attorney's fees on appeal pursuant to [15 U.S.C. § 15](#) GRANTED.

## Core Terms

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territories, Steel, customers, immunity, state-action, district court, electric, approving, facilities, allocated, plant, articulated, antitrust, damages, monopolies, Sherman Act, rates, authorize, displace, argues, foreseeability, regulation, ordinance, summary judgment, exchange of property, state policy, transferred, Parcel, antitrust immunity, foreseeable result

## LexisNexis® Headnotes

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Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

### [HN1](#) Regulated Industries, Energy & Utilities

[Or. Rev. Stat. § 758.400\(1\)](#) defines "allocated territory" as an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory; § 758.410(1) permits any person providing a utility service to contract with any other person providing a similar utility service for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by

111 F.3d 1427, \*1427 (1996 U.S. App. LEXIS 39499, \*\*1

which of said contracting parties; [§ 758.425](#) authorizes the Oregon Public Utility Commission to approve the contract as filed and provides that if the commission approves the contract, it shall be deemed to be valid and enforceable; and [§ 758.450\(2\)](#) provides that no other person shall offer, construct or extend utility service in or into an allocated territory.

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

## [HN2](#) Electric Power Industry, State Regulation

See [Or. Rev. Stat. § 757.480](#).

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

## [HN3](#) Monopolies & Monopolization, Conspiracy to Monopolize

An agreement among competitors to allocate territories is a per se violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

## [HN4](#) Exemptions & Immunities, Parker State Action Doctrine

In [antitrust law](#), the state-action doctrine cloaks anticompetitive conduct with antitrust immunity only if the state's intent to displace competition with regulation is clearly articulated and affirmatively expressed as state policy. The appropriate test is a rigorous one that ensures that private parties can claim state-action immunity from Sherman Act, [15 U.S.C.S. §1 et seq.](#), liability only when their anticompetitive acts are truly the product of state regulation. It guarantees that the private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests, and limits the spread of an immunity that is disfavored, much as are repeals of the antitrust laws by implication, because of Congress's overarching and fundamental policies protecting competition.

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

## [HN5](#) Electric Power Industry, State Regulation

See [Or. Rev. Stat. § 758.400\(1\)](#).

111 F.3d 1427, \*1427 (1996 U.S. App. LEXIS 39499, \*\*1

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

#### **HN6** Exemptions & Immunities, Parker State Action Doctrine

In antitrust litigation, state action immunity only applies if the state actively supervises the challenged anticompetitive conduct.

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

Energy & Utilities Law > Antitrust Issues > General Overview

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

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

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

#### **HN7** Energy & Utilities, State Regulation

If the defendant in an antitrust case engages in anticompetitive conduct, presumably because of a territorial agreement, but the area in question was never approved by the Oregon Public Utility Commission, the defendant's action does not merit state action immunity because of the lack of active state supervision.

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

Energy & Utilities Law > Antitrust Issues > General Overview

Governments > Public Improvements > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

#### **HN8** Exemptions & Immunities, Parker State Action Doctrine

The two elements in the federal test for determining whether it is a state's intent to displace competition with regulation - i.e, whether the state's policy is clearly articulated and affirmatively expressed - are both directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy.

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

#### **HN9** Regulators, Public Utility Commissions

See [Or. Rev. Stat. § 758.460](#).

Energy & Utilities Law > Utility Companies > Contracts for Service

111 F.3d 1427, \*1427\* 1996 U.S. App. LEXIS 39499, \*\*1

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

#### [\*\*HN10\*\*](#) [blue icon] Utility Companies, Contracts for Service

Or. Rev. Stat. § 758.410 permits utilities to contract with each other for the purpose of allocating territories and customers between the parties.

Energy & Utilities Law > Utility Companies > Contracts for Service

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

#### [\*\*HN11\*\*](#) [blue icon] Utility Companies, Contracts for Service

See [Or. Rev. Stat. § 758.425](#).

Governments > State & Territorial Governments > Claims By & Against

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Public Health & Welfare Law > Healthcare > General Overview

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

#### [\*\*HN12\*\*](#) [blue icon] State & Territorial Governments, Claims By & Against

Actions otherwise immune from antitrust actions should not forfeit that protection merely because a state's attempted exercise of its power is imperfect in execution under its own law.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Civil Procedure > Appeals > Appellate Briefs

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

#### [\*\*HN13\*\*](#) [blue icon] Antitrust & Trade Law, Exemptions & Immunities

The Oregon Public Utility Commission can not confer state-action immunity by forming an intent that is not expressed forthrightly and clearly.

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

#### [\*\*HN14\*\*](#) [blue icon] Exemptions & Immunities, Parker State Action Doctrine

Mere state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Courts > Judicial Precedent

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

## [\*\*HN15\*\*](#) [L] Exemptions & Immunities, Parker State Action Doctrine

In antitrust litigation, the availability of the defense of state action immunity depends upon the satisfaction of the objective standards set forth by United States Supreme Court precedent and the authorities which have interpreted that precedent.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

## [\*\*HN16\*\*](#) [L] Estoppel, Collateral Estoppel

Oregon law provides that one tribunal may give preclusive effect to the prior determination of an issue by another tribunal only if the issue in the two proceedings is identical.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

## [\*\*HN17\*\*](#) [L] Estoppel, Collateral Estoppel

Oregon law provides that the one tribunal may give preclusive effect to an earlier decision by another tribunal only if the party sought to be precluded has had a full and fair opportunity to be heard on that issue while before the first tribunal.

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

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

## [\*\*HN18\*\*](#) [L] Exemptions & Immunities, Parker State Action Doctrine

In antitrust litigation, state-action immunity is not an issue of fact. It cannot be decided simply by ferreting out extrinsic evidence in an effort to ascertain the subjective intent of the state. The issue of state-action immunity must be decided by applying the rigorous test of whether the state clearly articulated and affirmatively expressed its intent to displace competition with regulation as a matter of state policy.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

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

## [\*\*HN19\*\*](#) [L] Preclusion of Judgments, Full Faith & Credit

111 F.3d 1427, \*1427\* 1996 U.S. App. LEXIS 39499, \*\*1

It is fundamental that an order or judgment is not entitled to full faith and credit if the issuing tribunal had no subject matter jurisdiction over the matter before it.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

#### **HN20** [blue icon] **Reviewability of Lower Court Decisions, Preservation for Review**

An appellate court may review an issue that has been raised for the first time on appeal under certain narrow circumstances, including when the issue is purely one of law.

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

#### **HN21** [blue icon] **Exemptions & Immunities, Parker State Action Doctrine**

A state must act if antitrust immunity is to exist.

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

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

#### **HN22** [blue icon] **Per Se Rule & Rule of Reason, Per Se Violations**

In the absence of state-action immunity, an agreement between two power companies to divide the a market for electricity constitutes a per se violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Revival

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

#### **HN23** [blue icon] **Sherman Act, Claims**

111 F.3d 1427, \*1427\* 1996 U.S. App. LEXIS 39499, \*\*1

Even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

#### **HN24[] Regulated Industries, Energy & Utilities**

The regulatory justification defense provides that there is no antitrust liability when a defendant reasonably concludes that its actions are necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

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

#### **HN25[] Defenses, Demurrers & Objections, Affirmative Defenses**

The business justification defense provides that a public utility is not liable for using high-powered transmission lines to the exclusion of competitors in order to keep rates low.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

#### **HN26[] Antitrust & Trade Law, Sherman Act**

The Sherman Act, 15 U.S.C.S. § 1 et seq., does not prohibit competitors from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

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

#### **HN27[] Exemptions & Immunities, Noerr-Pennington Doctrine**

Applying to an administrative agency for approval of an anticompetitive contract is not lobbying activity within the meaning of federal precedent.

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

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

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

## **HN28** [L] **Monopolies & Monopolization, Conspiracy to Monopolize**

If a plaintiff can establish the existence of a conspiracy in violation of the antitrust laws and that certain defendants were a part of such a conspiracy, those defendants will be liable for the acts of all members of the conspiracy in furtherance of the conspiracy, regardless of the nature of each defendant's own actions.

**Counsel:** Allan M. Garten and Barbee B. Lyon, Tonkon, Torp, Galen, Marmaduke & Booth, Portland, Oregon, for Portland General Electric Company.

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**Judges:** Before: James R. Browning, Thomas [\*\*2] M. Reavley, \* and William A. Norris, Circuit Judges. Opinion by Judge Norris.

**Opinion by:** NORRIS

## **Opinion**

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### **[\*1432] OPINION**

NORRIS, Circuit Judge:

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\* The Honorable Thomas M. Reavley, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

## C. The Noerr-Pennington Doctrine

## D. The Filed Rate Doctrine

## IV. Damages

## V. Columbia Steel's Cross-Appeal on Damages

## VI. Conclusion

This appeal arises out of an antitrust action that Columbia Steel Casting Co., a large consumer of electric power in Portland, Oregon, brought against two electric utilities, Portland General Electric (PGE) and Pacific Power & Light (PP&L), charging them with dividing the city of Portland into exclusive service territories in violation of the Sherman Act, [15 U.S.C. §§ 1-2](#).<sup>1</sup> PGE raised a state-action immunity defense on the basis of a 1972 order of the [\*\*3] Oregon Public Utility Commission which, PGE argued, approved a division of the Portland market into exclusive service territories. See [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#). The district court rejected this state-action immunity defense and awarded summary judgment to Columbia Steel. PGE appeals the summary judgment in favor of Columbia Steel and the denial of its own motion for summary judgment. Columbia Steel cross-appeals the amount of its damage [\*1433] award. We affirm the summary judgment in favor of Columbia Steel on PGE's antitrust liability and vacate and remand the damage award for further proceedings.

## I. Facts and Procedural History

The facts are undisputed. Until 1972, PGE and PP&L competed for customers throughout Portland. This competition resulted in the duplication of transmission lines and poles, substations, and transformers throughout the city. For many years the two utilities attempted to gain regulatory approval for a division [\*\*4] of the Portland market into exclusive service territories. In 1962, for example, PGE applied to Oregon's Public Utilities Commission (OPUC) for an allocation of an exclusive service territory in the city of Portland.<sup>2</sup> These efforts to secure exclusive service territories within Portland were unsuccessful, however, in part because of opposition from the city. Portland had a longstanding policy of encouraging competition among utilities, and the city charter provided that "no exclusive franchises shall be granted." Portland City Charter, § 10-206. See, e.g., Portland, Or., Resolution 28879 (1962) (opposing PGE's 1962 application to the OPUC for an "allocation of exclusive areas for electric service within . . . Portland").

[\*\*5] In 1972, PGE and PP&L jointly submitted to the city of Portland a plan to eliminate competition between them by dividing the city into exclusive service territories. This plan provided, *inter alia*, that "subject to the necessary regulatory approvals . . . it is proposed that Parcels A & B [two defined areas within the city of Portland] be served exclusively by PP&L," and that "subject to the necessary approvals, it is proposed that Parcel C [a defined area within the city of Portland] . . . be exclusively served by PGE." CR 269, exh. 47 at 2-3.

The Portland City Council disapproved the utilities' 1972 plan to displace competition with territorial monopolies in Portland. The City Council agreed, however, that the duplication of facilities should be eliminated for aesthetic, safety, and economic reasons. In the ordinance it passed, the City Council declared, "both [PGE and PP&L] operate under non-exclusive franchises and . . . the obligation to supply properties within the City must remain binding upon both companies." Portland, Or., Ordinance 134416 (Apr. 26, 1972). The only action that the ordinance approved was "the sale, transfer and exchange of plant and property between [\*\*6] Portland General Electric Company and Pacific Power & Light Company."<sup>3</sup> *Id.*

<sup>1</sup> Only PGE is a party to this appeal.

<sup>2</sup> In 1961, the Oregon legislature enacted a statute vesting in the OPUC exclusive authority to approve the creation of exclusive service territories in order to promote "the elimination and future prevention of duplication of utility facilities." [Or. Rev. Stat. § 758.405](#). The statute authorizes the OPUC to approve contracts between competitors that divide markets into exclusive service territories. [Or. Rev. Stat. §§ 758.410 - 758.425, 758.450](#).

<sup>3</sup> The Ordinance states, in part:

[\*\*7] After securing the City Council's approval of the exchange of utility properties, but not the establishment of exclusive service territories, PGE and PP&L entered into an agreement, dated July 18, 1972 (the "1972 Agreement"), which they submitted to the OPUC for approval. In contrast to the plan submitted to the Portland City Council, the 1972 Agreement said nothing about exclusive service territories in Portland. The "whereas" [\*1434] clauses of the 1972 Agreement recited that one of its purposes was to comply with the terms of the Portland ordinance, which had approved an exchange of plant and property, but had disapproved exclusive service territories. The 1972 Agreement recited:

WHEREAS, [PGE] and [PP&L] wish to provide for the elimination of duplicating electric facilities in [the city of Portland]; and

WHEREAS, the City of Portland, by Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972, consented to the exchange by [PGE] and [PP&L] of certain properties located within the city;

NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed . . . .

1972 Agreement [\*\*8] at 1-2.

The 1972 Agreement used the following language to effect the exchange of facilities:

1. *Exchange of Facilities*

(a) [PP&L] shall transfer and convey to [PGE] and [PGE] shall acquire from [PP&L] all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by [PP&L] in . . . the area [in Portland] designated as Parcel C . . . .

(b) [PGE] shall transfer and convey to [PP&L] and [PP&L] shall acquire from [PGE] all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by [PGE] in the areas [in Portland] designated as Parcels A and B . . . .

1972 Agreement at 2-3.

The 1972 Agreement was approved by an order of the OPUC issued in December 1972. The 1972 Order provided, in relevant part:

The Commissioner's approval is needed prior to the sale, lease, assignment or other disposition of public [\*\*9] utility property pursuant to [ORS 757.480](#). . . .

On July 18, 1972, [PP&L] and [PGE] entered into an agreement whereby an exchange of property and utility facilities would be made between [PGE and PP&L] in the City of Portland . . . . This exchange . . . also involves the transfer of customers from one party to the other.

....

An Ordinance consenting to exchange of certain property within the City between [PGE] and [PP&L] on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.

The City of Portland ordains:

Section 1. The Council finds that both [PGE] and [PP&L] operate electric power systems which serve patrons within the City, that *both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies*; that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes . . . . ; that to reduce the visual impact of duplicating facilities, to promote safety, to promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rates for users within the City, an interchange of properties between the companies should be permitted as hereinafter set forth; . . . now, therefore, *the City does by this ordinance consent to the sale, transfer and exchange of plant and property between [PGE] and [PP&L] as follows . . . .*

Portland, Or., Ordinance 134416 (Apr. 26, 1972) (emphasis added).

ORDERED that [PP&L] may transfer to [PGE] all electric distribution plant . . . situated within or used for providing utility service within the boundaries of Parcel A . . . [and] Parcel B . . .

ORDERED that [PGE] may transfer to [PP&L] all electric distribution plant . . . used for providing utility service within the boundaries of [Parcel C] . . .

.....  
ORDERED that the manner and method of accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be provided by that agreement between the companies herein, dated July 18, 1972.

Pub. Util. Comm'n of Or., Order 72-970 (Dec. 15, 1972) (the "1972 Order").<sup>4</sup>

[\*\*10] In approving the exchange of property in the city of Portland, the OPUC did not cite any of the statutory provisions that give the OPUC its authority to approve contracts between [\*1435] utility companies allocating exclusive service territories. See Or. Rev. Stat., ch. 758 ("Utility . . . Territory Allocation . . .").<sup>5</sup> [\*\*11] Unlike the Portland City Council ordinance - which had expressly disapproved exclusive service territories - but like the 1972 Agreement, the 1972 Order said nothing about exclusive service territories in Portland. The OPUC cited as authority for its approval of the 1972 Agreement Chapter 757 of the Oregon Revised Statutes ("Utility Regulation Generally"), specifically [Or. Rev. Stat. § 757.480](#),<sup>6</sup> which gives the OPUC authority to approve the sale, lease, assignment or other disposition of public utility property.

<sup>4</sup>The only reference to customer accounts in the 1972 Agreement is in Section 7, which provides in relevant part:

#### 7. Transfer of Customer Accounts

The transfer of customer accounts between [PGE] and [PP&L] shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. . . .

There is no reference to customer accounts in [Section 1](#) of the 1972 Agreement, which provides for the exchange of facilities. In referring to the transfer of customers, Section 7 does not use the "shall transfer and convey" language used in [Section 1](#). Thus the language and structure of the 1972 Agreement, as well as the language of the 1972 Order quoted in the text, suggest that the transfer of customers was treated as a necessary incident to the exchange of facilities. For a further discussion of the transfer of customers, see *infra* pp. 17-19.

<sup>5</sup> [HN1↑](#) Chapter 758 of the Oregon Revised Statutes speaks of "allocated" territories and defines that term in a way that means exclusive service territories. [Section 758.400\(1\)](#) defines "allocated territory" as "an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory"). [Or. Rev. Stat. § 758.400\(1\)](#). [Section 758.410\(1\)](#) permits "any person providing a utility service [to] contract with any other person providing a similar utility service for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties." [Or. Rev. Stat. § 758.410\(1\)](#). [Section 758.425](#) authorizes the OPUC to approve the "contract as filed" and provides that "if the commission approves [the] contract . . . the contract shall be deemed to be valid and enforceable . . ." [Or. Rev. Stat. § 758.425](#). [Section 758.450\(2\)](#) provides that "no other person shall offer, construct or extend utility service in or into an allocated territory." [Or. Rev. Stat. § 758.450\(2\)](#).

<sup>6</sup> [Section 757.480](#) provides in pertinent part:

[HN2↑](#) (1) No public utility doing business in Oregon shall, without first obtaining the commission's approval of such transaction:

(a) Sell, lease, assign or otherwise dispose of the whole of the property of such public utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of \$ 10,000, or sell, lease, assign or otherwise dispose of any franchise, permit, or right to maintain and operate such public utility or public utility property, or perform any service as a public utility;

....

After the OPUC issued its 1972 Order, PGE and PP&L stopped competing with each other in Portland. Each utility served customers exclusively in the parcels in which it had acquired the electric distribution facilities of the other.

Columbia Steel operates a steel casting plant located [\*\*12] in the area which PGE began serving exclusively after the issuance of the 1972 Order. In 1987, Columbia Steel asked PP&L to service its plant because PP&L's rates were lower than PGE's. PP&L refused, citing the fact that the plant was located in the territory being served exclusively by PGE.

In 1989, Columbia Steel again asked PP&L to service its casting plant. This time, PP&L agreed and offered to enter into a supply contract with Columbia Steel. PGE objected, however, citing its 1972 Agreement with PP&L. PGE took the position that the 1972 Agreement gave it the exclusive right to service Columbia Steel's plant because it was located in the service territory allegedly "allocated" to PGE by the 1972 Agreement. Undeterred, Columbia Steel wrote PGE on May 30, 1990, asking it to "wheel" electricity generated by PP&L to the casting plant until PP&L could build a substation which would enable it to deliver power directly to the plant. PGE refused, reasserting that it had the exclusive right to service Columbia Steel's plant.

On June 19, 1990, Columbia Steel filed this antitrust action against PGE, PP&L, and the OPUC, on the theory that the division of Portland into exclusive service territories [\*\*13] violated the Sherman Act, [15 U.S.C. §§ 1-2](#).<sup>7</sup> The defendants raised the [\*1436] state-action doctrine as an affirmative defense, contending that the division of the Portland market was cloaked with antitrust immunity by the 1972 Order of the Oregon OPUC approving the 1972 Agreement.

In July 1990, PP&L entered into a contract with Columbia Steel and began servicing the casting plant in July 1991, when PGE began transmitting PP&L's power to the plant over PGE's power line. Columbia Steel later dismissed all its claims [\*\*14] against PP&L, which explains why PP&L is not a party to this appeal.

On July 3, 1991, the district court rejected PGE's state-action defense in an order granting Columbia Steel's motion for partial summary judgment. [Pacificorp v. Portland Gen. Elec. Co., 770 F. Supp. 562 \(D. Or. 1991\)](#). The district court held that the OPUC's 1972 Order did not articulate a state policy to allocate exclusive service territories in Portland as required by [California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#). [Pacificorp, 770 F. Supp. at 569-71](#). As the district court interpreted the OPUC's 1972 Order, it approved a one-time exchange of property and customer accounts, but not an allocation of exclusive service territories. [Id. at 570-71](#).

On February 4, 1993, the district court granted summary judgment for Columbia Steel on the remaining issues, ruling that PGE had violated [section 1](#) of the Sherman Act in agreeing with PP&L not to compete in the Portland market. The court awarded Columbia Steel \$ 508,425 in treble damages and \$ 901,671.62 in attorneys' fees and costs.

## II. State-Action Immunity

### A. The Midcal Clear Articulation [\*\*15] Requirement

**HN4** [↑] The state-action doctrine cloaks anticompetitive conduct with antitrust immunity only if the state's intent to displace competition with regulation is "clearly articulated and affirmatively expressed as state policy." [Midcal, 445](#)

(2) Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same is void.

[Or. Rev. Stat. § 757.480](#).

<sup>7</sup> **HN3** [↑] An agreement among competitors to allocate territories is a per se violation of [§ 1](#) of the Sherman Act. E.g., [Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50, 112 L. Ed. 2d 349, 111 S. Ct. 401 \(1990\)](#); [Otter Tail Power Co. v. United States, 410 U.S. 366, 378, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\)](#) (contracts that purported to restrict defendant's ability to wheel power "were 'in reality, territorial allocation schemes,'" and "were per se violations of the Sherman Act") (citation omitted).

[U.S. at 105](#) (upholding state wine pricing system because "the legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance"). The *Midcal* test is a "rigorous" one that "ensures that private parties [can] claim state-action immunity from Sherman Act liability only when their anticompetitive acts [are] truly the product of state regulation." [Patrick v. Burget, 486 U.S. 94, 100, 100 L. Ed. 2d 83, 108 S. Ct. 1658 \(1988\)](#). It guarantees that the "private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests," [id. at 101](#), and limits the spread of an immunity that is "disfavored, much as are repeals [of the antitrust laws] by implication," [FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636, 119 L. Ed. 2d 410, 112 S. Ct. 2169 \(1992\)](#), because of Congress's "overarching and fundamental policies" protecting competition, [City of Lafayette v. I\\*\\*161 Louisiana Power & Light Co., 435 U.S. 389, 398-99, 55 L. Ed. 2d 364, 98 S. Ct. 1123 \(1978\)](#). See also Phillip Areeda & Donald F. Turner, [Antitrust Law](#) Par. 214e (1978).

The district court acknowledged that the provisions of chapter 758 of the Oregon Revised Statutes, which authorize the OPUC to approve contracts between public utilities allocating exclusive service territories, "articulate the policy of the State of Oregon to remove market competition as the basis for determining the customers of the providers of electricity." [Pacificorp, 770 F. Supp. at 570](#). As the district court put it:

To the extent that a public utility provider obtains a lawful and valid contract for the allocation of territories and customers through the provisions of the territorial allocation statutes, [Or. Rev. Stat.] 758.400 to 758.475, that provider is immune from antitrust violations.

....

[Or. Rev. Stat.] 758.400(1) states that [HNS\[↑\]](#) "'allocated territory' means an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation [\[\\*17\]](#) of territory." In order to lawfully displace competition as the method of allocating customers for electric service in a particular area, utility companies must enter into [\[\\*1437\]](#) a contract which allocates service territories and designates service to customers, and the utility companies must make application to and receive an order from the OPUC approving and establishing the allocation of these territories. These requirements must be met in order to receive the immunity which is provided by the state statutory scheme from the federal antitrust laws.

*Id.*

Notwithstanding the clarity with which chapter 758 expresses a legislative policy of authorizing the OPUC to approve allocations of exclusive service territories, the district court rejected PGE's state-action immunity defense because the OPUC failed to exercise that authority in issuing the 1972 Order. [Id. at 571](#). The district court explained that the 1972 Agreement between PGE and PP&L, which the 1972 Order approved, did not establish exclusive service territories in the city of Portland. As the district court read the 1972 Agreement, PGE and PP&L had agreed "only to an exchange of facilities within the area relevant to this [\[\\*18\]](#) action." [Id. at 571](#). In other words, the state did not approve the displacement of competition with territorial monopolies in the Portland market with the clarity required by *Midcal*.

We agree with the district court that the 1972 Order fails to speak with sufficient clarity to satisfy the *Midcal* test.<sup>8</sup> Neither the 1972 Order nor the 1972 Agreement it approved says anything about exclusive service territories in the

<sup>8</sup> PGE argues that the clear articulation prong of the *Midcal* is satisfied because [Or. Rev. Stat. §§ 758.400 - 758.450](#) "encourage exactly the kind of division that PGE and PP&L carried out," and that whether or not the OPUC clearly authorized PGE's challenged conduct is relevant only to the active supervision prong of [Midcal, 445 U.S. at 105 HN6\[↑\]](#) (state action immunity only applies if the state actively supervises the challenged anticompetitive conduct). Resp. of Portland General Elec. Co. to Appellant's Pet. for Reh'g and Amicus Brief of United States, at 18. In making this argument, PGE relies on [Praxair, Inc. v. Florida Power & Light Co., 64 F.3d 609, 612 \(11th Cir. 1995\) HNT\[↑\]](#) ("If [the defendant engaged in anticompetitive conduct] presumably because of a territorial agreement, but the area in question was never approved by the Commission, the [defendant's] action would not merit state action immunity because of the lack of 'active state supervision.'") (quoting [FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636, 119 L. Ed. 2d 410, 112 S. Ct. 2169 \(1992\)](#)), cert. denied, 116 S. Ct. 1678, 134 L. Ed. 2d 781 (1996).

city of Portland. This omission becomes glaring when the language of the 1972 Order as it pertained to Portland is compared with the language of the same order as it pertained to the city of Rainier. Although the 1972 Order said nothing about exclusive service territories in approving the exchange of property in Portland, it expressly used such language in approving a provision of the 1972 Agreement which transferred to PGE an area within the city of Rainier that had previously been served exclusively by PP&L. See 1972 Order at 8 ("ORDERED that the application of [PP&L] to transfer certain of its *exclusively served area allocated to it and lying in and around Rainier, Oregon, to [PGE]* is approved.") (emphasis added). The contrast between the "transfer **[\*\*19]** and exchanging of utility property and facilities and customers" language used in the 1972 Order to describe the utilities' agreement with respect to the city of Portland, 1972 Order at 8, and the "exclusively served territory" language used in the 1972 Order to describe the utilities' agreement **[\*1438]** with respect to the Rainier area, *id.*, is striking.

**[\*\*20]** Like the part of the 1972 Order relating to Rainier, the ordinance passed by the Portland City Council earlier in 1972 also referred to exclusive service territories. It did so, however, in disapproving, not approving, the elimination of competition in favor of a territorial division between PGE and PP&L. The ordinance reminded the utilities that they "operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies." Portland, Or., Ordinance 134416 (1972).

Our second reason for agreeing with the district court is that in approving the exchange of property in Portland, the 1972 Order does not cite any of the statutory provisions governing the allocation of exclusive service territories. Rather than citing chapter 758 or any of its provisions, the OPUC cited a provision of chapter 757, the chapter governing "Utility Regulation Generally," specifically [Or. Rev. Stat. § 757.480](#), which authorizes the approval of exchanges of utility facilities. We are struck by the precision and care with which the OPUC cited various statutory provisions in issuing the 1972 Order. As authority for approving the transfer to PGE **[\*\*21]** of the exclusively served territory in Rainier previously allocated to PP&L, the OPUC cited the statutory provision governing transfers of previously allocated service territories ([Or. Rev. Stat. § 758.460](#)<sup>9</sup>). It did not cite any section of chapter 758 in approving the provisions of the 1972 Agreement relating to Portland.<sup>10</sup> As authority for approving the exchange of facilities in Portland, the OPUC cited only the statutory provision governing transfers of utility facilities ([Or. Rev. Stat. § 757.480](#)).

*Praxair* does not help PGE. As the Court explained in *Ticor*, the case on which *Praxair* relies, **HN8**↑ "Midcal's two elements . . . [are both] directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636. *Praxair* is nothing more than a fact specific application of the *Midcal* test. The anticompetitive conduct had been authorized by a Florida Public Service Commission order approving an allocation of service territories, and the Eleventh Circuit merely held that the order was intended to include a particular county in the exclusive service territories created. See *Praxair*, 64 F.3d at 613. Since the Oregon statute speaks solely of authorizing the OPUC to approve exclusive service territories, the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct. It follows, therefore, that we must look to the decisions of the OPUC to determine whether PGE's conduct was part of a clearly articulated state policy. Cf. *Ticor*, 504 U.S. at 636-37 (first prong of *Midcal* test intended to ensure state has not acted through inadvertence).

<sup>9</sup> [Section 758.460](#) provides in relevant part:

**HN9**↑ (1) The rights acquired by an allocation of territory may only be assigned or transferred with the approval of the commission after a finding that such assignment or transfer is not contrary to the public interest.

[Or. Rev. Stat. § 758.460](#).

<sup>10</sup> In particular, there is no reference in the 1972 Order to [Or. Rev. Stat. § 758.410](#), **HN10**↑ which permits utilities to contract with each other "for the purpose of allocating territories and customers between the parties." Nor is there any reference to [§ 758.425](#), which gives the OPUC its authority to approve such contracts, even though an exclusive service territory can be established only **HN11**↑ "by a contract between persons furnishing a similar utility service and approved by the commission or . . . by an order of the commission approving an application for the allocation of territory." [Or. Rev. Stat. § 758.400\(1\)](#) (defining "allocated territory").

[\*\*22] In sum, the OPUC did not "forthrightly state[]" a policy of the state of Oregon that was "clear in its purpose" to displace competition in the Portland market with territorial monopolies.<sup>11</sup> *Midcal, 445 U.S. at 105.*

The OPUC argues that, despite the failure of the 1972 Order to say anything about exclusive service territories in the city of Portland, the Order nonetheless immunized the division of the Portland market because the "statutory import" [\*\*23] of the 1972 Order was necessarily an allocation of service territory in the City of Portland as between PGE and PP&L." Opening Brief of Pub. Util. Comm'n of Or. at 9. The OPUC asserts that the 1972 Agreement "effectively" allocated exclusive service territories because "exchanging customers is logically the only way to reallocate established service territory into exclusive zones." *Id.* at 9-10. The OPUC adds that "the only way that the OPUC could lawfully have approved the transfer of customers between existing utilities was under the authority of the territorial allocation statutes." *Id.* at 10. See also Resp. of Portland General Elec. Co. to Appellant's Pet. for Reh'g and Amicus Brief of United States, at 7 ("The allocation statutes speak of the allocation of 'territories and customers.' The 1972 Agreement and the 1972 Order explicitly allocate *customers*, whether they explicitly allocate [\*1439] territories or not.") (citation omitted) (emphasis in original).

In response, Columbia Steel argues that nothing in the relevant statutory provisions rules out a one-time exchange of customers as an incident of an exchange of facilities without the establishment of permanent territorial [\*\*24] monopolies. According to Columbia Steel, such a one-time exchange of customers is a practical consequence of an exchange of facilities:

When, as in this case, a utility sells the power line that distributes electricity directly to a customer, it makes sense that the account of the customer served by that line would be transferred to the new owner of the line. Thus, the transfer of customer accounts was only an incident of the transfer of utility property. It is the practical consequence of a transfer of facilities, but it is not the perpetual grant of monopoly power. As a practical matter, unless another source of electricity is available, the customer will take service from the utility that owns the facilities connected to that customer's premises. But the utility serves that customer because it is practical to do so, not because the utility has an exclusive right to serve that customer.

Pet. for Reh'g, at 13-14.

Columbia Steel's argument has considerable force. It is buttressed by the fact that PP&L was able to take a good customer away from PGE simply by building a substation in PGE's "territory" to transmit power to Columbia Steel's plant at rates that were more [\*\*25] competitive than PGE's. Thus, although the transfer of facilities, and the transfer of customers incidental thereto, gave each utility a temporary competitive advantage, it did not immunize them from competition forevermore. That PGE's advantage proved to be transitory is not surprising given the competitive pressures that technology and deregulation have been exerting on utility markets where monopolies have traditionally reigned.

In any case, we need not resolve the dispute over whether, as the OPUC argues, an exchange of customer accounts is, as a practical matter, the factual equivalent of an allocation of exclusive service territories. Even if this were the case, it would merely be evidence that might tend to support a permissive inference that the OPUC intended to approve a displacement of competition in Portland with monopolies, and any such inference could not transform the 1972 Order into the forthright and clear statement that it takes to satisfy *Midcal's* stringent requirements.

PGE and the OPUC also argue that the OPUC's failure to cite any provision of chapter 758 as authority for the 1972 Order as it pertains to Portland renders the 1972 Order nothing more than an [\*\*26] "imperfect regulation" which may still confer state-action immunity, citing *Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985)* [HN12](#) [↑]

<sup>11</sup> Columbia Steel argues that PGE and PP&L intentionally introduced ambiguity into the 1972 Agreement in order to slip a monopolistic agreement past the city of Portland. We need not address this argument because, whether or not ambiguity was introduced into the contract for the self-serving purpose of making it less politically vulnerable, the utilities' failure to include the "exclusively served" language in the 1972 Agreement that had been included in the plan submitted to the City Council certainly had the effect of creating ambiguity in the 1972 Order.

("actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law").

PGE and the OPUC's reliance on *Llewellyn* is misplaced. In *Llewellyn*, the administrator of a state agency promulgated a fee schedule for health care providers, as he was authorized to do under state statute, but bypassed statutory rulemaking procedures. We held that although the administrator had acted in a "procedurally improper manner," the state government was nonetheless entitled to state-action immunity. *Id. at 773*. *Llewellyn* is inapposite here. There the state legislature had clearly articulated an intention to authorize the administrator to promulgate a fee schedule, and the administrator had exercised that authority in clearly articulating his intent to adopt such a fee schedule, notwithstanding that he did not follow the required rulemaking procedures of the state's Administrative Procedure Act. *Id. at 772*. In contrast, the OPUC did not clearly exercise **[\*\*27]** its statutory authority to approve the allocation of exclusive service territories in Portland; indeed, it did not speak to the issue at all. So rather than exercising its authority "imperfectly," the OPUC failed altogether to exercise its authority to approve exclusive service territories with any clarity whatsoever.

Finally, PGE and the OPUC argue that even if the 1972 Order did not clearly authorize **[\*1440]** an allocation of exclusive service territories within the city of Portland, later orders issued by the OPUC clarify the 1972 Order. In particular, the PGE and the OPUC rely upon a 1974 Order of the OPUC, which, they assert, confirmed that the 1972 Order did, in fact, confer state-action immunity.<sup>12</sup>

None of the OPUC orders relied on by PGE establishes state-action immunity. First, to the extent that there is language in the orders relevant to the division of the Portland market, it **[\*\*28]** merely recognizes the undisputed fact that PGE and PP&L had stopped competing with each other in that city.<sup>13</sup> For instance, the 1974 Order, on which PGE relies most heavily, states that PGE and PP&L "no longer competitively serve the same areas. Their respective areas of service within Portland have been defined." Pub. Util. Comm'n of Or., Order 74-658 (Sept. 3, 1974), *aff'd sub nom. American Can Co. v. Davis*, [28 Ore. App. 207, 559 P.2d 898 \(1976\)](#) (the "1974 Order"), at 25; see also Pub. Util. Comm'n of Or., Order 75-704 (Aug. 13, 1975) (noting that PP&L serves customers "in parts of Portland"). That language is merely a description of the status quo; it is not an expression of a state policy to replace competition with regulation. Although the quoted language might tend to support a permissive inference that the commissioners in 1974 thought that the commissioners in 1972 had defined exclusive service territories in Portland when they issued the 1972 Order, **HN13**<sup>14</sup> the OPUC can not confer state-action immunity by forming an intent that is not expressed forthrightly and clearly.

**[\*\*29]** Second, the "respective areas of service" language in the 1974 Order, as well as the language in the other OPUC orders stating that PGE and PP&L had stopped competing in Portland, cannot be construed as a product of the OPUC's exercise of its statutory authority to approve contracts allocating exclusive service territories. Because there were no such contracts before the OPUC when it issued these later orders, the orders were not issued pursuant to the provisions of Or. Rev. Stat. ch. 758 authorizing approval of such contracts. The 1974 Order, for example, was issued pursuant to [Or. Rev. Stat. §§ 757.205, 757.210](#), and 757.215, which pertain to changes in tariffs charged by utilities. The 1974 Order approved PP&L's revised tariff schedule, which equalized PP&L's rates in Portland with the higher rates it charged in other areas of the state. As a result, PP&L's rates for customers in Portland became higher than the rates charged by PGE. The "respective areas of service" language in the 1974 Order was recited merely to establish a rationale for the OPUC's action approving the new rates:

A rate differential between Portland and [other areas] was formerly justified on the basis **[\*\*30]** of competing electric service in Portland between [PP&L] and [PGE]. For various reasons, it was believed that in the Portland metropolitan area rates between two similar utilities serving the same area should be the same.

<sup>12</sup> PGE also cites Pub. Util. Comm'n of Or., Orders 73-688 (Oct. 25, 1973), 75-704 (Aug. 13, 1975), and 79-055 (Jan. 12, 1979).

<sup>13</sup> As Columbia Steel puts it, "whether, as a matter of fact, the utilities competed is an entirely different inquiry from whether, as a matter of law, the utilities secured lawful allocations of exclusive service territory." Columbia Steel Reply Brief at 11.

The two companies no longer competitively serve the same areas. Their respective areas of service within Portland have been defined. Thus, with the lack of competition, the justification for rate uniformity is said to have disappeared.

1974 Order, at 25.

As a matter of law, then, neither the 1974 Order nor any of the other subsequent orders of the OPUC amend the 1972 Order to clarify that Order as an expression of state policy to displace competition with regulation. At best, these orders recite that the utilities have stopped competing with each other within territories they have defined. As our court has said, [HN14](#)<sup>14</sup> mere "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." [Phonetel, Inc. v. American Tel. & Tel. Co.](#), 664 F.2d 716, 736 (9th Cir. 1981) (quoting [Cantor v. Detroit Edison Co.](#), 428 U.S. 579, 592-93, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 [[\\*1441](#)] (1976)), cert. denied, 459 U.S. 1145, [[\\*\\*31](#)] 103 S. Ct. 785, 74 L. Ed. 2d 992 (1983).

In sum, we agree with the district court that the elimination of competition between PGE and PP&L in Portland was not cloaked with state-action immunity. As the district court put it, the OPUC did not "specifically and clearly authorize[] by the relevant statutory process" a division of the Portland market into exclusively served territories. [Pacificorp](#), 770 F. Supp. at 571.

#### B. Issue Preclusion

After Columbia Steel filed this antitrust action in federal district court, PGE applied to the OPUC for a declaration that the 1972 Order allocated exclusive service territories in Portland. In response, the 1992 OPUC issued an order declaring that the 1972 OPUC had intended to do so, and amended the 1972 Order, *nunc pro tunc*, to that effect. In its 1992 Order, the OPUC acknowledged that "perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP&L." Pub. Util. Comm'n of Or., Order 92-557 (Apr. 16, 1992) (the "1992 Order"), at 14.<sup>14</sup>

[[\\*\\*32](#)] Armed with the OPUC's 1992 Order, PGE moved for reconsideration of the district court's summary judgment rulings in favor of Columbia Steel, arguing that the OPUC's 1992 Order was entitled to full faith and credit. The district court denied the motion, reasoning that:

[HN15](#)<sup>15</sup> the availability of the defense of state action immunity depends upon the satisfaction of the objective standards set forth in *Parker* [v. [Brown](#), 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)] and the authorities which have interpreted *Parker*. . . . The fact that the OPUC did not do what it now concludes that it intended to do in the 1972 Order does not alter the fact that the claim of PGE to a monopoly was not specifically and clearly authorized at the time that this court decided that Columbia Steel was entitled to a declaration that [the 1972 Order] neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia Steel.

Unpublished Opinion, filed June 29, 1992, at 7-9.

<sup>14</sup> The 1992 Order states, in relevant part:

Because [the 1972 Order] did not expressly refer to ORS Chapter 758 with respect to future service in Portland under the allocation statutes and because the order did not say that exclusive territorial allocations are being created in Portland, . . . perhaps it did not unambiguously allocate exclusive service territories to PGE and PP&L. However, the order did create boundaries that the utilities observed as if they were allocated territories until Columbia Steel's attempt to switch utilities in 1989. The Commission made the required statutory findings to allocate exclusive service territories and acted as if it had approved a territorial allocation in its 1972 order. The behavior of the utilities and the Commission demonstrates an understanding that exclusive service territories had been created.

For the foregoing reasons, it appears to the Commission that [the 1972 Order] is not a complete and accurate memorial of the 1972 decision of the Commissioner . . . : the order omits a reference to the statute under which its findings were actually made when the Commissioner approve the PGE/PP&L contract. Pursuant to [ORS 756.568](#), the Commission will amend [the 1972 Order], *nunc pro tunc*, to conform to the actual decision intended and followed.

We agree and hold that the 1992 Order is not entitled to preclusive effect because the issue decided by the OPUC in that order is not identical to the state-action immunity issue.<sup>15</sup> [\*\*33] The issue decided by the [\*1442] 1992 OPUC is whether the 1972 OPUC had the intent to approve the allocation of exclusive service territories in the city of Portland. The state-action immunity issue is different. It does not turn on the fact issue of the subjective intent of the OPUC at the time it issued the 1972 Order. Rather, the state-action immunity question is one of law that turns on whether the displacement of competition with monopolies in the Portland market was "clearly articulated and affirmatively expressed as state policy," *Midcal, 445 U.S. at 105*. As the district court said, "the availability of the defense of state-action immunity depends upon the satisfaction of the objective standards set forth in *Parker* [and its progeny]." Unpublished Opinion, filed June 29, 1992, at 7-8. In other words, state-action immunity is a question of federal antitrust law that turns on the clarity of a state's expression of its policy, not the subjective intent of its policymakers.

[\*\*34] In declaring what the 1972 OPUC intended to do, the 1992 OPUC approached the 1972 Order as though it were interpreting a contract. After finding ambiguity in the 1972 Order, the 1992 OPUC went on to decide, as an issue of fact, the intent of the 1972 OPUC by looking to extrinsic evidence such as the behavior of the parties between 1972 and 1990. See 1992 Order, at 12-15. To repeat, *HN18*<sup>16</sup> state-action immunity is not an issue of fact. It cannot be decided simply by ferreting out extrinsic evidence in an effort to ascertain the subjective intent of the state. The issue of state-action immunity must be decided by applying the "rigorous" test, *Patrick, 486 U.S. at 100*, of whether the state "clearly articulated and affirmatively expressed" its intent to displace competition with regulation as a matter of state policy. *Midcal 445 U.S. at 105*.<sup>16</sup>

[\*\*35] In sum, the 1992 OPUC could not satisfy the *Midcal* test retroactively by amending the 1972 Order years after PGE entered into the monopolistic agreement it now seeks to cloak with federal antitrust immunity.<sup>17</sup> [\*\*36] In other words, the state of Oregon cannot satisfy the objective *Midcal* clear articulation test by declaring that it had intended to displace competition with regulation 20 years earlier.<sup>18</sup>

<sup>15</sup> *HN16*<sup>16</sup> Oregon law provides that one tribunal may give preclusive effect to the prior determination of an issue by another tribunal only if "the issue in the two proceedings is identical." *Hickey v. Settemier, 318 Ore. 196, 864 P.2d 372, 375 (Or. 1993)*.

*HN17*<sup>17</sup> Oregon law also provides that the second tribunal may give preclusive effect to an earlier decision only if "the party sought to be precluded has had a full and fair opportunity to be heard on that issue." *Id.* Columbia Steel argues that it was not given such an opportunity before the OPUC issued the 1992 Order. Columbia Steel denies having waived its right to a hearing on the merits, pointing to record evidence that it only agreed to postpone the submission of evidence to the OPUC until the OPUC ruled on Columbia Steel's motion to dismiss for lack of jurisdiction. We need not decide whether Columbia Steel was denied a fair opportunity to be heard in the proceeding before the OPUC because, as we explain in the text, the issue in that procedure is not "identical" to the issue of state-action immunity in this federal antitrust action. *Id.*

<sup>16</sup> For the same reason, there can be no issue preclusion based on the judgment of the Marion County Court affirming the 1992 Order on the ground that it was "supported by substantial evidence." See *Columbia Steel Casting Co. v. Public Util. Comm'n of Or., Marion County Circuit Court No. 92C-12005, Judgment affirming Public Utility Commission of Oregon Order Nos. 92-557 & 92-1135, at 2, aff'd without opinion, Oregon Ct. of Appeals (Dec. 15, 1993).*

<sup>17</sup> *HN19*<sup>18</sup> It is fundamental that an order or judgment is not entitled to full faith and credit if the issuing tribunal had no subject matter jurisdiction over the matter before it. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 704-05, 71 L. Ed. 2d 558, 102 S. Ct. 1357 (1982)*. We do not know whether the OPUC and the Marion County Court had subject matter jurisdiction as a matter of state law to amend the 1972 Order retroactively. We believe, however, that it is questionable whether either had subject matter jurisdiction to decide the federal antitrust question of state-action immunity that is now before us. We need not decide this jurisdictional question because the lack of identity between the issue decided in the 1992 Order and the issue of state-action immunity deprives the 1992 Order of any preclusive effect in this federal antitrust action.

<sup>18</sup> PGE's reliance on *California Aviation, Inc. v. City of Santa Monica, 806 F.2d 905 (9th Cir. 1986)*, and the cases on which it relies, for the proposition that *Midcal* can be satisfied retroactively is misplaced. In *California Aviation*, the later statute "articulated and affirmed a pre-existing state policy of allowing [particular anticompetitive conduct]." *Id. at 909* (emphasis added).

### C. Foreseeability: PGE's New Argument on Appeal

PGE, joined by the OPUC, argues for the first time on appeal that state-action immunity applies because the division of the Portland market was a foreseeable result of the 1972 Order. According to PGE, "state action immunity must apply where the [challenged] conduct is the 'foreseeable result' of the state's policy." Opening Brief of Appellant Portland General Elec. Co. at 23 (citing *Nugget Hydroelectric Co. v. Pacific Gas & Elec. Co.*, 981 F.2d 429 (9th Cir. 1992), cert. denied, [\*37] 508 U.S. 908, 113 S. Ct. 2336, 124 [\*1443] L. Ed. 2d 247 (1993)). **HN20** [↑] "We will review an issue that has been raised for the first time on appeal under certain narrow circumstances," including "when the issue is purely one of law." *Parks Sch. of Business v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995). Because the foreseeability issue raised by PGE and the OPUC is a pure issue of law, and because consideration of it will not prejudice Columbia Steel, see *Aronson v. Resolution Trust Corp.*, 38 F.3d 1110, 1114 (9th Cir. 1994), we exercise our discretion to consider it.

In our original opinion, we agreed with PGE. We held that "under [Nugget and *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988)], private conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct." *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 60 F.3d 1390, 1396 (9th Cir. 1995), herewith withdrawn. Although we said that "the 1972 Order is not particularly clear regarding the OPUC's intention to permit a permanent division of the Portland market, as opposed to a one-time [\*38] exchange of facilities and customer accounts," *id. at 1396*, we nonetheless "concluded that the elimination of competition between PGE and PP&L was a natural and foreseeable result of the 1972 Order," *id. at 1399*, "justifying the inference that it was intended by the [OPUC]." *Id.* Accordingly, we held that PGE's conduct enjoyed state-action immunity from Sherman Act liability.

We are persuaded by Columbia Steel's petition for rehearing and an amicus curiae brief filed by the Antitrust Division of the Department of Justice that we erred in allowing a foreseeability test to be substituted for the clear articulation test of *Midcal*. In doing so, we misconstrued *Medic Air* and *Nugget*. In *Medic Air*, we used *Midcal*'s clear articulation test, not a foreseeability test, in deciding that state-action immunity shielded a monopoly granted to Air Ambulance Authority in the market of dispatching air ambulances in Washoe County, Nevada. 843 F.2d at 1189. We did use a foreseeability test in *Medic Air*, but only in deciding the reach of the antitrust immunity that protected Air Ambulance Authority's monopoly in the dispatching market. Specifically, we held that Air [\*39] Ambulance Authority was not shielded from antitrust liability in using its immunized monopoly power to gain a competitive advantage in a different market, the market for air ambulance services. *Id.* We reasoned that Air Ambulance Authority's antitrust immunity in the dispatching market did not extend to the ambulance service market because anticompetitive conduct in the service market was "not a 'necessary or reasonable consequence' of the decision to establish an exclusive dispatcher." *Id.* (citation omitted). As we explained, "the state and its agencies have not granted Air Ambulance an exclusive [ambulance service] franchise. That they might have done so is irrelevant. **HN21**[↑] The state must act if immunity is to exist. . . . The Protocols [governing dispatching procedures] did not interfere with existing competition. The District Board did not seek to displace competition or limit entry into the ambulance market. The District Board did not even consider the dispatch program's effect upon competition." *Id.*

The anticompetitive conduct at issue in *Nugget* was also expressly authorized by state action independently of any foreseeability inquiry. A California statute authorized [\*40] the California Public Utility Commission to "specify the prices, terms, and conditions' for the sale of power by a private power producer like Nugget to a utility." *981 F.2d at 434* (quoting statute). In exercising that statutory authority, the California PUC clearly expressed an intention to regulate such sales in detail. The California PUC's implementing Guidelines provided that private power producers would "generally bear the risk of failing to develop their power facility before the five year deadline and that only rarely will permitting delays qualify as *force majeure* events." *Id.* The Guidelines specified that a utility was "expected . . . [to] negotiate [*force majeure* claims] only in instances where it is convinced that a settlement, versus adjudication, is in the ratepayers' best interest." *Id.* (quoting Guidelines). We held in *Nugget* that state-action immunity extended to the anticompetitive effects of a utility's rejection of a private power supplier's *force majeur*

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In contrast, there was no pre-existing state policy to eliminate competition in the Portland market for the OPUC to articulate or affirm in its 1992 Order.

claim for an extension of [\*1444] the contract period because the anticompetitive effects were a foreseeable result of the California PUC's implementing Guidelines. *Id.*

Our rejection of [\*\*41] PGE's argument that it is entitled to state-action immunity because the division of the Portland market was a foreseeable result of the 1972 Order is consistent with *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*, upon which we relied in *Nugget*. The issue in *Town of Hallie* was whether the city's anticompetitive activities were protected by state-action immunity "when the activities are authorized, but not compelled, by the State." *Id. at 36* (emphasis added). The Supreme Court held that the challenged action of the city was protected by the state-action immunity doctrine because the city's conduct was "a foreseeable result of empowering the City to refuse to serve unannexed areas." *Id. at 42*. However, the Court held that this result was foreseeable because the state expressly authorized the city's anticompetitive behavior. See *id.* In contrast, the OPUC did not expressly authorize PGE to maintain an exclusive service territory; it merely approved the exchange of property and customers.

In sum, neither *Medic Air* nor *Nugget* applies a foreseeability test as a substitute for the threshold *Midcal* clear articulation [\*\*42] test. As the Antitrust Division puts it, "express authorization [is] the necessary predicate for the Supreme Court's foreseeability test." Brief of Amicus Curiae United States, at 9. PGE cites no case to the contrary and we know of none.

### III. PGE's Other Defenses

**HN22**[] In the absence of state-action immunity, an agreement between PGE and PP&L to divide the Portland market for electricity constitutes a per se violation of § 1 of the Sherman Act. See, e.g., *Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50, 112 L. Ed. 2d 349, 111 S. Ct. 401 (1990)* (agreement among competitors to allocate territories to diminish competition is a per se § 1 violation). There is no genuine issue of material fact regarding the existence of such an agreement that would prevent the entry of summary judgment against PGE on liability. See *Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 410 (9th Cir. 1996)*. We therefore address PGE's affirmative defenses other than state-action immunity. Although the district court found only one of these defenses worthy of discussion, we discuss each of them in turn.

#### A. Statute of Limitations

PGE argues that Columbia Steel's antitrust action, which was filed [\*\*43] on June 19, 1990, is time-barred because it was filed four years after any overt act in furtherance of PGE and PP&L's agreement to divide the Portland market. See *15 U.S.C. § 15(b)* (establishing 4-year limitations period for Sherman Act violations); *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)* HN23[] ("even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act"). PGE argues that the acts relied upon by the district court in finding Columbia Steel's antitrust claims timely were insufficient to restart the running of the statute because they were merely "reaffirmations" of the original 1972 Agreement to divide the Portland market. See *id. at 238*.

On May 30, 1990, Columbia Steel wrote to PGE and stated that it would terminate its contract with PGE and take power from PP&L as of July 1, 1990, if PGE would agree to wheel power for PP&L so it could serve Columbia Steel's casting plant. PGE said no, declaring in a letter dated May 30, 1990, that "[Columbia Steel] is within PGE's exclusive territory. If it desires to purchase electricity, [\*\*44] it must do so from PGE." The district court held that PGE's refusal to wheel PP&L's electricity to Columbia Steel's casting plant was an overt act that restarted the statute of limitations.

We agree with the district court. PGE's refusal was not a mere reaffirmation of PGE and PP&L's 1972 Agreement to stop competing in the Portland market because the 1972 Agreement was not a permanent and final decision that controlled the later act. [\*1445] See *Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1300-01* (9th Cir.) (limitations period restarted each time tour guides shepherded tourists away from plaintiff's souvenir shop in furtherance of antitrust conspiracy between tour operators and other vendors) (quoting and distinguishing *In re*

*Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.), cert. denied, 444 U.S. 900, 100 S. Ct. 210, 62 L. Ed. 2d 136 (1979), in which later acts were mere affirmations of earlier "irrevocable, immutable, permanent and final" decisions" that "completely and permanently excluded [plaintiff] from the market"), cert. denied, 479 U.S. 886, 107 S. Ct. 279, 93 L. Ed. 2d 254 (1986).<sup>19</sup> *Hennegan* also distinguishes *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), cert. denied, 454 U.S. 816, 102 S. Ct. 92, 70 L. Ed. 2d 84 (1981), the only Ninth Circuit case other than *Multidistrict Air Pollution* that is cited by PGE on the statute of limitations issue, on the same ground. *Hennegan*, 787 F.2d at 1301-02.

#### B. Justification defenses

PGE asserts that the 1972 Order required it to stop competing with PP&L in the city of Portland, and that "had PGE failed to conform to the commands of the OPUC . . . it could" have subjected itself to treble damages for violation of Oregon utility law." Opening Brief of Appellant Portland Gen. Elec. Co., at 29. PGE argues that as a result it is entitled to raise [HN24](#)[<sup>19</sup>] a regulatory justification defense, see *Phonetel, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 737-38 (9th Cir. 1981) (no antitrust liability when defendant reasonably concludes that its actions are necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority), cert. denied, 459 U.S. 1145, 74 L. Ed. 2d 992, 103 S. Ct. 785 (1983), and [HN25](#)[<sup>19</sup>] a business justification defense, see, e.g., *City of Anaheim v. Southern Cal. Edison*, 955 F.2d 1373, 1381 (9th Cir. 1992) (utility not liable for using high-powered transmission line to the exclusion of competitors in order to keep rates low).

These justification defenses are not available to PGE. When it stopped competing with PP&L in Portland after the 1972 Order issued, it was under no compulsion to do so because the 1972 Order did not approve the allocation of exclusive service territories. Had the 1972 Order done so, a justification defense would arguably have been available to PGE because the Oregon statutes [\\*\\*47](#) provide that only the utility that has been allocated a territory may serve that territory. See Or. Rev. Stat. § 758.450(2) ("Except [under circumstances not relevant here], no other person shall offer, construct or extend utility service in or into an allocated territory."). In light of this provision, it is significant that in approving an exchange of facilities, the 1972 Order used permissive language. See 1972 Order at 8-9 ("ORDERED that [PP&L] *may* transfer to [PGE] all electric distribution plant . . . that [PGE] *may* transfer to [PP&L] all electric distribution plant . . . that the manner and method for accomplishing the transfer and exchange of property . . . and the terms and conditions governing this transfer, shall be as provided by [the 1972 Agreement]"') (emphasis added). Because the language of the 1972 Order was permissive, it did not require PGE and PP&L to perform the 1972 Agreement and did not prevent them from rescinding it before the property was exchanged. Given the statutory prohibition against serving a territory allocated to another utility, see Or. Rev. Stat. § 758.450(2), the permissive language in the 1972 Order would have [\\*\\*48](#) been incongruous if the 1972 Order had approved an allocation of exclusive service territories.

#### C. The Noerr-Pennington Doctrine

PGE argues that it is entitled to antitrust immunity under the Noerr-Pennington doctrine. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 5 L. Ed. 2d [\[\\*1446\]](#) 464, 81 S. Ct. 523 (1961) [HN26](#)[<sup>19</sup>] (the Sherman Act does not prohibit competitors from "associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly"); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965). The Noerr-Pennington doctrine, which is rooted in the *First Amendment* protection of political activity, see *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962), does not apply here. [HN27](#)[<sup>19</sup>] Applying to an administrative agency for approval of an anticompetitive contract is

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<sup>19</sup> Columbia Steel also argues that the refusal in 1987 of PGE's coconspirator PP&L to service the steel casting plant over the objection of PGE was also an overt act that restarted the statute of limitations. We need not consider the significance of the events in 1987 to the statute of limitations question because we hold that the statutory period was restarted in 1990. The 1987 events are, however, relevant to Columbia Steel's cross-appeal regarding damages, which we address in Part V, *infra*.

not lobbying activity within the meaning of the *Noerr-Pennington* doctrine. In any case, PGE is not being held liable for filing the application that resulted in the 1972 [\*\*49] Order. PGE is being held liable for agreeing with PP&L to replace competition with area monopolies in the Portland market.

#### D. The Filed Rate Doctrine

PGE argues that the filed rate doctrine bars Columbia Steel from recovering damages even if PGE did violate the Sherman Act. The filed rate doctrine generally forbids the recovery of treble damages under the Sherman Act based on the payment of rates that are established by regulated tariffs, even if the defendants engaged in illegal price-fixing. See, e.g., [\*Keogh v. Chicago & Northwestern Ry.\*, 260 U.S. 156, 162, 67 L. Ed. 183, 43 S. Ct. 47 \(1922\)](#). According to PGE, the filed rate doctrine applies in this case as follows: (1) Because PGE could charge only the rates approved by the OPUC, it could not charge the same rate offered by PP&L to Columbia Steel; (2) PGE could not "transfer" its customer Columbia Steel to PP&L without OPUC approval; (3) thus, the district court could not award damages based on the difference between the rate charged by PGE and the "rate that might have been approved absent the conduct at issue." Opening Brief of Appellant Portland General Electric Co. at 32.

We reject PGE's reasoning. The conduct challenged [\*\*50] in this case is not PGE's refusal to sell electricity to Columbia Steel at a lower rate. Rather, the challenged conduct is the non-competition agreement that prevented Columbia Steel from buying electricity at PP&L's lower rates. The filed rate doctrine is inapplicable. To hold that it is applicable would be to "allow a blockade of a competitor to escape scrutiny. This would overextend *Keogh*'s reach and could produce a rule that one who pays for services governed by [a regulatory body's] tariffs is foreclosed from asserting that antitrust violations prevented use of a less expensive, equivalent service." [\*In re Lower Lake Erie Iron Ore Antitrust Litig.\*, 998 F.2d 1144, 1159 \(3d Cir. 1993\)](#).

#### IV. Damages

PGE argues that Columbia Steel suffered no damages at any time because (1) at all relevant times, Columbia Steel was obligated on its requirements contract with PGE to purchase electricity from PGE, and (2) PGE could not transfer Columbia Steel as a customer to PP&L without prior OPUC approval. These arguments are to no avail. First, Columbia Steel's requirements contract with PGE did not bar it from suing PGE under the Sherman Act for agreeing with PP&L to stop competing in [\*\*51] the Portland market. See, e.g. [\*Perma Life Mufflers v. International Parts Corp.\*, 392 U.S. 134, 139-40, 20 L. Ed. 2d 982, 88 S. Ct. 1981 \(1968\)](#) (franchise agreement does not defeat franchisee's standing to bring antitrust suit against franchisor); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 781 (3d Cir. 1967) ("captive customer" having valid lease agreement with defendant for use of certain equipment could nonetheless sue for antitrust violation based on defendant's refusal to sell the equipment), *aff'd on other grounds*, [\*392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 \(1968\)\*](#).

As for PGE's second argument, the only authority it cites is the 1972 Order stating that "there can be no question that the Commissioner has regulatory approval over any such transfers or exchanges of customers," 1972 Order at 6. However, when read in context, this statement refers only to the joint application by PGE and PP&L for the transfer of tens of thousands of customers *without the customers' permission*. It has [\*1447] no application, therefore, to Columbia Steel's request to be transferred, as a customer, from PGE to PP&L. In the absence of any further analysis or authority [\*\*52] for PGE's argument that OPUC approval was necessary for Columbia Steel to become a customer of PP&L, we cannot hold that it has any merit.

#### V. Columbia Steel's Cross-Appeal on Damages

Columbia Steel argued to the district court, and now argues on its cross-appeal, that it was entitled to damages beginning with PP&L's refusal in 1987 to sell Columbia Steel power at its lower rates. The district court rejected this argument, stating that "Columbia Steel cannot recover damages from PGE for actions taken or not taken by PP&L. Even where officials of PP&L contacted officials of PGE and discussed the request for service, the refusal of service was an act by PP&L and not an act by PGE." Unpublished Opinion, filed Feb. 5, 1993, at 24. The district court therefore limited recovery of damages to the period from July 1990, when Columbia Steel entered into a contract

with PP&L and was thus "willing and able to actually purchase power at a lower rate from PP&L," and July 1991, when PGE began wheeling PP&L's power to Columbia Steel over PGE's transmission lines. *Id. at 25*.

We agree with Columbia Steel that the district court erred in not awarding damages beginning in 1987. The district court [\*\*53] mistakenly held that PGE could not be liable for PP&L's refusal to sell power to Columbia Steel in 1987. PP&L was a coconspirator in 1987, and PGE is liable for the acts of PP&L in furtherance of their conspiracy not to compete in Portland. See *Beltz Travel Serv., Inc. v. International Air Transport Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980) HN28<sup>1</sup> ("If [plaintiff] can establish the existence of a conspiracy in violation of the antitrust laws and that [defendants] were a part of such a conspiracy, [defendants] will be liable for the acts of all members of the conspiracy in furtherance of the conspiracy, regardless of the nature of [defendants'] own actions.").

## VI. Conclusion

The partial summary judgment holding PGE liable to Columbia Steel under § 1 of the Sherman Act is **AFFIRMED**. *The partial summary judgment awarding Columbia Steel \$ 508,425 in treble damages is VACATED and the case is remanded to the district court for a redetermination of Columbia Steel's damages in accordance with this opinion. Columbia Steel's motion for attorney's fees on appeal pursuant to 15 U.S.C. § 15 is GRANTED. The amount of the fees shall be determined by the district court.*

## ORDER

*The opinion [\*\*54] filed on December 27, 1996 is amended as follows:*

*Add to the end of footnote 8 at slip op. at 16278 the following two sentences:*

*Since the Oregon statute speaks solely of authorizing the OPUC to approve exclusive service territories, the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct. It follows, therefore, that we must look to the decisions of the OPUC to determine whether PGE's conduct was part of a clearly articulated state policy. Cf. *Ticor*, 504 U.S. at 636-37 (first prong of Midcal test intended to ensure state has not acted through inadvertence).*

Replace the first full paragraph at slip op. at 16298 with the following paragraph:

As for PGE's second argument, the only authority it cites is the 1972 Order stating that "there can be no question that the Commissioner has regulatory approval over any such transfers or exchanges of customers," 1972 Order at 6. However, when read in context, this statement refers only to the joint application by PGE and PP&L for the transfer of tens of thousands of customers *without the customers' permission*. It has no application, therefore, to [\*\*55] Columbia Steel's request to be transferred, as a customer, from PGE to PP&L. In the absence of any further analysis or authority for PGE's argument that OPUC approval was necessary for Columbia Steel to become a customer of PP&L, we cannot hold that it has any merit.

With the above amendments, the panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judge Browning has voted to reject the suggestion for a rehearing en banc, and Judges Reavley and Norris have recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. *Fed. R. App. P.* 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

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## Wisconsin v. Kenosha Hosp.

United States District Court for the Eastern District of Wisconsin

December 31, 1996, Decided ; December 31, 1996, FILED

Civil Action No. 96-C-1459

**Reporter**

1996 U.S. Dist. LEXIS 20215 \*; 1997-1 Trade Cas. (CCH) P71,669

STATE OF WISCONSIN, Plaintiff, v. KENOSHA HOSPITAL AND MEDICAL CENTER and ST. CATHERINE'S HOSPITAL, INC., Defendants.

### **Core Terms**

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health-care, provider, health plan, Subparagraph, patients, savings, target, privileges, contracts, purchasers, exclusive contract, compliance, terms, medical-staff, modification, Antitrust, consumers, terminate, entity, staff, reimburse, annual, notice, base year, five year, membership, referrals, ancillary services, provide a service, specialties

**Counsel:** [\*1] For WISCONSIN, STATE OF, plaintiff: James E. Doyle, Jr., Kevin J. O'Connor, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI.

**Judges:** Joseph Stadtmueller, Chief United States District Judge

**Opinion by:** Joseph Stadtmueller

### **Opinion**

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#### **FINAL JUDGMENT**

WHEREAS the State of Wisconsin filed a Complaint in this matter on *December 30, 1996*, as a direct purchaser of inpatient acute-care hospital services in Kenosha and surrounding counties and as *parens patriae* to protect its general economy, pursuant to section 7 of the Clayton Act, [15 U.S.C. § 18](#);

WHEREAS Kenosha Hospital and Medical Center ("KHMC"), St. Catherine's Hospital ("SCH"), and Dominican Healthcare, Inc., entered into an Alliance Agreement on December 1, 1995, by which they agreed to form Siena Healthcare System, Inc. ("Siena"), to manage and operate KHMC and SCH as an integrated community health-care delivery system in the southeast Wisconsin and northeast Illinois area;

WHEREAS Siena is expected to generate total cost savings of at least \$ 43.7 million over the five-year period following its implementation, consisting of approximately \$ 24 million in capital and duplicative-services avoidance and approximately [\*2] \$ 19.7 million in operational savings, to improve the quality of health care for area residents, and to increase access to health-care services for residents of Kenosha and surrounding counties, including the indigent and the otherwise underserved;

WHEREAS the Office of Attorney General of the State of Wisconsin ("Attorney General") is responsible for enforcement of the federal antitrust laws and is authorized to bring suit on behalf of the State as a direct purchaser of inpatient acute-care hospital services and as *parens patriae* to protect its general economy;

WHEREAS KHMC and SCH have cooperated fully with the Attorney General's investigation of the proposed consolidation;

WHEREAS the Attorney General has concluded its investigation of the proposed consolidation of the two hospitals and believes that, without this Final Judgment, the consolidation could raise competitive concern under the federal antitrust laws;

WHEREAS KHMC and SCH desire to assure the Attorney General and the community that they intend to operate Siena in accordance with the Siena mission and to continue the hospitals' traditional commitment of providing high-quality, affordable health care to the community;

[\*3] WHEREAS KHMC and SCH, desiring to resolve the Attorney General's concerns without trial or adjudication of any issue of fact or law, and before the taking of any testimony, have consented to entry of this Final Judgment; and

WHEREAS this Final Judgment is not an admission, or probative, of liability by KHMC, SCH, or Siena as to any issue of fact or law and may not be offered or received into evidence in any action, or otherwise be construed or interpreted, as an admission, or as being probative, of liability; it is hereby ordered:

#### I. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action and each of the parties consenting to this Final Judgment. The complaint states a claim upon which relief may be granted against the defendants under section 7 of the Clayton Act, [15 U.S.C. § 18](#).

#### II. DEFINITIONS

As used in this Final Judgment:

2. "Kenosha Hospital and Medical Center, Inc." ("KHMC") means the nonstock, nonprofit, tax-exempt corporation organized under the laws of the State of Wisconsin that operates a hospital with the same name at 6308 Eighth Avenue, Kenosha, Wisconsin 53143; and any entities operated or controlled by KHMC that provide services [\*4] provided by KHMC at the time of entry of this Final Judgment.

3. "St. Catherine's Hospital, Inc." ("SCH") means the nonstock, nonprofit, tax-exempt corporation organized under the laws of the State of Wisconsin that operates a hospital with the same name at 3556 Seventh Avenue, Kenosha, Wisconsin 53140. For purposes of this Final Judgment, "SCH" includes its sponsor, Dominican Health Care, Inc., and all entities operated or controlled by SCH that provide services provided by SCH at the time of entry of this Final Judgment.

4. "Siena" means the nonprofit, nonstock corporation that KHMC and SCH will create pursuant to their December 1, 1995 Alliance Agreement, and includes all physicians and other health-care providers employed, or whose business operations are controlled, by Siena. All provisions in this Final Judgment that apply to Siena also shall apply to KHMC and SCH.

5. "Member hospital" means KHMC or SCH.

6. "Ancillary services" means home-health services and durable medical equipment.

7. "Health plan" means all types of organized, health-service purchasing programs, including, but not limited to, networks or managed-care plans offered by third-party payers or providers, [\*5] that purchase hospital and other health-care services.

8. "Health-care provider" means physicians, hospitals, laboratories, physician networks, and ancillary health-care providers.

9. "Acquire" means to purchase the whole or the majority of the assets, stock, equity, capital, or other interest in a corporation or other business entity, or to obtain the right or ability to designate the majority of directors or trustees or otherwise control the management of a corporation or other business entity.

10. "Kenosha and surrounding counties" means Kenosha, Racine, and Lake Counties.

11. "Attorney General" means the Criminal Litigation and Antitrust Unit of the Wisconsin Office of Attorney General.

### III. TERMS

#### 12. *Anticipated Savings and Price Reductions*

KHMC and SCH intend to merge and consolidate services into Siena, increase efficiency, and reduce the cost of delivering health-care services so that the cost to the community of those services will be lower than they would have been absent the Siena alliance.

12.1 As set forth in Exhibit 1, Siena shall achieve in 1996 constant dollars at least \$ 43.7 million in savings by the end of five years after closing. Siena shall pass [\*6] on the operational savings and the capital-avoidance savings (as reflected by unincurred depreciation expense), shown on Exhibit 1 to consumers or other purchasers of health-care services by one or more of the following means: (a) providing low-cost or no-cost health-care programs for the community not already provided by KHMC or SCH, (b) expanding low-cost or no-cost health-care services for the community already provided by KHMC or SCH, (c) reducing prices or limiting actual price increases for existing services affecting Siena's case-mix adjusted net patient revenue per equivalent admission ("Revenue") so that the increase in Revenue is less than the increase in the Consumer Price Index for Hospital and Related Services, or (d) other methods agreed upon by Siena and the Attorney General. Prior to passing on to consumers or purchasers savings in the form of low-cost or no-cost health-care services, Siena shall provide its proposals for doing so to the Attorney General in writing, and the Attorney General shall be deemed to have approved the proposals unless it objects to specific proposals, providing its reasons to Siena in writing, within ten business days after receiving Siena's [\*7] proposals.

12.2 A schedule setting forth the savings of at least \$ 43.7 million over the five-year period following implementation of Siena, including \$ 24 million in capital and duplicative-services avoidance, \$ 19.7 million in operational savings, and the required pass through of operational and capital-avoidance savings to consumers or customers, is attached to this Final Judgment as Exhibit 1.

12.3 Each year, as part of the report required by Subparagraph 21.1, Siena will prepare and submit to the Attorney General a report monitoring its duty to avoid \$ 24 million in capital and duplicative-services expenditures listed in its efficiencies report.

12.4 If Siena fails to generate and pass on to purchasers or consumers the annual operational-savings target amounts in any year of the five-year period, the shortfall amount shall be carried forward into subsequent years until the required operational-savings target amount has been generated and passed on by Siena. If Siena exceeds the annual targeted operational-savings and pass-through amount of operational savings to purchasers or consumers in any given year, the excess amount shall be credited toward Siena's target for the next [\*8] fiscal year.

12.5 If, by the end of five years after closing, Siena has not avoided \$ 24 million in capital and duplicative-services costs and generated \$ 19.7 million in operational savings as shown on Exhibit 1, Siena shall pay in cash an amount equal to \$ 43.7 million less the amount of capital and duplicated services avoided and operational savings generated into an Indigent Care Fund established by Siena, but under the supervision of the Attorney General. The Indigent Care Fund shall be used for programs provided by Siena and approved by the Attorney General to meet the health-care needs of the indigent or underserved population of Kenosha and surrounding counties after consultation between Siena and the Attorney General about such programs. Such programs may include, but not

necessarily be limited to, preventive health-care services, child immunizations, mammograms, prenatal care, and alcohol and drug-abuse treatment programs. If Siena has not achieved \$ 43.7 million in savings by five years after closing, Siena shall have an opportunity to demonstrate, to the satisfaction of the Attorney General, that unforeseeable circumstances beyond its control prevented achievement of the [\*9] savings, and the Attorney General may reduce accordingly the cash payment set forth in this subparagraph.

12.6 As methods for ensuring and documenting the operational savings and the passing on of the target savings to consumers and purchasers:

12.6(a) Siena's Revenue for patients treated during each of the five years after entry of this Final Judgment shall not exceed the combined hospital Revenue of the member hospitals for calendar year 1996 (the "base year"). To the extent the Revenue for a given year is less than the base year Revenue, the difference shall be counted toward the annual pass-through targets as shown in Exhibit 1. To the extent the Revenue for a given year is greater than the base year, Siena shall reimburse the excess by lowering its rates in the next fiscal year by a sufficient amount to repay the excess Revenue. If, at the end of five years Siena has not met the cumulative pass through targets, Siena shall lower its rates to the extent necessary to pass through the amount of the unmet target.

12.6(b) Siena's case-mix adjusted net patient operating expense per equivalent admission ("Expense") for patients treated during each year of the five years after entry [\*10] of this Final Judgment shall not exceed the combined hospital Expense of the member hospitals for the base year. To the extent the Expense for a given year exceeds that of the base year, the excess amount shall be added to the next-year's annual operational savings target. Siena may instead reimburse the excess by lowering its patient rates in the next year by a sufficient amount to meet its prior year's unmet Expense target. The Attorney General may exempt Siena from adding the excess to future targets or from reimbursing the excess for good cause shown by Siena. If all or part of the excess was caused by the provision of low-cost or no-cost-services to the community, that amount shall be credited toward the operational savings target. To the extent the Expense for a given year is less than that of the base year, the difference shall be counted toward the operating savings targets as shown in Exhibit 1.

12.6(c) In determining compliance with Subparagraphs 12.6(a) and (b), base year Revenue and Expense shall be adjusted (up or down) for changes in the Consumer Price Index for Hospital and Related Services.

Siena shall describe its compliance with Subparagraph 12.6 in its annual report [\*11] described in Subparagraph 21.1. Siena shall provide the Attorney General with information reasonably needed and requested by the Attorney General to monitor its compliance with this Subparagraph.

12.7 Subparagraphs 12.4 through 12.6 shall apply only during those fiscal years during which the State of Wisconsin or the federal government does not substantially regulate hospital rates.

### *13. Nondiscrimination in Contracting With Managed Care and Related Health Care Facilities*

13.1 Siena shall not enter into any contract with any health plan that prohibits it from providing services to any other health plan.

13.2 Siena shall not restrict the ability of any physician not employed by it, or with which it does not have an exclusive contract as permitted by Subparagraphs 14.2 and 14.3, to provide services or procedures at locations other than Siena. This provision, however, shall not prohibit Siena from taking reasonable action necessary to ensure that such physician adequately covers his or her practice and patients at Siena.

13.3 Siena shall not restrict the ability of any physician not employed by it, or with which it has no exclusive contract as permitted by Subparagraphs 14.2 and [\*12] 14.3, to participate in any health plan of his or her choice. Any health plan or network in which Siena has ownership or membership may engage in good-faith selective contracting with physicians and not enter into provider contracts with all providers desiring to contract with it.

### *14. Competitive Access to Siena Facilities*

14.1 Except as provided in Subparagraphs 14.2 and 14.3, Siena shall not enter into any exclusive contract with any health-care provider by which, with respect to physicians not employed by it, it requires that provider to render services only or primarily at a member hospital, or by which, including physicians employed by it, it permits only one physician or group of physicians to be the sole or primary provider of particular services at a member hospital.

14.2 Siena may honor those exclusive contracts into which either KHMC or SCH had entered as of December 8, 1995, the date Siena was announced. It may not renew or expand those contracts after the nominal termination date of those contracts, regardless of any automatic renewal, "roll over," or "evergreen" provision unless they comply with Subparagraph 14.3. Siena may require physicians employed by it to provide [\*13] services only at member hospitals.

14.3 Siena may enter into exclusive contracts for hospital-based services with anesthesiologists, radiologists, radiation oncologists, cardiologists using Siena's cardiac diagnostic and cardiac catheterization labs, pathologists, nephrologists providing renal-dialysis services at Siena, and emergency-medicine physicians if it seeks competitive bids for the contract at least once every three years and the bidding specifications require that the exclusive contractor not refuse unreasonably to participate in any health plans that have provider contracts with Siena. All exclusive contracts in effect at the time this Final Judgment is entered will be re-bid not later than March 31, 1997.

14.4 The Siena Board of Directors shall provide for an open medical staff, ensuring access to all highly qualified physicians. In determining clinical privileges, Siena shall not discriminate against any applicant for medical staff privileges based on that applicant's status as an employee or affiliate of a Siena competitor, although Siena may take reasonable steps to ensure that such applicants do not have access to competitively sensitive Siena information. In determining [\*14] medical-staff membership and clinical privileges, Siena may enter into exclusive contracts to the extent permitted by Subparagraph 14.3, and may consider factors relating to the level of health-care quality provided at its facilities, apply its medical-staff bylaws, comply with all requirements of the Joint Commission on Accreditation of Healthcare Organizations necessary for accreditation, and apply the privilege categories set forth in Exhibit 2. The Siena medical-staff bylaws shall be substantially similar to those in effect at KHMC at the time this Final Judgment is entered, and shall be consistent with this Final Judgment both initially and in any changes made during the duration of this Final Judgment, and shall not be substantially changed without the prior approval of the Attorney General. Siena shall provide copies of its medical-staff bylaws, together with all written form materials provided to physicians relating to its staff credentialing process (e.g., application forms, policies, instructions, and criteria) to the Attorney General with each Annual Report required by Subparagraph 21.1 and whenever any of them are amended.

14.5 All physicians with medical staff membership [\*15] at KHMC or SCH, and all physicians with applications pending for medical staff membership who meet current credentialing requirements, shall have medical staff membership at Siena, provided that all subsequent decisions concerning privileges or corrective action shall be consistent with the Siena medical-staff bylaws in effect at the time of any such renewal or corrective action. Siena shall not deny any physician access to its medical-staff application process. Siena shall not reject the application for, terminate, suspend, or limit the staff privileges of any physician based on his or her lack of qualifications or for any quality-of-care concern without first providing the physician with due process pursuant to the medical-staff bylaws, including, without limitation, a statement of the reasons for its action and an appeal to the Siena Board of Directors. Siena shall make a final decision on each application for staff privileges within 90 days of its receiving all information necessary for making that decision. Pending applications and those that were pending on November 30, 1995, shall be decided within 60 days after entry of this Final Judgment. This subparagraph shall not apply [\*16] to any application for privileges to render services for which Siena has an exclusive contract as permitted by Subparagraphs 14.2 and 14.3.

14.6 Siena shall negotiate in good faith with all health plans serving or that plan to serve Kenosha and surrounding counties that approach it in good faith seeking a provider contract, and shall attempt, in good faith, to contract with all such health plans that offer competitively reasonable terms. Siena shall not refuse to contract with any health plan solely because it proposes or uses a capitation or other risk-bearing or risk-shifting reimbursement methodology. This subparagraph, however, does not require Siena to contract with any particular health plan or with all health plans. Should KHMC or SCH move any services from one hospital to the other, Siena shall provide

that service to any health plan that had a provider contract with either KHMC or SCH as of December 8, 1995, pursuant to the terms of that provider contract.

14.7 Siena shall not enter into provider contracts with any health plan in which it has an ownership (or membership, if a nonprofit entity) interest on terms significantly more favorable to it and which it receives because [\*17] of Siena's financial interest if those terms would place other health plans at a significant competitive disadvantage and the favorable terms granted Siena's plan cannot be justified because of efficiencies resulting from economic integration between Siena and that plan.

14.8 Siena will not use employment, the location of a physician or group practice, or the location where patients will receive any necessary follow-up care to determine referrals from the member hospitals' emergency rooms. Siena may consider quality of care in determining referrals. Siena shall provide the referral policy used to inform unassigned patients of the availability of follow-up care to the Attorney General within 30 days from entry of this Final Judgment or at such time as Siena adopts such a policy. Should the Attorney General object to the policy, it and Siena shall attempt to reach a mutually satisfactory solution. This subparagraph shall not preclude any health plan operated by Siena from limiting referrals to providers with provider contracts with that plan.

14.9 Except with regard to exclusive contractors permitted by Subparagraphs 14.2 and 14.3 and physicians employed by Siena, if Siena controls [\*18] or operates a health plan, it shall not base medical-staff appointment and privileging decisions or other decisions affecting a physician's access to, or working conditions at, Siena on whether that physician enters into a provider contract with either Siena's plan or with a competing health plan, or on whether the physician is employed by or has staff privileges at a competing hospital or health system.

14.10 Siena shall not condition the sale of hospital services provided by it to any purchaser on the purchaser's agreeing with Siena to (a) purchase other services from Siena or its employed physicians (unless those services are provided by physicians with whom Siena has an exclusive contract as permitted by Subparagraphs 14.2 and 14.3), or (b) deal with any health plan operated by Siena. Siena shall not reduce its rates for hospital services to purchasers on the condition that they purchase other services from Siena, from physicians employed by Siena, or from KHSC if, because of the differential in rates, the purchasers' only viable economic option is to purchase other services from Siena, its employed physicians, or KHSC.

14.11(a) Siena shall not enter into any agreement or understanding [\*19] with any physician by which that physician refuses to refer patients to, accept patient referrals or transfers from, provide back-up and specialty coverage for, or consult in the treatment of any patient with, any other physician or health plan. This provision shall not apply to physicians with which Siena has an exclusive contract permitted by Subparagraphs 14.2 and 14.3, or in the situation where the patient is a patient of a health plan or network and the referral would be to a physician that does not have a provider contract with that plan.

14.11(b) Siena shall not discriminate against physicians employed by competing organizations in scheduling operating room times or usage of other hospital facilities. This provision shall not apply to physicians with which Siena has an exclusive contract as permitted by Subparagraphs 14.2 and 14.3.

## *15. Employment of Physicians.*

15.1 Siena shall not employ more than 30 percent of the physicians within a 20-mile radius of Kenosha practicing in any of the following medical specialties: family practice/internal medicine, pediatrics, or obstetrics/gynecology, except as provided in Subparagraph 15.2. If, however, any other health-care provider [\*20] employs more than 30 percent of the physicians within a 20-mile radius of Kenosha in the above specialties, Siena may employ the same percentage. If, on the date of entry of this Final Judgment, Siena employs more than the 30 percent permitted above, it is not required to divest physicians, but it cannot hire additional physicians in that specialty until the percentage falls to 30 percent or less. In specialties in which Siena employs the only physicians in Kenosha, Siena shall attempt in good faith to ensure that those physicians, when offered commercially reasonable terms, contract to provide services to all health plans seeking to contract for those physicians' services subject to bona fide capacity constraints.

15.2 Siena may petition the Attorney General in writing for an exception to Subparagraph 15.1 when market conditions justify its employing physicians in any of the enumerated specialties above the 30 percent limit. The Attorney General will respond to the petition within 30 days from the receipt of all information from Siena reasonably necessary to analyze the petition.

#### *16. "Most-Favored-Nation" Provisions in Contracts With Health Plans*

Siena shall not enter into [\*21] any provider contract with any health plan on terms that include a most-favored-nation clause. A most-favored-nation clause is any term in a provider contract that allows the buyer to receive the benefit of any better payment rate, term or condition that the seller gives another provider for the same service. In the case of any existing most-favored-nation clause in any current KHMC or SCH provider contracts, Siena shall not renew or extend such contracts without deleting that term. Siena shall inform the Attorney General of the presence of a most-favored-nation clause in any existing provider contracts by providing a list of such contracts to the Attorney General not more than 30 days after entry of this Final Judgment.

#### *17. Ancillary Services*

Siena shall not require any health care purchaser or patient to purchase ancillary services from it. If other firms cannot provide ancillary services in a manner that would permit Siena to contain costs in the context of risk-bearing contracts, Siena may require that these services be purchased from it. Siena shall not discriminate in the provision of information provided to patients regarding ancillary services provided by Siena and any [\*22] other provider of ancillary services. If Siena provides such services, it shall affirmatively inform patients and other purchasers of all alternative suppliers of those services when it provides information about its products or services to the purchaser if those suppliers provide the necessary information to Siena.

#### *18. Applications*

Siena shall not oppose applications filed by other hospitals or other health-care providers with the Wisconsin Department of Health & Social Services ("Department") unless it notifies the Attorney General in writing at least seven days prior to filing any opposition, and provides a copy of any opposition to the Attorney General at the time of its filing with the Department.

#### *19. Future Sales and Acquisitions of Hospital Assets*

Siena shall not, without the prior approval of the Attorney General, either (a) acquire any interest in (including entering into a management contract) any hospital or health-care system in Kenosha or surrounding counties, or (b) permit any hospital or health-care system in Kenosha and surrounding counties to acquire it or any portion thereof. In the future while this Final Judgment is in effect, Siena shall not enter into [\*23] any joint venture with any health-care system in Kenosha or Racine Counties without the approval of the Attorney General, which approval shall not be unreasonably withheld. The Attorney General will notify Siena of its approval or disapproval within 30 days after the Attorney General has received from Siena information reasonably necessary for the Attorney General to analyze the joint venture, provided that the Attorney General shall promptly notify Siena of its information requests. If the Attorney General withholds its consent, Siena may challenge that determination by filing a petition with this Court, and the Attorney General shall have the burden of persuasion to show that the joint venture would violate federal or state antitrust law. Siena shall not, without providing at least 60-days' notice to the Attorney General, (a) enter into any joint venture with any other hospital, health-care system or health plan relating to the provision of hospital services, (b) acquire or be acquired by any health plan, or (c) acquire any interest in any hospital or health-care system outside Kenosha and surrounding counties. Nothing in this Paragraph shall be construed to apply to any sale or [\*24] acquisition in which KHMC and SCH are the only parties.

#### *20. Binding on Successors and Assigns*

The terms of this Final Judgment are binding on Siena and its directors, officers, managers and employees, successors and assigns, including but not limited to any person or entity to whom Siena may be sold, leased or otherwise transferred, and all persons who are in active concert or participation with them who have actual or

constructive notice thereof. Siena shall not permit any substantial part of Siena to be acquired by any other person unless that person agrees in writing to be bound by the provisions of this Final Judgment. Neither Siena nor any member hospital shall undertake any action through any entity controlled by any of them that would violate this Final Judgment if undertaken directly by Siena or a member hospital.

## *21. Reporting Mechanism*

21.1 Within 150 days after the anniversary of this Final Judgment while it is in effect, Siena shall submit to the Attorney General an annual report accompanied by an officer's compliance certificate describing its compliance with this Final Judgment. This report shall include a review of capital and duplicative-service avoidance [\*25] and indicate any monies spent to be added to the operational-savings target pursuant to Subparagraph 12.3. The report shall include an analysis of Revenue and Expense pursuant to Subparagraphs 12.6 (a), (b) and (c), indicating compliance with the required targets and documenting the amount and timing of any required rate reduction. The report shall also include a description of expenses incurred in providing low-cost or no-cost services to the community pursuant to Subparagraph 12.1(b). The Attorney General will provide notice to Siena of any concerns raised by the annual compliance report within 30 days after its receipt of the report. Siena will meet with the Attorney General to attempt to resolve any concerns that the Attorney General may raise from its review of the report.

21.2 Siena will reimburse the Attorney General for expenses, including the payment of any expert fees, incurred in analyzing and verifying this report, in an amount not to exceed \$ 10,000 per year. Within 60 days from entry of this Final Judgment, Siena will pay the Attorney General \$ 5,000 to establish a mutually-agreed upon model to be used to analyze compliance. This amount shall be deducted from the first [\*26] year's reimbursement requirement. Siena will cooperate with any expert hired by the Attorney General, including, but not limited to, providing any additional requested information within Siena's control reasonably necessary to complete the analysis and verification of the compliance report.

## *22. Publication*

### *22.1 Efficiency Report*

Within 30 days after entry of the Final Judgment, Siena shall prepare and submit to the Attorney General a condensed explanation of the anticipated efficiencies and service reconfigurations resulting from Siena's creation, which will be released to the general public in Kenosha and surrounding counties.

### *22.2 Terms and Conditions*

Within 21 days after entry of the Final Judgment, Siena shall prepare and submit to the Attorney General a condensed version of the Final Judgment's terms, which will be released to the general public in Kenosha and surrounding counties.

## *23. Compliance*

To determine or secure compliance with this Final Judgment, any duly authorized representative of the Attorney General shall be permitted:

23.1 Upon reasonable notice, access during normal business hours to all non-privileged records and documents in Siena's possession [\*27] or control relating to any matters contained in this Final Judgment; and

23.2 Upon reasonable notice, access during normal business hours to interview Siena officers, managers, or employees regarding any matters contained in this Final Judgment.

## *24. Complaint Procedure*

Any person, including health-care providers, health plans, or consumers of medical services, who wishes to report a possible violation of this Final Judgment shall send a written description of the possible violation to the Assistant

Attorney General in Charge of Antitrust Enforcement, Antitrust and Criminal Litigation Unit, Office of Attorney General, 4th Floor, 123 West Washington Avenue, Madison, Wisconsin 53707. Unless prohibited from doing so by law, the Attorney General shall send a copy of the complaint to Siena's President, 6308 Eighth Avenue, Kenosha, Wisconsin, 53143. At the request of the Attorney General, Siena shall respond in writing to the Attorney General within thirty 30 days after receiving the complaint. If the complaint is still unresolved, the Attorney General will attempt to negotiate a satisfactory resolution. If Siena believes any complaint is frivolous, it may so advise the Attorney General, [\*28] and its obligations under this paragraph will be satisfied unless it is otherwise advised by the Attorney General to respond more fully to the Complaint.

#### *25. Reimbursement of Expenses*

Upon entry of this Final Judgment, KHMC and SCH shall jointly pay \$ 20,000 to reimburse the Attorney General's costs incurred to conduct its investigation, which payment shall be used for future antitrust enforcement purposes.

#### *26. Enforcement*

26.1 If the Attorney General believes that there has been a violation of this Final Judgment, it shall promptly notify Siena in writing and explain the possible violation. The Attorney General shall permit Siena a reasonable opportunity to cure any alleged violation without instituting legal action. If Siena does not cure the alleged violation within 60 days after notification, the Attorney General may take any remedial action it deems appropriate. This time period shall be extended in circumstances where the 60-day period is not sufficient in which to cure the alleged violation.

26.2 In any action or proceeding brought by the Attorney General to enforce this Final Judgment or otherwise arising out of or relating hereto, the Attorney General, if it is [\*29] the prevailing party, shall recover its costs and expenses, including attorneys' fees.

#### *27. Legal Exposure*

No provision of this Final Judgment shall be interpreted or construed to require Siena to take any action, or to prohibit Siena from taking any action, if that requirement or prohibition would expose Siena to significant risk of liability, including, but not limited to, liability for any type of negligence (including negligent credentialing or negligence in making referrals) or malpractice.

#### *28. Notices*

All notices required by this Final Judgment shall be sent by certified or registered mail, return receipt requested, postage prepaid, or by hand delivery, to:

If to the Attorney General:

Assistant Attorney General in Charge of Antitrust Enforcement  
Criminal Litigation and Antitrust Unit  
Office of Attorney General  
4th floor, 123 West Washington Avenue  
Madison, WI 53707

If to Siena:

President, Siena Healthcare System, Inc.  
6308 Eighth Avenue  
Kenosha, WI 53143

#### *29. Averment of Truth*

Siena avers that the information it provided to the Attorney General in connection with this Final Judgment, to the best of its knowledge, is true and [\*30] represents the most recent and comprehensive data available, and that no material information has been withheld.

### *30. Termination*

This Final Judgment shall expire on the seventh anniversary of its date of entry if it has not terminated prior to that time as provided in Paragraph 31.

### *31. Early Expiration*

Five years after entry of this Final Judgment, Siena may request the Attorney General in writing to concur in Siena's application to this Court for an order terminating this Final Judgment. The Attorney General shall not unreasonably withhold its concurrence to the application if Siena has complied with the provisions of this Final Judgment. In addition, this Final Judgment shall terminate without further action by the Court or any of the parties at such time as any entity opens a health-care facility in Kenosha or Racine County which has a number of inpatient medical-surgical beds equal to 25 percent or more of the average number of inpatient staffed medical-surgical beds that Siena is operating at that time, except that Siena may not deem this Final Judgment to have terminated without first giving the Attorney General 30 days' advance written notice. In addition, if Siena [\*31] believes that any entity has opened or expanded a health-care facility that will provide substantial competition to Siena, it may petition the Attorney General to join a petition to this Court to terminate this Final Judgment.

### *32. Modification*

If either the Attorney General or Siena believes that modification of the Final Judgment would be in the public interest because of changed or unforeseen circumstances or for other reasons, that party shall notify the other, and the parties shall attempt to agree on a modification. If the parties agree on a modification, they shall petition the Court jointly to modify the Final Judgment. If they cannot agree on a modification, the party seeking modification may petition the Court for modification and shall bear the burden of persuasion that the requested modification is in the public interest.

### *33. Retention of Jurisdiction*

Unless this Final Judgment is terminated early pursuant to Paragraph 31, this Court shall retain jurisdiction for seven years after entry to enable any party to apply for such further orders and directions as may be necessary and appropriate for the interpretation, modification and enforcement of this Final Judgment.

DATED [\*32] this 20th day of Dec., 1996.

JAMES E. DOYLE

Attorney General

State of Wisconsin

KENOSHA HOSPITAL AND MEDICAL CENTER, INC.

By:

Kevin J. O'Connor

Assistant Attorney General

Office of Attorney General

4th Floor

123 West Washington Avenue

Madison, WI 53707

(608) 266-8986

By:

Richard O. Schmidt, Jr.

President and Chief

Executive Officer

Attest: B Carol Gammon

ST. CATHERINE'S HOSPITAL, INC.

By:

Ryland Davis

President and Chief Executive Officer

Attest:

John J. Miles

Bruce R. Stewart

Ober, Kaler, Grimes & Shriver

A Professional Corporation

1401 H Street, N.W.

Fifth Floor

Washington, DC 20005-3324

(202) 826-5008

Attorneys for KHMC and SCH

SO ORDERED: *December 31, 1996*

Joseph Stadtmueller

Chief United States District Judge

**Judgment entered this 31st day of December, 1996.**

*Exhibit 1*

Siena Healthcare System, Inc.

(000's Omitted)

Year 1	Year 2	Year 3	Year 4	Year 5	Total
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		Year 1	Year 2	Year 3	Year 4	Year 5	Total
1.	Operating Savings Target	(457)	3,597	5,502	5,514	5,519	19,675
2.	Depreciation Expense Not Incurred	75	318	519	618	792	2,322
3.	Sub-Total	(382)	3,915	6,021	6,132	6,311	21,997
4.	Pass Through Rate	60%	80%	80%	80%	80%	
5.	Pass Through to Community	(229)	3,132	4,817	4,906	5,049	17,675
6.	Capital and Duplicative Service Avoidance	3,369	10,357	1,658	4,358	4,310	24,052
Total of Operating Savings and Capital-Avoidance Savings (Lines 1+6) \$ 43,727							

## [\*33] Exhibit 2

In determining the clinical privileges to grant applicants for medical-staff membership and clinical privileges, the Siena Board of Directors will grant each applicant Category I, II, or III privileges, depending on the characteristics of that physician's practice and patients.

Category I Privileges -- Those privileges requiring a physician to have his or her office and residence within 30-minutes driving time of Siena's northeast and southeast campuses because of the types of medical services he or she provides and the potential urgent or emergent nature of his or her patients' needs. For an applicant to be assigned Category I privileges, his or her patients must have the greatest acuity level and level of risk of complications resulting from the procedures performed by the physician at Siena.

Category II Privileges -- Those privileges requiring a physician to have his or her office and residence within 60 minutes of Siena's northeast and southeast campuses, and have written backup coverage for urgent and emergent patient-care needs with a physician whose clinical privileges are comparable and whose office and residence are within 30-minutes driving time of Siena's [\*34] northeast and southeast campuses because of the types of medical services he or she provides and the potential urgent or emergent nature of his or her patients' needs.

Category III Privileges -- Those privileges requiring a physician to have his or her office and residence within 60 minutes of Siena's northeast and southeast campuses, but no physician backup coverage because the types of medical services rendered and type of patients seen result in little or no patient risk because of the non-urgent and non-emergent nature of patients seen or care rendered.

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End of Document

## Bijan Designer for Men v. Katzman

United States District Court for the Southern District of New York

January 6, 1997, Decided ; February 7, 1997, FILED

96 Civ. 7345 (BSJ)

**Reporter**

1997 U.S. Dist. LEXIS 1426 \*

BIJAN DESIGNER FOR MEN, INC., a Delaware corporation, Plaintiff, v. ALAN KATZMAN, Defendant.

**Disposition:** [\*1] Motions denied.

### **Core Terms**

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customers, customer list, vendors, confidential, restrictive covenant, no evidence, customer information, employees, confidential information, documents, lists, clothing, trade secret, mailing, secret, preliminary injunction, likelihood of success, names and addresses, irreparable harm, fiduciary duty, phone number, measurements, enjoin, merits, public relations firm, serious question, disclosure, injunctive, advertise, antitrust

### **LexisNexis® Headnotes**

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

#### **HN1[] Injunctions, Grounds for Injunctions**

A court may grant a preliminary injunction only upon the movant's showing of: (a) irreparable harm, and (b) either (1) a likelihood of success on the merits or (2) a sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Trade Secrets Law > Protected Information > Customer Lists

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Customers of Former Employer

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Misappropriation Actions > Unfair Competition

Trade Secrets Law > Employee Duties & Obligations > Right to Compete

## **HN2** [] Types of Contracts, Covenants

New York law disfavors restrictive covenants that interfere with a person's ability to pursue a vocation after leaving employment with a particular firm. Restrictive covenants appearing in employment agreements receive rigorous scrutiny. Therefore, a court will not enforce restrictive covenants between employer and employee unless reasonable temporally and geographically, and then only to the extent necessary to protect the employer from unfair competition stemming from the employee's use or disclosure of trade secrets, confidential customer lists, or confidential customer information. This rule effectively blunts the intended effect of many non-solicitation agreements, except insofar as they define the geographic or durational limits upon a former employee's use of trade secrets or other confidential information.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

## **HN3** [] Types of Contracts, Covenants

A court may enforce restrictive covenants between employer and employee if (1) it is reasonable temporally and geographically and (2) the employee's services are unique or extraordinary.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Governments > Legislation > Overbreadth

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

## **HN4** [] Types of Contracts, Covenants

The reasonableness of a restrictive covenant's duration is determined in large part by the specific circumstances of the case.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

## **HN5** Types of Contracts, Covenants

If a court finds the duration of a covenant not to compete unreasonable it can "blue pencil" the covenant to reduce the term to a reasonable time frame.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Trade Secrets Law > Employee Duties & Obligations > Right to Compete > Covenants Not to Compete

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

Trade Secrets Law > Trade Secret Determination Factors > General Overview

Trade Secrets Law > Protected Information > Customer Lists

## **HN6** Types of Contracts, Covenants

The court may only enforce a noncompetition agreement's restrictive covenants to the extent they protect an employer from an employee's unfair use of trade secrets or confidential customer information. Whether something is a confidential trade secret is determined by the following factors: (1) the extent to which the information is known outside the business; (2) the extent to which the information is known to employees and others involved in the business; (3) the extent that measures are taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease of difficulty with which the information could properly be acquired or duplicated by others. A customer list should be a confidential trade secret if it was developed through substantial effort and kept in confidence, provided the information it contains is not readily ascertainable.

Trade Secrets Law > Protected Information > Customer Lists

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > General Overview

Trade Secrets Law > Protected Information > Machines

Trade Secrets Law > Protection of Secrecy > General Overview

## **HN7** Protected Information, Customer Lists

A customer list developed by a business through substantial effort and kept in confidence is entitled to trade secret protection. However, the owner is entitled to such protection only as long as he maintains the list in secrecy. Upon disclosure, the information loses trade secret protection. A substantial element of secrecy must exist so that, except by the use of improper means, there would be difficulty in acquiring the information.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Governments > Legislation > Overbreadth

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Customers of Former Employer

#### **HN8** [] **Types of Contracts, Covenants**

An injunction which enjoins one from doing business with former customers who seek out his services without solicitation on his part operates in a harsh and oppressive manner and is void as against public policy. A restrictive covenant seeking to prevent an employee from contacting friends or associates is overbroad. It is inequitable to enjoin an employee from calling upon his experience, knowledge, and friendships.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

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

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Customers of Former Employer

#### **HN9** [] **Types of Contracts, Covenants**

To obtain injunctive relief enforcing a restrictive covenant concerning the information in a former employer's customer files other than names, addresses, and phone numbers, the employer need show not only that irreparable injury will likely occur, but also that such injury is imminent.

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

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Customers of Former Employer

Civil Procedure > Remedies > Damages > Monetary Damages

#### **HN10** [] **Injunctions, Grounds for Injunctions**

The use and disclosure of an employer's confidential customer information and the possibility of loss of customers through such usage constitute irreparable harm. The loss of good will constitutes irreparable harm that cannot be compensated by money damages.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Trade Secrets Law > ... > Remedies > Injunctions > General Overview

#### **HN11** [] **Injunctions, Preliminary & Temporary Injunctions**

A preliminary injunction requires a concrete showing of imminent irreparable harm.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Governments > Fiduciaries

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

## **HN12** [] **Types of Contracts, Covenants**

Once a party to a covenant not to compete returns confidential information, no further relief is required.

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > Remedies

Trade Secrets Law > ... > Remedies > Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Labor & Employment Law > Employment Relationships > Fiduciary Responsibilities

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

## **HN13** [] **Governments, Fiduciaries**

Even where a former employee has not misappropriated trade secrets or other confidential materials, a court may enjoin him from using information obtained from a former employer if it is shown that he obtained that information by wrongful means amounting to an egregious breach of trust and confidence, such as theft. In such cases the ex-employee has breached a fiduciary duty to the employer by engaging in misconduct during the course of his employment.

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

## **HN14** [] **Commercial Interference, Contracts**

To establish tortious interference with a contract, a party must show proof of (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional inducement of the third party to breach that contract, and (4) damages. The plaintiff must establish that the motive for the interference was improper. To commit tort of intentional interference with contract, one's motive must be solely malicious.

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

## **HN15** [blue icon] **Commercial Interference, Contracts**

A claim for tortious interference with a contract is very difficult to sustain and will not lie absent a showing that the action complained of was motivated solely by malice or a desire to inflict injury by unlawful means rather than by self-interest or other economic considerations. Where a party's interest is intended even partially to advance its own interests, the misconduct must rise to the level of fraudulent or criminal acts.

Antitrust & Trade Law > Sherman Act > General Overview

## **HN16** [blue icon] **Antitrust & Trade Law, Sherman Act**

To state a claim under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must at least show that the defendants' alleged actions had an actual adverse effect on competition as a whole in the relevant market. The overarching standard is whether the defendant's behavior diminished overall competition and hence consumer welfare. A plaintiff must show more than simple injury resulting from the defendant's conduct. 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](#). Private antitrust plaintiffs must show more than that the defendant's conduct caused them injury.

Antitrust & Trade Law > Sherman Act > General Overview

## **HN17** [blue icon] **Antitrust & Trade Law, Sherman Act**

New York State's antitrust act, the Donnelly Act, [N.Y. Gen. Bus. Law § 340](#) (1988), is modeled on the Sherman Act, [15 U.S.C.S. § 1](#), and is construed in accordance with the Sherman Act.

**Counsel:** For plaintiff: George L. Graff, Lisa J. Laplace, Paul, Hastings. Janofsky & Walker LLP, New York, NY.

For defendant: Alan B. Howard, Andrew T. Hahn, Winston & Strawn, New York, NY.

**Judges:** BARBARA S. JONES, UNITED STATES DISTRICT JUDGE

**Opinion by:** BARBARA S. JONES

## **Opinion**

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### **MEMORANDUM & ORDER**

**BARBARA S. JONES**

**UNITED STATES DISTRICT JUDGE**

This case concerns a men's clothier and its former employee. The clothier alleges that the former employee has breached a restrictive covenant in an agreement between them. The employee, in turn, alleges that his former employer is engaging in anti-competitive behavior towards the employee's new company.

Pending are cross-motions for preliminary injunctions. Plaintiff Bijan Designer for Men, Inc.'s ("Bijan") moves to enjoin its former employee, defendant Alan Katzman ("Katzman"), from using allegedly confidential information to develop his own retail clothing store. Katzman, meanwhile, cross-moves to enjoin Bijan from threatening clothing vendors with lost sales should they continue to deal with Katzman's new business.

After a hearing on November 7, 1996 and a review of the parties' post-hearing submissions, the Court [\*2] denies both motions.

## BACKGROUND

The following constitutes the Court's findings of fact pursuant to [Fed.R.Civ.P. 52\(a\)](#):

Bijan is a corporation organized and operating under the laws of the State of Delaware with its principal place of business in New York. As such, it is the corporate vehicle for Bijan Pakzad ("Pakzad"), a successful designer and retailer of high quality men's apparel and accessories. Bijan operates a store on New York City's Fifth Avenue.

In merchandising its inventory, Bijan offers personalized service to clients who shop at the Bijan store by appointment and are catered to by sophisticated salespeople. Offering individual items that can cost thousands of dollars each, Pakzad states that it is not unusual for customers to spend over \$ 100,000 on Bijan couture in a single day of shopping.

As might be expected, Bijan's potential client base is limited to those relatively few individuals able to afford the luxury of Bijan's offerings. As a result, Bijan has built its business on a small customer base, maintaining that any single customer represents a substantial amount of revenue.

In order to attract such customers, Pakzad states that Bijan has spent over [\*3] \$ 20 million in advertising in the past 15 to 20 years. Additionally, Pakzad and his associates -- including Katzman -- have traveled around the world publicizing the Bijan name and introducing themselves and their inventory to potential purchasers. In fact, according to Pakzad, only 15 to 20 percent of Bijan's business derives from New York City.

In connection with its business Bijan maintains customer information in an unlocked file cabinet in its New York store that consists of names, addresses, phone numbers, preferences, needs, measurements, and the manner of preferred payment. A list of customers' names and addresses is kept on notebook-size paper (hereinafter referred to as the "Customer List"). Bijan keeps at least two copies of this Customer List in its New York store. The rest of the information is kept in various other forms, such as on Rolodex and tailoring cards.

Bijan also attracts and keeps customers through its ability to offer unique and high-quality clothing. In this connection, Bijan's sources of supply are crucial to its success. Additionally, plaintiff has developed a list of manufacturers able to meet its standards and with which it regularly transacts.

In [\*4] order to protect the information it considers most critical, Bijan informs each prospective employee that it considers customer information to be confidential. Bijan's employee handbook emphasizes this point, warning employees to guard against unauthorized disclosure. Indeed, Bijan employs a security guard responsible for inspecting the bags of Bijan employees exiting the premises. Additionally, Pakzad once sent a memo to Bijan's employees alerting them that failure to preserve the confidentiality of Bijan's customer information could result in dismissal. Bijan also requires its employees to sign a confidentiality agreement commanding them to preserve Bijan's secrets, including customer and vendor information.

At the beginning of his employ with Bijan in November 1989, Katzman signed such an agreement (the "Agreement"), which describes the information Bijan considers confidential as:

the names, buying practices or needs of Employer's customers; the fact that they may be customers of Employer; information relating to customer's personal and business affairs; customer lists, files, records,

designs, measurements,... credit memoranda... methods used to contact customers and marketing [\*5] data; names of vendors or suppliers of Employer....

In addition, the Agreement obligates Katzman, for the term of his employment and for five years following, to:

... NOT DIRECTLY OR INDIRECTLY USE, SELL, OR DIVULGE ANY CONFIDENTIAL INFORMATION TO ANY PERSON, FIRM, OR CORPORATION;

... USE... BEST EFFORTS TO PREVENT THE DISCLOSURE OF ANY CONFIDENTIAL INFORMATION BY OTHERS; AND

... NOT CALL ON, SOLICIT, TAKE AWAY OR OTHERWISE CONTACT, EXCEPT AS INSTRUCTED BY EMPLOYER, ANY INDIVIDUALS WHO ARE OR WERE CUSTOMERS OF EMPLOYER DURING THE TERM HEREOF.

Moreover, the Agreement obligates Katzman to return to Bijan upon termination of his employment any documents containing or reflecting confidential information.

Despite such agreements and Bijan's purported desire to keep its Customer List a secret, Bijan has advertised the names of hundreds of its customers, placing that list in national publications, posters in its store window, and even on t-shirts.<sup>1</sup> In addition, Bijan's New York store boasts a "wall of clocks," which contains the names and locations of hundreds of its customers, and displays pictures of some of its more famous ones. Additionally, Pakzad has [\*6] disclosed the names of some of his customers to journalists preparing articles or television features concerning him. Moreover, even though Bijan employees are forbidden from removing company documents from its store, every Bijan employee, including the store's doorman, has access to the Customer List and Katzman regularly took home the business cards of Bijan customers.

As to his vendors, Pakzad admits that Bijan's sources are not a secret, stating that it is well known in the industry where Bijan purchases its clothes. Indeed, these vendors regularly advertise in trade journals and other publications. Moreover, Katzman has developed close personal relationships with their representatives.

While employed with Bijan, Katzman was promoted from salesman to general [\*7] manager and was introduced to many of its valuable customers. In this connection, Katzman developed close business and personal relationships with many of those on Bijan's Customer List. Despite his success, he resigned in July, 1996.

That month, Katzman began managing his own upscale men's clothes shop, "Harrison James," naming himself as its president and scheduling the store to open for business in November, 1996.<sup>2</sup> Operating out of a 15,000 square foot townhouse on a side street off of New York City's Fifth Avenue (directly around the corner from Bijan's store), Harrison James desires to rival the exclusivity and quality of the goods and services Bijan provides.

In order to begin establishing itself, Katzman hired at least two former Bijan employees -- Medhi Pakzad and Melinda [\*8] Raffi -- and a public relations firm. With regard to the employees, Medhi Pakzad, who is apparently related to Bijan Pakzad, terminated his employ with Bijan years ago and worked for the high-fashion retailer DeLisi prior to joining Harrison James. Melinda Raffi, meanwhile, testified that Katzman did not recruit her to leave Bijan, but that she asked Katzman to hire her.

When he hired the public relations firm, Katzman supplied the firm with a copy of Bijan's Customer List that he obtained while working at Bijan. It was to be used together with other lists of prominent citizens to accomplish a mass mailing announcing Harrison James' birth. There is no evidence that Katzman "stole" this list. Rather, the evidence only suggests that he lawfully had it in his possession when he resigned and that he did not return it until August 27, 1996, when Bijan reminded him of the Agreement's restrictive covenants. Later during the course of this litigation Katzman also produced pages from another Bijan customer list, photocopies of various cards taken from a Bijan Rolodex, and documents containing the tailoring measurements of certain Bijan customers. There is no

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<sup>1</sup> Pakzad characterizes these publications not as advertisements, but as "salutes" to people with style. Nevertheless, the fact remains that the publications -- whether meant to advertise or to honor -- announce the identities of certain Bijan customers.

<sup>2</sup> Katzman worked to form Harrison James during his tenure with Bijan -- but on his personal time. There is no evidence, however, to suggest that Katzman was working to undermine or to compete with Bijan while he was its employee.

evidence suggesting that prior [\*9] to returning these items Katzman took the time to memorize their contents. Additionally, there is no evidence that Katzman has retained copies of those documents he returned.

Although he asked his public relations firm to return Bijan's Customer List, Katzman did not instruct it to remove from the Harrison James mailing list the names of the customers on the Bijan list. As a result, although a number of lists which duplicated names on the Bijan list were used for the mailing, the public relations firm cannot say which list was the source of any particular customer name. What is certain, however, is that the names and addresses on Bijan's Customers List are easily found in other sources. In fact, they can be duplicated by copying the membership rolls of exclusive Manhattan clubs and subscription lists of various publications. Patricia Harrington, Katzman's public relation's agent, testified that there is a "New York social list, which everyone has access to," as well as various other publicly available social lists whose content encompasses the names and addresses of Bijan's customers. Additionally, she stated that many of the addresses can be ascertained simply by calling Information. [\*10] In this connection, Carlye Duffy, who works for the public relations firm that executed Harrison James' mass mailing, testified that she was unsure which sources were used to garner specific names and addresses to complete the mailing, but that she was certain that lists other than Bijan's Customer List were used. Similarly, she testified that the names on Harrison James' current customer list all came from sources other than Bijan's Customer List.

In addition to accomplishing a mass mailing after leaving Bijan, Katzman approached at least two of Bijan's vendors and placed orders for Harrison James. Specifically, Katzman ordered goods from Saintandrews and claims to have had a purchase agreement with the vendor Hettabretz, although he offers only a purchase order, and not a signed, written contract, to that effect.

Upon learning that Katzman sought to purchase clothing from these vendors, Pakzad became upset and told the vendors' representatives that he would cease purchasing from them if they maintained business relationships with Katzman. As a result, Hettabretz and Saintandrews refused to meet Harrison James' orders for goods. Specifically, by letter dated July 11, 1996, Hettabretz [\*11] informed Katzman that after meeting with Pakzad, it was compelled to decide that it could not supply him with topcoats he earlier had ordered. That letter, however, also communicates Hettabretz' intention to remain available to do future business with Katzman. Additionally, John McCoy, a Saintandrews representative, informed Katzman that Pakzad had told the vendor that Bijan would no longer purchase Saintandrews' materials if the supplier continued to do business with Katzman. Given this, Saintandrews decided not to meet Katzman's order. Since then, Bijan has continued to purchase clothing from Saintandrews.<sup>3</sup> Lastly, a representative from Marol approached Katzman to inform him that Pakzad had told him that Bijan would not purchase from Marol if it sold to Harrison James. Katzman now maintains that Pakzad's behavior threatens his supply of high-quality, fine men's clothing.

## [\*12] DISCUSSION

### I. LEGAL STANDARD

Two motions are pending. Plaintiff asks the Court to enjoin Katzman from soliciting Bijan's customers, manufacturers, and employees in building his business.<sup>4</sup> Defendant cross-moves to enjoin Bijan from threatening vendors from doing business with Harrison James.

Both motions are governed by the overarching and well-settled law instructing courts to issue sparingly the extraordinary remedy of a preliminary injunction. Indeed, [HN1](#) [↑] a court may grant a preliminary injunction only upon the movant's showing of:

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<sup>3</sup> Pakzad admits that he told vendors that he would not do business with them should they sell to Katzman, but denies threatening them to cut off all ties with his former employee.

<sup>4</sup> Originally, plaintiff also accused Katzman of approaching several manufacturers and attempting to persuade them to sell to Harrison James goods that they had agreed to sell exclusively to Bijan. However, while it still asserts the veracity of this allegation, plaintiff has withdrawn the claim pending further discovery.

(a) irreparable harm; and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make [\*13] them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

[Blum v. Schlegel, 18 F.3d 1005, 1010 \(2d Cir. 1994\); accord Baker's Aid v. Hussmann Foodservice Corp., 830 F.2d 13, 15 \(2d Cir. 1987\); Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 \(2d Cir. 1979\); see also Hanson Trust PLC v. MS SCM Acquisition, Inc., 781 F.2d 264, 273 \(2d Cir. 1986\).](#)

## II. BIJAN'S MOTION

By Order to Show Cause dated September 30, 1996, Bijan asked this Court to issue a preliminary injunction enforcing the Agreement's restrictive covenants. Additionally, Bijan argues that a fiduciary duty arises out of Katzman's former relationship with Bijan, prohibiting him from now exploiting Bijan's Customer List and other allegedly confidential information for his own benefit.<sup>5</sup> In response, Katzman maintains that the Agreement's restrictive covenants are unenforceable and that this case does not implicate any fiduciary duty.

[\*14] For the following reasons, Bijan's motion is denied.

### A. Restrictive Covenant

#### 1. Likelihood of Success or Sufficiently Serious Questions Going to the Merits

[HN2\[↑\]](#) New York law disfavors restrictive covenants that interfere with a person's ability to pursue a vocation after leaving employment with a particular firm. [American Broadcasting Companies, Inc. v. Wolf, 52 N.Y.2d 394, 438 N.Y.S.2d 482, 486-87, 420 N.E.2d 363 \(Ct. App. 1981\); see also Baker's Aid, 730 F. Supp. at 1214](#) (noting that restrictive covenants appearing in employment agreements receive rigorous scrutiny). Therefore, a court will not enforce restrictive covenants between employer and employee unless reasonable temporally and geographically, and then only to the extent necessary to protect the employer from unfair competition stemming from the employee's use or disclosure of trade secrets, confidential customer lists, or confidential customer information.<sup>6</sup> [Coolidge Co., Inc. v. Mokrynski, 472 F. Supp. 459, 462 \(S.D.N.Y. 1979\); Columbia Ribbon & Carbon Mfg. Co., Inc. v. A-1-A Corp., 42 N.Y.2d 496, 398 N.Y.S.2d 1004, 1006-07, 369 N.E.2d 4 \(Ct. App. 977\); Reed, Roberts Assocs., Inc., 40 N.Y.2d 303, 386 N.Y.S.2d 677, 679-80, 353 N.E.2d 590 \(Ct. App. \[\\*15\] 1976\); Family Affairs Haircutters v. Detling, 110 A.D.2d 745, 488 N.Y.S.2d 204, 207 \(App. Div. 1985\)](#). This rule effectively blunts the intended effect of many non-solicitation agreements, except insofar as they define the geographic or durational limits upon a former employee's use of trade secrets or other confidential information. See [Briskin v. All Seasons Servs., Inc., 206 A.D.2d 906, 615 N.Y.S.2d 166-167 \(App. Div. 1994\); Greenwich Mills Co. v. Barrie House Coffee Co., 91 A.D.2d 398, 459 N.Y.S.2d 454, 459 \(App. Div. 1983\)](#).

Katzman argues that the restrictive covenant at issue in [\*16] this case is unreasonable in duration and that, in any event, its enforcement is unnecessary to protect Bijan from the unfair use of confidential trade secrets.<sup>7</sup> Bijan disagrees, stating that the covenant is enforceable as written.

<sup>5</sup> Bijan also moves to enjoin Katzman from soliciting individuals who were employed by Bijan during the term of Katzman's tenure to terminate their employ with Bijan. However, it fails to show how the Agreement or any other legal theory would support the issuance of such relief. Moreover, Bijan flounders in its attempt to show that Katzman has raided Bijan and solicited its employees to work for him. Indeed, of the two former Bijan employees working for Harrison James, one worked for Bijan years ago, while the other testified unequivocally that she approached Katzman for a job. Accordingly, Bijan's plea to obtain an injunction preventing Katzman from hiring Bijan employees is denied.

<sup>6</sup> Additionally, [HN3\[↑\]](#) a court may enforce restrictive covenants between employer and employee if (1) it is reasonable temporally and geographically and (2) the employee's services are unique or extraordinary. [Columbia Ribbon & Carbon Mfg. Co., Inc., 398 N.Y.S.2d at 1006-07 \(1977\)](#). However, as there is no allegation that Katzman possesses such unique or extraordinary abilities, the Court will not address this issue.

**HN4**<sup>↑</sup> The reasonableness of a restrictive covenant's duration is determined in large part by the specific circumstances of the case. See *Ivy Mar Co., Inc. v. C.R. Seasons Ltd.*, 907 F. Supp. 547, 558 (E.D.N.Y. 1995) (listing cases). The Court finds that it is unnecessary at this time to decide whether the full five-year term is overbroad. Rather, since Katzman left Bijan's employ only months ago in July 1996, it is clear that the Agreement's terms reasonably extend to the present and near future.<sup>8</sup>

[\*17] Nonetheless, **HN6**<sup>↑</sup> the Court may only enforce the Agreement's restrictive covenants to the extent they protect Bijan from Katzman's unfair use of trade secrets or confidential customer information. See *Reed, Roberts Assocs., Inc.*, 398 N.Y.S.2d at 679-80. Bijan argues that its list of suppliers and manufacturers, i.e. its vendors, as well as the data on its Customer List constitute such information. The Court disagrees.

Whether something is a confidential trade secret is determined by the following factors: (1) the extent to which the information is known outside the business; (2) the extent to which the information is known to employees and others involved in the business; (3) the extent that measures are taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease of difficulty with which the information could properly be acquired or duplicated by others. *Integrated Cash Management Services v. Digital Transactions, Inc.*, 920 F.2d 171, 173 (2d Cir. 1990); *Ivy Mar Co., Inc. v. C.R. Seasons, Ltd.*, 907 F. Supp. at 556.

In this [\*18] light, a customer list should be considered a confidential trade secret if it was developed through substantial effort and kept in confidence, provided the information it contains is not readily ascertainable. *Defiance Button Machine Co. v. C & C Metal Products Corp.*, 759 F.2d 1053, 1063 (2d Cir.), cert. denied, 474 U.S. 844, 88 L. Ed. 2d 108, 106 S. Ct. 131 (1985); *Columbia Ribbon & Carbon Mfg. Co., Inc.*, 398 N.Y.S.2d at 1006-07; *Leo Silfen, Inc. v. Cream*, 29 N.Y.2d 387, 328 N.Y.S.2d 423, 427-29, 278 N.E.2d 636 (Ct. App. 1972) (holding that **HN7**<sup>↑</sup> a customer list developed by a business through substantial effort and kept in confidence is entitled to trade secret protection). However, the owner is entitled to such protection only as long as he maintains the list in secrecy; upon disclosure, the information loses trade secret protection. *Defiance Button Machine Co.*, 759 F.2d at 1063 (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475-76, 40 L. Ed. 2d 315, 94 S. Ct. 1879 (1974)). "A substantial element of secrecy must exist so that, except by the use of improper means, there would be difficulty in acquiring the information." *Restatement of Torts*, § 757, Comment [\*19] b, at 6 (1939); see also *FMC Corp. v. Taiwan Tainan Giant Ind. Co., Ltd.*, 730 F.2d 61, 63 (2d Cir. 1989) (per curiam) (stating that New York follows the *Restatement of Torts*, § 757, comment b).

Here, there is no evidence that Bijan took any steps to keep its customers or vendors' identities secret. Pakzad admits that the vendors it uses are known throughout the industry. Additionally, these vendors advertise themselves in trade journals and participate in trade shows. Indeed, their success depends in part on publicizing their identities and capabilities. Accordingly, the restrictive covenant is unenforceable to the extent it seeks to prevent Katzman from using certain vendors.

The situation is similar with regard to the information on Bijan's Customer List. All Bijan employees have access to its Customer List. Moreover, the evidence is clear that it is not difficult for anyone to obtain in the public domain the names and addresses on the list. Additionally, one may consult well-known sources such as Information, an exclusive club, or magazine subscription lists to garner information about people to whom stores like Bijan cater. Bijan not only made this information-gathering [\*20] task easier when it hung its "wall of clocks," displayed photographs, and published advertisements depicting and naming hundreds of its customers, see *Business Trends*

<sup>7</sup> Katzman does not argue that the covenant is overbroad in geographic scope, and thus the Court will not treat the issue at this time.

<sup>8</sup> The Court notes that even **HN5**<sup>↑</sup> if it found the five-year term unreasonable, it could "blue pencil" the covenant to reduce the term to a reasonable time frame. See *South Nassau Control. Corp. v. Innovative Control Mgmt. Corp.*, 95 Civ. 3724, at \*5, 1996 WL 496610 (E.D.N.Y. June 10, 1996); *Webcraft Techs., Inc. v. McCaw*, 674 F. Supp. 1039, 1047 (S.D.N.Y. 1987); *Karpinski v. Ingrasci*, 28 N.Y.2d 45, 320 N.Y.S.2d 1, 6-7, 268 N.E.2d 751 (Ct. App. 1971).

*Analysts, Inc. v. Freedonia Group, Inc.*, 700 F. Supp. 1213, 1236 (S.D.N.Y. 1988) (finding that party failed to take necessary steps to keep customer information a secret), but also offers no evidence suggesting, let alone proving, that the names and addresses on its list are not ascertainable through such methods. Indeed, there is testimony that the names on Katzman's customer list are all listed in publicly available databases, and that many, if not all, of those who received cards announcing Harrison James' opening are on lists other than Bijan's Customer List.<sup>9</sup> See *Public Relations Aids, Inc. v. Wagner*, 37 A.D.2d 293, 324 N.Y.S.2d 920, 922 (App. Div. 1971) (finding party's customer list "well-known to any one in the business of public relations"), aff'd, 30 N.Y.2d 890, 335 N.Y.S.2d 439, 286 N.E.2d 922 (Ct. App. 1972); cf. *Town & Country House and Home Service, Inc. v. Newbery*, 3 N.Y.2d 554, 170 N.Y.S.2d 328, 332, 147 N.E.2d 724 (Ct. App. 1958) (finding customer list confidential [\*21] in part because the names could not be found in public directories).

[\*22] While it is clear that the names and addresses of Bijan's customers are in the public domain, there is little evidence concerning whether their phone numbers are. In the absence of a well-developed record on this point, and faced with the testimony of Harrington and Duffy that the data concerning the customers is available through such services as public as Information, this Court declines to find such information "confidential."

On the other hand, the evidence is sufficient to show that the data beyond names, addresses and phone numbers in Bijan's customer files are not in the public domain; obviously, neither a person's neck and belt size, nor knowledge relating to a customer's personal and business affairs are discoverable by calling Information or consulting a magazine subscription list or club membership roll. See *Holiday Food Co. v. Munroe*, 37 Conn. Supp. 546, 426 A.2d 814, 818 (Conn. Super. Ct. 1981) (equating customers' buying habits, requirements, and preferences with "difficult to obtain information.") Additionally, there is no evidence suggesting that Bijan has ever disclosed this other information to persons outside of its employ.

Thus, this other information [\*23] in Bijan's customer files -- the information beyond the names, addresses, and phone numbers -- constitutes confidential customer information. Accordingly, the Court finds that Bijan has demonstrated a likelihood of success on its claim as to that part of the Agreement's restrictive covenants regarding the use of this information.

## 2. Irreparable Harm

In order [HN9](#) to obtain injunctive relief enforcing that part of the restrictive covenant concerning the information in Bijan's customer files other than names, addresses, and phone numbers, Bijan need show not only that irreparable injury will likely occur, but also that such injury is imminent. *Borey v. National Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991); *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990).

[HN10](#) "The use and disclosure of an employer's confidential customer information and the possibility of loss of customers through such usage constitute irreparable harm." *Ecolab, Inc.*, 753 F. Supp. at 1110 (emphasis supplied); see also *Ecolab, Inc. v. K.P. Laundry Machinery, Inc.*, 656 F. Supp. 894, 899 (S.D.N.Y. 1987) (loss of good will constitutes irreparable harm that cannot be compensated [\*24] by money damages).

<sup>9</sup> Bijan's motion seeks to enjoin Katzman from engaging in any contact with Bijan's customers. This relief, if granted, would prevent Katzman from doing business with these customers even if they sought his services without solicitation on his part. Indeed, it would require Katzman to actively avoid such customers. Such [HN8](#) an injunction would operate in a harsh and oppressive manner, and thus would be void as against public policy. See *American Broadcasting Companies, Inc.*, 438 N.Y.S.2d at 486; *Mohawk Maintenance Co. v. Kessler*, 74 A.D.2d 511, 424 N.Y.S.2d 907 (App. Div. 1980), aff'd, 52 N.Y.2d 276, 437 N.Y.S.2d 646, 419 N.E.2d 324 (Ct. App. 1981). Additionally, the Court notes that a restrictive covenant seeking to prevent an employee from contacting friends or associates, i.e. utilizing "normal friendships and business contacts", is overbroad. See *Great Lakes Carbon Corp. v. Koch Industries, Inc.*, 497 F. Supp. 462, 471 (S.D.N.Y. 1980); *Arnold K. Davis & Co., Inc. v. Ludemann*, 160 A.D.2d 614, 559 N.Y.S.2d 240, 242 (App. Div. 1990) (holding that it would be inequitable to enjoin employee from calling upon his "experience, knowledge, [and] friendships....")

Here, there is no evidence beyond conclusory statements suggesting that the use of the information in Bijan's customer files other than names, addresses, and phone numbers -- the information concerning personal bents, needs, measurements, and the manner of preferred payment -- threatens any possibility, let alone an imminent one, of loss of customers or other irreparable harm. See [USA Network v. Jones Intercable, Inc., 704 F. Supp. 488, 491 \(S.D.N.Y. 1989\)](#) (holding that [HN11](#)[<sup>15</sup>] preliminary injunction requires "concrete showing of imminent irreparable harm") (citing [State of New York v. Nuclear Reg. Comm'n, 550 F.2d 745 \(2d Cir. 1977\)](#)). Moreover, since Harrison James already has sent its mass mailing to persons on Bijan's Customer List, it is difficult to fathom the utility of an injunction prohibiting Katzman's use of those customers' measurements, preferences, and other confidential information. After all, Katzman presumably will discover this information on his own should the customers patronize his store. Further, there is no evidence that Katzman memorized or kept copies of documents memorializing this confidential information. See [Reidman Agency Inc. \[\\*25\] v. Musnicki, 79 A.D.2d 1094, 435 N.Y.S.2d 837, 838 \(App. Div. 1981\)](#) (holding that [HN12](#)[<sup>16</sup>] once party returns confidential information, no further relief is required) (citing [Leo Silfen, Inc., 387 N.Y.S.2d at 449](#)). Thus, Bijan has failed to establish the elements required to obtain injunctive relief enforcing the restrictive covenant.

#### B. Fiduciary Duty

[HN13](#)[<sup>17</sup>] Even where a former employee has not misappropriated trade secrets or other confidential materials, a court may enjoin him from using information obtained from a former employer if it is shown that he obtained that information by wrongful means amounting to an egregious breach of trust and confidence, such as theft. [Leo Silfen, Inc., 29 N.Y.2d 387, 328 N.Y.S.2d 423, 278 N.E.2d 636](#); accord [Ivy Mar Co., 907 F. Supp. at 560; Panther Systems II, Ltd. v. Panther Computer Systems, Inc., 783 F. Supp. 53, 66-67 \(E.D.N.Y. 1991\)](#) The rationale for issuing an injunction in such cases is that the ex-employee has breached a fiduciary duty to the employer by engaging in misconduct during the course of his employment. [Leo Silfen, Inc., 328 N.Y.S.2d at 426](#).

Here, there is no evidence that Katzman purloined information concerning [\[\\*26\]](#) Bijan's vendors. Moreover, although Katzman possessed documents belonging to Bijan containing customer information, there is no evidence that Katzman *purposefully took* these documents from Bijan. Rather, the evidence shows that he *retained* certain materials following his resignation and returned them upon being accused of their wrongful removal; the evidence does not suggest that Katzman still has any Bijan documents. This conduct does not amount to the kind of studied and wrongful behavior necessary to implicate a breach of the fiduciary duty. See [Leo Silfen, Inc., 328 N.Y.S.2d at 426; Ruesch Intl., Inc. v. MacCormack, 222 A.D.2d 343, 635 N.Y.S.2d 226, 227 \(App. Div. 1995\)](#) (where defendant "took" documents memorializing plaintiff's allegedly confidential customer information, but returned them upon being "accused by plaintiff of illegal removal," evidence is insufficient to show egregious breach of trust and confidence necessary to form breach of fiduciary duty).

#### III. KATZMAN'S MOTION

Katzman moves to enjoin Bijan from persisting in alleged anticompetitive and tortious behavior. Specifically, Katzman maintains that Bijan has engaged in systematic efforts [\[\\*27\]](#) to intimidate and coerce vendors to keep them from dealing with Katzman and Harrison James. Such behavior, Bijan maintains, amounts to (1) tortious interference with contract, (2) tortious interference with precontractual relations, and (3) violations of federal and state [antitrust law](#). Bijan counters that Katzman has failed to establish the elements required to obtain a preliminary injunction. For the following reasons, the Court denies the motion.

First, in order [HN14](#)[<sup>18</sup>] to establish tortious interference with contract, a party must show proof of (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional inducement of the third party to breach that contract, and (4) damages. [Finley v. Giacobbe, 79 F.3d 1285, 1294 \(2d Cir. 1996\)](#); [Kronos Inc. v. AVX Corp., 81 N.Y.2d 90, 595 N.Y.S.2d 931, 934, 612 N.E.2d 289 \(Ct. App. 1993\)](#). In addition, the plaintiff must establish that the motive for the interference was "improper." [M.J. Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 428 N.Y.S.2d 628, 632 & n.2, 406 N.E.2d 445 \(Ct. App. 1980\)](#) (listing factors to be considered [\[\\*28\]](#) in determining whether motive was improper); see also [M.J. & K. Co., Inc. v. Matthew Bender and Co., Inc., 220 A.D.2d 488, 631 N.Y.S.2d 938, 940 \(App. Div. 1995\)](#) (stating that in order to commit tort of intentional interference with contract, one's motive must be "solely malicious").

Here, Katzman offers proof of only one agreement between it and a vendor, namely Hettabretz. Even there, however, there is no written signed contract between the entities, and it is unclear whether an enforceable contract existed. See [New York v. SCA Services, Inc., 1993 U.S. Dist. LEXIS 12416](#), 83 Civ. 6402, 1993 WL 355348, at \*2 (S.D.N.Y. Sept. 8, 1993) (discussing whether purchase order constitutes enforceable contract). Additionally, there is no evidence demonstrating that Bijan was aware of that agreement; the evidence only shows that Pakzad knew that Katzman had approached various manufacturers to persuade them to sell to him. Moreover, the evidence does not show that Bijan's motive in informing vendors that he would cease purchasing from them should they sell to Harrison James was "improper." Rather, it seems fair for him to desire not to offer the same goods as Harrison James -- especially given Bijan's desire [\*29] to offer relatively unique merchandise and the fact that Harrison James is located around the corner from Bijan's New York store.

Similarly, Katzman fails to establish a likelihood of success or sufficiently serious questions going to the merits on its claim for tortious interference with precontractual relations. Such [HN15](#) [↑] a claim is "very difficult to sustain," [Kramer v. Pollock-Krasner Foundation, 890 F. Supp. 250, 258 \(S.D.N.Y. 1995\)](#), and will not lie absent a showing that the action complained of was motivated *solely* by malice or a desire to inflict injury by unlawful means rather than by self-interest or other economic considerations. *Id.*; [M.J. Guard-Life Corp., 428 N.Y.S.2d at 632-633](#). Thus, where a party's interest is intended even partially to advance its own interests, the misconduct must rise to the level of fraudulent or criminal acts. [Kahn v. Salomon Bros. Inc., 813 F. Supp. 191, 195 \(E.D.N.Y. 1993\)](#). The evidence fails to show that Bijan was motivated solely by malice when he informed various vendors that he would no longer do business with them should they decide to sell to Harrison James.

Lastly, Katzman also fails to show a likelihood of success or [\*30] sufficiently serious questions going to the merits of its claim grounded in federal and state **antitrust law**. In order [HN16](#) [↑] to state a claim under section one of the Sherman Act, [15 U.S.C. § 1](#), Katzman must at least show that Bijan's alleged actions had an "actual adverse effect" on competition as a whole in the relevant market; the overarching standard is whether Bijan's behavior "diminished overall competition, and hence consumer welfare." [K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co., 61 F.3d 123, 126 \(2d Cir. 1995\)](#); [Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 966 F.2d 537, 543 \(2d Cir.\), cert. denied, 510 U.S. 947, 126 L. Ed. 2d 337, 114 S. Ct. 388 \(1993\)](#). Thus, Katzman must show more than simple injury resulting from Bijan's conduct; "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." [K.M.B. Warehouse Distributors, Inc., 61 F.3d at 130](#) (citing [Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133-34 \(2d Cir. 1978\)](#)); see also [Balaklaw v. Lovell, 14 F.3d 793, 797 \(2d Cir. 1994\)](#) (private antitrust plaintiffs must show more than that the defendant's conduct caused them injury).

Here, Katzman merely demonstrates that Bijan's actions caused him to lose potentially lucrative contracts with Hettabretz, Saintandrews, and Marol; he shows only that Bijan, acting as a customer of the vendors, individually persuaded them not to sell to Harrison James, another potential customer. He does not establish any adverse effect on competition in the interbrand or intrabrand market and indeed submits *no* evidence demonstrating that his injury reflects the anticompetitive effect of Bijan's alleged antitrust violations. As a result, he fails to raise sufficiently serious questions on the merits of his antitrust claim, let alone a likelihood of success, justifying the issuance of the injunctive relief sought. See [K.M.B. Warehouse Distributors, Inc., 61 F.3d at 127](#).<sup>10</sup>

## [\*32] CONCLUSION

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<sup>10</sup> [HN17](#) [↑] New York State's antitrust act, the Donnelly Act, [N.Y. Gen. Bus. Law § 340](#) (McKinney 1988), was modeled on the Sherman Act, see [State v. Mobil Oil Corp., 38 N.Y.2d 460, 381 N.Y.S.2d 426, 344 N.E.2d 357 \(1976\)](#), and generally is construed in accordance with that act, [Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 525 N.Y.S.2d 816, 820, 520 N.E.2d 535 \(1988\)](#). Since Katzman identifies no state policy or difference in the statutory language that would justify construing the Donnelly Act differently from the Sherman Act in this case, his motion under New York **antitrust law** fails for the same reasons it does under federal **antitrust law**.

For the foregoing reasons, both motions are denied. The parties are directed to appear on January 10, 1996 in Courtroom 618, 40 Foley Square, New York, New York 10007 at 4:30 p.m. for a pretrial conference in order to discuss the further conduct of the case.

Dated: New York, New York

January 6, 1997

**BARBARA S. JONES**

**UNITED STATES DISTRICT JUDGE**

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## McIver v. General Mills

Court of Appeal of California, Second Appellate District, Division Six

January 6, 1997, Filed

No. B097951

**Reporter**

1997 Cal. App. Unpub. LEXIS 5 \*; 1997 WL 314376

SHERRIE ANN McIVER et al., Plaintiffs and Appellants, v. GENERAL MILLS, INC., etc., et al., Defendants and Respondents. ELISA A. MORGAN et al., Plaintiffs and Appellants, v. GENERAL MILLS, INC., etc., et al., Defendants and Respondents.

**Notice:** NOT TO BE PUBLISHED IN OFFICIAL REPORTS. [CALIFORNIA RULES OF COURT, RULE 8.1115\(a\)](#), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY [RULE 8.1115\(b\)](#). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF [RULE 8.1115](#).

**Prior History:** [\*1] Superior Court of Santa Barbara County. Super. Ct. No. 206666, Super. Ct. No. 207438. Arnold D. Gowans, Judge \*.

## **Core Terms**

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discovery, cereal, prices, conspiracy, summary judgment, consumer, continuance, antitrust, increases, summary judgment motion, appellants', products, Foods, manufacturers, protective order, minimum price, documents, meetings, trial court, grant summary judgment, Cartwright Act, complaints, collusive, retail, alleged conspiracy, wholesale price, no evidence, allegations, nonmoving, agreeing

**Counsel:** Cappello & McCann, Michael W. McCann, J. Paul Gignac and Wendy D. Welkom for Plaintiffs and Appellants.

Gibson, Dunn & Crutcher, Robert S. Warren, Daniel G. Swanson, Antoinette D. Paglia and Charles F. Kester for Defendant and Respondent General Mills, Inc.

Steefel, Levitt & Weiss, Leonard R. Stein and Eugene M. Pak for Defendant and Respondent The Quaker Oats Company.

Arnold & Porter, Susan J. Eliot and Margaret M. Morrow; Donna E. Patterson, pro hac vice, and Nancy M. Olson, pro hac vice, for Defendant and Respondent Kraft Foods, Inc.

Furth, Fahrner & Mason, Frederick P. Furth, Daniel S. Mason and Michele C. Jackson for Defendant and Respondent Kellogg Company.

**Judges:** STONE, P. J.; GILBERT, J., YEGAN, J. concurred.

**Opinion by:** STONE

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\* Assigned by the Chairperson of the Judicial Council.

## Opinion

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Sherrie Ann McIver and Elisa A. Morgan on behalf of themselves and all others similarly situated appeal from the judgment entered on grant of summary judgment by the Santa Barbara County Superior Court in favor of respondents General Mills, Inc., The Quaker Oats Company, Kraft Foods, Inc., and Kellogg Company. They [\*2] contend that the trial court erred in granting a protective order to enable respondents to move for summary judgment and in granting summary judgment and denying the requested continuance. We affirm.

### PROCEDURAL HISTORY

In March and April of 1995, appellants McIver and Morgan filed their complaints for restraint of trade and unfair competition against respondents, the nation's four leading ready-to-eat (RTE) cereal manufacturers, alleging a price-fixing scheme in violation of the Cartwright Act and the Unfair Competition Act. ([Bus. & Prof. Code, §§ 16700, 16750 et seq., 17200 et seq.](#)) The complaints alleged that: 1) defendants pursued a common course of conduct, acted in concert, and conspired with one another to accomplish the alleged offenses; 2) defendants collectively control nearly 85 percent of the market for cold breakfast cereal; 3) during the past decade the price paid by consumers has risen by 90 percent even though production costs have decreased over the same period of time; 4) this price escalation is twice the price hike which has occurred with respect to other foods and "vastly exceeds the rate of inflation experienced during that period of time;" 5) as a result of continuous [\*3] price escalation, defendants reap a profit margin of approximately 17 percent of the price of their cereal products, among the highest profit margins in the consumer food industry and three times higher than the average profit margin in the manufacturing industry; 6) the retail outlets pass on all of the supra-competitive fixed prices to consumers; 7) beginning on a date unknown and continuing to date of complaint, defendants "entered into and engaged in a contract, combination and conspiracy to suppress competition and unreasonably restrain trade and commerce by fixing and raising the prices of cereal products sold to consumers in the State of California;" 8) "This unlawful conduct, combination and conspiracy consisted of a continuing agreement, understanding and concert of action between and among Defendants and the Doe Defendants to fix, raise and maintain the prices of cereal products by: [¶] (a) agreeing to establish minimum price increases for cereal products; [¶] (b) agreeing to implement the minimum price increases; and [¶] (c) implementing the minimum price increases by means of a price leadership scheme;" 9) defendants combined and conspired to do these things by "(a) participating [\*4] in meetings and discussions about the prices of cereal products; [¶] (b) agreeing, in the course of those meetings and discussions, on minimum price increases for cereal products; [¶] (c) agreeing, in the course of those meetings and discussions, that the agreed upon minimum price increases would be implemented by means of a price leadership scheme; [¶] (d) agreeing to adhere to the minimum price increases established for cereal products; and [¶] (e) monitoring and enforcing compliance with the agreements to implement minimum price increases for cereal products."

Respondents demurred to the complaints. The court overruled the demurrers and respondents filed their answers. May 19, 1995, Kellogg propounded document requests requiring McIver to produce all documents supporting the conspiracy allegations, and General Mills submitted special interrogatories to McIver asking her to identify all facts supporting the conspiracy allegations.<sup>1</sup> In response to the questions to identify each and every meeting at which defendants, or any of them allegedly participated in discussions about the price of cereal products, appellant McIver stated, "At present, Plaintiff is aware of no more specific information [\*5] regarding any such meeting beyond that which is alleged in her Complaint. Plaintiff anticipates that, after a reasonable opportunity for discovery, she will be able to provide additional identifying information concerning such meetings." She produced four documents in response to the document request: 1) a report entitled "Consumers In A Box: [¶] A Consumer Report On Cereal Issued By [¶] Representative Sam Gejdenson, MC [¶] Representative Charles Schumer, MC" dated March 7, 1995; 2) a letter written by the two congressmen to the United States Attorney General Janet Reno urging her to investigate possible antitrust violations by the leading firms in the RTE cereal industry; 3) the transcript of a press conference by Representatives Schumer and Gejdenson on cereal pricing March 7, 1995; and 4) a copy of [State v.](#)

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<sup>1</sup> The McIver and Morgan complaints were not as yet consolidated.

*Kraft General Foods, Inc. (S.D.N.Y. 1995) 926 F.Supp. 321*, discussing the State of New York's complaint seeking divestiture or rescission pursuant to section 7 of the Clayton Act ([15 U.S.C. § 18](#)), [section 1](#) of the Sherman Act ([15 U.S.C. § 1](#)) and the Donnelly Act (N.Y.Gen. Bus. Law, §§ 340-344) of Kraft's acquisition of RTE cereal assets of Nabisco in which the court entered judgment [[\\*6](#)] in favor of defendants. In response to the question to identify all witnesses known to her who evidence any of the contentions set forth in paragraphs 35 or 36 regarding the alleged conspiracy and meetings, McIver listed as individuals who may possess information Representative Sam Gejdenson, Representative Charles Schumer, and Ronald Coterill, the State's expert witness in *State v. Kraft General Foods, Inc., supra.*<sup>2</sup>

In June 1995, McIver served on all respondents separate sets of form and special interrogatories, as well as requests for admissions and for documents. McIver requested all documents concerning pricing and other decisions for a 10-year period, including all documents concerning the *State v. Kraft General Foods, Inc.*, action, and names and addresses of each person employed between January 1, 1985, and the date of the request having any responsibility for maintaining and enforcing any practices regarding monitoring, tracking, or recording prices, participating in any investigations [[\\*7](#)] of possible violations of federal antitrust laws, California antitrust laws, or consumer protection statutes, or who was present at any meeting in which there was any communication that related in any way to any actual, proposed or prospective prices of cereal.

General Mills filed a motion for a protective order, joined by all other defendants, seeking a stay of discovery pending the disposition of summary judgment motions to be filed based upon appellant's alleged factually devoid discovery responses. Appellant McIver opposed the motion, arguing that the discovery statutes and California case law provided for discovery in consumer class actions, and that without such discovery the consumer, who otherwise would never have evidence of the defendants' meetings, could never proceed. McIver also argued that the defendants had failed to establish good cause or sufficient burden to limit discovery. August 11, 1995, the court granted the motion. The court also granted the motion to consolidate the McIver and Morgan complaints.

In August 1995, respondents each filed motions for summary judgment, arguing that appellant McIver's interrogatory answers had effectively admitted that appellant had [[\\*8](#)] no evidence of secret meetings or agreements to establish the conspiracy alleged. Appellants opposed the motions and requested a nine-month continuance to conduct discovery against respondents pursuant to [Code of Civil Procedure section 437c, subdivision \(h\)](#).<sup>3</sup> The trial court granted summary judgment to all respondents.<sup>4</sup>

## DISCUSSION

### 1. No Error in Granting Protective Order Pending Summary Judgment

Appellants assert the trial court "manifestly abused its discretion when it issued a protective order for the sole purpose of shielding defendants from disclosing relevant information prior to hearing the defendants' yet-to-be filed summary judgment motions." They argue that since McIver's pleadings successfully withstood demurrer, she had an "absolute right" to proceed with discovery. Because of the similarity in California and federal discovery law, federal decisions have been considered persuasive absent contrary California law. [[\\*9](#)] (*Liberty Mutual Ins. Co. v. Superior Court (1992) 10 Cal.App.4th 1282, 1288*.) Under neither federal nor California law does a litigant have an absolute, unfettered right to discovery.

The Legislature intended that discovery be allowed whenever consistent with justice and public policy. (*Irvington-Moore, Inc. v. Superior Court (1993) 14 Cal.App.4th 733, 738*; accord, *Brigante v. Huang (1993) 20 Cal.App.4th 1569, 1582*.) To further that end, the trial court has the power to enter a protective order to protect a party from

<sup>2</sup> The court in *State v. Kraft General Foods, Inc.*, found Coterill's "econometric analysis" "too flawed to be reliable." ([926 F.Supp. 321, 358](#).)

<sup>3</sup> All further statutory references are to the Code of Civil Procedure unless otherwise stated.

<sup>4</sup> The court stated, "I just feel that, you know, to require the defendants to produce what you want them to produce, it's my position that there's no showing of collusion."

unwarranted annoyance, embarrassment, oppression, or undue burden and expense. ([Liberty Mutual Ins. Co. v. Superior Court, supra, 10 Cal.App.4th 1282, 1287](#); see also §§ 2017, subd. (c), 2030, subd. (e), 2031, subd. (e).) The court's ruling, like any discovery ruling, will not be disturbed absent abuse of discretion. ([Liberty Mutual, supra, at pp. 1286-1287](#).)

Contrary to appellants' assertions, the court had good cause to stay discovery pending the hearing of respondents' summary judgment motions. A stay of discovery may be imposed whenever the interests of justice so require. (See [Haskel, Inc. v. Superior Court \(1995\) 33 Cal.App.4th 963, 978, 980-981](#), in which the court [\*10] ordered a stay of discovery by an insurer prior to the insured's summary judgment motion in a declaratory relief action where such discovery might prejudice the interests of the defendant insured in the underlying liability suit.) The record belies appellants' contention that respondents never argued the necessity of a protective order on grounds other than the pending of summary judgment motions. All respondents pointed out the breadth of the discovery requested by McIver which covered a 10-year period.

In particular, Kraft's attorney declared that responding to the requested discovery would be an undue burden and expense and explained that in *State v. Kraft General Foods, Inc.*, Kraft had to hire over 20 temporary employees and spend over \$1.5 million to comply with discovery in that case. (See [West Pico Furniture Co. v. Superior Court \(1961\) 56 Cal.2d 407, 417](#).) Kraft's counsel also explained that the discovery undertaken in the New York case would not alleviate its burden here because the issues were broader in *State v. Kraft General Foods, Inc.*, and two years had passed. Kraft would essentially have to begin again to sort through documents to comply with McIver's requests and would [\*11] be in no better position than the other respondents. Consequently, there was a sufficient showing of good cause for a temporary stay of discovery.

## 2. No Error in Denying Continuance and Granting Summary Judgment

To obtain summary judgment, a moving party must establish the right to the entry of judgment as a matter of law. (§ 437c, subd. (c).) Recent amendments to [section 437c](#) indicate a move toward the federal standard governing burden of proof on summary judgment motions codified in [Federal Rules of Civil Procedure, rule 56](#), as interpreted in [Celotex Corp. v. Catrett \(1986\) 477 U.S. 317 \[91 L.Ed.2d 265\]](#). ([Hunter v. Pacific Mechanical Corp. \(1995\) 37 Cal.App.4th 1282, 1286](#).) Although the moving party always bears the initial burden of establishing the absence of a genuine issue of material fact, if the nonmoving party bears the burden of proof on an issue at trial, the moving party may simply point to the absence of evidence to support the nonmoving party's case. (*Ibid.*) The burden then shifts to the nonmoving party to set forth specific facts which prove the existence of a triable issue of material fact. (*Ibid.*; [Union Bank v. Superior Court \(1995\) 31 Cal.App.4th 573, 590](#).) A moving [\*12] defendant may utilize the plaintiff's factually vague discovery responses to point to the absence of evidence to support the plaintiff's case. ([Leslie G. v. Perry & Associates \(1996\) 43 Cal.App.4th 472, 482](#).) "A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." ([Hunter, supra, at p. 1286](#).) We review the trial court's ruling de novo. ([Union Bank, supra, at p. 579](#).)

Stripped of hyperbole, appellants' position is that respondents could not be entitled to summary judgment until appellants had undertaken discovery and that summary judgment should not be granted where the issue is conspiracy in a consumer class action. [Section 437c, subdivision \(h\)](#), provides that "[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." The trial court was aware of this provision and brought it to appellant McIver's attention [\*13] at the hearing on the protective order.

Appellants contend that this section is mandatory and that they made the proper showing for a continuance of the summary judgment motions to conduct discovery. They argue that they were unable to obtain evidence to prove the existence of a conspiracy only because they were precluded from so doing by the protective order. Thus, they assert, they were entitled to a continuance pursuant to [section 437c, subdivision \(h\)](#).

Appellants were entitled to a continuance under [section 437c, subdivision \(h\)](#) only if the conditions recited in that section were met. ([Wachs v. Curry \(1993\) 13 Cal.App.4th 616, 623](#).) The party opposing summary judgment must

show by affidavit: 1) the facts to be obtained are essential to opposing the motion; 2) there is reason to believe such facts may exist; and 3) the reasons why additional time is needed to obtain these facts. (*Ibid.*; see also [American Continental Ins. Co. v. C & Z Timber Co. \(1987\) 195 Cal.App.3d 1271, 1280](#).) Courts have construed [section 437c, subdivision \(h\)](#) to mean that the party seeking a continuance show that the proposed discovery "... would have led to "facts essential to justify opposition."'" ([Scott v. CIBA Vision Corp. \(1995\) 38 Cal.App.4th 307, 326](#).)

Appellants' [\*14] counsel, J. Paul Gignac, declared in opposition to summary judgment and in support of a continuance for discovery that the complaint was filed "on the heels of a comprehensive report on the Ready-To-Eat ('RTE') cereal industry prepared by two respected members of the United States House of Representatives" and the findings made in that congressional report were "sufficiently compelling" that the two congressmen made a written request that the United States Attorney General investigate possible antitrust violations by respondents. Mr. Gignac then enumerated the same allegations made in the complaints as facts establishing "a strong likelihood that evidence exists which, if discovered, will enable Plaintiffs to establish collusive behavior on the part of the defendants with respect to the fixing, raising and maintaining of prices for RTE cereal . . ." He also attached a copy of the United States District Court's decision in [State v. Kraft General Foods, Inc., supra](#), and referred to facts in that decision to establish that General Mills and Kellogg are generally the first among the major manufacturers of RTE cereal to announce changes in the wholesale prices for RTE cereal, the other [\*15] manufacturers of RTE cereal often follow the wholesale price increases initiated by General Mills or Kellogg, and it is profit-maximizing for other manufacturers of RTE cereal to follow the lead of General Mills and Kellogg on wholesale price increases for RTE cereal. ([926 F.Supp. 321, 342](#).) He concluded that he intended to conduct depositions of those individuals identified by defendants in his propounded discovery in order to demonstrate that defendants were present at meetings or otherwise communicated among themselves with respect to the prices of RTE cereal; agreed to certain periodic minimum price increases for RTE cereal; implemented price increases for RTE cereal through a price leadership scheme whereby each defendant expressly or implicitly agreed to "follow the leader" in response to any increase in the prices; and monitored one another in order to ensure that each defendant was "falling in line" and implementing the agreed upon periodic minimum price increases.

We agree with respondents that appellants' request for a continuance did not meet the standard set forth in [section 437c, subdivision \(h\)](#). Gignac's declaration contained the same allegations as appellants' complaints, [\*16] which were taken from the congressional report. Many of these alleged facts were rejected by the court in *State v. Kraft General Foods, Inc.*, upon which appellants also relied to support their allegations.<sup>5</sup> Respondents produced evidence that the United States Attorney General's Office declined to investigate respondents, based in part on the court's findings in *State v. Kraft General Foods, Inc.* The Attorney General's response to the congressmen's request stated that, "After a full trial on the merits, Judge Wood found that there was no evidence of collusion in this industry, that the data relied upon to argue that industry prices were high were misleading, because they failed to reflect the effect of promotions, that concentration in this industry was declining, and that private label cereals were a significant and growing presence in this market." A trial court can consider the extensive discovery completed in other cases on the same subject in deciding whether additional discovery would alter conclusions already reached on the subject. (See [Artiglio v. Corning Inc. \(1996\) 49 Cal.App.4th 845, 859-860](#).)

<sup>5</sup> Respondents objected to the congressional report and news conference as incompetent [\*17] hearsay. They did not obtain a ruling from the court on their objections. Appellants now contend that we may not consider the facts and findings in *State v. Kraft General Foods, Inc.*, because judicial notice of the content of court records is appropriate only when the existence of the record itself precludes contravention or where collateral estoppel or res judicata applies. (See [Columbia Casualty Co. v. Northwestern Nat. Ins. Co. \(1991\) 231 Cal.App.3d 457, 473](#); [Sosinsky v. Grant \(1992\) 6 Cal.App.4th 1548, 1569](#).) Appellants wish to rely on the decision for their purposes but preclude respondents from doing so. Because all parties failed to obtain rulings on their evidentiary objections, the objections are waived and not preserved for appeal. ([Ann M. v. Pacific Plaza Shopping Center \(1993\) 6 Cal.4th 666, 670, fn. 1](#).) "Although many of the objections appear meritorious, for purposes of this appeal we must view the objectionable evidence as having been admitted in evidence and therefore as part of the record." (*Ibid.*) In any case, even if the "facts" or findings in *State v. Kraft General Foods, Inc.*, are not subject to judicial notice, we look to them to ascertain whether appellants' [\*18] reliance upon that opinion to support their causes of action is well founded.

Under the Cartwright Act, a court looks to whether the prices were in fact artificially maintained rather than to the economic reasonableness of the prices. ([San Diego Gas & Electric Co. v. Superior Court \(1996\) 13 Cal.4th 893, 919](#), citing [Cellular Plus, Inc. v. Superior Court \(1993\) 14 Cal.App.4th 1224, 1246](#).) Federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act. ([Roth v. Rhodes \(1994\) 25 Cal.App.4th 530, 542](#); [Biljac Associates v. First Interstate Bank \(1990\) 218 Cal.App.3d 1410, 1420](#).) Concerted activity is essential to a Cartwright Act or Sherman Act claim because the acts prohibit only contracts, combinations or conspiracies in restraint of trade. ([Biljac Associates, supra, at p. 1423](#).) Conscious parallel pricing is not in itself unlawful and, without more, will not support an inference of antitrust conspiracy. ([Id., at p. 1428](#); see also [Brooke Group v. Brown & Williamson \(1993\) 509 U.S. 593, 125 L.Ed.2d 168, 189](#); [Rebel Oil Co., Inc. v. Atlantic Richfield Co. \(9th Cir. 1995\) 51 F.3d 1421, 1442](#).) Nor is an oligopoly per se illegal under the Sherman [**\*19**] Act. ([Rebel Oil Co., Inc., supra, at pp. 1442-1443](#).)<sup>6</sup> This is so even where an oligopolistic market structure consisting of a small group of manufacturers engages in consciously parallel pricing of an identical product. ([Reserve Supply v. Owens-Corning Fiberglas \(7th Cir. 1992\) 971 F.2d 37, 50](#).)

To state a cause of action for conspiracy, the complaint must allege 1) formation and operation of the conspiracy, 2) the wrongful act or acts done pursuant thereto, and 3) damage resulting from such act or acts. ([Cellular Plus, Inc. v. Superior Court, supra, 14 Cal.App.4th 1224, 1236](#).) However, simply because appellants successfully opposed demurrers does not immunize them from summary judgment. A demurrer raises only a question of law, as the allegations of fact contained in the complaint must be accepted as true. ([Id., at p. 1231](#).)

Appellants assert that courts are chary about granting summary judgment in antitrust conspiracy cases because the essential facts are in the possession of the defendants. It is true that, by its nature, [**\*20**] a conspiracy to fix prices in violation of **antitrust law** is a secret act whose effects are public. ([Union Carbide Corp. v. Superior Court \(1984\) 36 Cal.3d 15, 26](#).) There is a "practical inability of a typical plaintiff to allege at the outset of its Cartwright Act claim the full details of an alleged price fixing agreement. Because of the well-known wrongfulness of price fixing agreements, conspirators rarely make such agreements in the open or document their illicit agreements. Rather, it is usually the situation that such agreements are made covertly, thereby making it difficult for a plaintiff to allege the full details of such price fixing agreement prior to its ability to engage in the 'rock-turning' allowed by discovery." ([Cellular Plus, Inc. v. Superior Court, supra, 14 Cal.App.4th 1224, 1239](#).) Nonetheless, even though the requisite concurrence and knowledge may be inferred from the nature of the acts done, the relation of the parties, and the interests of the coconspirators and circumstances, a reasonable inference may not be based on suspicion alone, or speculation, or conjecture. ([Wilcox v. Superior Court \(1994\) 27 Cal.App.4th 809, 828](#).)

The discovery responses and declaration [**\*21**] in opposition to summary judgment and for a continuance reveal that the conspiracy allegations have no factual basis. If we consider the court's discussion in *State v. Kraft General Foods, Inc.*, that decision explains that RTE cereal manufacturers sell their cereals to retailers, not to consumers, and compete on the bases of price, quantity, new product introductions, promotions, coupons, and advertising. The district court found no evidence of close coordination in price as cereals are priced at widely varying wholesale prices per pound. ([926 F.Supp. 321, 342](#).) Although wholesale prices for RTE cereal products are set by manufacturers, retail prices are set completely independently by retailers based on the retailers' own competitive circumstances, including their retail competition, overhead, financial incentives and pricing strategies. ([Id., at p. 344](#).) The court found no evidence that RTE cereal manufacturers can or do punish competitors or that profit levels in the RTE cereals industry reflect impermissible market power or collusive behavior. ([Id., at pp. 350-351](#).) The court also found no evidence of close coordination in price. ([Id., at pp. 342-343](#).)

**Antitrust law** limits the range [**\*22**] of permissible inferences from ambiguous evidence in a Sherman antitrust case. ([Matsushita Elec. Industrial Co. v. Zenith Radio \(1986\) 475 U.S. 574, 588](#)) "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." (*Ibid.*; [Monsanto Co. v. Spray-Rite Service Corp. \(1984\) 465 U.S. 752, 764](#).) Appellants had to produce

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<sup>6</sup> An oligopoly is a "market situation in which each of a few producers affects but does not control the market." (Webster's Ninth New Collegiate Dict. (1983) p. 822.)

evidence "that tends to exclude the possibility' that the alleged conspirators acted independently." (*Matsushita, supra, at p. 588.*) Appellants did not do so.

If we disregard *State v. Kraft General Foods, Inc.*, as appellants would now have us do, appellants' factual underpinnings must rest upon the congressional report and the two congressmen's press conference. Although that report speaks of high profits and low costs in relation to other industries, the "facts" reported are "as consistent with permissible competition as with illegal conspiracy." (*Matsushita Elec. Industrial Co. v. Zenith Radio, supra, 475 U.S. 574, 588.*) Appellants point out that the lack of merit of a conspiracy cause of action may not be proved simply by the nonmoving party's admission of unawareness of communications [\*23] which he or she would not have been present to observe. (*Villa v. McFerren (1995) 35 Cal.App.4th 733, 749.*) Nonetheless, "[a]n entity that engages in legitimate business . . . cannot be deemed a coconspirator, absent clear evidence of an agreement to join in the tortious conduct." (*Kidron v. Movie Acquisition Corp. (1995) 40 Cal.App.4th 1571, 1590.*) Appellants failed to demonstrate how the purported "economic facts" upon which they rely are consistent with an inference of illegal conspiracy, and how those facts are more reasonably or probably construed in favor of appellants' conspiracy theory as opposed to being equally or more consistent with a finding of lawful conduct.<sup>7</sup>

A plaintiff's entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited and may be curtailed when it is not likely to produce the facts needed by plaintiff to withstand a motion for summary judgment. (*Paul Kadair, Inc. v. Sony Corp. of America (5th Cir. 1983) 694 F.2d 1017, 1029-1030.*) [\*24] The court did not err in finding that appellants were simply attempting to engage in a nine-month fishing expedition (the length of their requested continuance) to substantiate their allegations and that to allow the requested discovery would not only be unduly burdensome and expensive to respondents, but was not justified by appellants' supporting documents. (*Artiglio v. Corning Inc., supra, 49 Cal.App.4th 845, 859-860.*)

Appellants decry the grant of summary judgment as signaling the death knell to consumer class-action antitrust suits which, they contend, depend upon discovery to unearth defendant conspirators' collusive activity. They interpret the court's ruling too broadly. There simply is no exception in the summary judgment statutes for class actions or antitrust suits. Appellants failed to offer any evidence to support their contention that Quaker was involved in a collusive price-fixing scheme. In fact, the documents they produced tended to negate that proposition. The congressmen, in their press conference, stated that Quaker's pricing and competitive practices were not in line with the other respondents. Appellants' allegations against the other respondents were based on [\*25] speculation and conjecture. Although it may be unusual to grant summary judgment before the plaintiff has undertaken discovery, it was neither an abuse of discretion nor a violation of *section 437c* to do so here.

Appellants assert that the trial court did not provide an adequate statement of reasons for its decision. This assertion is without merit. *Section 437c* does not require the court to issue a statement of decision when granting the motion. (*Dameshghi v. Texaco Refining & Marketing, Inc. (1992) 3 Cal.App.4th 1262, 1284*, disapproved on other grounds in *Trope v. Katz (1995) 11 Cal.4th 274, 286-287, 292.*) We review the ruling and not the rationale. (*Transamerica Occidental Life Ins. Co. v. State Bd. of Equalization (1991) 232 Cal.App.3d 1048, 1053-1054.*) Due to our independent review of a summary judgment, a trial court's failure to refer to the evidence in its ruling is not dispositive. (*Hagen v. Hickenbottom (1995) 41 Cal.App.4th 168, 178.*) The court stated at the hearing that there was no showing of collusion and that reliance upon the "Consumers In A Box" report was insufficient. The court's order indicated that it had considered the papers submitted and arguments and granted [\*26] summary judgment on the complaint brought under the Cartwright Act. The basis of the court's ruling was evident.

The judgments are affirmed. Costs to respondents.

STONE, P. J.

<sup>7</sup> Appellants fare no better with their *Business and Professions Code section 17200* claims (unfair business practices) as they are derivative of and based upon the conspiracy allegations. (*Biljac Associates v. First Interstate Bank, supra, 218 Cal.App.3d 1410, 1433.*)

We concur:

GILBERT, J.

YEGAN, J.

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End of Document

## Roncari Dev. Co. v. Gmg Enters.

Superior Court of Connecticut, Judicial District of Hartford - New Britain, At Hartford

January 8, 1997, Memorandum Filed

File No. CV910394934

**Reporter**

45 Conn. Supp. 408 \*; 1997 Conn. Super. LEXIS 402 \*\*; 718 A.2d 1025 \*\*\*

RONCARI DEVELOPMENT COMPANY v. GMG ENTERPRISES, INC., ET AL.

**Subsequent History:** [\*\*1] As Amended November 10, 1998.

**Prior History:** Memorandum on the defendants' motions to strike the plaintiff's revised complaint.

**Disposition:** Motions denied.

## Core Terms

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antitrust, defendants', competitor, valet parking, allegations, airport, sham, revised, anti trust law, treble damages, lawsuit, courts, unfair, monopolize, anticompetitive, unfair methods of competition, antitrust violation, restraint of trade, conspiracy, provisions, consumer, damages, relevant market, federal trade, practices, singular, plural, prices, prevent competition, quotation

## LexisNexis® Headnotes

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

### [HN1](#) Motions to Dismiss, Failure to State Claim

A motion to strike contests the legal sufficiency of the allegations of the challenged pleading to state a claim upon which relief can be granted. Conn. Gen. Prac. Book, R. App. P. § 512. In ruling on a motion to strike, the court is limited to the facts alleged in the complaint. The court must take the facts to be those alleged in the plaintiff's complaint and construe the complaint in the manner most favorable to sustaining its legal sufficiency. A motion to strike admits all facts well pleaded. If the facts provable under its allegations would support a cause of action, then the motion to strike must fail. The challenged pleading is to be read broadly, not strictly limited to the allegations, but also including the facts necessarily implied by and fairly provable under them.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

## [\*\*HN2\*\*](#) Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine shields from the Sherman Antitrust Act a concerted effort to influence public officials regardless of intent or purpose.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

## [\*\*HN3\*\*](#) Exemptions & Immunities, Noerr-Pennington Doctrine

It is generally recognized that there may be situations where the combination of parties to assert legal claims is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act will be justified. In those situations, the Noerr-Pennington doctrine affords the colluding parties no protection from federal antitrust laws.

Constitutional Law > State Constitutional Operation

## [\*\*HN4\*\*](#) Constitutional Law, State Constitutional Operation

See [Conn. Const. art. 1, § 10.](#)

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

## [\*\*HN5\*\*](#) Exemptions & Immunities, Noerr-Pennington Doctrine

For purposes of the Noerr-Pennington doctrine, an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.

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

Pertaining to the Noerr-Pennington doctrine, a new test is outlined as follows: 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. 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. Under the new test, evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

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## [\*\*HN7\*\*](#) Exemptions & Immunities, Noerr-Pennington Doctrine

Pertaining to the Noerr-Pennington doctrine, the plaintiff must plead facts which would support a claim that the litigation is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

## [\*\*HN8\*\*](#) Exemptions & Immunities, Noerr-Pennington Doctrine

Pertaining to the Noerr-Pennington doctrine, 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. Essentially, then, a sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

Torts > Business Torts > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

## [\*\*HN9\*\*](#) Costs & Attorney Fees, State Regulation

The right to bring a treble damages action for alleged violation of the Connecticut Antitrust Act (Act), [Conn. Gen. Stat. § 35-24 et seq.](#), arises under [Conn. Gen. Stat. § 35-35](#), which provides that the state, or any person, including, but not limited to, a consumer, injured in its business or property by any violation of the provisions of this chapter shall recover treble damages, together with a reasonable attorney's fee and costs. To plead a sufficient cause of action under this section, a plaintiff must allege both that the defendants engaged in at least one violation of the provisions of this chapter--i.e., of the Act, which is codified at Conn. Gen. Stat. ch. 624--and that the plaintiff is a person injured in its business or property by said violation. [Conn. Gen. Stat. § 35-35](#).

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

## [\*\*HN10\*\*](#) Regulated Practices, Price Fixing & Restraints of Trade

See [Conn. Gen. Stat. § 35-26](#).

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

## [\*\*HN11\*\*](#) Regulated Practices, Monopolies & Monopolization

See [Conn. Gen. Stat. § 35-27](#).

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

## **HN12** [ ] **Regulated Practices, Price Fixing & Restraints of Trade**

See [Conn. Gen. Stat. § 35-28.](#)

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Courts > Judicial Precedent

## **HN13** [ ] **Public Enforcement, State Civil Actions**

Since the Connecticut Antitrust Act, [Conn. Gen. Stat. § 35-24 et seq.](#), is based upon the federal antitrust laws, its provisions must ordinarily be construed in light of binding federal precedents interpreting and applying parallel provisions of federal law.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

## **HN14** [ ] **Remedies, Damages**

See [15 U.S.C.S. § 15\(a\).](#)

Governments > Legislation > Interpretation

## **HN15** [ ] **Legislation, Interpretation**

See [Conn. Gen. Stat. § 35-44b.](#)

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

Torts > ... > Elements > Causation > General Overview

## **HN16** [ ] **Private Actions, Remedies**

A literal reading of [15 U.S.C.S. § 15\(a\)](#) is inappropriate. Though the statute's language, like that of [Conn. Gen. Stat. § 35-35](#), is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation, that language must be read more restrictively in light of established common-law

principles, including the doctrines of foreseeability and proximate cause, directness of injury, and certainty of damages, which the statute's framers expected courts to apply when construing it.

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

## [HN17](#) [+] **Private Actions, Remedies**

Pertaining to the issue of which cases are covered by [15 U.S.C.S. § 15\(a\)](#) and which are excluded from it, lower federal courts must analyze each case individually, evaluating the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them, and deciding whether the law affords a remedy in the circumstances presented, in light of factors bearing appropriately on that issue, as identified in previously decided cases.

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

## [HN18](#) [+] **Private Actions, Standing**

Several factors affecting judicial recognition of the plaintiff's antitrust claims include the following. First, , though not dispositive, is the alleged causal connection between an antitrust violation and harm to the plaintiff. Second, also not dispositive, is the plaintiff's claim that the defendants intended to cause the particular harm. Third, which may be controlling, is the nature of the plaintiff's alleged injury.

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

## [HN19](#) [+] **Private Actions, Remedies**

When an antitrust plaintiff has not yet entered the relevant market, more difficult questions naturally arise as to whether he has truly suffered any injury, much less an injury to his ability to compete in that market, which the antitrust laws were enacted to protect. If a plaintiff only contemplated entering the relevant market before the antitrust violation occurred, his claim of competitive injury, like his business plans themselves, is merely speculative, and thus is not the proper subject of a treble damages action. If, on the other hand, a plaintiff with well-developed plans, available means and a definite intention to make immediate entry into that market is prevented from so doing by the anticompetitive conduct of the defendants, then it, no less than those already competing with the defendants in the market, is the very sort of person who is classically entitled to bring a statutory treble damages action.

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

## [HN20](#) [+] **Private Actions, Remedies**

When a potential competitor brings an antitrust action, the court's task is to distinguish between a serious potential competitor who has illegally been kept out of the market and the inchoate business enterprise with a mere hope of entry. A prospective participant in the market suffers an antitrust injury if it has taken substantial and demonstrable steps to enter an industry but has been thwarted in that purpose by an antitrust violation.

Governments > Legislation > Interpretation

**HN21** [blue document icon] **Legislation, Interpretation**

Singular and plural usages in state statutes may be used interchangeably where the broader statutory context supports such a reading. On this precise point, [Conn. Gen. Stat. § 1-1\(f\)](#) provides: Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular. It is true that the legal principle set forth in [§ 1-1\(f\)](#) cannot be said to "require" that singular and plural forms have interchangeable effects. However, the principle is properly invoked and relied upon where the legislature's intent to give singular meanings to plural terms or plural meanings to singular terms is otherwise evidenced by the text or history of the relevant statute.

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 > Scope

**HN22** [blue document icon] **State Regulation, Claims**

Though the language of [Conn. Gen. Stat. § 42-110b\(a\)](#) unquestionably describes substantive violations of the Connecticut Unfair Trade Practices Act (CUTPA), [Conn. Gen. Stat. § 42-110a et seq.](#), in the plural, it does not, on its face, purport to require proof of multiple acts, practices, or methods of competition to establish a CUTPA violation.

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

**HN23** [blue document icon] **Trade Practices & Unfair Competition, State Regulation**

Each and every unfair method of competition, as well as each and every unfair or deceptive act or practice, is separately actionable as a violation of the Connecticut Unfair Trade Practices Act (CUTPA), [Conn. Gen. Stat. § 42-110a et seq.](#), by any person who suffers an ascertainable loss by reason thereof.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Civil Procedure > Remedies > Damages > Monetary Damages

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

**HN24** [blue document icon] **Trade Practices & Unfair Competition, State Regulation**

[Conn. Gen. Stat. § 42-110g](#), which establishes the right to bring an action for money damages under the Connecticut Unfair Trade Practices Act (CUTPA), [Conn. Gen. Stat. § 42-110a et seq.](#), describes the conduct necessary to recover such damages in the singular as follows: Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act, or practice prohibited by [Conn. Gen. Stat. § 42-110b](#), may bring an action to recover actual damages. The singular usage in the previously quoted statute leaves nothing to the imagination as to the conduct which is prohibited by [§ 42-110b](#). It makes plain

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that the plural language of [§ 42-110b](#) prohibits single, as well as multiple or repeated acts, practices, and methods of competition.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

#### [\*\*HN25\*\*](#) **Trade Practices & Unfair Competition, State Regulation**

The language of [Conn. Gen. Stat. § 42-110g](#) clearly establishes that each such act, practice, and method of competition affords a proper basis for a damages action under the Connecticut Unfair Trade Practices Act, [Conn. Gen. Stat. § 42-110a et seq.](#)

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

#### [\*\*HN26\*\*](#) **Regulated Practices, Trade Practices & Unfair Competition**

See [Conn. Gen. Stat. § 42-110b](#).

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Governments > Courts > Common Law

#### [\*\*HN27\*\*](#) **Regulated Practices, Trade Practices & Unfair Competition**

Following the mandate of [Conn. Gen. Stat. § 42-110a](#), Connecticut courts adopt the criteria set out in the "cigarette rule" by the Federal Trade Commission for determining when a practice is unfair: (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).

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

#### [\*\*HN28\*\*](#) **Public Enforcement, US Federal Trade Commission Actions**

The Federal Trade Commission has broad powers to declare trade prices unfair, and this broad power is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Trademark Law > Special Marks > Trade Names > General Overview

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Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Business & Corporate Compliance > ... > Estate, Gift & Trust Law > Trusts > Creation of Trusts

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

## **HN29** [blue icon] Antitrust & Trade Law, Federal Trade Commission Act

A combination or conspiracy in restraint of trade is an unfair method of competition. The standards established by the anti-trust acts, and by the courts in construing and applying such acts, are the standards to be applied in determining whether particular acts amount to unfair methods of competition within the Federal Trade Commission Act, and in determining whether practices which are against public policy because of their dangerous tendency to hinder competition or create a monopoly constitute unfair methods of competition.

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 > Scope

## **HN30** [blue icon] State Regulation, Claims

To prove a violation of the Connecticut Unfair Trade Practices Act (CUTPA), [Conn. Gen. Stat. § 42-110a et seq.](#), a plaintiff need not show that he suffered consumer injury. Instead, a competitor or other business person can maintain a CUTPA cause of action.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

## **HN31** [blue icon] State Regulation, Claims

The standards applicable to antitrust claims govern those applicable to similar conduct under the Federal Trade Commission Act, and thus, by extension, under the Connecticut Unfair Trade Practices Act, [Conn. Gen. Stat. § 42-110a et seq.](#)

**Counsel:** Tyler, Cooper & Alcorn, for the plaintiff.

Nair & Levin, for the named defendant et al.

O'Connell, Flaherty, Attmore & Forsyth, for the defendant Northeast Parking, Inc.

Silver, Webb, Sweeney & Griffith for the defendant Northeast Parking, Inc., et al.

Dwyer, Sheridan & Fitzgerald, for the defendant Bradley Airport Valet Parking, Inc., et al.

No appearance for the defendants Joseph Scott Guilmartin and Bradley Air Parking Limited Partnership.

**Judges:** SHELDON, J.

**Opinion by:** SHELDON

## Opinion

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[\*409] [\*\*\*1026] SHELDON, J. In this case, plaintiff Roncari Development Company (Roncari), has sued seven defendants,<sup>1</sup> [\*3] [\*\*\*1027] all persons or entities allegedly involved in the airport valet parking business in and around Bradley International Airport (Bradley Airport) from 1987 or earlier, until the date this case was commenced.<sup>2</sup> The plaintiff [\*410] seeks money damages and injunctive relief in connection with and as a result of the defendants' joint and concerted efforts, pursuant to a conspiracy to monopolize, restrict and/or prevent competition, and/or control prices [\*2] in the local airport valet parking market to prevent the plaintiff from entering and competing in that market since 1989. In its four count revised complaint, the plaintiff alleges, more particularly, that the defendants pursued their anti-competitive design by jointly filing, maintaining and supporting by false and misleading testimony a groundless administrative appeal from the July 10, 1989 approval by the town of Windsor Locks zoning board of appeals (ZBA), of the plaintiff's application for a permit to construct a 2500 car valet parking facility on its thirty-two acre property directly across the road from Bradley Airport. As a result of the defendants' prosecution of their appeal, which the plaintiff has characterized as a "sham," the plaintiff claims that it has been delayed, hindered and/or prevented from using its property as an airport valet parking facility in competition with the defendants, lost income that would have derived from such use, and it incurred substantial costs, including attorney's fees, in opposing the appeal and otherwise protecting its interests.

The first and second counts of the revised complaint allege that the defendants engaged in the above described conduct in violation of the Connecticut Anti-trust Act, General Statutes § 35-24 et seq. The third count, which incorporates by reference all the allegations of the first two counts, alleges that the defendants' conduct constituted unfair methods of competition and/or unfair or deceptive acts or practices in the conduct of trade or business, in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. In this count, the plaintiff seeks both money damages for all losses allegedly caused by the [\*411] defendants' conduct and injunctive relief to prevent the continuation and/or future repetition of such conduct. The fourth and final count of the revised complaint, which repeats all of the substantive allegations of the first three counts, claims that the defendants' joint and concerted efforts to prevent it from entering the airport [\*4] valet parking market tortiously interfered with a reasonable business expectancy it has had ever since the ZBA approved its application to construct a valet parking facility on its property in July, 1989. In this count, like the third count, the plaintiff seeks both money damages and injunctive relief.

The defendants have now moved to strike the plaintiff's revised complaint on the following grounds: first, that all of the plaintiff's claims are based upon conduct that is constitutionally protected by the first and fourteenth amendments to the United States constitution by analogous provisions of the Constitution of Connecticut, to wit: the filing and prosecution of a non-sham lawsuit in the legitimate exercise of the defendants' legal rights; second,

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<sup>1</sup> The defendants include: GMG Enterprises, Inc., doing business as Airport Valet Parking (GMG); GMG's vice president, Robert A. Gosselin; Bradley Air Parking Limited Partnership (BAP/LP); Northeast Parking, Inc., doing business as V.I.P. Valet Parking (Northeast); Joseph Scott Guilmartin, the managing general partner of GMG and the president of Northeast; Bradley Airport Valet Parking, Inc. (BAVP); and BAVP's president, Guy Piccolo.

<sup>2</sup> This case was commenced by the service of process on or about May 14, 1991, with a return date of May 28, 1991.

the plaintiff lacks standing to pursue its claims that the defendants violated the Connecticut Antitrust Act; third, that the plaintiff's CUTPA claim is legally insufficient because it is based upon a single act or course of conduct rather than a regular trade or business practice, it fails to allege that that act or course of conduct was engaged in the conduct of trade or commerce, and the plaintiff was not, at the time of such [\*\*5] act or course of conduct, either a consumer or a competitor of the defendants in the relevant market.

I

**HN1**[] A motion to strike contests the legal sufficiency of the allegations of the challenged pleading to state a claim upon which relief can be granted. Practice Book § 512; *Mingachos v. CBS, Inc.*, 196 Conn. 91, 108, 491 [\*412] A.2d 368 (1985); *Ferryman v. Groton* [\*\*\*1028] 212 Conn. 138, 142, 561 A.2d 432 (1989). "In ruling on a motion to strike, the court is limited to the facts alleged in the complaint." (Internal quotation marks omitted.) *Novametrix Medical Systems, Inc. v. BOC Group, Inc.*, 224 Conn. 210, 215, 618 A.2d 25 (1992). The court "must take the facts to be those alleged in the plaintiff's complaint and construe the complaint in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *Warner v. Konover*, 210 Conn. 150, 152, 553 A.2d 1138 (1989). A motion to strike admits all facts well pleaded. *Mingachos v. CBS, Inc.*, *supra*, 108. "If the facts provable under its allegations would support . . . a cause of action, [then] the motion to strike must fail." *Id.*, 109. The challenged pleading is to be read broadly, [\*\*6] "not strictly limited to the allegations, but also including the facts necessarily implied by and fairly provable under them." (Internal quotation marks omitted.) *Commercial Union Ins. Co. v. Frank Perrotti & Sons, Inc.*, 20 Conn. App. 253, 257, 566 A.2d 431 (1989) (citing *Schmidt v. Yardney Electric Corp.*, 4 Conn. App. 69, 74, 492 A.2d 512 (1985)).

II

The defendants first claim that all counts of the revised complaint must be stricken because they are based, in their essence, on the filing and prosecution of a non-sham lawsuit in the legitimate exercise of their legal rights. Such conduct, note the defendants is constitutionally protected from federal antitrust actions by the *first amendment to the United States constitution*, as interpreted and applied under the so-called *Noerr-Pennington* doctrine. Therefore, they argue, it must similarly be protected from state antitrust and other statutory and common-law actions under the *first* and *fourteenth amendments to the United States constitution* and analogous provisions of the constitution of Connecticut.

[\*413] The plaintiff does not strenuously argue against the applicability of the *Noerr-Pennington* doctrine to state [\*\*7] statutory and common-law damages actions. Rather, it argues principally that each count of its revised complaint states a valid claim for relief that may constitutionally be pursued under the sham litigation exception to *Noerr-Pennington*. For the following reasons, this court agrees with the plaintiff that this portion of the defendants' challenge to the revised complaint must be rejected.

**HN2**[] The *Noerr-Pennington* doctrine, evolving from a trilogy of United States Supreme Court decisions; *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464, reh. denied, 365 U.S. 875, 81 S. Ct. 899, 5 L. Ed. 2d 864 (1961); *United 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); "shields from the Sherman [Antitrust] Act a concerted effort to influence public officials regardless of intent or purpose." *United Mine Workers v. Pennington*, *supra*, 670. As the court noted in *California Motor Transport*, "it would be destructive of rights of association and of petition to [\*\*8] 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 resolution of their business and economic interests vis a vis their competitors." *California Motor Transport Co. v. Trucking Unlimited*, *supra*, 404 U.S. at 510-11.

Even so, **HN3**[] it is generally recognized that there may be situations where the combination of parties to assert legal claims "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Eastern* [\*414]

Railroad Presidents Conference v. Noerr Motor Freight, supra, 365 U.S. 144. In those situations, the *Noerr-Pennington* doctrine affords the colluding parties no protection from federal antitrust laws.

In this case, the plaintiff brought claims under the Connecticut Antitrust Act, CUTPA and Connecticut common law. Although no Connecticut Supreme or Appellate Court decision has applied the *Noerr-Pennington* [\*\*\*1029] doctrine to Connecticut antitrust law, the doctrine has gained wide acceptance [\*\*9] in the decisions of this court. See Connecticut National Bank v. Mase, 1991 Conn. Super. LEXIS 364, judicial district of Fairfield at Bridgeport, Docket Number 269180 (January 31, 1991, *Flynn, J.*); Abrams v. Knowles, 1990 Conn. Super. LEXIS 1920, Superior Court, judicial district of Norwich, Docket No. 95287 (December 4, 1990) (3 Conn. L. Rptr. 13) (*Axelrod, J.*); Yale University School of Medicine v. Wurtzel, 1990 Conn. Super. LEXIS 1720, Superior Court, judicial district of New Haven, Docket Number 275314 (November 9, 1990, *Flanagan, J.*). Moreover, the Second Circuit Court of Appeals has concluded that our Supreme and Appellate Courts will very probably adopt *Noerr-Pennington* and the sham lawsuit exemption thereto when presented with the opportunity to do so: "We believe that Connecticut's courts would be guided by the strong suggestions from the federal courts that imposing liability for the act of filing a non-sham lawsuit would present serious constitutional problems, and would construe Connecticut law to avoid those problems. Especially since *Noerr-Pennington*'s statutory exemption is defined in terms of first amendment activity, we are confident that Connecticut's courts would carve out a similar exception to CUTPA and the common [\*\*10] law, whether or not they believed that they were required to do so by the Constitution." Suburban Restoration Co., Inc. v. ACMAT Corp., 700 F.2d 98, 102 (2d Cir. 1983).

This court agrees. Since HN4[<sup>1</sup>] article first, § 10, of the constitution of Connecticut provides that "all courts shall [\*415] be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay," the public policy of this state strongly supports the adoption of the *Noerr-Pennington* doctrine.

Until recently, there was considerable uncertainty as to what constitutes "sham litigation" for the purposes of the *Noerr-Pennington* doctrine.<sup>3</sup> Some feared, in particular, that the term "sham" might become "no more than a label courts could apply to activity they deem unworthy of antitrust immunity." Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 55, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993), quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 n.10, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988). In 1993, however, [\*\*11] with its decision in *Professional Real Estate Investors*, the United States Supreme Court resolved this issue by holding that HN5[<sup>1</sup>] "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., supra, 57, HN6[<sup>1</sup>] The court outlined a new test, as follows: "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 [\*416] 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. . . . 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." (Emphasis in original.) Id., 60. Under the new test, "evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." Id., 59. HN7[<sup>1</sup>] To [\*\*12] satisfy the first prong of the *Professional Real Estate Investors* test the plaintiff must plead facts which [\*\*\*1030] would support a claim that the litigation is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Id., 60. In the case at bar, the plaintiff alleges that the defendants violated the Connecticut Antitrust Act by "commencing, maintaining, and actively participating in the appeal without a reasonable basis in fact and in law for

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<sup>3</sup>Thus, for example, it has been held: that an alleged sham must be proved legally, unreasonable; McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1560 (11th Cir. 1992); that litigation with genuine legal substance raises merely a rebuttable presumption of immunity; Westmac, Inc. v. Smith, 797 F.2d 313, 318 (6th Cir. 1986); that immunity should be denied, even in the pursuit of valid claims, if "the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation;" Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982); and that "success on the merits does not . . . preclude" proof of a sham if the litigation was not "significantly motivated by a genuine desire for judicial relief . . . ." (Internal quotation marks omitted.) In re Burlington Northern, Inc., 822 F.2d 518, 528 (5th Cir. 1987).

their claims of aggrievement . . . for their claims that the Zoning Board of Appeals acted illegally . . . for the purpose of preventing, delaying, or hindering competition during the pendency of the appeal without a reasonable expectation that they would ultimately prevail on the merits . . ." The language of this paragraph of the plaintiff's complaint is virtually identical to the language in *Professional Real Estate Investors*, outlining and explaining the "objectively unreasonable" test. The plaintiff will, of course, bear the burden of proving its allegations at trial. At this stage, however, nothing more is required.

[\*\*13] The defendants claim, however, that even if the first prong of the test is satisfied, the second prong is not. [HN8](#) "Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit [\*417] conceals 'an attempt to interfere directly with the business relationships of a competitor;' *[Eastern Railroad Presidents Conference v. Noerr Motor Freight, supra, 365 U.S. 144]*;" through the 'use [of] the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon. . .' [(Emphasis in original.) *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 378, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*]" *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,supra, 508 U.S. 60-61*. Essentially, then, "[a] sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all . . ." (Internal quotation marks omitted.) *Columbia v. Omni Outdoor Advertising, Inc., supra, 380*.

In the present case, the plaintiff has alleged that "the defendants combined, conspired, and colluded with each other . . . to monopolize, restrict [\*\*14] and/or prevent competition in the market for valet parking, to prevent entry into the market and/or to control the price, service and availability of valet parking . . . in restraint of trade through . . . (a) meeting together, actively participating in, and jointly hiring counsel to commence, continue and maintain lawsuits . . . which lawsuits were designed and intended to delay or prevent new competitors from entering the valet parking market . . . (b) presenting false and misleading testimony and pleadings in the lawsuits . . . (c) filing the lawsuits under assumed or fictitious names . . ." Nothing else is needed. In fact, these allegations, if proven, describe the classic situation envisioned by the United States Supreme Court as typifying abuse of the legal process--"the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *Id., 380*. The plaintiff has therefore [\*418] alleged facts sufficient to satisfy the second prong of the *Professional Real Estate Investors* test.

Because the plaintiff has alleged facts which, if proved, would show that the defendant's [\*\*15] appeal was objectively baseless and concealed an attempt to interfere directly with the plaintiff's business relationships, this portion of the defendant's motion to strike is denied.

### III

The defendants next challenge the legal sufficiency of the first and second counts of the plaintiff's revised complaint, contending that on the facts therein alleged, the plaintiff lacks standing to sue for treble damages under the Connecticut Antitrust Act. They claim, in particular, that since the plaintiff, by its own allegation and resulting judicial admission, was not engaged in the airport valet parking business at the time of their alleged conspiracy, combination and joint and concerted actions to monopolize, restrain trade, prevent competition and/or control prices in the relevant market, it could not have suffered the kind of competitive injury that the Connecticut Antitrust Act was designed to prevent.

[\*\*\*1031] [HN9](#) The right to bring a treble damages action for alleged violation of the Connecticut Antitrust Act arises under *General Statutes § 35-35*, which provides that "the state, or any person, including, but not limited to, a consumer, injured in its business or property by any violation of the [\*\*16] provisions of this chapter shall recover treble damages, together with a reasonable attorney's fee and costs." To plead a sufficient cause of action under this section, a plaintiff must obviously allege *both* that the defendants engaged in at least one "violation of the provisions of this chapter"--i.e., of the Connecticut Antitrust Act, which is codified at chapter 624 of the General Statutes--and that the plaintiff is a "person [\*419] . . . injured in its business or property by [said] violation . . ." *General Statutes § 35-35*.

In this case, the plaintiff has clearly alleged that the defendants, by their conduct, violated several substantive provisions of the Connecticut Antitrust Act. In particular, the plaintiff's allegations of conspiracy, combination, and joint and concerted efforts to monopolize, restrain trade, prevent competition, and/or control prices in the local valet parking market would, if proved at trial, establish violations of the following substantive provisions of the Connecticut Antitrust Act: [General Statutes § 35-26](#), which provides that [HN10](#) "every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful[;]" [General Statutes § 35-27](#), which provides that [HN11](#) "every contract, combination, or conspiracy to monopolize, or attempt to monopolize, or monopolization of any part of trade or commerce is unlawful[;]" and [General Statutes § 35-28](#), which provides in relevant part that, [HN12](#) "without limiting [section 35-26](#), every contract, combination, or conspiracy is unlawful when the same are for the purpose, or have the effect, of: (a) Fixing, controlling, or maintaining prices, rates, quotations, or fees in any part of trade or commerce; [or] (b) fixing, controlling, maintaining, [or] limiting . . . the . . . supply of any part of trade or commerce . . . ."

Accordingly, the defendants have focused their challenge on the second essential requirement of [§ 35-35](#): that the plaintiff be a "person . . . injured in its business or property by [the antitrust] violation[s]" alleged in its revised complaint. The defendants' claim, to restate it, is that the plaintiff could not, as a matter of law, have suffered an actionable antitrust injury because, at the time of the defendants' alleged conspiracy, combination and joint and concerted efforts to monopolize, restrain trade, prevent competition and/or [\[\\*420\]](#) control [\[\\*18\]](#) prices in the local airport valet parking market, the plaintiff did not compete in that market.

If the statutory phrase, "any person injured in its business or property by any violation of the provisions of this chapter," were given a literal interpretation, the statute would plainly be broad enough to confer standing to bring a treble damages action upon every person who ever sustained any kind of pecuniary loss or injury that could be traced, however remotely or indirectly, to a proven violation of the Connecticut Antitrust Act. In that event, the first and second counts of the plaintiff's revised complaint would surely state valid claims under [§ 35-35](#), for it explicitly alleges that as a result of the defendants' monopolistic and otherwise anticompetitive conduct, the plaintiff was unable to make profitable use of its Windsor Locks property as an airport valet parking facility, it lost profits that would have come from such use, and it has been forced to expend monies to protect its legal rights in response to the defendants' actions.

It has long been understood, however, that [HN13](#) since the Connecticut Antitrust Act is based upon the federal antitrust laws, its provisions must ordinarily [\[\\*19\]](#) be construed in light of binding federal precedents interpreting and applying parallel provisions of federal law. [Westport Taxi Service, Inc. v. Westport Transit District, 235 Conn. 1, 15-16, 664 A.2d 719 \(1995\)](#) (observing that since "the legislative history of the act clearly establishes that it was intentionally patterned after the [antitrust law](#) of the federal government . . . we follow federal precedent when we interpret the act unless the text of our antitrust statutes, or other pertinent state [\[\\*1032\]](#) law, requires us to interpret it differently)." <sup>4</sup> (Citations [\[\\*421\]](#) omitted.) Therefore, this court cannot construe [§ 35-35](#) until it has examined and considered federal case law interpreting and applying its functionally identical federal counterpart--the federal treble damages statute, which was enacted as § 4 of the Clayton Antitrust Act (Clayton Act) and is now codified at [15 U.S.C. § 15](#). See generally [Douglas v. Hospital of St. Raphael, 33 Conn. Supp. 215, 219-25, 371 A.2d 396 \(1976\)](#). Section 4 of the Clayton Act provides as follows: [HN14](#) "Any person who shall be injured in his business or property by reason of anything forbidden in the [federal] antitrust laws may sue therefor [\[\\*20\]](#) in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . . ." [15 U.S.C. § 15\(a\)](#). Prior to 1984, the lower federal courts had unanimously shared the view that this statute should be read more narrowly than its broad, all-encompassing language might suggest. In particular, they were concerned that unless the statutory treble damages remedy were

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<sup>4</sup> Recently, this rule of construction was explicitly incorporated into the Connecticut Antitrust Act by the passage of Public Acts 1992, No. 92-248, which is now codified at [General Statutes § 35-44b](#). [HN15](#) [Section 35-44b](#) provides as follows: "It is the intent of the General Assembly that in construing [sections 35-24 to 35-46](#), inclusive, the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes."

restricted to persons or entities whose losses were proximately or legally caused by antitrust violations, courts would be clogged with a surfeit of speculative damages claims by those whom Congress never sought to protect by the federal anti-trust laws, and whose prosecution of such claims would actually frustrate private antitrust enforcement efforts by unnecessarily complicating more meritorious actions with complicated allocation of damages questions. See generally annot., "Target Area" doctrine as basis for determining standing to sue under § 4 of Clayton Act ([15 U.S.C. § 15](#)) allowing treble damages for violation **[\*\*21]** of antitrust laws, 70 A.L.R. Fed. 637, 642-45 (1984).

**[\*422]** There was considerable disagreement among the federal circuits, however, as to how cases falling within the statute should be distinguished from cases falling outside it. Id. "Some courts have focused on the directness of the injury[.] . . . Others have applied the requirement that the plaintiff must be in the 'target area of the antitrust conspiracy, that is, the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Another Court of Appeals . . . asked **[\*\*22]** whether the injury is 'arguably within the zone of interests protected by the antitrust laws.'" (Citations omitted.) [\*Associated General Contractors v. Carpenters, 459 U.S. 519, 536 n.33, 103 S. Ct. 897, 74 L. Ed. 2d 723 \(1983\)\*](#).

In *Associated General Contractors*, where it first formally addressed this issue, the United States Supreme Court agreed with the lower courts that [HN16](#) a literal reading of the statute was inappropriate because such a reading would be inconsistent with the intent of Congress, as evidenced by the statute's legislative history. Thus, though it acknowledged that the statute's language, like that of [§ 35-35](#), "is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation;" *id.*, [529](#); it concluded that that language must be read more restrictively in light of established common-law principles, including the doctrines of foreseeability and proximate cause, directness of injury and certainty of damages, which the statute's framers expected courts to apply when construing it. *Id.*, [532-33](#).

As it did so, however, the court declined to adopt any particular test for deciding which cases are covered **[\*\*23]** by the statute and which are excluded from it. Instead, it declared that [HN17](#) lower federal courts must analyze each case individually, evaluating "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them;" *id.*, [535](#); and deciding whether the **[\*423]** law affords a remedy in the circumstances presented, in light of factors bearing appropriately on that issue, as identified in previously decided cases. *Id.*, [537](#). The court then went on, **[\*\*\*1033]** instructively, to identify and apply [HN18](#) several "factors [affecting] judicial recognition of the [plaintiff's] antitrust claims" to the allegations in the case before it. *Id.*

The first factor so identified and applied, though not dispositive of the plaintiff's right of action, was the alleged "causal connection between an antitrust violation and harm to the [plaintiff]." *Id.* The second, which was also not dispositive, was the plaintiff's claim that "the defendants intended to cause [the particular] harm." *Id.*

A third factor, one which the court said "may be controlling;" *id.*, [538](#); was "the nature of the plaintiff's alleged injury." *Id.* On that score, the court made the following significant observations: "As the legislative **[\*\*24]** history shows, the Sherman [Antitrust] Act[, [15 U.S.C. § 1 et seq.](#)] was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market. Last term in [\*Blue Shield of Virginia v. McCready, \[457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 \(1982\)\]\*](#), we identified the relevance of this central policy to a determination of the plaintiff's right to maintain an action under § 4. McCready alleged that she was a consumer of psychotherapeutic services and that she had been injured by the defendants' conspiracy to restrain competition in the market for such services. The Court stressed the fact that 'McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws.' [457 U.S. at 483](#), citing [\*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-89, 97 S. Ct. 690, 50 L. Ed. 2d 701\*](#) (1977). After noting that her injury 'was inextricably **[\*424]** intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market.' [457 U.S. at 484](#), the **[\*\*25]** Court concluded that such an injury 'falls squarely within the area of congressional concern. *Ibid.*" [\*Associated General Contractors v. Carpenters, supra, 459 U.S. 538\*](#). So stating, the court went on to hold that in the case before it, the nature of the alleged injury was not a factor which favored the plaintiff, because the plaintiff was a labor union, whose interests as a bargaining representative for its members, unlike those of "a consumer [or] a

competitor in the market in which trade was restrained;" *id.*, 539; were not the sort of interests which the Sherman Antitrust Act was designed to protect. A final important factor identified by the court was "the directness or indirectness of the asserted injury." *Id.*, 540. In the case before it, said the court, this factor worked against the plaintiff union because "the chain of causation between the Union's injury and the alleged restraint in the [relevant] market . . . contains several somewhat vaguely defined links. According to the complaint, 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. [\*\*26] As a result, the Union's complaint alleges, the Union suffered unspecified injuries in its 'business activities.' It is obvious that any such injuries were only an indirect result of whatever harm may have been suffered by 'certain' construction contractors and subcontractors.

"If either these firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and, as we held in *McCready*, they would have a right to maintain their own treble-damages actions against the defendants. An action on their behalf would encounter none of the conceptual difficulties that encumber the Union's claim. The existence of an identifiable class of persons [\*425] whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied." *Id.*, 540-42. The court concluded its remarks on the directness or indirectness of the [\*\*27] plaintiff's alleged injury by noting that if the right to bring treble damages actions were appropriately limited to those directly injured by the defendants' anticompetitive activity, speculative damages [\*\*\*1034] claims would be avoided, the risk of duplicate recoveries would be lessened, and the scope of already complex antitrust cases would be maintained within manageable judicial limits by eliminating complex apportionment of damages issues. *Id.*, 542-44.

The defendants in the instant case would have this court rule that since the plaintiff had not yet entered the airport valet parking business by the time of their alleged conspiracy, combination and joint and concerted actions to prevent him from doing so, the plaintiff has not suffered the sort of competitive injury which the antitrust laws, state and federal, were designed to prevent. Employing the analysis used by the United States Supreme Court in *Associated General Contractors*, however, the defendants' claim must be rejected.

To begin with, as previously noted, the plaintiff has clearly alleged a causal link between the defendants' alleged antitrust violations and the losses for which it seeks treble damages in this case. It has [\*\*28] claimed, moreover, that it was the direct and intended victim of the defendants' anticompetitive activities, for the alleged purpose and effect of the defendants' challenged administrative appeal was to overturn the board's approval of its building permit application, and thus to [\*\*426] delay, hinder or prevent its immediate entry into the local airport valet parking market.<sup>5</sup> These factors, all identified, described, and relied upon to determine antitrust standing under the Clayton Act by the United States Supreme Court, strongly favor the viability of the plaintiff's treble damages action under § 35-35.

[\*\*29] It is true, of course, that the plaintiff had not yet become a competitor in the relevant market when the defendants' alleged conspiracy, combination and joint and concerted actions to prevent it from entering that market took place. Even so, both the nature of the defendants' challenged conduct and the nature of the plaintiff's alleged injury strongly support the plaintiff's claim that it has standing to pursue this action. When an antitrust plaintiff is already a competitor of the antitrust defendants in the market they seek to monopolize and control, any alleged injury to its ability to compete in that market is the classic sort of injury for which a treble damages claim under the antitrust laws may be pursued. Such a competitor is the direct and foreseeable target of the defendants' conduct, its

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<sup>5</sup> At least one of the defendants has argued that the plaintiff could not have been delayed, hindered or prevented from entering the airport valet parking business by the bringing and maintaining of the subject administrative appeal because the pendency of that appeal did not operate to stay the ZBA's approval of the plaintiff's building permit, or thus to prevent the construction and opening for business of the planned valet parking facility. Because this argument requires proof of facts outside the allegations of the revised complaint, it cannot be considered a proper basis for striking that pleading.

injuries are immediate and far from speculative, and the presentation of its claim presents no risk of duplicate recoveries or complex apportionment of damages issues.

**[HN19]** When, by contrast, an antitrust plaintiff has not yet entered the relevant market, more difficult questions naturally arise as to whether he has truly suffered any injury, much less an injury to his ability to compete [**\*\*30**] in that market, which the antitrust laws were enacted to [**\*427**] protect. If a plaintiff only contemplated entering the relevant market before the antitrust violation occurred, his claim of competitive injury, like his business plans themselves, is merely speculative, and thus is not the proper subject of a treble damages action. If, on the other hand, a plaintiff with well-developed plans, available means and a definite intention to make immediate entry into that market is prevented from so doing by the anticompetitive conduct of the defendants, then it, no less than those already competing with the defendants in the market, is the very sort of person who is classically entitled to bring a statutory treble damages action. See generally 54 Am. Jur. 2d 430, Monopolies and Restraints of Trade § 414 (1996) ("Prospective competitors, as well as current competitors, may have standing to bring an action alleging a conspiracy to restrain trade or other antitrust violation, if such would-be competitors are able to demonstrate both an intention and a preparedness to enter the relevant market.")

**[\*\*\*1035]** **[HN20]** When a potential competitor brings an antitrust action, the court's task is to distinguish between a serious [**\*\*31**] potential competitor who has illegally been kept out of the market and the inchoate business enterprise with a mere hope of entry. *Practice Perfect, Inc. v. Hampton County Pharmaceutical Ass'n, 732 F. Supp. 798, 802 (S.D. Ohio 1990)*. A prospective participant in the market suffers an antitrust injury if it has taken substantial and demonstrable steps to enter an industry but has been thwarted in that purpose by an antitrust violation. *In re Dual-Deck Video Cassette Recorder Antitrust Litigation, 11 F.3d 1460, 1464-65 (9th Cir. 1993)*.

In this case, the plaintiff alleges that over a period of four years it made efforts to secure the approval of Windsor Locks zoning authorities for the construction of a valet parking facility on its property across from Bradley Airport. Having finally secured the necessary [**\*428**] permit, it alleges that it was prepared to construct the planned facility at once so that it could open its airport valet parking business by December, 1989. According to the plaintiff, the defendants' filing and prosecution of their sham administrative appeal injured it directly and substantially by delaying, hindering and preventing it from proceeding at once with the [**\*\*32**] long planned construction of its new facility and the opening of its new valet parking business. Because these allegations, if proved at trial, would clearly establish both that the defendant was a serious potential competitor of the defendants in the market they sought to monopolize and control, and that the plaintiff had taken substantial and demonstrable steps to enter that market before it was thwarted in that purpose by the defendants' anticompetitive conduct, the court concludes that the plaintiff has standing to pursue that claim under § 35-35. Accordingly, this portion of the defendants' motion to strike is also denied.

#### IV

The defendants' final challenge to the plaintiff's revised complaint is directed at the third count of that pleading, which alleges, *inter alia*, that by filing and prosecuting their sham appeal from the ZBA's approval of the plaintiff's building permit application, and thereby preventing, hindering and/or delaying the plaintiff's entry into the local airport valet parking market pursuant to a conspiracy to monopolize, restrain trade, prevent competition and/or control prices in that market, the defendants violated CUTPA. The defendants have advanced [**\*\*33**] a number of related reasons why their conduct, as alleged in the revised complaint, cannot be found to constitute an actionable violation of CUTPA. For the following reasons, the court concludes that this final aspect of the defendants' motion to strike must also be denied.

**[\*429]** The defendants first claim that the doing of a single act, of whatever kind or for whatever reason, can never constitute a violation of CUTPA because the substantive proscription of unfair trade practices set forth therein is worded in the plural, as follows: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or business." General Statutes § 42-110b (a). (Emphasis added.) There are two important reasons why this frequently proffered argument must be rejected.

First, the General Assembly has long made it clear that [HN21](#) singular and plural usages in state statutes may be used interchangeably where the broader statutory context supports such a reading. On this precise point, [General Statutes § 1-1 \(f\)](#) provides: "Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number [\*\*34] may include the singular." It is true, of course, that "the legal principle set forth in [§ 1-1 \(f\)](#) cannot be said to 'require' that singular and plural forms have interchangeable effects . . ." [Winchester v. Connecticut State Board of Labor Relations, 175 Conn. 349, 361, 402 A.2d 332 \(1978\)](#). However, the principle is properly invoked and relied upon where the legislature's intent to give singular meanings to plural terms or plural meanings to singular terms is otherwise evidenced by the text or history of the relevant statute. Id.

[HN22](#) Though the language of [§ 42-110b \(a\)](#) unquestionably describes substantive violations of CUTPA in the plural, it does not, on its [\[\\*\\*\\*1036\]](#) face, purport to require proof of multiple acts, practices or methods of competition to establish a CUTPA violation. As it is the purpose of this remedial statute to protect consumers, competitors and other business people from *all* kinds of unfair trade practices, without limitation, it surely takes no leap of logic to infer that the legislature meant to prohibit *every* such act, practice or method of competition, if ever and [\[\\*430\]](#) whenever it occurred. A contrary reading of the statute would effectively afford immunity [\[\\*\\*35\]](#) from CUTPA enforcement to any person whose unfair or deceptive act, practice or method of competition, however harmful to the rights and interest of others, cannot be shown to have happened more than once.

In fact, the broader context of CUTPA makes it clear that [HN23](#) each and every unfair method of competition, as well as each and every unfair or deceptive act or practice, is separately actionable as a violation of CUTPA by any person who suffers an ascertainable loss by reason thereof. [HN24](#) [General Statutes § 42-110g](#), which establishes the right to bring an action for money damages under CUTPA, describes the conduct necessary to recover such damages in the singular as follows: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [section 42-110b](#), may bring an action . . . to recover actual damages." (Emphasis added.) The singular usage in the previously quoted statute leaves nothing to the imagination as to the conduct which is prohibited by [§ 42-110b](#). It makes plain that the plural language of [§ 42-110b](#) prohibits single, as well as multiple or repeated acts, practices [\[\\*\\*36\]](#) and methods of competition. [HN25](#) It also clearly establishes that each such act, practice and method of competition affords a proper basis for a damages action under CUTPA. For these reasons, the defendants' initial challenge to the third count of the plaintiff's revised complaint must be rejected.

The defendants next claim that even if a single act can constitute a violation of CUTPA, the act of filing and maintaining a lawsuit--even one that meets the sham litigation exception to the *Noerr-Pennington* doctrine, and thus qualifies as a violation of the antitrust laws--does not violate CUTPA where, as here, none of the defendants filed the lawsuit "in the conduct of any [\[\\*431\]](#) trade or commerce." [General Statutes § 42-110b](#). For the following reasons, this court disagrees.

[HN26](#) [Section 42-110b](#) provides in pertinent part that:

"(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

"(b) It is the intent of the legislature that in construing subsection (a) of this section, the . . . courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section [\[\\*\\*37\]](#) 5 (a) (1) of the Federal Trade Commission Act ([15 U.S.C. 45 \(a\) \(1\)](#)), as from time to time amended."

[HN27](#) Following the mandate of [§ 42-110a](#), Connecticut courts have "adopted the criteria set out in the 'cigarette rule' by the federal trade commission for determining when a practice is unfair: '(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)].'"

Conaway v. Prestia, [191 Conn. 484, 492-94, 464 A.2d 847 (1983),] quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972). . . ." McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 567-68, 473 A.2d 1185 (1984).

Applying these criteria to the act of prosecuting a sham lawsuit to prevent, hinder or delay a prospective competitor from entering [\*\*38] a market pursuant to a conspiracy to monopolize, restrain trade, prevent competition and/or to control prices in that market, the [\*432] following observations must be made. First, because such conduct directly [\*\*\*1037] violates the antitrust laws, state and federal, it clearly "offends public policy as . . . established by [those laws]." (Internal quotation marks omitted.) Id. 568. Secondly, such conduct is "oppressive [and] unscrupulous," for it subjects the plaintiff, a would-be competitor, both to the loss of a valuable business opportunity and to the potentially crippling expense of hiring counsel to overcome the defendants' dishonest, anticompetitive effort to extinguish it entirely. (Internal quotation marks omitted.) Id. Thirdly, the delay or prevention of the plaintiff's entry into the valet parking market with a large new facility that could potentially serve a large percentage of that market very probably caused substantial injury not only to the plaintiff, but to the consuming public. Just as the plaintiff was disenabled from competing in the relevant market, customers in that market were deprived of the plaintiff's services and of the price and service benefits that would doubtless [\*\*39] have been realized with increased competition. In short, the challenged conduct appears on its face to satisfy each prong of the cigarette rule.

Not surprisingly, the federal courts have long agreed with this position, holding that HN28 [↑] "the [federal trade] commission has broad powers to declare trade prices unfair[, and that this] broad power . . . is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws." FTC v. Brown Shoe Co., 384 U.S. 316, 320-21, 86 S. Ct. 1501, 16 L. Ed. 2d 587 (1966). Accordingly, in FTC v. Motion Picture Advertising Co., 344 U.S. 392, 394-95, 73 S. Ct. 361, 97 L. Ed. 426 (1953), the United States Supreme Court declared that "the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices [\*433] which, when full blown, would violate those Acts . . . as well as to condemn as 'unfair methods of competition' existing violations of them." (Citations omitted; emphasis added.)

So stating, the court has clearly established [\*\*40] that HN29 [↑] "[a] combination or conspiracy in restraint of trade is an unfair method of competition . . ." 87 C.J.S. 649 Trade-Marks, Trade-Names and Unfair Competition, § 228c (1954). It has also established that "the standards established by the anti-trust acts, and by the courts in construing and applying such acts," are the standards to be applied in "determining whether particular acts amount to unfair methods of competition within the Federal Trade Commission Act, and in determining whether practices which are against public policy because of their dangerous tendency to hinder competition or create a monopoly constitute unfair methods of competition." Id. 649-50; accord 1 R. Langer, J. Morgan & D. Belt, Connecticut Unfair Trade Practices Act (1994) § 2.4, p. 23 ("When first enacted, the Federal Trade Commission Act prohibited only unfair methods of competition. The provision now is understood to cover anticompetitive conduct of essentially the same character as the Sherman Act and the Clayton Act. The Connecticut Antitrust Act covers the same subject matter . . .")

Here, then, since this court has already ruled that the allegations of the plaintiff's antitrust counts, all [\*\*41] of which are incorporated by reference, in its CUTPA count, are sufficient to plead an actionable violation of the Connecticut Antitrust Act within the sham litigation exception to the *Noerr-Pennington* doctrine, the count concludes that it has also adequately pleaded a violation of CUTPA.

The defendants' final challenge to the third count of the plaintiff's revised complaint is that the plaintiff is [\*434] not entitled to make a CUTPA claim since it was not a consumer or a competitor of the defendants when they filed the challenged administrative appeal. This argument is easily disposed of on two independent bases. First, in *McLaughlin Ford*, our Supreme Court explicitly held that HN30 [↑] to prove a violation of CUTPA, a plaintiff need not show that he suffered consumer injury. Instead, said the court, "we agree with the plaintiff that a competitor or other business person can maintain a CUTPA cause of action. . . ." (Emphasis added.) McLaughlin Ford, Inc. v. Ford Motor Co., supra, 192 Conn. 567. Since the plaintiff in this action, though only [\*\*\*1038] a serious potential competitor of the defendants in the airport valet parking market, was clearly another "business person," it is entitled [\*\*42] to present its claim for relief under CUTPA.

Second, as previously noted, since the plaintiff has already been determined by this court to have standing, as a potential competitor of the defendants, to file and maintain an antitrust claim against them, then it likewise has a right to present a CUTPA claim against them. To reiterate a point just made: [HN31](#)[] the standards applicable to antitrust claims govern those applicable to similar conduct under the Federal Trade Commission Act, and thus, by extension, under CUTPA.

## CONCLUSION

For all of the foregoing reasons, each and every claim presented by the defendants in their pending motions to strike is hereby denied.

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End of Document



## **PSI Repair Servs. v. Honeywell, Inc.**

United States Court of Appeals for the Sixth Circuit

January 13, 1997, Decided ; January 13, 1997, Filed

No. 95-1351

**Reporter**

104 F.3d 811 \*; 1997 U.S. App. LEXIS 455 \*\*; 1997 FED App. 0008P (6th Cir.) \*\*\*; 1997-1 Trade Cas. (CCH) P71,674

PSI REPAIR SERVICES, INC., Plaintiff-Appellant, v. HONEYWELL, INC., Defendant-Appellee.

**Subsequent History:** [\[\\*\\*1\]](#) Certiorari Denied June 9, 1997, Reported at: [1997 U.S. LEXIS 3574](#).

**Prior History:** ON APPEAL from the United States District Court for the Eastern District of Michigan.

**Disposition:** AFFIRMED

## **Core Terms**

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customers, market power, manufacturers, relevant market, costs, products, summary judgment, repair, circuit-board, monopoly power, repair service, district court, circuit board, replacement, industrial, contends, consumers, boards, prices, tie, Sherman Act, purchases, seller, aftermarket, antitrust, upgrades, issue of material fact, purposes, copiers, percent

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

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

[\*\*HN1\*\*](#) **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > Sentencing > Fines

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

[\*\*HN2\*\*](#) **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 2](#).

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

### **HN3** [down arrow] **Standards of Review, De Novo Review**

An appellate court reviews a district court's grant of summary judgment de novo.

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

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

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

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

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

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

### **HN4** [down arrow] **Discovery, Methods of Discovery**

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether the non-moving party has raised a genuine issue of material fact, the evidence of appellant is to be believed, and all justifiable inferences are to be drawn in its favor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

### **HN5** [down arrow] **Tying Arrangements, Clayton Act**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different or tied product, or at least agrees that he will not purchase that product from any other supplier. Such an arrangement constitutes an impermissible tie under S. 1 of the Sherman Act, 15 U.S.C.S. § 1 et seq., 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 > Sherman Act > General Overview

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

## [\*\*HN6\*\*](#) [down] Antitrust & Trade Law, Sherman Act

A court follows a three-step analysis for determining whether a tying arrangement is likely to cause such an anticompetitive effect: (1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied-product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN7\*\*](#) [down] Sherman Act, Claims

The offense of monopoly under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), 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.

**Counsel:** For PSI REPAIR SERVICES, INCORPORATED, Plaintiff - Appellant: Rodger D. Young, ARGUED, BRIEFED, Anthony P. Cho, BRIEFED, Young & Associates, Southfield, MI.

For HONEYWELL, INCORPORATED, A FOREIGN CORPORATION, Defendant - Appellee: Thomas W.B. Porter, Dykema & Gossett, Detroit, MI. Matthew L. Woods, BRIEFED, Elliot S. Kaplan, ARGUED, Robins, Kaplan, Miller & Ciresi, Minneapolis, MN.

**Judges:** Before: BOGGS and MOORE, Circuit Judges; HILLMAN, District Judge. \*

**Opinion by:** KAREN NELSON MOORE

## Opinion

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[\*812] KAREN NELSON MOORE, Circuit Judge. This case presents several issues involving [§§ 1](#) and [2](#) of the Sherman [\*\*\*2] Antitrust Act.<sup>1</sup> [\*813] Plaintiff PSI Repair Services, Inc. ("PSI") asserted an illegal tying claim under [§ 1](#) and a monopolization claim under [§ 2](#) against defendant Honeywell, Inc. ("Honeywell"). The district court granted summary judgment in favor of Honeywell on both counts. For the reasons that follow, we affirm, on different grounds, the judgment of the district court.

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\* The Honorable Douglas Hillman, United States District Judge for the Western District of Michigan, sitting by designation.

<sup>1</sup> [Section 1](#) of the Sherman Act provides in relevant part: [\*\*HN1\*\*](#) [up] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U.S.C. § 1](#). [Section 2](#) provides: [\*\*HN2\*\*](#) [up] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$ 10,000,000 if a corporation, or, if any other person, \$ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C. § 2](#).

## [\*\*2] I. BACKGROUND

Honeywell manufactures and sells industrial control equipment. This equipment controls the manufacturing processes at various refineries and factories. At issue in this case are three different types of control equipment: the TDC, or "Total Distributed Controller"; the PLC, or "Programmable Logic Controller"; and the UDC, or "Universal Digital Controller." The TDC, which ranges in price up to \$ 800,000 per unit, automates and controls the manufacturing processes at industrial facilities, such as oil refineries, paper mills, and chemical processing plants. The PLC controls various robotic operations on automobile assembly lines. While less sophisticated than a TDC, the PLC and TDC share some common characteristics. The third controller at issue, the UDC, which ranges in price from \$ 250 to in excess of \$ 4,000, regulates temperature operations in various industrial settings. J.A. at 371.

Honeywell's industrial control equipment contains and depends heavily on printed circuit boards. These boards, [\*\*\*3] which range in price from \$ 200 to \$ 5000, are comprised of a thin rectangle of fiberglass that is laminated with copper foil. Placed on this fiberglass [\*\*3] are numerous components, such as computer chips, that communicate with each other via the copper foil on the board. These components periodically fail, which in turn often causes the circuit board and the industrial control equipment also to fail. J.A. at 38-39. When a circuit board fails, Honeywell will replace it with a new or refurbished board, charging its customer fifty percent of the list price, so long as the customer returns the defective board. J.A. at 306. Upon receipt of the defective board, Honeywell evaluates it to determine whether it is repairable. If it is, Honeywell will replace any defective component and then test the board before placing the board back into its inventory. Thus, the customer does not receive the same board that it returned. Honeywell does not distinguish between its new and refurbished boards within its parts inventory. J.A. at 295.

Roughly ninety-five percent of the components on the circuit boards, referred to as "generic components," can be purchased either from the component manufacturer or from a component distributor. The other five percent are designed specifically for Honeywell by third-party manufacturers, as Honeywell itself does not manufacture [\*\*4] components. Honeywell has restrictive agreements with these manufacturers whereby the manufacturers agree not to sell these components to either Honeywell equipment owners or service organizations such as PSI. Honeywell also has a stated policy of not selling its components to anyone. J.A. at 295. When a circuit board fails, equipment owners cannot usually identify which component caused the failure. J.A. at 1059. Thus, as a result of Honeywell's restrictive policy, its equipment owners essentially must return to Honeywell to obtain an entire replacement board.

PSI offers circuit-board repair services to owners of industrial control equipment. It does not manufacture industrial control equipment, and, similar to Honeywell, it does not manufacture board components. PSI provides [\*\*\*4] board services for customers who own systems manufactured by Honeywell's competitors by purchasing the necessary components from either the equipment or component manufacturer. J.A. at 356-60. It is also able to obtain any firmware and documentation necessary for the non-generic components either from the manufacturer's marketing information or by purchasing this [\*814] information from the manufacturer. [\*\*5] J.A. at 359-60.

Because PSI is unable to obtain any of the components manufactured exclusively for Honeywell, it is, for all practical purposes, unable to compete in the market for repair of Honeywell boards. Indeed, the district court took judicial notice of this fact. J.A. at 396-97. The record contains ample evidence that without this restriction, PSI could effectively compete in the market for Honeywell board repair work. PSI's economic expert expressed the opinion that in an unrestrained market, PSI's market share should be as high as twenty-seven percent. J.A. at 1005. In addition, PSI's chief operating officer, Eugene Laurie, testified at the district court's evidentiary hearing about the numerous Honeywell equipment owners that have asked PSI to perform board repairs, only to find out that, because of Honeywell's restrictive policy, PSI may not be able to repair their board. J.A. at 373-76. While the district court apparently did not reject these contentions, it did not find them determinative in its analysis.

The district court granted Honeywell's motion for summary judgment on the § 1 tying claim because it found that there were not two separate products that could be [\*\*6] tied. It stated in its order addressing the § 1 claim that "there are not separate markets for parts for the circuit boards manufactured by defendant and for the servicing of circuit boards when a board requires repair or replacement." District Ct. Order Dismissing § 1 Claim at 2-3. In

granting Honeywell's motion for summary judgment on the [§ 2](#) claim, the court declared: "Here the only thing defendant has done is maintain its right to proprietary technology by declining to make available to the market the proprietary components that make up part of [\*\*\*5] its circuit boards. Under such circumstances there is no genuine issue of material facts which is ripe for jury determination." District Ct. Order Dismissing [§ 2](#) claim at 3. As we explain at length below, the [§ 1](#) ruling was incorrect. But as we also explain, the primary equipment market, not any aftermarket, is the relevant market in this case for purposes of [§§ 1](#) and [2](#). Because of this conclusion, the district court's [§ 2](#) analysis is no longer applicable in this case. Our relevant market analysis, however, leads us to conclude that summary judgment nonetheless was proper on both claims.

## II. STANDARD OF REVIEW

[\*\*7] [HN3](#) We review a district court's grant of summary judgment de novo. See [City of Mount Clemens v. EPA, 917 F.2d 908, 914 \(6th Cir. 1990\)](#); [Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1472 \(6th Cir.\)](#), cert. denied, 488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 (1988). [HN4](#) Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#). In determining whether the non-moving party has raised a genuine issue of material fact, "the evidence of [appellant] is to be believed, and all justifiable inferences are to be drawn in [its] favor." [Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#) (citations omitted). Prior to Kodak, there had been some debate whether [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#), placed special burdens on antitrust plaintiffs responding to summary judgment challenges. But this debate was resolved in Kodak, when the Court stated: "Matsushita demands only that the [\*\*8] nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." [504 U.S. at 468](#). We therefore now turn to the evidence in the record, construing it in a light most favorable to PSI, in order to determine whether it raises a genuine issue of material fact [\*\*\*6] and whether PSI's inferences from this evidence are reasonable.

## III. THE TYING CLAIM

Appellant alleges that Honeywell has violated [§ 1](#) of the Sherman Act through an impermissible tying arrangement. In particular, PSI contends that Honeywell has [\*815] illegally tied the sale of its circuit-board components to its circuit-board repair services. [HN5](#) "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.'" [Kodak, 504 U.S. at 461](#) (quoting [Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#)). Such an arrangement constitutes an impermissible tie under [§ 1](#) of the Sherman Act "if the seller has 'appreciable economic power' in the tying product market [\*\*9] and if the arrangement affects a substantial volume of commerce in the tied market." [504 U.S. at 462](#).<sup>2</sup> While a

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<sup>2</sup> While PSI argues on appeal that Honeywell's tying arrangement is illegal under both per se and rule-of-reason analysis, these two theories have, in effect, merged in recent years. Under traditional per se analysis, restraints of trade were condemned without any inquiry into the market power possessed by the defendant. See, e.g., [Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). However, under tying's per se rule, the seller must possess substantial market power in the tying product market. In addition, tying's per se rule provides for an inquiry into whether the defendant's conduct has procompetitive effects. See [Kodak, 504 U.S. at 478-79](#). Such an extensive factual inquiry is hardly the stuff of per se analysis. Under rule-of-reason analysis, the antitrust plaintiff must show, inter alia, an adverse effect on competition. See [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29-30, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). This circuit adopted the [HN6](#) following three-step analysis for determining whether a tying arrangement is likely to cause such an anticompetitive effect: "(1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied-product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct." [Hand v. Central Transp., Inc., 779 F.2d 8, 11 \(6th Cir. 1985\)](#). Thus, in this circuit, market power in the tying product market is an indispensable requirement under either per se or rule-of-reason analysis. As Professors Areeda, Elhauge,

substantial amount [\*\*7] of commerce is potentially involved, Honeywell disputes both the existence of two separate products and market power.

#### [\*\*10] A. Separate Products

For the district court's grant of summary judgment to be reversed, PSI must first show that a reasonable trier of fact could find that circuit-board components and service are two distinct products. Our analysis of this issue is controlled largely by the Supreme Court's decisions in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992), and *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). In *Kodak*, the plaintiffs, a group of independent service organizations (ISOs), contended that Kodak had illegally tied the sale of replacement parts for its photocopiers and micrographic equipment to the service of such equipment. Because of Kodak's unique parts and its restrictive policy, the ISOs could not perform the repairs on Kodak machines. Kodak contended that parts and service could not constitute separate products under § 1 of the Sherman Act. In rejecting this contention, the Court remarked that parts and service could be separate products if there is "sufficient consumer demand so that it is efficient for a firm to provide service separately from parts." [504 U.S. at 462](#).

The consumer-demand test articulated [\*\*11] in *Kodak* merely clarified what had already been decided in *Jefferson Parish*. In *Jefferson Parish*, the plaintiff, an anesthesiologist, alleged that the defendant hospital's exclusive contract with a firm of anesthesiologists was an illegal tie under § 1. [\*\*8] The hospital responded that it was "merely providing a functionally integrated package of services." [466 U.S. at 19](#). Rejecting the hospital's argument, the Court stated that, in determining whether one or two products is involved, the focus should be "not on the functional relation between them, but rather on the character of the demand for the two items." *Id.* Indeed, as the *Kodak* Court stated, "We have often found arrangements [\*816] involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." [504 U.S. at 463](#) (quoting *Jefferson Parish*, 466 U.S. at 19 [n.30](#)). With *Jefferson Parish* and *Kodak* as our guide, we now turn to the facts of this case.

Honeywell first contends that it does not even sell repair services, the tied product in this case. It claims that instead of servicing a defective circuit board, it simply replaces the board with [\*\*12] a new or refurbished one, charging the same price for all similar replacement boards, regardless of the problem with the defective board. Honeywell, however, cannot claim that it does not participate in the repair business simply because the replacement board it gives a customer is not the same one the customer returned. Honeywell has decided that it is more cost-effective to replace a board immediately and then later to determine whether the board is worth repairing than to attempt to repair the same board returned by its customer. But this decision does not alter the fact that Honeywell repairs a substantial number of the boards that are returned. Simply put, there is substantial evidence that Honeywell repairs circuit boards.

Honeywell next contends that even if its practices reasonably can be characterized as involving repair services, separate markets for components and board services do not exist because consumers simply demand functioning replacement boards. We agree with Honeywell that its customers want functioning boards. In *Kodak*, the consumers certainly wanted functioning photocopiers, just as all consumers want functioning products. Yet this elementary conclusion [\*\*13] had no bearing on the *Kodak* Court's [\*\*9] inquiry into whether parts and services could be distinct products for antitrust purposes in that case. Similarly, Honeywell's characterization of its customers' needs moves us no closer to the resolution of the separate-products issue in this dispute.

What does aid our analysis in this case is the evidence in the record suggesting that it would be efficient for a firm to provide some component parts separate from circuit-board repair services. PSI's very existence indicates the possibility of a separate market for service, because PSI does not manufacture any of the component parts for the

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and Hovenkamp comment, "the per se rule against tying is 'per se' in only one respect--namely, dispensing with proof of anticompetitive effects . . ." 10 PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* P 1760e, at 372 (1996). The merger of these two theories is apparent in the majority opinion in *Kodak*, which does not even mention the terms "per se" or "rule of reason," even though *Kodak* was technically a per se case.

circuit boards but instead purchases them from third-party manufacturers. See *Kodak, 504 U.S. at 462* ("The development of the entire high-technology service industry is evidence of the efficiency of a separate market for service."). There is also evidence in the record that it is not uncommon for other control-equipment manufacturers to sell circuit-board components. J.A. at 1201. Moreover, the record contains evidence that some circuit-board repair services do not even involve the purchase of components. J.A. at 1203-04. In addition, Honeywell [\*\*14] admits that the generic components on its circuit boards--roughly 95% of the components--are available for sale either directly through the manufacturer or a third-party distributor. J.A. at 224.

Indeed, Honeywell itself sells components for its PLC equipment to customers and admits allowing one customer to purchase TDC components from it. In describing the latter situation, Edward Hurd, Honeywell's President of Industrial Control indicated that a "concession" was made in its policy to one customer. J.A. at 295-96. From the record before us, it appears that other Honeywell customers would welcome a similar concession. PSI's industry expert indicated that without Honeywell's component-part restrictions, PSI's repair market for Honeywell equipment would be twenty-seven percent. J.A. at 1005. The same expert also conducted a survey indicating that fifteen percent of Honeywell customers have purchased and continue to purchase component parts from Honeywell [\*\*\*10] without purchasing circuit-board repair services. J.A. at 1003. While Honeywell contends that only one customer continues to purchase its component parts, this contention, when compared to the PSI survey, creates an issue [\*\*15] of material fact that we are not in a position to resolve at the summary judgment stage.

More important, however, Honeywell's own actions have essentially limited the existence of a separate market for components. On this point, *Allen-Myland, Inc. v. IBM, 33 F.3d 194* [\*817] (3rd Cir.), cert. denied, 130 L. Ed. 2d 615, 115 S. Ct. 684 (1994), is instructive. At issue in *Allen-Myland* was a "net pricing policy" by the defendant, which essentially required IBM customers to purchase computer upgrades and upgrade installation together. On a few occasions, however, IBM allowed customers to purchase the upgrade parts separately. IBM then contended that because only a few upgrades were sold apart from service, no separate market existed for service. In rejecting this argument, the Third Circuit stated that "the fact a few . . . upgrades were sold [separately from the installation] does not prove that there was no separate demand for installation services, particularly considering that IBM had every economic incentive to protect its revenues and avoid widely publicizing the existence of such upgrades." *33 F.3d at 214*. Similarly, Honeywell cannot point to its one customer that purchases components separately [\*\*16] as evidence of a lack of a market for components, when it was Honeywell's own restrictive policy that assured the absence of a component market.

As a final argument, Honeywell asserts that a decision in favor of PSI here would expand *S. 1* to include virtually all parts of finished products, since very few products do not contain sub-parts of some kind. Honeywell's concerns are not without merit. See *Jefferson Parish, 466 U.S. at 39* (O'Connor, J., concurring) ("All but the simplest products can be broken down into two or more components that are 'tied together' in the final sale."). While we are mindful of the various efficiency gains that can accrue to both suppliers and customers from bundling certain products together, see 9 PHILLIP E. AREEDA, *ANTITRUST LAW* P 1717b, [\*\*11] at 214-18 (1991), we are confident that the antitrust laws provide the tools to distinguish between meritorious and non-meritorious claims. As a threshold matter, an antitrust plaintiff must be able to show that competition--as opposed to competitors--is harmed by the bundling of products. See, e.g., *HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 878* (6th Cir. 1991), cert. [\*\*17] denied, 503 U.S. 938 (1992) ("The antitrust laws were enacted for 'the protection of competition, not competitors.'") (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502* (1962) (emphasis in original)). Moreover, the Sherman Act is not triggered merely by the presence of component parts, but only when there is sufficient demand for these parts such that it would be efficient for a firm to provide them separately. See *Kodak, 504 U.S. at 462*. As the above discussion indicates, a question of fact exists in this case on this very point. We conclude, therefore, that the district court improperly relied on the lack of separate products as a basis for granting summary judgment in favor of Honeywell on PSI's *S. 1* claim.

## B. Market Power

We must now consider the next feature of an illegal tying arrangement: appreciable economic power in the tying market. The district court did not address this issue, having based its [§ 1](#) ruling on its finding that there were not separate products. Nonetheless, Honeywell contends that because it lacks market power, this is an alternative basis for granting summary judgment in its favor.

"Market power is the power 'to [\*\*18] force a purchaser to do something that he would not do in a competitive market.' It has been defined as 'the ability of a single seller to raise price and restrict output.' The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market." [Kodak, 504 U.S. at 464](#) (citations omitted). "Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the [\*\*\*12] market." [Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 504, 22 L. Ed. 2d 495, 89 S. Ct. 1252 \(1969\)](#). If the seller has sufficient market power in the tying market to "force" the customer to purchase the tied product then "competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." [Jefferson Parish, 466 U.S. at 12](#). The market power requirement is important because, without market power, a seller cannot engage in the forcing necessary to establish a [§ 1](#) violation. A thirty-percent share of the market, standing alone, provides an insufficient basis from which to infer market power. [466 U.S. at 26-29](#). [\*\*19] With this background in mind, we turn to the parties' asserted definitions of the relevant market in this case.

PSI contends that Honeywell-brand components comprise the relevant market, since these components are not interchangeable with any other components offered in the market. It alleges that Honeywell has enough market power in the component market to force the undesired purchase of Honeywell board services. Honeywell, on the other hand, argues that the relevant market consists of either the market for all components used on its boards or the primary equipment market. Honeywell first claims that PSI is bound by a relevant market including all board-level components because this is how PSI has defined the relevant market until this appeal. While neither party has been exceptionally clear in its proposed definition of the relevant market, both PSI's amended complaint and its appellate brief indicate that it considers the relevant market to consist of only the Honeywell-brand circuit-board components. See First Am. Compl. P 15; Appellant's Br. at 38. [\*\*\*13]<sup>3</sup>

[\*\*20] Honeywell's real argument is that the relevant market should be defined to include all of the manufacturers of industrial control equipment with whom it competes. It contends that even if it possesses market power in the component market, competition in the primary equipment market precludes it from exercising this monopoly power. This was the precise argument presented by the defendant to the Court in *Kodak*. Defendant Kodak asked the Supreme Court to adopt a legal rule that "equipment competition precludes any finding of monopoly power in derivative aftermarkets." [Kodak, 504 U.S. at 466](#).<sup>4</sup> In arguing against such a rule, the ISOs contended that information costs and switching costs prevented the competition in the primary market from constraining Kodak's ability to exact supracompetitive prices in the aftermarket. Information costs are costs that prevent consumers from obtaining all relevant information about a product at the time of sale. Switching costs are borne by customers who have already purchased a product and who would then incur some cost in switching to another product. Information and switching costs were particularly high in *Kodak* because Kodak adopted its [\*\*21] parts-restrictive policy after numerous customers had already purchased Kodak copiers, thus creating a "lock-in" effect. Agreeing with the ISOs' theory that many Kodak customers were potentially "locked-in," the Court concluded that there was "a question of fact whether information costs and switching costs foil the simple assumption that the equipment and service markets act as pure complements to one another." [504 U.S. at 477](#). [\*\*\*14]

<sup>3</sup> Honeywell's reasons for attempting to constrain PSI to a relevant market consisting of all components on Honeywell boards are obvious, since ninety-five percent of the components on its boards are widely available in the market. Nevertheless, it is questionable whether such a market definition would benefit Honeywell. Even though market power is normally established by controlling a substantial share of the market, market power also exists "when the seller offers a unique product that competitors are not able to offer." See [Jefferson Parish, 466 U.S. at 17](#). In this case, Honeywell itself describes its own board components as "proprietary," and there is substantial evidence that competitors are unable to offer these components.

<sup>4</sup> In *Kodak* the Court found that the ISOs had conceded that Kodak lacked market power in the equipment market. [Kodak, 504 U.S. at 465 n.10](#).

Honeywell first contends that the Court in *Kodak* refused to uphold the grant of summary judgment largely because of the limited evidentiary record in *Kodak*. In *Kodak*, summary judgment was granted after a brief discovery period and without a hearing. [504 U.S. at 459](#). While Honeywell correctly concludes that the Court did not hold that summary judgment was never appropriate in aftermarket cases, neither did [\*819] the Court hold [\*\*22] that a more complete record would assure Kodak of summary judgment. Regardless of the size of the record after discovery, if a material issue of fact exists, summary judgment is inappropriate.

Honeywell's next attempt to distinguish *Kodak* has much more merit. It contends that while Kodak changed its service and parts policy to include the tie after many Kodak customers purchased their equipment, Honeywell has consistently maintained its policy of board replacement. While Honeywell does not clearly articulate why this distinction is important, we interpret Honeywell's argument to be that the *Kodak* Court's finding of a material issue of fact on the definition of the relevant market resulted from Kodak's change in policy. PSI, on the other hand, argues that even without a change in policy, significant information costs still exist. It points to deposition testimony by Honeywell's own personnel that it would be "very difficult" for customers to determine the lifecycle cost of its equipment. J.A. at 1347. There is also evidence in the record that it would be difficult for Honeywell to predict the cost of parts down the road. J.A. at 1344. And while Honeywell equipment owners may [\*\*23] know that Honeywell's equipment is often capable of lasting for the lifetime of the plant, the owners are constantly upgrading and enhancing the equipment along the way, so that these costs are difficult to gauge. J.A. at 1354-55.

The Court in *Kodak* did not explicitly state the extent to which Kodak's change in policy affected the Court's analysis. Nonetheless, it suggested that the outcome might have been different had Kodak presented evidence that its [\*\*\*15] restrictive parts policy was consistently maintained and generally known. In responding to Justice Scalia's dissent, which argued, *inter alia*, that but for Kodak's change in policy, the Court would be faced with a traditional tie between copiers and aftermarket service, the majority responded:

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. Whether a tie between parts and service [\*\*24] should be treated identically to a tie between equipment and service, as the dissent and Kodak argue, depends on whether the equipment market prevents the exertion of market power in the parts market. Far from being "anomalous," requiring Kodak to provide evidence on this factual question is completely consistent with our prior precedent.

[504 U.S. at 477 n.24](#) (internal citations omitted). This passage can be read to imply that had Kodak presented undisputed evidence that it never changed its policy and that its policy was generally known, the Court would have considered Kodak copiers as the tying product and service and parts combined as the product being tied. See 10 PHILLIP E. AREEDA, ET AL., **ANTITRUST LAW** P 1740c, at 150 (1996) ("The majority [in *Kodak*] apparently agreed with [the dissent] when it emphasized the absence of evidence that Kodak's policy was generally known."); *id.* at 157 ("The *Kodak* majority indicated that it would assess the defendant's power in the interbrand machine market (where it had none) were it 'generally known' to machine buyers that the defendant supplied unique repair parts only in connection with its service, notwithstanding [\*\*25] ignorance of lifecycle prices.").

[\*\*\*16] Both the First and the Seventh Circuits have interpreted *Kodak* to be limited to situations in which the seller's policy was not generally known. See [Digital Equip. Corp. v. Uniq Digital Techs., Inc.](#), 73 F.3d 756, 763 (7th Cir. 1996)

(“The Court did not doubt in *Kodak* that if spare parts had been bundled with Kodak’s copiers from the outset, or Kodak had informed customers about its policies before they bought its machines, purchasers could have shopped around for competitive life-cycle prices. The material dispute that called for a trial was whether the change in policy enabled Kodak to extract supra-competitive prices from customers who had already purchased its machines.”); [Lee v. Life Ins. Co. of North America](#), 23 F.3d 14, 20 (1st Cir.), [\*820] cert. denied, 130 L. Ed. 2d 340, 115 S. Ct. 427 (1994) (“The timing of the ‘lock in’ at issue in *Kodak* was central to the Supreme Court’s decision. . . . Had previous customers known, at the time they bought their Kodak copiers, that Kodak would implement its restrictive parts-servicing policy, Kodak’s ‘market power,’ i.e., its leverage to induce customers to

purchase Kodak servicing, could [\*\*26] only have been as significant as its [market power] in the copier market, which was stipulated to be inconsequential or nonexistent.").

We likewise agree that the change in policy in *Kodak* was the crucial factor in the Court's decision. By changing its policy after its customers were "locked in," Kodak took advantage of the fact that its customers lacked the information to anticipate this change. Therefore, it was Kodak's own actions that increased its customers' information costs. In our view, this was the evil condemned by the Court and the reason for the Court's extensive discussion of information costs. While PSI's argument seems to suggest that *Kodak* supports a finding of market power whenever information costs are present, such a position cannot be reconciled with *Jefferson Parish*. In *Jefferson Parish*, the plaintiff argued there were various "market imperfections" that enabled the hospital to charge noncompetitive prices and that saddled the consumers with inadequate information, which in turn "render[ed]" [\*\*17] consumers unable to evaluate the quality of the medical care provided by competing hospitals." [466 U.S. at 27](#). Dismissing this argument, the [\*\*27] Court responded that "while these factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying." *Id.* Put another way, the Court rejected the premise that imperfect consumer information resulting from basic market imperfections could be used as a basis to infer market power for purposes of the Sherman Act. We are unwilling to conclude that *Kodak* overruled this portion of *Jefferson Parish*, especially because the Court in *Kodak* cites *Jefferson Parish* with approval in its general discussion of market power. [Kodak, 504 U.S. at 464](#).

In light of our reading of *Jefferson Parish* and *Kodak*, we thus hold that an antitrust plaintiff cannot succeed on a *Kodak*-type theory when the defendant has not changed its policy after locking-in some of its customers, and the defendant has been otherwise forthcoming about its pricing structure and service policies. This rule should encourage manufacturers to divulge all relevant information at the time of sale. While we recognize that some information costs will still exist even with full disclosure by a seller, see Mark R. Patterson, [\*\*28] *Product Definition, Product Information, and Market Power: Kodak in Perspective*, [73 N.C. L. REV. 185, 215-216 \(1994\)](#) ("The buyer's pre-purchase knowledge of a tie allows her only to anticipate those additional costs of the tie about which she knows prior to the purchase; it does not reduce the effects of the information costs that prevented buyers of Kodak equipment from accurately determining lifecycle prices."), these additional information costs stem from the fact that our economy is not one of perfect information, a factor that alone should not invoke antitrust condemnation. Accepting PSI's argument would expose many manufacturers of durable, expensive equipment to potential antitrust liability for having inherent power over the aftermarkets of their products, a result certainly not intended by *Kodak* and not consistent with *Jefferson Parish*.

[\*\*18] The present dispute provides an ideal example as to how our reading of *Kodak* can be applied in practice. In this case, there are no allegations that Honeywell changed its parts-restrictive policy in order to lock-in customers, nor has PSI alleged that Honeywell's policy was not generally known. There also is evidence [\*\*29] that Honeywell and its customers engage in lengthy negotiations before the sale of Honeywell equipment. J.A. at 270. This fact is hardly surprising in light of the substantial price of the equipment. The record also contains evidence that Honeywell will provide estimates of service costs and failure rates of various parts if asked by its customers, J.A. at 1339, 1342, and that it offers various service plans to enable the customers more accurately to estimate the cost of the equipment. J.A. at 974-76. [\*821] All of these actions by Honeywell reduce the information costs faced by its consumers. If there were any evidence in the record that Honeywell took advantage of its customers' imperfect information in order to reap supracompetitive profits in the aftermarkets for its equipment, we would not hesitate to allow a *Kodak*-type theory to be submitted to the jury. However, we can find nothing in the record or PSI's brief that alleges that Honeywell engaged in such activities. In this situation a *Kodak*-type theory is not applicable. Since PSI has not alleged or shown that Honeywell has market power in the relevant market--the primary equipment market--summary judgment is appropriate in [\*\*30] favor of Honeywell on PSI's [§ 1](#) claim.

#### IV. THE MONOPOLY CLAIM

PSI contends the district court erred by granting summary judgment in favor of Honeywell on PSI's [§ 2](#) monopoly claim. [HNT](#) "The offense of monopoly under [§ 2](#) of the Sherman Act has two elements: (1) the possession of

monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Kodak, 504 U.S. at 481* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*). As was the case in [\*\*\*19] *Kodak*, our § 1 analysis of the relevant market largely dictates our § 2 conclusion on this issue as well. Thus, our conclusion that the relevant market in this case is the primary equipment market is equally applicable here. *Section 2* does, however, require a greater market share for a finding of market power than does § 1. *Kodak, 504 U.S. at 481*; *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*. While there is no magical percentage of market power that will qualify as monopoly power under § 2, the Supreme [\*\*31] Court has concluded that an 87% share of the market and over two-thirds of the market both constitute monopoly power under § 2. See *United States v. Grinnell Corp., 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)* (87% of market constitutes a monopoly); *American Tobacco Co. v. United States, 328 U.S. 781, 797, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)* (over two-thirds of market constitutes a monopoly).

In this case, PSI alleges that Honeywell possesses monopoly power in the market for circuit-board repair services, and that it willfully acquired this monopoly power by restricting the availability of its brand of circuit-board components. While the district court made no findings regarding the relevant market, it concluded that Honeywell had an absolute right to refuse to deal in its proprietary components, and that, because of this fact, Honeywell had legitimate reasons for acquiring whatever market power it had. In other words, the district court concluded that even if Honeywell had monopoly power in the market for circuit-board repair services, it achieved that power as a result of legitimate reasons, namely the proprietary nature of its components. In light of our holding on the relevant-market issue, however, the district court's [\*\*32] analysis, which focused on Honeywell's reasons for acquiring and maintaining power in the market for circuit-board repair services, is no longer applicable. Because we have limited the relevant market in this case to the primary equipment market, PSI can no longer rely on any power that Honeywell may have in the market for circuit-board components and repair services as a basis for § 2 liability. Therefore, because PSI has not shown that Honeywell possesses market power in the relevant market, i.e., the [\*\*\*20] primary equipment market, summary judgment likewise was appropriate in favor of Honeywell on the § 2 claim.

Even if PSI had produced evidence regarding Honeywell's share of the primary equipment market, and even if we assume, for summary judgment purposes, that Honeywell has monopoly power in the market for its equipment, PSI must satisfy the second part of the § 2 analysis, i.e., it must show that Honeywell willfully acquired or maintained this alleged monopoly power. *Kodak, 504 U.S. at 481*. This requirement of proving exclusionary [\*822] conduct also poses an insurmountable obstacle for PSI.

PSI's entire theory in this case revolves around Honeywell's practices in the [\*\*33] circuit-board repair market. As stated throughout this opinion, PSI contends that Honeywell's domination of the market for Honeywell-brand components has foreclosed PSI from the repair market for Honeywell circuit boards. Nowhere does PSI allege that Honeywell willfully sought to acquire monopoly power in the market for industrial control equipment, a market in which PSI does not compete and does not seek to enter. Nor does PSI contend that Honeywell's parts-restrictive policy has allowed Honeywell to achieve and maintain monopoly power in the market for industrial control equipment. See 3 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* P 626c (1978) ("Exclusionary' behavior should be taken to mean conduct other than competition on the merits, or other than restraints reasonably 'necessary' to competition on the merits, *that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.*") (emphasis added). If anything, a restrictive service policy would encourage competition in the primary equipment market. PSI, therefore, cannot establish that Honeywell's practices in the parts and services markets--not relevant markets in this [\*\*34] dispute--have contributed to Honeywell's power in the market for industrial control equipment. Therefore, PSI fails the second part, as well as the first part, of the § 2 analysis.

## [\*\*\*21] V. CONCLUSION

We conclude that because Honeywell's parts-restrictive policy has been consistently maintained and generally known, and because Honeywell has otherwise been forthcoming about its pricing structure and service policies, the primary equipment market in this case comprises the relevant market for purposes of both §§ 1 and 2 of the Sherman Act. Accordingly, relying on these grounds, since PSI has not alleged or shown that Honeywell has market power in the relevant (primary equipment) market, we AFFIRM the judgment of the district court.

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## **Exxon Corp. v. Superior Court**

Court of Appeal of California, Sixth Appellate District

January 14, 1997, Decided

No. H015001.

**Reporter**

51 Cal. App. 4th 1672 \*; 60 Cal. Rptr. 2d 195 \*\*; 1997 Cal. App. LEXIS 22 \*\*\*; 97 Cal. Daily Op. Service 373; 97 Daily Journal DAR 558; 1997-1 Trade Cas. (CCH) P71,677

EXXON CORPORATION, Petitioner, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; SHIRLEY CHENG KOUTNEY et al., Real Parties in Interest.

**Subsequent History:** [\*\*\*1] As Modified on Denial of Rehearing of February 13, 1997, Reported at: [1997 Cal. App. LEXIS 106](#). Review Denied May 14, 1997.

**Prior History:** Santa Clara County Super. Ct. No. CV 735811. Hon. Conrad L. Rushing, Judge.

**Disposition:** Let a peremptory writ of mandate issue as prayed, directing the respondent court to vacate its order denying summary adjudication to Exxon, and to make new and different orders granting the motions for summary adjudication as to the following claims: second cause of action (Cartwright Act--vertical restraint); third cause of action (Cartwright Act--monopolization); sixth and seventh causes of action (fraud and negligent misrepresentation--price), including any claims of gasoline price overcharging; those parts of the fourth and eleventh causes of actions alleging tortious interference with economic opportunity and breach of the covenant of good faith and fair dealing; and those parts of the tenth cause of action for breach of contract concerning any claims arising out of the discontinuation of acceptance of the Exxon credit card and arising out of oral promises to remodel stations. Costs to petitioner.

## **Core Terms**

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gasoline, relevant market, antitrust, summary adjudication, vertical, trial court, cause of action, franchisees, monopoly, retail, plaintiffs', brand, cases, matter of law, consumers, dealers, jobbers, repair, market power, anticompetitive, Theatres, triable, restraint of trade, summary judgment, franchise, parties, question of fact, credit card, Cartwright Act, interchangeable

## **LexisNexis® Headnotes**

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

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

### **[HN1](#) [down arrow] Entitlement as Matter of Law, Materiality of Facts**

The trial court must grant summary adjudication where the moving party establishes the right to the entry of judgment as a matter of law. [Cal. Code Civ. Proc. § 437c\(c\)](#). Summary judgment is mandatory where no triable

issues exist as to a material fact, and if the documentation submitted on the motion entitles the moving party to judgment as a matter of law. [Code Civ. Proc. § 437c\(c\)](#).

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 > Opposing Materials > General Overview

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

## [HN2](#) Summary Judgment, Entitlement as Matter of Law

When defendants seek summary judgment, their supporting documentation must either establish a complete defense to the plaintiff's action or demonstrate an absence of an essential element of the plaintiff's case. When defendants establish the foregoing, and the plaintiff's opposing documentation does not show either a triable issue of fact with respect to the defense or that an essential element exists, summary judgment should be granted. These general principles also apply to an appellate court's review of a summary judgment ruling, which is conducted de novo.

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

## [HN3](#) Summary Judgment, Partial Summary Judgment

For summary judgment to be granted, the moving party must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial.

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

Energy & Utilities Law > Natural Gas Industry > Liquefied Natural Gas

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Antitrust & Trade Law > Sherman Act > General Overview

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

#### **HN4** **Conspiracy to Monopolize, Sherman Act**

Contracts, combinations and conspiracies in restraint of trade covered by [Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), are of two types, horizontal or vertical. Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.

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

#### **HN5** **Price Fixing & Restraints of Trade, Vertical Restraints**

An antitrust plaintiff attacking vertical restraints cannot make out a case unless the plaintiff can show some anticompetitive effect in the larger, interbrand market. The prevailing standard is the "rule-of-reason" which measures whether the anticompetitive aspect of a vertical restraint outweighs its procompetitive effects. And it is plaintiff's burden to make the required showing of a substantially adverse effect on competition in the relevant market.

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

#### **HN6** **Price Fixing & Restraints of Trade, Vertical Restraints**

Vertical restraints are permissible unless a harmful effect on interbrand competition and an anticompetitive purpose can be shown.

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

#### **HN7** **Regulated Practices, Monopolies & Monopolization**

A supplier cannot have a monopoly, normally, in its own product.

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

#### **HN8** **Monopolies & Monopolization, Actual Monopolization**

Monopoly of a single brand is not an antitrust violation.

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

#### [HN9](#) [] **Regulated Practices, Market Definition**

The need to prove market power is a threshold consideration in an antitrust case and is the sine qua non of recovery.

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

#### [HN10](#) [] **Regulated Practices, Price Fixing & Restraints of Trade**

To meet his initial burden in establishing that a practice is an unreasonable restraint of trade, a plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude. Ordinarily, a plaintiff to do this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.

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

#### [HN11](#) [] **Regulated Practices, Market Definition**

The relevant market is determined by considering commodities reasonably interchangeable by consumers for the same purposes. Or, in other words, the relevant market is composed of products that have reasonable interchangeability for the purpose for which they are produced.

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

#### [HN12](#) [] **Summary Judgment, Entitlement as Matter of Law**

The issue of fact becomes one "of law" and loses its "triable" character if the undisputed facts leave no room for a reasonable difference of opinion.

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Evidence > ... > Testimony > Expert Witnesses > General Overview

#### [HN13](#) [] **Gasoline Fuels, Gasoline Dealers & Distributors**

A court is not bound by an expert opinion that is speculative or conjectural or that is based on an incorrect legal theory.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

**HN14** [blue icon] **Conveyances, Franchises**

A franchisor's ability to "coerce" its franchisee does not show market power and does not invoke antitrust concerns.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Interference With Business Relations

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

**HN15** [blue icon] **Causes of Action, Interference With Business Relations**

In actions for interference with prospective economic advantage, as applied to existing contracts, a plaintiff must show that interference was wrongful by some measure beyond the interference itself.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Breach of Contract

Contracts Law > Contract Interpretation > General Overview

**HN16** [blue icon] **Types of Contracts, Covenants**

An implied covenant cannot create an obligation inconsistent with an express term of the agreement.

**Headnotes/Summary**

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**Summary****CALIFORNIA OFFICIAL REPORTS SUMMARY**

Franchisee gasoline service station dealers brought an action against the franchisor, alleging that defendant compelled plaintiffs to buy all their gasoline from defendant at a price considerably higher than the "rack price" at which defendant sold the gasoline to independent jobbers, and alleging causes of action under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), and for monopolization, price overcharging, tortious interference with business relationship, and breach of the covenant of good faith and fair dealing. The trial court denied defendant's motion for summary adjudication that the relevant market was the motor fuel market (all gasoline) and not the wholesale market for defendant's brand fuel. The trial court ruled the issue was a question of fact. (Superior Court of Santa Clara County, No. CV 735811, Conrad Lee Rushing, Judge.)

The Court of Appeal ordered issuance of a writ of mandate directing the trial court to vacate its order denying summary adjudication to defendant, and to make new and different orders granting the motions as to specified causes of action. The court held that in antitrust actions under the Cartwright Act, the need to prove market power is a threshold consideration and is the sine qua non of recovery. The court held that the relevant market was a question of law and was the market of all gasoline. In the market of all gasoline, defendant's market share was less than 10 percent, which was not enough to demonstrate a restraint of trade. In a franchise relationship, the

franchisee presumably accepts the burdens of the arrangement to reap some benefits, e.g., although plaintiffs had to buy their gas from defendant at its wholesale to dealer price rather than its rack price, they got in return defendant's institutional advertising, marketing support, and related benefits, as well as no transportation costs. The court further held that plaintiffs failed to raise a triable issue that the restrictions in their lease agreement prohibiting the use of defendant's tanks, lines, and equipment for the sale of any product other than defendant's brand of gasoline was an illegal tying arrangement. Defendant's lack of market power precluded plaintiffs from proving power in the tying product (here, service station sites). Furthermore, a franchisor's ability to "coerce" its franchisee does not show market power and does not invoke antitrust concerns. (Opinion by Wunderlich, J., with Elia, J., concurring. Dissenting opinion by Premo, Acting P. J.)

## **Headnotes**

### **CA(1)** [blue download icon] (1)

#### **Summary Judgment § 3—Propriety—By Defendant.**

--The trial court must grant summary adjudication where the moving party establishes the right to the entry of judgment as a matter of law ([Code Civ. Proc., § 437c, subd. \(c\)](#)). Summary judgment is mandatory where no triable issues exist as to a material fact, and if the documentation submitted on the motion entitles the moving party to judgment as a matter of law. When defendant seeks summary judgment, the supporting documentation must either establish a complete defense to the plaintiff's action or demonstrate an absence of an essential element of the plaintiff's case. When defendant establishes the foregoing, and the plaintiff's opposing documentation does not show either a triable issue of fact with respect to the defense or that an essential element exists, summary judgment should be granted. These general principles also apply to an appellate court's review of a summary judgment ruling, which is conducted de novo. For summary judgment to be granted, the moving party must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial.

### **CA(2)** [blue download icon] (2)

#### **Mandamus and Prohibition § 40—Mandamus—To Courts—Summary Adjudication of Some Issues.**

--Pretrial mandamus review of the denial of summary adjudication of some but not all issues in an antitrust action was appropriate, where the issues ruled on by the trial court contained the heart of plaintiffs' case and the trial might well be simplified if it was found that the trial court erred. In addition, numerous other cases in the state raised the same or similar issues.

### **CA(3)** [blue download icon] (3)

#### **Monopolies and Restraint of Trade § 7—Under Cartwright Act—Agreements in Restraint of Trade.**

--The Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), as was the Sherman Antitrust Act ([15 U.S.C. § 1 et seq.](#)), was enacted to promote free market competition and to prevent conspiracies or agreements in restraint or monopolization of trade. Contracts, combinations, and conspiracies in restraint of trade are of two types, horizontal or vertical. Horizontal combinations are cartels or agreements among competitors that restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical nonprice restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail. Vertical

restraints are permissible unless a harmful effect on interbrand competition and an anticompetitive purpose is shown. Normally, a supplier cannot have a monopoly in its own product.

#### CA(4) [ ] (4)

##### **Monopolies and Restraint of Trade § 7—Under Cartwright Act—Agreements in Restraint of Trade—Proof.**

--In antitrust actions under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), the need to prove market power is a threshold consideration and is the sine qua non of recovery. To meet this initial burden in establishing that the practice is an unreasonable restraint of trade, plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude. Ordinarily, a plaintiff to do this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.

#### CA(5a) [ ] (5a) CA(5b) [ ] (5b)

##### **Monopolies and Restraint of Trade § 7—Under Cartwright Act—Agreements in Restraint of Trade—Gasoline Franchisor's Requirement That Franchisees Buy From Franchisor at Higher Price Than Paid by Jobbers—Relevant Market.**

--In an antitrust action under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) by franchisee gasoline service station dealers against the franchisor, alleging that defendant compelled plaintiffs to buy all their gasoline from defendant at a price considerably higher than the "rack price" at which defendant sold the gasoline to independent jobbers, the trial court incorrectly ruled that whether the relevant market was the motor fuel market (all gasoline), as defendant asserted, or only the wholesale market for defendant's brand fuel, was a question of fact, and erred in denying defendant's motion for summary adjudication. The relevant market was a question of law and was the market of all gasoline. An issue of fact becomes one of law and loses its triable character if the undisputed facts leave no room for a reasonable difference of opinion. In the market of all gasoline, defendant's market share was less than 10 per cent, which was not enough to demonstrate a restraint of trade. In a franchise relationship, the franchisee presumably accepts the burdens of the arrangement to reap some benefits, e.g., although plaintiffs had to buy their gas from defendant at its wholesale to dealer price rather than its rack price, they got in return defendant's institutional advertising, marketing support, and related benefits as well as no transportation costs.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 575 et seq.]

#### CA(6) [ ] (6)

##### **Summary Judgment § 19—Hearing and Determination—Expert Opinion.**

--A court hearing a summary judgment motion is not bound by an expert opinion that is speculative or conjectural or that is based on an incorrect legal theory.

#### CA(7) [ ] (7)

##### **Monopolies and Restraint of Trade § 7.4—Under Cartwright Act—Agreements in Restraint of Trade—Tying Arrangements—Gasoline Franchisor's Requirement That Franchisees Buy From Franchisor at Higher Price Than Paid by Jobbers.**

--In an antitrust action under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) by franchisee gasoline service station dealers against the franchisor, alleging that defendant compelled plaintiffs to buy all their gasoline

from defendant at a price considerably higher than the "rack price" at which defendant sold the gasoline to independent jobbers, plaintiffs failed to prove that the restrictions in their lease agreement prohibiting the use of defendant's tanks, lines, and equipment for the sale of any product other than defendant's brand of gasoline was an illegal tying arrangement. Defendant's lack of market power (10 percent of market) precluded plaintiffs from proving power in the tying product (here, service station sites). Furthermore, a franchisor's ability to "coerce" its franchisee does not show market power and does not invoke antitrust concerns.

#### CA(8) [L] (8)

**Monopolies and Restraint of Trade § 5—Actions—Gasoline Franchisor's Requirement That Franchisees Buy From Franchisor at Higher Price Than Paid by Jobbers.**

--In an action by franchisee gasoline service station dealers against the franchisor, alleging that defendant compelled plaintiffs to buy all their gasoline from defendant at a price considerably higher than the "rack price" at which defendant sold the gasoline to independent jobbers, and alleging causes of action for monopolization, price overcharging, tortious interference with business relationship and breach of the covenant of good faith and fair dealing, the trial court erred in denying defendant's motion for summary adjudication. Defendant, with 10 percent of the market, had no probability of obtaining a monopoly in the relevant market of all gasoline, since consumers had many interchangeable choices. Defendant presented evidence that its prices fell within the range of prices charged by other major oil companies to their dealers, which was all that was required. The claims for tortious interference and breach of covenant required finding an anticompetitive practice, even if not a statutory antitrust violation, but there was none. Moreover, defendant in fact had a clear financial interest in its dealers and therefore was privileged to "interfere" with the contract.

#### CA(9) [L] (9)

**Summary Judgment § 24—Hearing and Determination—Partial Judgment.**

--Where plaintiffs pleaded their case by splitting causes of action, defendant was entitled to present summary adjudication motions ([Code Civ. Proc., § 437c, subd. \(f\)\(1\)](#)), that were dispositive of allegations that would have formed a single cause of action if properly pleaded.

#### CA(10) [L] (10)

**Contracts § 23—Construction and Interpretation—Implied Covenant.**

--An implied covenant cannot create an obligation inconsistent with an express term of the agreement.

**Counsel:** Sheuerman & Martini, Alan L. Martini, McClintock, Weston, Benshoof, Rochefort, Rubalcava & MacCuish, **[\*\*2]** John M. Rochefort, Kurt Osenbaugh and Eugene A. Burrus for Petitioner.

No appearance for Respondent.

Tanke & Willemsen, Tony J. Tanke, Ruby & Schofeld, Allen Ruby, Cotchett & Pitre, Joseph W. Cotchett and Bruce L. Simon for Real Parties in Interest.

**Judges:** Opinion by Wunderlich, J., with Elia, J., concurring. Dissenting opinion by Premo, Acting P. J.

**Opinion by:** ELIA

## **Opinion**

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**[\*1676] [\*\*198] WUNDERLICH, J.**

Defendant Exxon Corporation petitions for writ of mandate following the trial court's denial of its motions for summary adjudication on various causes of action, primarily antitrust violations. The key question is whether or not for purposes of the Cartwright Act the relevant market for assessing anticompetitive behavior is all gasoline or Exxon gasoline. The trial court concluded the relevant market is a factual question, such that Exxon gasoline could be shown to be the relevant market. We disagree and thus grant Exxon's petition for writ of mandate.

**[\*1677] BACKGROUND**

Plaintiffs, 35 Exxon franchisee service station dealers, filed a complaint against Exxon stating 16 causes of action for Cartwright Act violations, business torts, and related claims. The factual essence [\*\*\*3] of these claims is that the plaintiff dealers are locked into franchise relationships with Exxon and have invested considerable money and effort in acquiring their service stations, but the terms of the agreements make it difficult for them to compete both with independent dealers and with Exxon-owned stations. This is because Exxon compels the franchisees to buy all their Exxon gasoline from Exxon at a price considerably higher than the "rack price" at which Exxon sells the gasoline to independent jobbers.<sup>1</sup> The franchisees claim they are at a competitive disadvantage in competing with these jobbers, with company-owned stations, and with independent operators who can all obtain fuel more cheaply than can plaintiffs.<sup>2</sup> Further, the jobbers are forbidden to resell their Exxon fuel to plaintiffs as franchisees. Plaintiffs claim the price discrepancies between their cost and that of the jobbers have no reasonable relationship to the value of any distribution services which the jobbers perform in marketing the product. Although the agreements with Exxon do not preclude plaintiffs from selling other brands of gasoline, they may not do so unless they put in separate tanks and pumps, [\*\*\*4] an economically prohibitive arrangement.

In making their Cartwright Act claims of both horizontal and vertical restraints, plaintiffs maintain that the relevant market is not the motor fuel market (all gasoline), but only the wholesale market for Exxon brand fuel. This allegation is crucial because the parties are agreed that Exxon does not own a dominating share of the petroleum market and therefore is not in a position to monopolize or dominate that market. It does, however, have a natural monopoly over its own product, and it is that dominance and control which plaintiffs challenge.

[\*\*\*5] Plaintiffs also alleged violations of oral promises not to withdraw the Exxon credit card from the California market and to remodel or repair certain service stations. Exxon contends such alleged promises are inconsistent with the express language of the parties' integrated agreements.

Exxon moved for summary adjudication of several causes of action. The trial court granted summary adjudication of plaintiffs' first cause of action, [\*1678] for horizontal restraint, because there was no evidence of an agreement to restrain trade between Exxon and its jobbers. However, on the other causes of action, the trial court agreed with plaintiffs that triable issues of fact existed.

The trial court denied the motion for summary adjudication of the vertical restraint claim because, in its opinion, whether the product is "all gas" or "Exxon gas" is a question of fact, and whether there is consumer preference for Exxon gas as a single brand is also a question of fact. The court [\*\*199] cited *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal. 3d 842 [94 Cal. Rptr. 785, 484 P.2d 953]*, holding that the relevant market is a triable issue on the question of the reasonableness [\*\*\*6] of restraints. For this same reason, the court also denied the motions for summary adjudication of the plaintiffs' monopoly claim and their price overcharging claim. The court similarly denied summary adjudication of the claim of tortious interference or breach of the implied covenant,

<sup>1</sup>The franchisees pay Exxon the "Dealer Tank Wagon" (DTW) price for a supply of gasoline delivered to their stations. The jobbers, independent distributors who buy and transport Exxon gasoline from the refinery, pay a generally lower "rack" price.

<sup>2</sup>According to Exxon, independent service station operators, served by the jobbers, are located in rural areas, whereas the franchisees are located in metropolitan areas.

because there are factual issues. (Citing [\*Della Penna v. Toyota Motor Sales, U.S.A., Inc. \(1995\) 11 Cal. 4th 376 \[45 Cal. Rptr. 2d 436, 902 P.2d 740.\]\*](#)) The factual issues referenced are the same as those cited regarding existence of the relevant market. Plainly, the trial court believed that because the claim for tortious interference stands or falls on a showing of an antitrust violation, the same facts which produce dispute as to those issues produce dispute as to the tort claims.

In denying the motion for summary adjudication of the claims based on the agreements of the parties, the trial court found questions of fact existed whether the claimed integrated contract was inconsistent with plaintiffs' allegations that Exxon breached promises to continue its credit card in effect and to remodel and repair certain stations. However, the court did grant Exxon's motion for summary adjudication of [\*\*\*7] the Seaman's cause of action for tortious breach of implied covenant ([\*Seaman's Direct Buying Service, Inc. v. Standard Oil Co. \(1984\) 36 Cal. 3d 752 \[206 Cal. Rptr. 354, 686 P.2d 1158.\]\*](#)), because a franchise relationship is commercial in nature and does not give rise to tort liability for breach. ([\*Harris v. Atlantic Richfield Co. \(1993\) 14 Cal. App. 4th 70 \[17 Cal. Rptr. 2d 649.\]\*](#))

Exxon then filed a statutory petition for mandate, claiming the trial court erred in failing to grant summary adjudication. ([\*Code Civ. Proc., § 437c\*](#), subd. (f).) We issued an alternative writ of mandate, and the parties responded. We are now called upon to determine if in fact the trial court was correct in denying Exxon's motions for summary adjudication of certain issues, or whether summary adjudication should have been granted. The definition of the relevant market is the critical issue.

## [\*1679] DISCUSSION

### I. Summary Adjudication

**CA(1)[]** (1) **HN1[]** The trial court must grant summary adjudication where the moving party establishes the right to the entry of judgment as a matter of law. ([\*Code Civ. Proc., § 437c, subd. \(c\); Union Bank v. Superior Court \(1995\) 31 Cal. App. 4th 573, 579 \[\\*\\*\\*8\] \[37 Cal. Rptr. 2d 653.\]\*](#)) "Summary judgment is mandatory where no triable issues exist as to a material fact, and if the documentation submitted on the motion entitles the moving party to judgment as a matter of law. ([\*Code Civ. Proc., § 437c, subd. \(c\).\*](#)) **HN2[]** When, as here, defendants seek summary judgment, their supporting documentation must either establish a complete defense to the plaintiff's action or demonstrate an absence of an essential element of the plaintiff's case. When defendants establish the foregoing, and the plaintiff's opposing documentation does not show either a triable issue of fact with respect to the defense or that an essential element exists, summary judgment should be granted. [Citations.] These general principles also apply to an appellate court's review of a summary judgment ruling, which is conducted de novo. [Citations.]" ([\*Thompson v. Halvonik \(1995\) 36 Cal. App. 4th 657, 661 \[43 Cal. Rptr. 2d 142.\]\*](#)) **HN3[]** For summary judgment to be granted, "[t]he moving party must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial. [Citations.]" [\*\*\*9] ([\*Chevron U.S.A., Inc. v. Superior Court \(1992\) 4 Cal. App. 4th 544, 548 \[5 Cal. Rptr. 2d 674.\]\*](#))

Although Exxon initially complains that the trial court order did not meet the requirements of [\*Code of Civil Procedure section 437c, subdivision \(g\)\*](#) in that it insufficiently specifies what evidence is in conflict, we believe that absent a demand for greater specificity in the trial court, the order suffices procedurally. (See [\*Haskell v. Carli \(1987\) 195 Cal. App. 3d 124, 129-130 \[240 Cal. Rptr. \[\\*\\*200\] 439\]\*](#); see also [\*Miller v. Lakeside Village Condominium Assn. \(1991\) 1 Cal. App. 4th 1611, 1621 \[2 Cal. Rptr. 2d 796\].\*](#))

**CA(2)[]** (2) We note also that plaintiffs object to consideration by writ review because certain causes of action remain, regardless of our decision, and thus a trial will go forward even if we grant the writ. However, we conclude pretrial review is appropriate here, where the issues ruled on by the trial [\*1680] court contain the heart of plaintiffs' case and the trial might well be simplified if we find the trial court erred.<sup>3</sup>

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<sup>3</sup> In addition, numerous other cases in the state raise the same or similar issues. (See also [\*Ajir v. Exxon Corp.\* \(N.D.Cal. No. C-93 20830 RMW PVT\) \[summary judgment granted on same issues\].](#))

[\*\*\*10] Preliminarily, it is important to emphasize what this case is *not* about: plaintiffs have not alleged any cause of action for price discrimination (under the federal Robinson-Patman Act or the California Unfair Practices Act) nor have they sued all major oil companies in an attempt to demonstrate a conspiracy or concerted action. Nor do we have before us individual claims of unconscionable contracts (franchise agreements). And we stress that this case concerns a franchise relationship, a specific and highly regulated contractual business arrangement.

## II. Antitrust Causes of Action

**CA(3)[<sup>1</sup>]** (3) The Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), like the Sherman Antitrust Act ([15 U.S.C. § 1 et seq.](#)), was enacted to promote free market competition and to prevent conspiracies or agreements in restraint or monopolization of trade.<sup>4</sup> Restraint of trade may be horizontal or vertical. **HN4[<sup>2</sup>]** "Contracts, combinations and conspiracies in restraint of trade covered by [Section 1](#) of the Sherman Act are of two types, horizontal or vertical. Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily [\*\*\*11] illegal per se. [Citations.] Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the [\*1681] plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail." ([Muenster Butane, Inc. v. Stewart Co. \(5th Cir. 1981\) 651 F.2d 292, 295](#), fns. omitted (*Muenster Butane*)).

[\*\*\*12] The United States Supreme Court has intimated that intrabrand competition is not a concern of the antitrust laws (e.g., [Continental T.V., Inc. v. GTE Sylvania, Inc. \(1977\) 433 U.S. 36, 52, fn. 19](#) [[53 L. Ed. 2d 568, 581, 97 S. Ct. 2549](#)]), and a California court has held that **HN5[<sup>3</sup>]** an antitrust plaintiff attacking vertical restraints cannot make out a case unless the plaintiff can show some anticompetitive effect in the larger, interbrand market. ([Gianelli, supra, 172 Cal. App. 3d at pp. 1044, 1048](#).) The *Gianelli* case also finds the prevailing standard to be the "rule-of-reason" which measures whether the anticompetitive aspect of a vertical restraint outweighs its procompetitive effects. (*Id. at p. 1048*.) [\*\*201] And it is plaintiff's burden to make the required showing of a " 'substantially adverse effect on competition in the relevant market.' " (*Id. at p. 1049*.)

A long line of federal cases stands for the general proposition that **HN6[<sup>4</sup>]** vertical restraints are permissible unless a harmful effect on interbrand competition and an anticompetitive purpose can be shown. (E.g., [O.S.C. Corp. v. Apple Computer, Inc. \(9th Cir. 1986\) 792 F.2d 1464, 1469](#); [Seagood Trading Corp. \[\\*\\*\\*13\] v. Jerrico, Inc. \(11th Cir. 1991\) 924 F.2d 1555, 1569](#); [Supermarket of Homes v. San Fernando Valley Bd. \(9th Cir. 1986\) 786 F.2d 1400, 1405](#); [Ron Tonkin Gran Turismo v. Fiat Distributors \(9th Cir. 1981\) 637 F.2d 1376, 1387-1388](#); [Red Diamond Supply, Inc. v. Liquid Carbonic Corp. \(5th Cir. 1981\) 637 F.2d 1001, 1007](#).) These cases are consistent with the many cases holding that **HN7[<sup>5</sup>]** a supplier cannot have a monopoly, normally, in its own product. (E.g., [International Logistics Group v. Chrysler Corp. \(6th Cir. 1989\) 884 F.2d 904, 908](#) [**HN8[<sup>6</sup>]** monopoly of a single brand is not an antitrust violation]; [Stearns v. Genrad, Inc. \(4th Cir. 1984\) 752 F.2d 942, 946](#); [Smalley & Co. v. Emerson & Cuming, Inc. \(D.Colo. 1992\) 808 F. Supp. 1503, 1512](#).)

<sup>4</sup> State courts have liberally applied federal Sherman Act doctrine in interpreting the Cartwright Act. (See, e.g., [Roth v. Rhodes \(1994\) 25 Cal. App. 4th 530, 542](#) [[30 Cal. Rptr. 2d 706](#)]; [Cellular Plus, Inc. v. Superior Court \(1993\) 14 Cal. App. 4th 1224, 1242](#) [[18 Cal. Rptr. 2d 308](#)]; [Bert G. Gianelli Distributing Co. v. Beck & Co. \(1985\) 172 Cal. App. 3d 1020, 1042](#) [[219 Cal. Rptr. 203](#)] (*Gianelli*)).

However, in their final brief, plaintiffs insist the Cartwright Act is much broader than the Sherman Act, and thus they should not be bound by cases interpreting the Sherman Act, especially concerning vertical restraints and market definition. (See [State of California ex rel. Van de Kamp v. Texaco, Inc. \(1988\) 46 Cal. 3d 1147, 1160-1164, 1168](#) [[252 Cal. Rptr. 221, 762 P.2d 385](#)] [Cartwright Act modeled after earlier Texas and Michigan acts, but not broader than Sherman Act].) They cite, for example, [Texaco, Inc. v. Hasbrouck \(1990\) 496 U.S. 543](#) [[110 L. Ed. 2d 492, 110 S. Ct. 2535](#)], wherein the Supreme Court held that discounts to wholesale buyers who also resold gasoline at retail were illegal price discrimination because Texaco failed to prove the discounts were functionally related. But *Hasbrouck* was a price discrimination case brought under the Robinson-Patman Act, and here plaintiffs have made no Robinson-Patman (or similar California Unfair Practices Act) allegations in their complaint.

**CA(4)** [↑] (4) In addition, case law holds that [HN9](#)[↑] the need to prove market power is a threshold consideration in an antitrust case and is the sine qua non of recovery.<sup>5</sup> These cases are collected in [O.S.C. Corp. v. Apple Computer, Inc.](#) (C.D.Cal. 1985) 601 F. Supp. 1274, 1291, fn. 8, and include [Graphic Products Distributors v. Itek Corp.](#) (11th Cir. 1983) 717 F.2d 1560, 1568; [\*1682] [Muenster Butane, supra, 651 F.2d 292](#); General [\*\*\*14] [Leaseways v. National Truck Leasing Ass'n](#) (7th Cir. 1984) 744 F.2d 588, 596; see also [Rutman Wine Co. v. E. & J. Gallo Winery](#) (9th Cir. 1987) 829 F.2d 729. In specifically interpreting the Cartwright Act, the court in [Roth v. Rhodes, supra, 25 Cal. App. 4th at page 542](#), emphasized that since the *Sylvania* decision by the United States Supreme Court ([Continental T.V., Inc. v. GTE Sylvania, Inc., supra, 433 U.S. 36](#)), federal courts applying the rule of reason to vertical restraints have required a threshold inquiry into the defendant's market power, which is usually equated with market share. [HN10](#)[↑] "To meet his initial burden in establishing that the practice is an unreasonable restraint of trade, plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude. . . . Ordinarily, a plaintiff to do this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.' . . ." ([Roth v. Rhodes, supra, 25 Cal. App. 4th at p. 542](#) [citations omitted].)

[\*\*15] **CA(5a)** [↑] (5a) Exxon has presented uncontradicted evidence that it does not have a controlling share of the petroleum gasoline market, and that therefore as a matter of law plaintiffs cannot prevail on their antitrust claims. Indeed the parties agree that Exxon accounts for less than 10 percent of the market.

The trial court apparently placed weight on the declaration of plaintiffs' expert to raise a material triable issue of fact. Although we acknowledge that in some cases, the relevant market may be a question of fact, here we find it is a matter of law, as plaintiffs' theory of relevant market has no real support in the case law.

The United States Supreme Court has declared that [HN11](#)[↑] the relevant market is determined by considering "commodities reasonably interchangeable by consumers for the same purposes." ([United States v. Du Pont & Co.](#) (1956) 351 U.S. 377, 395 [100 L. Ed. 1264, 1280-1281, 76 S. Ct. 994].) Or, in other words, the relevant market is composed of products that have reasonable interchangeability for the purpose for which they are produced. ([Id. at p. 404](#) [100 L. Ed. at pp. 1285-1286].) The Supreme Court used the example of different soft drink formulae, noting [\*\*202] that [\*\*\*16] one can hardly say each one is an illegal monopoly. ([Id. at p. 393](#) [100 L. Ed. at pp. 1279-1280].) Here, the reasonable interchangeability for the purpose for which gasoline is produced (use in consumers' motor vehicles) mandates the relevant market to be all gasoline, not the wholesale market for one brand of gasoline.

In [Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal. 3d 842](#), the California Supreme Court concluded that the market definition (all [\*1683] classes of legal advertisements versus notices of trustee sales only) was a mixed question of law and fact that could not be resolved on the limited record before it. ([Id. at p. 855](#).) The record before us is anything but limited, and we find that the relevant market here is a question of law and is defined as the market of all gasoline. [HN12](#)[↑] "[T]he issue of fact becomes one 'of law' and loses its 'triable' character if the undisputed facts leave no room for a reasonable difference of opinion. [Citation.]" ([Terry v. Atlantic Richfield Co.](#) (1977) 72 Cal. App. 3d 962, 967 [140 Cal. Rptr. 510].) In the market of all gasoline, the parties agree that Exxon's market share is less than 10 percent. [\*\*\*17] This is not enough to demonstrate a restraint of trade. Plaintiffs cannot show that Exxon's activity restrains trade and impairs competition significantly. (See [Roth v. Rhodes, supra, 25 Cal. App. 4th at p. 542](#); [Gianelli, supra, 172 Cal. App. 3d at p. 1049](#); [Davis-Watkins Co. v. Service Merchandise](#) (6th Cir. 1982) 686 F.2d 1190, 1202.)

Plaintiffs presented the opinion of Keith Leffler, a leading petroleum economist, who based his opinion on the premise that the relevant market was the wholesale market for Exxon brand gasoline. Thus, his opinions on the

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<sup>5</sup> A leading commentator on vertical restraints has suggested that proof of the antitrust defendant's 'substantial' market power should be a preliminary hurdle in all restricted distribution (vertical restraint) cases. '[I]f a firm lacks market power, it cannot affect the price of its product,' and thus any vertical restraint could not be anticompetitive at the interbrand level. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U.Chi.L.Rev. 6, 16 (1981)." ([Muenster Butane, supra, 651 F.2d at p. 298](#).)

effect of Exxon's practices on the entire retail market are purely speculative. Leffler opined that the vertical restraints can have an effect on the retail price of gasoline, in that the inability of Exxon dealers to purchase Exxon products through the competitive jobber market protects a noncompetitive wholesale and retail price structure throughout the entire markets in which these dealers operate. Exxon had offered documentary evidence that the retail market for gasoline and the wholesale market for gasoline were each highly competitive and operated independently of each other. These factual showings were not [\*\*\*18] rebutted. Leffler's speculations do not rise to the status of contradictory evidence. [CA\(6\)↑ \(6\)](#) And [HN13↑](#) the court is not bound by an expert opinion that is speculative or conjectural or that is based on an incorrect legal theory. (See *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 1135 [234 Cal. Rptr. 630]; [Painter v. Workers' Comp. Appeals Bd. \(1985\) 166 Cal. App. 3d 264, 271 \[212 Cal. Rptr. 354\]](#).) In fact, Leffler himself declared that the retail gasoline market is highly competitive: "At the retail level, consumers are very responsive to relatively small differentials in prices across gasoline brands." [CA\(5b\)↑ \(5b\)](#) This statement undermines his opinion that Exxon's vertical restraints may have an anticompetitive effect.<sup>6</sup>

[\*\*\*19] We also find the major cases cited by plaintiffs are inapposite here. It is important to note that these cases do not concern franchise relationships as [\*1684] does the present case. Plaintiffs rely heavily upon *Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal. App. 3d 687 [248 Cal. Rptr. 189], to show that the market for a particular product may be the relevant market for antitrust purposes even when the product is part of a larger market in which the defendant does not dominate. In *Redwood Theatres*, the defendant distributors had a small share of the film market but a large share of "first run" films, and were therefore found to have a potential for monopoly of that market. According to plaintiffs, Exxon similarly has a small share of the gasoline market, but a dominating control over the market for Exxon gas. The court in *Redwood Theatres* agreed that the measure of validity of vertical [\*\*203] restraints is the rule-of-reason and that the reasonableness of a restraint is normally a factual issue to be determined at trial. ([200 Cal. App. 3d at pp. 712-713](#), citing [Corwin v. Los Angeles Newspapers Service Bureau, supra, 4 Cal. 3d at p. 855](#).) [\*\*\*20] However, on its facts, *Redwood Theatres* differs from this case in that first run films are a unique product in which the distributor defendant enjoyed a monopoly, or near monopoly, whereas here, gasoline is a commonly and widely available product which can be bought under many different brand names so that Exxon cannot be said to have a dominating market share in that market. Plaintiffs allege that there exists a consumer preference for Exxon, but they have presented no evidence to show this, and indeed Exxon's less than 10 percent market share belies their claim.

The refusal of major film distributors to deal with plaintiff Redwood Theatres could amount to an anticompetitive practice, potentially ruinous to the small theatre operator, against which the Cartwright Act is designed to guard. We question the application of the *Redwood Theatres* analysis to a franchise case. In a franchise relationship, the franchisee presumably accepts the burdens of the arrangement to reap some benefits. For instance, here Exxon dealers have to buy their gas from Exxon at its wholesale to dealer price rather than its rack price; but they get in return the Exxon institutional advertising, marketing [\*\*\*21] support, and related benefits as well as no transportation costs. Thus they are situated differently from the jobbers, who get none of these things but buy the gasoline for less. In the film industry, there is no justification, other than personal economic benefit to the studios, in their refusal to sell a particular product to a small theater. And this refusal tends to drive small theaters out of business and thus hamper competition at the retail level, restricting the consumer to the larger theaters which have the muscle to swing the studio deals. So in *Redwood Theatres*, applying the Cartwright Act serves the fundamental purpose of the antitrust laws, which is to protect competition at the retail level. In a franchise situation, as here, applying the antitrust law does not serve that purpose.

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<sup>6</sup>Leffler's statements imply that anticompetitive injury results only if all major producers use the same dual distribution system. Then, according to him, the market becomes dominated by that system in such a way that the price of gasoline is kept artificially high because all these producers keep the price higher for their franchised dealers than for the rack market. While this might be a statement of a monopoly situation, it lacks the essential element of combination or illegal agreement. There are no such allegations in the complaint. Leffler's assertion that an individual producer such as Exxon is free to use the system since it will not suffer in competition by keeping its prices high so long as everyone else does the same thing is speculative.

[\*1685] Plaintiffs also rely on [\*Eastman Kodak Co. v. Image Technical Services, Inc. \(1992\) 504 U.S. 451 \[119 L. Ed. 2d 265, 112 S. Ct. 2072\]\*](#). In that case, the plaintiffs were independent service organizations (ISO's) that serviced copying and micrographic equipment manufactured by Kodak. Kodak adopted policies limiting availability of replacement parts for its machines [\*\*\*22] to ISO's. The ISO's filed an antitrust suit contending that Kodak unlawfully tied the sale of service for its machines to the sale of parts and had unlawfully monopolized the sale of such services and parts in violation of the Sherman Act. The Supreme Court reversed a district court summary judgment for Kodak. The high court (three justices dissenting) held that there were factual issues concerning Kodak's market power in the service and parts markets, and that lack of such market power could not be assumed just because such power was absent in the total equipment market. Kodak had argued that it lacked market power in the primary equipment market; but the court said that was not dispositive. The fact that Kodak controlled nearly 100 percent of the parts market and 80 to 95 percent of the service market sufficed to withstand summary judgment on the monopoly claims. ([\*Id. at pp. 481-483 \[119 L. Ed. 2d at pp. 293-294, 112 S. Ct. at p. 2090\]\*](#).)

Plaintiffs point particularly to the discussion rejecting Kodak's argument that, as a matter of law, a single brand of a product can never be a relevant market. ([\*504 U.S. at pp. 481-484 \[119 L. Ed. 2d at pp. 293-295, 112 S. Ct. at pp. 2090-2091\]\*](#)). [\*\*\*23] The relevant market for antitrust purposes, "is determined by the choices available to Kodak equipment owners." Service and parts for Kodak equipment are not interchangeable with service and parts for other manufacturer's products; therefore the relevant market from the perspective of owners of Kodak equipment consists only of those companies that service such equipment. In that market, Kodak has a monopoly. ([\*Id. at pp. 481-483 \[119 L. Ed. 2d at pp. 293-294, 112 S. Ct. at p. 2090\]\*](#).) The situation here is different. Exxon gas is interchangeable with other brands of gasoline. From the consumers' perspective, there is no "lock in" to Exxon gas. Therefore they are not in a similar position to the owners of Kodak equipment who must buy parts and service from Kodak ISO's. From the perspective of [\*\*\*204] retail gasoline consumers, the relevant market is all gas, not just Exxon gas.

The *Gianelli* court summarized: "While it is true that there is generally 'a greater reluctance to uphold a grant of summary judgment when the rule of reason is the appropriate standard[,] . . . it is also true that where there exists 'no tenable *per se* boycott theory "appellants must evince a substantially [\*\*\*24] adverse effect on competition in the relevant market to support a viable legal theory . . ." ' . . . and consequently to survive a summary judgment [\*1686] motion." ([\*172 Cal. App. 3d at p. 1049\*](#), [citations omitted].) No such evidence has been presented. <sup>7</sup>

[\*\*CA\(7\)\[!\[\]\(32944c299745462efa21036107e0b331\_img.jpg\)\]\*\*](#) (7) In a related argument, plaintiffs contend the restrictions in their lease agreement prohibiting the use of Exxon's tanks, lines and equipment for the sale of any product other than Exxon brand [\*\*\*25] gasoline is an illegal tying arrangement. <sup>8</sup> But Exxon's lack of market power eliminates a prerequisite to plaintiffs' success on this claim. Plaintiffs must prove power in the tying product (here, service station sites) in order to prevail. ([\*Grappone, Inc. v. Subaru of New England, Inc. \(1st Cir. 1988\) 858 F.2d 792.\*](#))

Plaintiffs' real complaint is that they are being oppressed within a contractual relationship with the manufacturer. There are legal remedies for oppressive conduct regarding a contractual relationship, but they are not antitrust remedies. Cases hold that [\*\*HN14\[!\[\]\(f8ab1d10523ac9cc5639dce07071018b\_img.jpg\)\]\*\*](#) a franchisor's ability to "coerce" its franchisee does [\*\*\*26] not show market power and does not invoke antitrust concerns. (See, e.g., [\*Tominaga v. Shepherd \(C.D.Cal. 1988\) 682 F. Supp. 1489, 1495; Mozart Co. v. Mercedes-Benz of North America, Inc. \(9th Cir. 1987\) 833 F.2d 1342, 1346-1347\*](#)

<sup>7</sup> As plainly described by the court in *Muenster Butane*: "Muenster Butane's fundamental mistake throughout this case has been to view the product market as confined to Zenith sets. The record contains no suggestion that Zeniths are unique or that Zenith dealers enjoy a downward sloping demand curve for their sets. Indeed, the uncontradicted testimony of Nick Heffley indicates that competition between Zenith dealers and dealers in other brands of television sets was 'so keen' that he could not fix a minimum price for his Zeniths." ([\*651 F.2d at p. 296.\*](#))

<sup>8</sup> Exxon's assertion that plaintiffs' tying claims are barred by a consent decree entered in [\*Bogosian v. Gulf Oil Corp. \(E.D.Pa. 1985\) 621 F. Supp. 27\*](#), a case where such arrangements were allegedly validated as part of the consent decree and in which many plaintiffs here were class members, is unsupported by appropriate documentary evidence showing terms, identities and facts.

[analysis for vertical restraint and tying claims must be made at the precontract stage, not after a franchise agreement has been signed].)

The franchisees' "lock in" to Exxon results from a business relationship of their choosing, the franchise, whose terms were freely entered into by both parties. If the franchise agreement is unconscionable or adhesive it may be subject to rescission or reformation. However, these facts do not implicate antitrust concerns. Exxon's conduct vis-a-vis the franchisees is part of a negotiated business relationship and is not a restraint of trade; it does not directly impact the retail market. And there was no "lock in" until plaintiffs voluntarily assumed their roles as franchisees; they had the entire spectrum of gasoline sellers from which to choose in deciding how to structure their service station businesses.

Recently, a federal district court in Pennsylvania decided similar issues in an action brought against [\*\*\*27] the franchisor by 40 percent of its franchisees. In [\*1687] [Queen City Pizza, Inc. v. Domino's Pizza, Inc. \(E.D.Pa. 1996\) 922 F. Supp. 1055](#), the court held that the relevant market definition that franchisees urged in support of their antitrust claims, one that encompassed the market for ingredients and supplies among franchisees, failed as a matter of law. The court concluded that the restraints at issue were, as here, vertical nonprice restraints and not price maintenance, and that market power cannot be established by showing contractual power arising out of the franchise agreement. ([Id. at pp. 1060-1062.](#))

Similarly, we conclude the relevant market is all gasoline, and Exxon, as a matter of law, does not have significant power for antitrust purposes in that market.

### III. Other Business Torts

**CA(8)[<sup>8</sup>] (8)** Plaintiffs also sued Exxon for monopolization, price overcharging, tortious interference [\*\*205] with business relationship and breach of the covenant of good faith and fair dealing, all in relation to their inability to purchase Exxon gas at a lower cost from jobbers. The trial court concluded these related claims also depended on the definition of relevant market, a triable issue [\*\*\*28] of fact. Again, we disagree.

As to the monopolization cause of action, Exxon has no dangerous probability of obtaining a monopoly in the relevant market of all gasoline, because consumers have many interchangeable choices. (See [Spectrum Sports, Inc. v. McQuillan \(1993\) 506 U.S. 447, 454-458 \[122 L. Ed. 2d 247, 256-258, 113 S. Ct. 884, 890-891\]](#); see also [Bushie v. Stenocord Corporation \(9th Cir. 1972\) 460 F.2d 116, 120](#) [unless manufacturer used his natural monopoly in his own product to gain control of the relevant market in which his products compete, the antitrust laws are not violated].)

As to price overcharging, Exxon presented evidence that its DTW prices fell within the range of DTW prices charged by other major oil companies to their dealers.<sup>9</sup> This is all that is required. (See [Au Rustproofing Center v. Gulf Oil Corp. \(6th Cir. 1985\) 755 F.2d 1231, 1235](#); [TCP Industries, Inc. v. Uniroyal, Inc. \(6th Cir. 1981\) 661 F.2d 542, 548-549.](#)) Exxon distributes to two different classes, each performing different functions. Leffler's opinion that the difference in price between DTW price and rack price is not equivalent to the services performed is speculative at [\*\*\*29] best.

[\*1688] Plaintiffs' claims for tortious interference and breach of covenant must be tied to finding an anticompetitive practice, even if not a statutory antitrust violation. In [Della Penna v. Toyota Motor Sales, U.S.A., Inc., supra, 11 Cal. 4th at page 393](#), the Supreme Court held that **HN15[<sup>15</sup>]** in actions for interference with prospective economic advantage, as applied to existing contracts, a plaintiff must show that interference was wrongful by some measure

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<sup>9</sup> Even the trial court acknowledged that "plaintiffs have not met Exxon's assertion that the gas price was 'smack dab in the middle.'"

beyond the interference itself. Moreover, Exxon in fact has a clear financial interest in its dealers and therefore is privileged to "interfere" with the contract.<sup>10</sup> (*Hamro v. Shell Oil Co. (9th Cir. 1982) 674 F.2d 784.*)

#### [\*\*\*30] IV. Breach of Contract

**CA(9)[↑] (9)** (See fn. 11.) Plaintiffs alleged that Exxon had no right to withdraw its Exxon credit card from the California market.<sup>11</sup> Exxon attacked that claim on the basis that it varies the express language of the parties' integrated agreement which gives Exxon the right to cancel the credit card at any time. The relevant contract provision states: "Exxon may, for any reason, upon written notice, terminate this Agreement [pertaining to its credit card] and discontinue the purchase or acceptance of Credit Sales Tickets from any Retailer or Distributor." Plaintiffs' claim violates the express language of the contract, and thus it cannot stand. **CA(10)[↑] (10) HN16[↑]** An implied covenant cannot create an obligation inconsistent with an express term of the agreement. (See *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 374 [6 Cal. Rptr. 2d 467, 826 P.2d 710];* see also *Slivinsky v. Watkins-Johnson Co. (1990) 221 Cal. App. 3d 799, 806-807 [270 Cal. Rptr. 585].*)

**[\*\*\*31]** Similarly, we conclude the relevant contract language is inconsistent with plaintiffs' allegation that Exxon made collateral promises to repair or remodel certain stations. **[\*\*206]** The lease is an integrated agreement, and it provides in relevant parts: Under the heading of "Repairs and Additional Facilities," the lease states that lessor shall make repairs and replacements as provided **[\*1689]** in an attached exhibit if lessee promptly notifies lessor in writing that there is need and lessor determines that such repairs are economically justified, and lessor shall be "absolutely exempt" from making any other repair, renewal, or replacement. The lease further states that lessee shall at its own expense make all other repairs, renewals and replacements, and that lessor at its option has the "right but not the obligation" to demolish, rebuild, reconstruct, remodel, modernize, change, eliminate, replace, or make additions to the premises. This provision clearly allocates the decision to Exxon alone. Moreover, plaintiffs have pointed to no concrete evidence of specific agreements to repair or remodel. Summary adjudication was warranted.

#### DISPOSITION

Let a peremptory writ of mandate issue **[\*\*\*32]** as prayed, directing the respondent court to vacate its order denying summary adjudication to Exxon, and to make new and different orders granting the motions for summary adjudication as to the following claims: second cause of action (Cartwright Act--vertical restraint); third cause of action (Cartwright Act--monopolization); sixth and seventh causes of action (fraud and negligent misrepresentation--price), including any claims of gasoline price overcharging; those parts of the fourth and eleventh causes of actions alleging tortious interference with economic opportunity and breach of the covenant of good faith and fair dealing; and those parts of the tenth cause of action for breach of contract concerning any claims arising out of the discontinuation of acceptance of the Exxon credit card and arising out of oral promises to remodel stations. Costs to petitioner.

Elia, J., concurred.

**Dissent by:** PREMO

<sup>10</sup> Plaintiffs complain that their contract with Exxon specifies they are "independent" dealers. However, under the sales agreement complained of here, plaintiffs and Exxon have contracted for gasoline sold and supplied. A separate lease agreement contains a paragraph setting forth the dealers' independent status for purposes of third party liability.

<sup>11</sup> Plaintiffs argue that a summary adjudication of this point does not dispose of an entire cause of action and is therefore not a proper subject of summary adjudication under the new statute. ( *Code Civ. Proc., § 437c, subd. (f)(1)*.) However, plaintiffs pleaded their case by combining causes of action. Exxon remains entitled to present summary adjudication motions that dispose of allegations which would have formed a single cause of action if properly pleaded. (See *Lilienthal & Fowler v. Superior Court (1993) 12 Cal. App. 4th 1848, 1854-1855 [16 Cal. Rptr. 2d 458].*)

## Dissent

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### PREMO, Acting P. J.

I respectfully dissent. My concern is that even if the argument put forth by Exxon, as adopted by the majority, ultimately is persuasive and carries the day, it is premature for us to draw conclusions as a matter of law at this point in the case.

My colleagues [\*\*\*33] state the dispositive conclusion that the relevant market in this case is the overall retail gasoline market and not the Exxon gasoline stocks which are purportedly the subject of vertical restraints. The majority does so because of what they perceive to be unassailable case law in support of petitioner's argument. As a result the relevant market decision is herein made as a matter of law. We therefore disagree with the trial court who felt a triable question of fact was entailed.

Again, I stress my concern is the timing of these conclusions. The majority may well have stated the correct ultimate outcome. Certainly there [\*1690] is a trend in the decided cases that would so indicate. But to do so in a case which at best is complex and somewhat arcane, which requires the distinguishing of *Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal. App. 3d 687 [248 Cal. Rptr. 189] and *Eastman Kodak Co. v. Image Technical Services, Inc.* (1992) 504 U.S. 451 [119 L. Ed. 2d 265, 112 S. Ct. 2072], and which entails weighing and disregarding the proffered testimony of respondent's primary expert witness is, in my opinion, a bit of a quantum leap.

Even had these [\*\*\*34] arguments been subjected to an evidentiary hearing or trial itself where the parties' entrenched positions could be illuminated or worse, exposed as unpersuasive, in the light of cross-examination this court would at least have a complete record upon which to base the comprehensive conclusions of the majority opinion.

Without such a record, I believe this case does not merit our intervention at this stage. We should deny the petition.

A petition for a rehearing was denied February 13, 1997, and the opinion was modified to read as printed. The petition of real parties in interest for review by the Supreme Court was denied May 14, 1997. Mosk, J., Chin, J., and Brown, J., were of the opinion that the petition should be granted.

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End of Document



## Westowne Shoes, Inc. v. Brown Group, Inc.

United States Court of Appeals for the Seventh Circuit

October 31, 1996, Argued ; January 17, 1997, Decided

No. 96-1955

**Reporter**

104 F.3d 994 \*; 1997 U.S. App. LEXIS 787 \*\*; 41 U.S.P.Q.2D (BNA) 1461 \*\*\*; 1997-1 Trade Cas. (CCH) P71,678

WESTOWNE SHOES, INC. and CARL A. BIWER CO., Plaintiffs-Appellants, v. BROWN GROUP, INC., et al., Defendants-Appellees.

**Subsequent History:** [\[\\*\\*1\]](#) Rehearing Denied April 7, 1997, Reported at: [1997 U.S. App. LEXIS 6588](#). Certiorari Denied October 6, 1997, Reported at: [1997 U.S. LEXIS 5340](#).

**Prior History:** Appeal from the United States District Court for the Eastern District of Wisconsin. No. 93 C 720. Rudolph T. Randa, Judge.

**Disposition:** AFFIRMED.

## Core Terms

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trademark, shoes, dealers, dealership, knock-offs, antitrust, statute of limitations, promise, contracts, license, anti trust law, terms

## LexisNexis® Headnotes

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Contracts Law > Contract Conditions & Provisions > General Overview

Trademark Law > Abandonment > General Overview

### [\*\*HN1\*\*](#) Contracts Law, Contract Conditions & Provisions

The common law of contracts does not empower a court to write the parties' contract for them.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

Governments > Legislation > Statute of Limitations > General Overview

Torts > Malpractice & Professional Liability > Attorneys

Governments > Courts > Authority to Adjudicate

Governments > Legislation > Statutory Remedies & Rights

## [\*\*HN2\*\*](#) [down] Consideration, Promissory Estoppel

To disguise a statutory claim as a claim for promissory estoppel in an unnecessary effort to beat a statute of limitations is a formula for confusion, and the district court is not required to tolerate it.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

## [\*\*HN3\*\*](#) [down] Business Torts, Fraud & Misrepresentation

Fraud is not actionable without harm.

Business & Corporate Compliance > ... > Trademark Cancellation & Establishment > Commercial Use > Affixation Required

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

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

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

## [\*\*HN4\*\*](#) [down] Commercial Use, Affixation Required

While a trademark licensee (at least if he has an exclusive license), as well as the trademark's owner, can sue to protect the trademark from infringement, he cannot sue the trademark owner for "infringing" the trademark.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## [\*\*HN5\*\*](#) [down] Public Enforcement, State Civil Actions

The decisions of the federal courts interpreting federal **antitrust law** shall control the interpretation of Wisconsin's **antitrust law**.

Business & Corporate Compliance > ... > Likelihood of Confusion > Factors for Determining Confusion > Comparison of Advertising

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

## [\*\*HN6\*\*](#) [down] Likelihood of Confusion, Comparison of Advertising

A supplier is not required to allow his dealers to use his trademark to designate his competitors' products.

**Counsel:** For WESTOWNE SHOES, INCORPORATED, CARL A. BIWER COMPANY, Plaintiffs - Appellants: George P. Kersten, Kenan J. Kersten, KERSTEN & MCKINNON, Milwaukee, WI USA.

For BROWN GROUP, INCORPORATED, BROWN SHOE COMPANY, FAMOUS FOOTWEAR CO, BROWN GROUP RETAIL, INCORPORATED, WOHL SHOE COMPANY, BROWN GROUP INTERNATIONAL

INCORPORATED, Defendants - Appellees: Ronald M. Wawrzyn, Walter E. Zimmerman, Bryan B. House, FOLEY & LARDNER, Milwaukee, WI USA.

**Judges:** Before POSNER, Chief Judge, and FLAUM and EVANS, Circuit Judges.

**Opinion by:** POSNER

## Opinion

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[\*\*\*1461] [\*995] POSNER, *Chief Judge*. In this diversity suit based on Wisconsin law, affiliated firms, now defunct, that owned retail shoe stores in Wisconsin and that we shall refer to collectively as "Westowne" fired a blunderbuss full of charges, mostly based on the common law of contracts but with trademark and antitrust allegations thrown in, against Westowne's former supplier, the Brown Shoe Company of antitrust fame. The district court granted summary judgment for Brown and we must therefore resolve factual disputes as favorably to [\*\*2] Westowne as the record permits.

Brown manufactures a popular line of women's dressy shoes under the name "Naturalizer." Beginning in the early 1970s, Brown sold Naturalizers to Westowne for resale. It also licensed Westowne to use the name "Naturalizer" as part of Westowne's trade dress; that is, Westowne was permitted to use the name on its store signs (Brown even furnished the signs) and thus represent the stores to the consuming public as being authorized Naturalizer dealers. Westowne and the other licensees were not forbidden to sell other brands, and Westowne supplemented Naturalizers with women's casual shoes made by the San Antonio Shoe Company, but 80 to 90 percent of the shoes that it sold were Naturalizers.

In 1987 Brown instituted (actually reinstated, but that is a detail we can ignore) its curiously named "purity" program, the focus of Westowne's wrath. Under this program, any store that wanted to retain "Naturalizer" in its sign, that is, wanted to represent itself as an authorized Naturalizer dealer or Naturalizer specialty store, had to cease selling brands other than Naturalizer. Brown was willing to continue selling Naturalizers to stores that carried other brands, [\*\*3] but it required them to delete the [\*\*\*1462] word "Naturalizer" from their store signs and gave them a lower priority in the filling of orders.

The problem with "going pure" was that the Naturalizer line was not complete. It had dressy shoes, but not casual ones. So along with or as part of the purity program-- for all we know, it was a principal purpose of the program-- Brown developed a line of women's casual shoes under the Naturalizer label. It told Westowne that these shoes would be "stitch-by-stitch knock-offs"--that is, perfect imitations--of the popular SAS shoes. According to testimony that we must accept as true for purposes of this appeal, though without vouching for its truth, Brown's attempt to develop SAS "knock-offs" was a flop. They were so bad that not only was Westowne, which wanted to remain an authorized Naturalizer dealer and therefore stopped buying from SAS and began buying the knock-offs instead, unable to sell them; they also degraded the Naturalizer mark, making it difficult for Westowne to sell even the good Naturalizers--the original, dressy line--at a profit. Compounding Westowne's problems, it found it increasingly difficult to obtain the good Naturalizers. Brown [\*\*4] has an "in stock" program, under which it maintains a large inventory of shoes from which to restock its dealers, enabling them to minimize their own inventory expense. As part of what Westowne describes as Brown's effort to monopolize the shoe business, Brown was busy buying up retail outlets and allocating all available inventory to them, thus starving independent dealers like Westowne; and it also sold to its own outlets at a lower price. Eventually Westowne went under and, owing Brown a considerable sum for shoes delivered but not paid for, brought this suit.

Westowne argues that Brown committed a breach of contract by putting Westowne to the miserable choice of losing its Naturalizer dealership (that is, the right to represent its stores as Naturalizer dealers) or replacing the SAS shoes that it carried with inferior knock-offs. The only written contract was the licensing agreement, and it does not bear on this contract claim. Westowne's argument is that the course of dealing between the parties, not any written contract, gave Westowne a contractual entitlement to remain a Naturalizer dealer indefinitely and forbade Brown to impose

unreasonable [\*996] conditions on the retention of [\*\*5] the dealership, such as requiring the dealer to carry a substandard product. Westowne points out that the Wisconsin Fair Dealership Law, Wis. Stat. ch. 135, creates such an entitlement. True; but this is not a suit under the dealership act; such a suit would be barred by the act's one-year statute of limitations. [Wis. Stat. § 893.93\(3\)\(b\)](#). Westowne's argument that the act creates entitlements which can then be enforced by a suit under the common law of contracts, with its six-year statute of limitations, [Wis. Stat. § 893.43](#), is a transparent evasion of the statute of limitations in the dealership act.

The absence of a *written* contract other than the irrelevant licensing agreement and the multitudinous sales contracts, also irrelevant, covering particular shipments of shoes to Westowne's stores is not critical to the common law contract claim, because Brown has not raised a statute of frauds defense. What is critical is the absence of terms. Westowne's principal testified that he had a contract with Brown, but he was unable to answer such questions as, When did the contract start? When or under what conditions does it terminate? Is the "purity" program a violation? Did Brown [\*\*6] so far relinquish its rights over its trademark as to entitle Westowne to sell another manufacturer's shoes from a store that holds itself out to be a Naturalizer dealership? What consideration did Brown receive for this trademark-endangering concession? [HN1](#)<sup>↑</sup> The common law of contracts does not empower a court to write the parties' contract for them, [Witt v. Realist, Inc., 18 Wis. 2d 282, 118 N.W.2d 85, 93-94 \(Wis. 1962\)](#); [Messner Manor Associates v. Wisconsin Housing & Economic Development Authority, 204 Wis. 2d 492, 555 N.W.2d 156, 159 \(Wis. App. 1996\)](#); [Goldstick v. ICM Realty, 788 F.2d 456, 461-62 \(7th Cir. 1986\)](#), but that is what Westowne is asking us to do.

Westowne also argues, however, that by promising it perfect imitations of SAS shoes, Brown induced it to forgo its remedies under the Wisconsin Fair Dealership Law until the statute of limitations ran out. (Under that law, according to Westowne, Brown could not have forced Westowne to give up its Naturalizer dealership just because Westowne insisted on continuing to carry SAS shoes.) Brown should therefore be estopped to-to what? Westowne is not very clear about this, but the only answer can be--to plead the statute of limitations in a suit under [\*\*7] the dealership law. A defendant who takes steps to prevent the plaintiff from suing within the statute of limitations is equitably estopped to plead it. [Hester v. Williams, 117 Wis. 2d 634, 345 N.W.2d 426, 431 \(Wis. 1984\)](#); [Poeske v. Estreen, 55 Wis. 2d 238, 198 N.W.2d 625, 628-29 \(Wis. 1972\)](#); [Bell v. Employers Mutual Casualty Co., 198 Wis. 2d 347, 541 N.W.2d 824, 834 \(Wis. App. 1995\)](#); [Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 \(7th Cir. 1990\)](#); [Tiberi v. CIGNA Corp., 89 F.3d 1423, 1429 \(10th Cir. 1996\)](#). But this principle presupposes a suit to which the statute of limitations has been interposed as a defense, in this case a suit under the Wisconsin Fair Dealership Act. Westowne has not sued under that act. We do not think it is permitted to recycle the statutory claim that it failed to make as a common law claim of promissory estoppel in which damages are sought, much as in a suit for legal malpractice, for the loss of the statutory claim. That approach would require speculation about what Westowne's remedies under the dealership law might have been had it sued under that law. Unnecessary speculation: unlike a case of legal malpractice, where the suit the lawyer botched is gone forever, a plaintiff who [\*\*8] claims that the defendant by promises or otherwise prevented him from bringing a timely suit can bring an untimely suit against that defendant on the identical claim on which the timely suit would have been based. [HN2](#)<sup>↑</sup> To disguise a statutory claim as a claim for promissory estoppel in an unnecessary effort to beat a statute of limitations is a formula for confusion, and the district court is not required to tolerate it. [Sams v. United Food & Commercial Workers Int'l Union, 866 F.2d 1380, 1385 \(11th Cir. 1989\)](#).

Westowne makes the alternative argument for promissory estoppel--an argument happily free from any dependence on the unpledged dealership law--that it relied on the promise of the stitch-by-stitch knock-offs by "going pure," that is, by discontinuing [\*997] its purchases of SAS shoes. Yet at the same time it argues that it had to go pure because it could not afford to give up the Naturalizer sign. This means that it would have gone pure even if Brown had not promised a perfect substitute. So the promise made no difference. The promise is also the basis for Westowne's claim of misrepresentation, and fails for the same reason. [HN3](#)<sup>↑</sup> Fraud is not actionable without harm. If, as Westowne itself [\*\*9] asserts, it would have gone pure to retain its dealership, regardless of any representation concerning the SAS knock-offs, those representations caused it no harm. No harm, no tort. [Schicker v. Leick, 40 Wis. 2d 295, 162 N.W.2d 66, 69 \(Wis. 1968\)](#); [Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F.2d 1363, 1372 \(7th Cir. 1990\)](#) (applying Wisconsin law).

Westowne has other arrows in its quiver. It claims that Brown violated the trademark license by degrading the Naturalizer trademark by affixing it to the unwearable, unsalable knock-offs. [HN4](#) While a trademark licensee (at least if he has an exclusive license), as well as the trademark's owner, can sue to protect the trademark from infringement, [\*G.H. Mumm Champagne v. Eastern Wine Corp.\*, 142 F.2d 499, 502 \(2d Cir. 1944\)](#) (L. Hand, J.); [\*Norman M. Morris Corp. v. Weinstein\*, 466 F.2d 137, 142 \(5th Cir. 1972\)](#); 1a Jerome Gilson, *Trademark Protection and Practice* § 816[1][b], pp. 8-360 to 8-361 (1987), he cannot sue the trademark owner for "infringing" the trademark. [\*Silverstar Enterprises v. Aday\*, 537 F. Supp. 236, 240-41 \(S.D. N.Y. 1982\)](#). There is no basis in either the federal or the state law of unfair competition for [\\*\\*10](#) such a claim. The owner can if he wants, unless contractually committed otherwise, abandon the trademark, dilute it, attach it to goods of inferior quality, attach it to completely different goods-- can, in short, take whatever steps he wants to jeopardize or even completely destroy the trademark. When cases speak of the trademark owner's "duty to ensure the consistency of the trademarked good or service," [\*Gorenstein Enterprises v. Quality Care-USA, Inc.\*, 874 F.2d 431, 435 \(7th Cir. 1989\)](#); see also 2 Thomas J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18.14[1], pp. 18-64, 18-66 (1996), they mean that it is a condition of the continued validity of the trademark, see *id.*, § 18.15, pp. 18-74 to 18-74.1, or a defense to a consumer's claim of having been fooled by the substitution of an inferior good, not that it is a ground for a licensee's being allowed to sue to force the trademark owner to take steps to assure the trademark's continued validity.

We think that Westowne more or less understands all this, and is making solely a contract claim--that the trademark license obligated Brown to keep the Naturalizer mark up to snuff. A licensor might so promise, [\\*\\*11](#) but this licensor did not. Westowne is asking us to make such a promise an *implied* term of every trademark licensing agreement, and that would be absurd. It would give licensees comprehensive power over the licensor's business--in this case power to tell Brown what kind or quality of shoes it can manufacture and sell under the Naturalizer label. Few licensors would agree to that, and there is no evidence that Brown is one of them. The office of implied contractual terms is to save contracting parties costs of negotiations by interpolating terms that they are pretty sure to have agreed to had they thought about the matter, not terms that they would be almost sure to reject; for the interpolation of *such* terms would increase rather than decrease the costs of contracting as parties busied themselves contracting around the interpolated terms. We add that Westowne's trademark claim is inconsistent [\\*\\*\\*1464](#) with its other claims, all of which are premised on the continued potency of the Naturalizer mark.

Last, Westowne has an antitrust claim. It bases this claim--that Brown impaired competition by conditioning its dealers' use of the Naturalizer mark on their agreeing to carry the knock-offs, [\\*\\*12](#) cf. [\*Jack Walters & Sons Corp. v. Morton Building, Inc.\*, 737 F.2d 698, 704-06 \(7th Cir. 1984\)](#)--on Wisconsin rather than federal *antitrust law*. Wis. Stat. ch. 133. Under federal law, the claim could not take one step toward first base, since Westowne is unprepared to show that Brown's effort to confine Naturalizer dealers to shoes made by Brown could have [\\*998](#) any effect on competition in the shoe business. It could have an effect, maybe, if Naturalizer dealers were the only outlets for SAS shoes in Wisconsin *and* if having a sign outside your store that says "Naturalizer Dealer" is such a valuable asset that you'll replace your SAS shoes with an unmarketable substitute. Neither condition is plausible, and concerning the first there is not a shred of evidence--not even the self-serving testimony of Westowne's principal, which is the only evidence for the second condition, the immense value of the Naturalizer mark that Brown with extreme perversity is (according to Westowne) doing its best to destroy.

Westowne's hope is that Wisconsin *antitrust law* is more archaic than federal. Since there is much more federal than state antitrust litigation, a state antitrust case is more likely to [\\*\\*13](#) remain unrevisited by the court that rendered it and therefore untouched by the winds of change that have been blowing through the antitrust fields in recent decades than a federal antitrust case. Westowne relies on what it hopes is such a case, [\*Johnson v. Shell Oil Co.\*, 274 Wis. 375, 80 N.W.2d 426 \(Wis. 1957\)](#). The defendant refused to allow its dealers to use the Shell trademark in conjunction with the gasoline of its competitors, but did allow them to sell that gasoline from other pumps on its premises, pumps not labeled "Shell." The Supreme Court of Wisconsin held that this arrangement did not violate the state's *antitrust law*. The holding is obviously of no value to Westowne--in fact is adverse to it--but Westowne likes the standard used by the court--a "partial restraint of trade, where effected for a proper purpose and limited in time and scope and otherwise reasonable[, is] not invalid." [80 N.W.2d at 429](#). This is the same test

that is used for covenants not to compete found in contracts for the sale of a business and in employment contracts. It is a part of the common law of restraint of trade rather than of statutory antitrust law, but Johnson borrowed it for use in interpreting the [\*\*14] state's antitrust statute, as had an earlier case, *Ruhland v. King*, 154 Wis. 545, 143 N.W. 681 (Wis. 1913). Westowne argues that Brown had an improper, namely an anticompetitive, purpose in forbidding its Naturalizer dealers to carry its competitors' brands, failed to limit the prohibition in time or scope, and, especially considering the lousy quality of the SAS knock-offs, acted unreasonably.

The *Johnson* case is 40 years old, and *Ruhland* far older, and since then the Supreme Court of Wisconsin has ruled that HN5[<sup>↑</sup>] the decisions of the federal courts interpreting federal antitrust law shall control the interpretation of Wisconsin's antitrust law. *Grams v. Boss*, 97 Wis. 2d 332, 294 N.W.2d 473, 480 (Wis. 1980); *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 405 N.W.2d 354, 367 (Wis. App. 1987). But we need not look beyond *Johnson*, because it dooms Westowne's antitrust claim. *Johnson* holds that HN6[<sup>↑</sup>] a supplier is not required to allow his dealers to use his trademark to designate his competitors' products. Such a requirement would diffuse the goodwill associated with his trademark by associating it with a competitor's product and would jeopardize the trademark by allowing [\*\*15] it to stand for products of different quality.

AFFIRMED.

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## **Albani v. Southern Ariz. Anesthesia Servs., P.C.**

United States District Court for the District of Arizona

January 22, 1997, Decided ; January 27, 1997, Filed

No. CIV 91-588 TUC

**Reporter**

1997 U.S. Dist. LEXIS 16245 \*; 1997-2 Trade Cas. (CCH) P71,927

ROBERT ALBANI, M.D., ET AL v. SOUTHERN ARIZONA ANESTHESIA SERVICES, P.C., ET AL.

**Disposition:** [\*1] SAA's motions denied.

### **Core Terms**

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monopolize, anesthesia, anesthesiology, contracts, prices, defendants', market power, antitrust, damages, argues, matter of law, Sherman Act, conspiracies, scientific, barriers, parties

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

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

#### **HN1** [down arrow] **Antitrust & Trade Law, Sherman Act**

In deciding a motion under *Fed. R. Civ. P. 50*, a district court may not overturn a jury's verdict unless there was an absence of substantial evidence presented that could support a finding for the nonmoving party. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. While the court must draw all reasonable inferences in favor of the nonmoving party, it must be mindful of the court of appeals admonition that in the antitrust context, determining what amount of evidence will support a jury verdict and assessing the quality of the evidence from which an inference of illegal action may be drawn takes on a special importance. For a number of reasons, antitrust law limits the range of permissible inferences from ambiguous evidence in antitrust cases. Consequently, the court must closely scrutinize the evidence in a given case to avoid the danger of improper antitrust condemnations.

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

#### **HN2** [down arrow] **Monopolies & Monopolization, Attempts to Monopolize**

To demonstrate an attempt to monopolize, a plaintiff must have proved (1) that the defendant has engaged in predatory or anticompetitive conduct, with (2) a specific intent to monopolize and (3) a dangerous propensity of achieving monopoly power.

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

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

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

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

### **HN3** **Conspiracy to Monopolize, Sherman Act**

While § 1 of the Sherman Act, 15 U.S.C.S. § 1, forbids contracts or conspiracies in restraint of trade or commerce, § 2 of the Sherman Act, 15 U.S.C.S. § 2, addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize.

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

### **HN4** **Regulated Practices, Market Definition**

It is through evidence of market dominance that the jury may measure the defendants' ability to lessen or destroy competition, and thus threaten the interests protected by the antitrust laws. To demonstrate market power a plaintiff must (1) define the market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and that existing competitors lack the capacity to increase their output in the short run.

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**Judges:** WEINER, J.<sup>1</sup>

**Opinion by:** WEINER

## Opinion

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### **MEMORANDUM OPINION AND ORDER**

Plaintiffs, Robert Albani, M.D., John Easa, M.D. and Arizona Anesthesia Associates (Collectively "AAA"), brought this suit against Southern Arizona Anesthesia Services, P.C., et al. (collectively SAA) alleging violations of [Sections 1 and 2](#) of the Sherman Act, [15 U.S.C. § 1, 2](#), [Section 7](#) of the Clayton Act, [15 U.S.C. § 18](#), and Arizona common law. The action involves the market for the provision of anesthesia services in Tucson, Arizona. AAA alleged that through its use of exclusive contracts, price differentials, control of hospital anesthesia departments and erection of [\*4] entry barriers, SAA exercised market power. A bifurcated jury trial resulted in a defense verdict on all counts, with the sole exception of plaintiffs' Sherman Act [Section 2](#) attempted monopolization claim. Presently before the court are motions by SAA for judgment notwithstanding the verdict, for summary judgment on the pending damage phase of the trial, and to strike the testimony of AAA's expert. For the reasons which follow, the motions will be denied.

We begin our analysis by noting some serious concerns with the jury's result. In effect, the jury found no improper conduct on SAA's part to support the finding of a conspiracy, combination or contract in restraint of trade. Nor did the jury find that SAA monopolized the market or conspired to monopolize the market. The jury did find, however, that this same conduct constituted an attempt to monopolize. SAA insists that these verdicts are inconsistent, and that it is entitled to judgment as a matter of law, because the jury found the actions which presumably constituted the anticompetitive conduct underlying the attempted monopolization claim was not illegal. After a thorough review of the record and the briefs of the parties, and [\*5] applying the standard for deciding [Rule 50](#) motions, we conclude that the verdict on the [Section 2](#) claim cannot be overturned.

**HN1** [↑] In deciding a motion under [Fed. R. Civ. P. 50](#), a district court may not overturn a jury's verdict unless there was an absence of substantial evidence presented that could support a finding for the nonmoving party. [Los Angeles Land Co. v. Brunswick Corp.](#), 6 F.3d 1422, 1425 (9th Cir. 1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*, quoting [Syufy Enters. v.](#)

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<sup>1</sup> United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

American Multicinema Inc., 793 F.2d 990, 992 (9th Cir. 1986). While we must draw all reasonable inferences in favor of the nonmoving party, we are not unmindful of the Court of Appeals admonition that

In the antitrust context, determining what amount of evidence will support a jury verdict and assessing the quality of the evidence from which an inference of illegal action may be drawn takes on a special importance. For a number of reasons, "antitrust law" limits the range of permissible inferences from ambiguous evidence [in antitrust cases]." ... Consequently, the court must closely scrutinize the evidence in [\*6] a given case to avoid the danger of improper antitrust condemnations.

The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152 (9th Cir. 1988) (internal citations omitted). Applying this standard, we find that, while the proofs adduced by AAA at trial were strongly contested and hardly overwhelming, they were sufficient to support the jury's Section 2 verdict.

**HN2**[] To demonstrate an attempt to monopolize, a plaintiff must have proved (1) that the defendant has engaged in predatory or anticompetitive conduct, with (2) a specific intent to monopolize and (3) a dangerous propensity of achieving monopoly power. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993). Although SAA's review of the evidence acknowledges that AAA introduced evidence on all these elements, it essentially argues that the jury misconstrued the evidence in finding for AAA on the Section 2 attempt claim. Acknowledging that SAA's inconsistent jury verdict argument has some strength, we believe the verdicts can be reconciled since the elements of the two Sections are distinct.

**HN3**[] While § 1 of the Sherman Act forbids contracts or conspiracies in restraint of trade [\*7] or commerce, § 2 addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993). Thus, given sufficient evidence on the three elements of Section 2, it would not be inconsistent for the jury to have concluded that plaintiffs made out a case under Section 2, but not Section 1, if it believed the plaintiffs failed to establish that the **other entities** with which SAA dealt; i.e. the HMOs and other third party payors, did not have the requisite intent to join a conspiracy to violate the antitrust laws. Section 2 requires no such intent by other parties and focuses solely upon the conduct of the defendants. Accordingly, as we must attempt to reconcile inconsistent verdicts wherever possible, we find the mere fact that the jury's verdict was split on the two claims does not render the Section 2 verdict unreasonable as a matter of law.<sup>2</sup>

[\*8] Reviewing the evidence in the light most favorable to AAA, we find there was sufficient evidence from which the jury could conclude the plaintiffs showed anticompetitive conduct and the specific intent to monopolize. The problem with SAA's argument on this point is that its recitation of the evidence placed before the jury fails to account for the reasonable inferences the jury could have taken, and asks that we ignore them as well. For example, SAA concedes that evidence of its merger activities was introduced, but argues it could not constitute predatory conduct because the entities acquired by SAA "were disintegrating without any impetus from SAAS". To accept this argument would be a clear intrusion on the province of the jury. AAA placed the evidence of mergers before the jury to establish SAA's intent to eliminate competition and show its intent to dominate the market. Combined with other statements which, although refuted by SAA, would tend to show an improper motive of attempting to eliminate competition, the jury was within its province in determining from the totality of the evidence that SAA engaged in anticompetitive conduct with the specific intent to monopolize the market [\*9] for anesthesia services in Tucson. It was for the jury to accept or reject defendants' argument that it had a legitimate business

<sup>2</sup> Coupled with their response to defendants' motion is a motion by the plaintiffs pursuant to Rule 15(b) to amend their Second Amended Complaint to conform to the evidence adduced at trial. Essentially, this motion seeks to make clear that all the defendants' overt acts that made up the Section 1 claim constituted predatory conduct under Section 2. Rule 15(b) is intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel, or on the basis of a statement of the claim that was made at a preliminary point. Consequently, courts should interpret subdivision (b) liberally and permit an amendment whenever doing so will effectuate the underlying purpose of the rule. 6A Wright, et al., *Federal Practice & Procedure*, § 1491. Accordingly, the motion will be granted.

justification for the mergers. On a [Rule 50](#) motion, we must respect the inferences drawn by the jury that defendants' motivation was otherwise.

SAA likewise argues that its "control" over hospital anesthesia departments was a simple result of its size, rather than evidence of its specific intent to erect entry barriers and decrease competition. It points to a stipulation by the parties that hospital boards of directors, rather than departments, had the power to grant permanent privileges. Again this argument ignores other evidence of record that the departments granted provisional privileges, and that its control of the departments permitted SAA to "harass" surgeons into using only SAA doctors and to control staffing.

The final element of the attempt claim, a dangerous probability of success, generally requires a definition of the relevant market and examination of market power. [Spectrum Sports, 506 U.S. at 455. HN4](#)<sup>1</sup> It is through evidence of market dominance that the jury may measure the defendants' ability to lessen or destroy competition, *Id. at [\*10] 456*, and thus threaten the interests protected by the antitrust laws. To demonstrate market power a plaintiff must (1) define the market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and 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 \(9th Cir. 1995\)](#).<sup>3</sup>

[\*11] The evidence construed most favorably to plaintiffs was that SAA controlled as much as 71% of the market for private practice anesthesiology in Tucson, defined as the provision of services at the five private hospitals servicing Tucson; 100% of anesthesia services at the two large surgical outpatient facilities servicing Tucson; and 100% of the market at the smaller miscellaneous facilities. While the parties stipulated that Tucson was the relevant geographic market, there was a dispute over the definition of the relevant product market. Plaintiffs defined the product as the private practice of anesthesiology, which excluded anesthesiology services provided at Kino Hospital, the public hospital in Tucson owned by Pima County, and at the University Medical Center, which is owned by the University of Arizona. SAA defined the product as all anesthesia services performed in Tucson. Under its definition, SAA controlled between 40 and 44% of the market. For the purpose of the instant motion, we must accept that the definition proffered by plaintiffs, and the evidence to support it, was accepted by the jury since that definition was not invalid as a matter of law.

A "market" is a group [\*12] of sellers or producers who have the "actual or potential ability to deprive each other of significant levels of business". [Rebel Oil, 51 F.3d at 1434](#). The evidence of record showed that anesthesiology services performed at Kino and UMC were exclusively provided by public salaried staff anesthesiologists at Kino and the university medical faculty at UMC, and thus were not open to SAA or AAA. The evidence also showed that the private anesthesiology industry recognized the remaining five private hospitals and the outpatient facilities as the relevant market. The jury was well within its province to determine that Kino and UMC were not part of the relevant market because there was no potential ability by either party to take that business away from the other. Thus plaintiffs presented substantial evidence to demonstrate the first two criteria of market power.

Plaintiffs also presented substantial evidence to show that there were significant barriers to entry into the market for anesthesiology in Tucson. No other entity other than SAA and Old Pueblo Associates ever achieved higher than a 5% share of the relevant market. Exclusive contracts with HMOs and other third party payors, SAA's [\*13] control

<sup>3</sup> We note that the Court of Appeals used the conjunctive "and", rather than the disjunctive "or" when restating the third criterion. The authority cited by the *Rebel Oil* court, [Ryko Mfg. Co. v. Eden Serv., 823 F.2d 1215, 1232 \(8th Cir. 1987\)](#) and [Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325, 1335 \(7th Cir. 1986\)](#), both state the test in the disjunctive, i.e., plaintiff must show significant barriers **either** to the entry of new competitors or to increased output by existing competitors. We need not ponder this discrepancy at any length. In the instant situation, where we deal with the provision of a licensed professional service, entry barriers and the ability to increase output are the same. In cases dealing with the manufacture of goods, an increase in output is dependent upon idle capacity or the ability of competitors to quickly retool existing capacity to provide the goods in short supply due to the actions of the monopolist. An increase in capacity to provide a licensed professional service is dependent primarily upon staffing. Thus, while anesthesiologists use machines and other equipment in the provision of their services, the ability to increase output is limited primarily by the entry barriers we discuss below.

of the hospital departments, the State's education and licensing requirements and capitol and equipment costs were all shown by the evidence to be barriers to entry. Indeed, the evidence showed that no new competitors entered the market after 1988, the period of time plaintiffs argued to the jury that SAA exercised market power. Thus, the evidence before the jury was sufficient to establish all the elements of the Section 2 attempt claim. Again, although we harbor some trepidations about the result reached by the jury, given the record presented on all these points, it would not be appropriate for the court to overturn this verdict. Accordingly, SAA's motion for judgment as a matter of law must be denied.

For similar reasons, we will deny the defendants' motion for summary judgment on the damages phase of this case, with leave to renew after plaintiffs have presented their proofs. The action was bifurcated before the jury and the issue of damages remains to be tried. SAA seeks summary judgment arguing that AAA has failed to demonstrate any damages that are related to the Sherman Act Section 2 claim, upon which they prevailed. Rather, SAA contends, all the damages evidence [\*14] will relate to the claims upon which the jury found no liability, and thus is insufficient as a matter of law.

Specifically, SAA argues that one of the underlying assumptions contained in the damage study prepared by AAA's expert Glenn Wilt, Ph.D. is that the contracts between SAA and various HMOs constituted unlawful conspiracies in violation of Sherman Act Section 1, a claim rejected by the jury. In response to the motion, AAA has submitted an affidavit of Dr. Wilt in which he avers he did not make such an assumption. He claims he analyzed all of SAA's "practice patterns" which resulted in AAA being denied access to certain patient populations. He avers he referred generally to this conduct as "market restrictions", intending to reference **any** illegal conduct of the defendants, not just putative violations of Section 1.

Having reviewed the moving papers and Dr. Wilt's affidavit, we will deny the motion at this time with leave to renew at the close of AAA's damages case. In so doing, we admonish all counsel that they must specifically tie all damage evidence to the one claim remaining in this action. We will not permit either party to retry the claims already adjudicated during [\*15] the liability phase.

Dr. Wilt was never deposed. Although we assume he will testify from his expert report, it is not clear at this point that AAA should be precluded from presenting damage evidence to the jury. As AAA points out, the Supreme Court has repeatedly held that in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts have caused damage to the plaintiffs.... Juries are allowed to act upon probable and inferential, as well as direct and positive proof....

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 124, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969), citing Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946). We believe it prudent to permit the AAA an opportunity to tie the expert evidence to the Section 2 claim upon which it prevailed. However, in order to ensure that the evidence is relevant to the one remaining claim, [\*16] in the order which follows, we will direct that all damage experts be deposed at the same time prior to the damages trial, so that each will know the testimony of the others and insure there are no surprises during their trial testimony.

SAA also argues that there is no evidence that, in the absence of SAA's exclusive contracts with the HMOs, these HMOs would have contracted with the AAA. Even were this true, granting a motion on this ground would be an improper invasion of the province of the jury. First, we note that the evidence showed AAA had an exclusive contract with the Department of Corrections to provide anesthesia services and also included statements by Dr. Easa that the only reason AAA did not get HMO contracts was the interference by SAA. While this evidence was disputed, the jury was certainly entitled to consider it. Second, we cannot discount the inference advanced by AAA, that but for the defendants' conduct, AAA would have grown large enough to service the HMO's needs. While the HMOs are not parties before the court, and thus we cannot grant injunctive relief that binds them to doing business with the plaintiffs, AAA is entitled to present evidence of money damages [\*17] arising from its inability to get HMO contracts. Of course, such evidence may not be speculative and we leave open to the time of trial a final ruling on

this issue.<sup>4</sup> Accordingly, the motion for summary judgment on damages must be denied with leave to renew at the close of AAA's case.

[\*18] Finally, SAA renews its motion to strike the trial testimony of AAA's liability expert, Dr. Ronald Vogel. It argues that his opinions were devoid of any scientific knowledge or methodology. Because the objection was not timely raised at trial, we find the issue has been waived. Dr. Vogel testified on Wednesday, May 15, 1996. Defendants asked him no questions on his qualifications. Dr. Vogel then testified without objection to his opinions regarding the market for anesthesiology services in Tucson and a "pricing study" he conducted, drawing references to the market for similar services in Florida. He concluded his testimony that day. SAA made no motion to strike his testimony at that time. AAA rested its case on Friday, May 17. At that time, SAA moved to strike portions of the testimony of several witnesses, but did not make a similar request regarding Dr. Vogel's expert testimony. SAA did not move to strike Vogel's testimony until Monday, May 20. At that time, AAA had rested its case and presumably Dr. Vogel was no longer available. At oral argument, defendants explained that it took the weekend for the problem with Dr. Vogel's testimony, i.e. its alleged complete lack of scientific [\*19] foundation, to "sink in".

If their problem with Dr. Vogel was so fundamental, we scarcely think it should have taken defendants five days to realize the testimony was objectionable. SAA had at least three occasions to object to Dr. Vogel: when he was qualified as an expert, at the close of his direct testimony, and at the close of AAA's case in chief. Instead they waited to the following week to raise the issue for the first time. It was counsel's responsibility to bring the issue to the court's attention at a time when the plaintiffs could have cured any defect in Dr. Vogel's testimony. See generally, *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996). Making their objection after the plaintiff rested deprived them that opportunity.

Even if the issue was not waived, we do not think that Vogel's testimony was subject to be stricken. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993) requires that an expert's testimony reflect scientific knowledge derived from the scientific method to establish evidentiary reliability. SAA bases its argument on Vogel's statements on cross examination that he did not directly investigate [\*20] the pricing structure of anesthesiology services in Florida, but instead inferred that the prices there were close to the Medicare established prices because of that State's large population of elderly. Rather than directly investigating raw date, Vogel made his inference from published statistics.

The fact that Vogel inferred results from published statistics does not violate the *Daubert* standard. *Daubert* does not require that an expert personally conduct research to accumulate the data upon which his opinion is based. The use of recognized statistical compilations is part of the scientific method. So to is the process of inference. Indeed this may be the only way to reach conclusions on subjects that are not directly observable. Vogel's testimony was that he conducted a study of SAA's pricing structure, finding that it charged twenty-four different prices. He also looked at SAA's market share and concluded that its ability to charge differentiated prices was due to market power. While defendants were well within their bounds to challenge Vogel's inferences on cross examination, which they clearly did, this was an issue of weight, not admissibility. Accordingly, the motion [\*21] to strike will also be denied.

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<sup>4</sup>We observe in passing that, to a great extent, the "real" parties in interest in this matter are the HMO's and third party payors who let the contracts for the provision of anesthesia services. Plaintiffs brought this suit presumably to get a bigger piece of that market. Given the jury's verdict on the conspiracy claims, it is problematic whether plaintiffs could have received injunctive relief against the HMOs even if they been parties. We wait to see how plaintiffs will prove to the jury they would have received a part of this income stream, but for the conduct of the defendants, since the HMOs were free to contract with whomever they chose to provide the services they required. Anything less than direct testimony that the HMOs were prepared to give them contracts, but for the defendants' illegal conduct, might not be sufficient. It is not enough to ask the jury to speculate; plaintiffs must demonstrate actual antitrust injury.



## United States v. Time Warner

United States District Court for the District of Columbia

January 22, 1997, Decided ; January 22, 1997, FILED

Misc. Action No.94-338 (HHG)

### **Reporter**

1997 U.S. Dist. LEXIS 2752 \*; 1997-1 Trade Cas. (CCH) P71,702

UNITED STATES OF AMERICA, Petitioner, v. TIME WARNER INC., et al., Respondents.

**Disposition:** [\*1] Petition to enforce the civil investigative demands granted.

## **Core Terms**

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music video, music, antitrust, exporters, investigate, rights, exemption, licenses, price-fixing, programming, anti trust law, domestic, broadcast, subpoena, boycott, effects, Press, respondents', commerce, legislative history, joint venture, prerecorded, programmers, television, violations, documents, worldwide, markets, comity

## **LexisNexis® Headnotes**

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Administrative Law > Agency Investigations > General Overview

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > General Overview

Business & Corporate Compliance > ... > Wage & Hour Laws > Administrative Proceedings > Enforcement Provisions

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

Business & Corporate Compliance > ... > Wage & Hour Laws > Administrative Proceedings > Investigative Authority

### **HN1[] Administrative Law, Agency Investigations**

In contrast to the showing of probable cause required for issuance of a search warrant, a court may enforce an administrative subpoena upon a showing only that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

## **HN2** Methods of Investigation, Subpoenas

There is little, if any, difference between the standards that have been traditionally applied in subpoena enforcement cases and those that should be applied to civil investigative demands under the Antitrust Civil Process Act.

Administrative Law > Separation of Powers > Jurisdiction

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

## **HN3** Separation of Powers, Jurisdiction

Barring a patent lack of jurisdiction, courts do not uphold jurisdictional challenges to civil investigative demands.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

Criminal Law & Procedure > Commencement of Criminal Proceedings > Grand Juries > General Overview

## **HN4** Methods of Investigation, Subpoenas

Courts indicate the standard for enforcement of regulatory subpoenas is the same as that applied to grand jury investigations. The Justice Department is to be given wide latitude when issuing civil investigative demands as the unmistakable purpose of the Antitrust Civil Process Act is to facilitate the Justice Department's efforts to obtain evidence during the course of a civil investigation.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

## **HN5** International Aspects, Foreign Trade Antitrust Improvements Act

Under the Foreign Trade Antitrust Improvements Act, conduct is exempt from the Sherman Act if it does not have a direct, substantial, and reasonably foreseeable effect on United States commerce. [15 U.S.C.S. § 6a](#).

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Communications Law > ... > Regulated Entities > Cable Systems > Cable & Video Competition

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN6\*\*](#) [down] Antitrust & Trade Law, Exemptions & Immunities

Foreign corporations are not exempt from the Sherman Act if their export-oriented conduct has the direct effect of injuring competing United States exporters.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

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

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

## [\*\*HN7\*\*](#) [down] Antitrust & Trade Law, Exemptions & Immunities

The Foreign Trade Antitrust Improvements Act confers jurisdiction for a foreign corporation's boycott activity that excludes United States exports.

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

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > 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 > General Overview

## [\*\*HN8\*\*](#) [down] Horizontal Refusals to Deal, Boycotts

While not every price-fix is a boycott, the fact that boycott activity implements a price-fixing arrangement does not preclude antitrust jurisdiction over such activity.

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

## [\*\*HN9\*\*](#) [down] US Department of Justice Actions, Investigations

In determining whether a request for information under a civil investigative demand (CID) is unreasonable, the question is whether the demand is unduly burdensome or unreasonably broad. The burden of demonstrating that the CIDs are unreasonable is on the subpoenaed party.

Administrative Law > Separation of Powers > Executive Controls

Governments > Courts > Judicial Comity

International Law > Dispute Resolution > Act of State Doctrine

## **HN10** [ ] Separation of Powers, Executive Controls

The executive branch, of which the United States Justice Department is a part, is charged with determining whether the importance of antitrust enforcement outweighs any relevant foreign policy concerns. It is not a court's role to second-guess the executive branch's judgment as to the proper role of comity concerns in this area.

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**Judges:** HAROLD H. GREENE, United States District Judge

**Opinion by:** HAROLD H. GREENE

## **Opinion**

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### **OPINION**

Before the Court is the petition of the United States to enforce civil investigative demands (CIDs) issued by the Department of Justice under the Antitrust Civil Process Act (ACPA). [15 U.S.C. § 1312 \(1994\)](#). The CIDs seek information located in the United States relating to "restraints or monopolization of domestic and international markets for cable, **[\*2]** wire and satellite-delivered music programming through price-fixing cartels and overbroad joint ventures." Respondents are the world's major producers of prerecorded music and music videos: Time Warner Inc., Sony Corporation of America, MCA, PolyGram Holding Inc., EMI Music Inc., and Bertelsmann, Inc. Time Warner is an American company; the other respondents are American subsidiaries of foreign parents.

The basic issue is whether under the circumstances here presented the United States is entitled to investigate the factual basis for possible antitrust claims. Under the ACPA, the Department of Justice has the authority to conduct such an investigation if it has "reason to believe" that the requested information is "relevant to a civil antitrust investigation." [15 U.S.C. § 1312](#).

Respondents seek to set aside the CIDs insofar as they relate to their foreign activities, contending that the Department lacks jurisdiction to investigate this conduct for three reasons: (1) respondents are exempt from the antitrust laws under the Foreign Trade Antitrust Improvements Act (FTAIA), [15 U.S.C. § 6a](#); (2) the transactions sought to be investigated are moot; and (3) principles of comity bar the **[\*3]** Department's investigation.

I

### **Factual Background**

The CIDs seek information related to an antitrust investigation of respondents' potentially anticompetitive conduct in the United States and abroad. The Justice Department claims that such an investigation might uncover possible violations of the Sherman Act in the form of a worldwide price-fixing conspiracy or a monopoly of music programming markets with respect to several areas, as follows.

First, the major focus of the antitrust investigation is on access to prerecorded music and music videos. Respondents control at least 80 per cent of the market for prerecorded music<sup>1</sup> and music videos. They market their music videos to music video programmers who broadcast the videos over cable and satellite television. The music companies control the intellectual property rights that attach to their prerecorded music and music videos. These property rights vary from country to country, but in many foreign countries it is not permitted to broadcast a music video without a license for the right to perform the video--the "public performance right"--typically held by the music company.

[\*4] Respondents control various "performance rights societies," which act as collective licensing bodies for performance rights. At the time the government issued its civil investigative demands, respondents licensed the rights to their music and music videos exclusively through such societies, including both national performance right societies, such as Video Performance, Ltd. (VPL) in Britain, and umbrella international copyright societies, such as the International Federation of the Phonographic Industry, (IFPI). In order to broadcast any music videos produced by respondents on their networks outside of the United States, music programming services (such as MTV or Country Music Television) must pay a blanket licensing fee to the national performance rights society of the country in which the music videos would be broadcast (although such videos could be broadcast for free on networks in the United States). The Justice Department seeks to investigate whether these performance rights societies have impeded U.S. exporters of music videos and original non-music programming (*i.e.*, traditional television programming) from entering foreign markets.

Respondents claim that VPL and several [\*5] other performance rights societies in Europe have been restructured so that they no longer hold the exclusive rights to their members' music and music videos, and that foreign record companies may now negotiate individually with music programmers. However, because respondents have refused to produce documents related to their foreign conduct, the Department asserts that it is unable to determine precisely how the performance right societies have been restructured.<sup>2</sup> Indeed, based upon an examination of some documents related to the restructuring of VPL, the Department claims to have reason to believe that the exclusivity may not have been terminated. It appears to be certain that access to the withheld documents would enable the Department to investigate "the existence, scope and likely permanence of such restructurings, the existence or likelihood of *de facto* exclusivity, and the possibility of continued collusion through participation in such societies." Petitioner's Memorandum in Support of Motion to Set a Hearing Date, at 5.

[\*6] Second, the Department seeks to investigate the European performance rights society, Phonographic Performance, Ltd. (PPL), that collectively licenses broadcasting rights to digital radio programmers and digital radio programming joint ventures formed by respondents. The Department posits that these activities may have raised the price of foreign and domestic digital radio broadcasting rights and reduced United States exports of digital radio programming.<sup>3</sup>

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<sup>1</sup> Prerecorded music consists of records, tapes, and compact discs.

<sup>2</sup> Of course, the Court is likewise unable to do so.

<sup>3</sup> Since the Justice Department issued the CIDs at issue, Congress enacted a compulsory digital radio licensing system pursuant to which, in the absence of an agreement between a licensor and licensee, domestic licenses are set by arbitration. Digital Performance Right in Sound Recordings Act of 1995, (codified at [17 U.S.C. § 115](#)). Accordingly, the Court is requiring that the CIDs shall be modified to preclude investigation into any effects, occurring after the effective date of this Act, of the digital radio performance rights society on the price of domestic digital radio broadcasting rights. However, for the reasons outlined *infra*, the Justice Department may investigate the effect of the digital radio-related activities on U.S. exports of digital radio programming.

[\*7] Third, the Department also seeks to inquire into joint ventures for programming services. One such joint venture, formed to produce a United States music video channel, has been terminated since the CIDs were issued, and respondents argue that any such investigation into this venture therefore is moot. However, the Department seeks to investigate also whether respondents are likely to re-form a similar joint venture in the United States, as has apparently been reported in the music industry press, and whether respondents have agreed to provide exclusive licenses for music videos to this venture in order to boycott competitors such as MTV. See, e.g., Brett Atwood, Majors Eye New Options for Vid Channel, THE BILLBOARD, July 22, 1995. The Department also claims to be concerned that American programmers may have been denied access to music videos in an Asian venture formed by some of respondents.

Fourth, the Department seeks to investigate possible antitrust violations in various worldwide license agreements entered into by some of the respondents that may have extracted higher than competitive fees for such licenses from American programmers, and it has submitted to the Court [\*8] one such worldwide agreement. See Exhibit 1B to United States' Reply in Support of Petition to Enforce CIDs, December 22, 1994 (filed under seal).

II

### General Legal Principles

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209, 90 L. Ed. 614, 66 S. Ct. 494 (1946), the seminal case on administrative subpoenas, held that, HN1[ in contrast to the showing of probable cause required for issuance of a search warrant, a court may enforce an administrative subpoena upon a showing only that "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." Oklahoma Press concerned the authority of the Administrator of the Wage and Hour Division of the Department of Labor to issue subpoenas duces tecum to secure evidence in an investigation of a possible violation of the Fair Labor Standards Act by a publishing company. The company refused to comply, but the Supreme Court held that "Congress has authorized the Administrator, rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations." Id. at 214.

Judge [\*9] June Green of this Court previously held that HN2[ there is "little, if any, difference between the standards that have been traditionally applied in subpoena enforcement cases such as Oklahoma Press . . . and those that should be applied to CIDs under the ACPA." Australia/Eastern U.S.A. Shipping Conference v. United States, 1982-1 Tr. Cas. (CCH) P64,721, at 74,063 (D.D.C. 1981). The undersigned agrees with this statement of the principle.

Like this case, which involves an asserted exemption under the Foreign Trade Antitrust Improvements Act for foreign conduct that has no substantial effect on domestic commerce, Australia/Eastern involved a Justice Department investigation into alleged antitrust violations <sup>4</sup> which had been given statutory exemption from the antitrust laws in some circumstances. The court ruled that because "it is possible that factual development proceeding from the investigation will uncover non-exempt conduct, the CIDs should be enforced." Id. at 74,063.

[\*10] The short of it is that, HN3[ barring a patent lack of jurisdiction, courts have not upheld jurisdictional challenges to CIDs. Respondents rely essentially only on an out-of-context snippet of the legislative history of the ACPA. The House Report on this statute indicates that "CID recipients may . . . refuse to comply with any CID if the Division has no jurisdiction to conduct an investigation—which will be the case if the activities at issue enjoy a clear exemption for the antitrust laws." H.R. Rep. No. 1343, 94th Cong., 2d Sess. 11. However, the same House Report goes on to state: the "Committee stresses that the scope of many antitrust exemptions is not precisely clear . . . In these many cases, the applicability of an asserted exemption may well be a central issue in the case. If so, the mere assertion of the exemption should not be allowed to halt the investigation." Id. at n. 30. So, too, here, it would

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<sup>4</sup> Those violations involved the ocean shipping industry.

be premature to halt the investigation unless it is clear that the Antitrust Division has no jurisdiction to investigate this conduct. This, patently, is not the case.

Respondents argue that the government must affirmatively establish the basis for its subject matter jurisdiction [\*11] in order to conduct an investigation. But this would rewrite Oklahoma Press and the legislative history of the ACPA, both of which suggest that HN4<sup>1</sup> the standard for enforcement of regulatory subpoenas is the same as that applied to grand jury investigations. Oklahoma Press, 327 U.S. at 216 (citing Blair v. United States, 250 U.S. 273, 282, 63 L. Ed. 979, 39 S. Ct. 468 (1919)); Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53, 58 (2d Cir. 1983) ("the House report accompanying the 1976 amendments to the ACPA reveals a preference for the less stringent grand jury subpoena standard"). The grand jury historically has had the "authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within [its] jurisdiction." Blair, 250 U.S. at 283. And as the Court of Appeals for the Second Circuit has said, "the ACPA's legislative history indicates that the Justice Department is to be given wide latitude when issuing CIDs, . . . [and] the unmistakable purpose of the ACPA was to facilitate the Justice Department's efforts to obtain evidence during the course of a civil investigation." Associated [\*12] Container, 705 F.2d at 58.

Although the Oklahoma Press doctrine does not require the Department to establish its ultimate subject matter jurisdiction at the outset of its investigation, respondents argue that the Department does not have the authority to conduct an unlimited fishing expedition. This is clearly true. However, for the reasons cited supra, this situation is far from that.

The Court now turns to the one issue which respondents have expressly identified as a possible exemption under the antitrust laws: respondents' foreign activities.

### III

#### Foreign Activities

HN5<sup>1</sup> Under the FTAIA, conduct is exempt from the Sherman Act if it does not have a "direct, substantial, and reasonably foreseeable effect" on United States commerce. 15 U.S.C. § 6a. Respondents argue that even if one assumes the Department's assertions are true--that the performance right societies operate as price-fixing cartels--the Justice Department does not have jurisdiction to investigate this conduct because respondents' conduct abroad produces merely "ordinary" export effects. This argument is grounded in a reference in the House Report on the FTAIA: "[A] price-fixing conspiracy directed solely [\*13] to exported products or services absent a spillover effect on the domestic marketplace . . . would normally not have the requisite effects on domestic or import conduct." H.R. Rep. No. 686, 97th Cong. 2d Sess. 10 (1982). Respondents argue that "normally" refers to the "ordinary" effects of price-fixing, and that accordingly, the FTAIA confers jurisdiction over foreign price-fixing only in the exceptional case when there is a "spillover effect" in domestic markets, such as was true with respect to the OPEC cartel.

However, neither the plain language of the FTAIA, which does not identify particular categories of exempted conduct, nor its legislative history considered in full supports respondents' argument about the restrictive scope of the FTAIA. The purportedly dispositive sentence about "spillover" effects appears in a section of the legislative history referring to the standing of injured foreign buyers, not injured U.S. exporters. Moreover, as the late Professor Areeda (formerly of counsel to respondent PolyGram Holding, Inc. in this matter) noted in his treatise:

... this conclusion [that "normally" excludes from the U.S. antitrust laws all "ordinary" export effects] [\*14] is not absolutely certain, for the paragraph containing the "normally" quote is followed immediately by . . .

"If such solely export-oriented conduct affects export commerce of another person doing business in the United States . . . [jurisdiction is preserved] insofar as there is injury to that person. Thus a domestic exporter is assured a remedy under our antitrust laws for injury caused by a competing United States exporter. But a foreign firm whose non-domestic operations were [thus injured] . . . would have no remedy under our antitrust laws."

Areeda & Hovenkamp, **Antitrust Law** P236', at 337 (1996 supp.) (quoting H.R. Rep. No. 686, 97th Cong., 2d Sess. at 10-11 (1982)).

In short it is clear that HN6[<sup>15</sup>] respondents are not exempt from the Sherman Act if their export-oriented conduct had the direct effect of injuring competing U.S. exporters. This is the question that the Justice Department is in the midst of investigating: Did foreign price-fixing affect access to music videos and prerecorded music; and if so, did such price-fixing injure American exporters, such as Country Music Television, which provide music programming services abroad by beaming their signal [\*15] unchanged from the United States to foreign countries?

This case is unlike Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984), where the district court dismissed a complaint for failing to allege any effect on U.S. trade or commerce. The plaintiff in Pfizer argued that defendants' activities had a "spillover effect" on domestic commerce, but the plaintiff could not allege any facts causally linking a price increase in the United States with the defendants' foreign conduct. Here, as outlined above, the Justice Department has identified several possible effects on United States commerce from respondents' foreign activities: (1) by fixing prices and thereby increasing the price for music videos abroad, the copyright societies' collective licensing scheme may have delayed or deterred American exporters from entering foreign markets; (2) these copyright societies may have limited exports of non-music, traditional television programming (such as "Beavis and Butt-head"); and (3) respondents may have extracted higher than competitive fees for world-wide licenses. The Department's conclusions are, of course, speculative at this stage because respondents have precluded [\*16] them from examining documents related to these activities. The point of the CIDs is to determine whether the facts support the government's theory.

Even if this Court were to agree with respondents that the "ordinary" effects of foreign price-fixing are exempt from the Sherman Act, HN7[<sup>16</sup>] the FTAIA would still confer jurisdiction for boycott activity that excludes other United States exports. See Areeda & Hovenkamp, **Antitrust Law** P236', at 338. The Department alleges that these performance-rights societies engaged in boycott activity by collectively refusing to deal except through a common agent and collectively refusing to grant world-wide licenses. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 118, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969) (conspiring to deny licenses to foreign intellectual property rights is a group boycott). Further, respondents allegedly formed downstream programming services in Europe and Asia, to which they may have agreed to grant exclusive music video rights--a group boycott that may violate the antitrust laws. See United States v. Columbia Pictures Industries, Inc., 507 F. Supp. 412, 428 (S.D.N.Y. 1980). Finally, although the [\*17] Court recognizes HN8[<sup>17</sup>] that not every price-fix is a boycott, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 800-811, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)(opinion of Scalia, J.), the fact that boycott activity implements a price-fixing arrangement does not preclude jurisdiction over such activity. See F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990).

Interwoven with respondents' jurisdictional arguments is the claim that compliance with the CIDs would be burdensome. HN9[<sup>18</sup>] "The question is whether the demand is unduly burdensome or unreasonably broad." F.T.C. v. Texaco, Inc., 180 U.S. App. D.C. 390, 555 F.2d 862, 882 (D.C. Cir.) (emphasis in original), cert. denied, 431 U.S. 974 (1977). The burden of demonstrating that the CIDs are unreasonable is on the subpoenaed party. United States v. Powell, 379 U.S. 48, 58, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964). Respondents have not met this standard for showing undue burden or unreasonable breadth. As to subsequent, more specific objections to burdensomeness and ambiguity, the Court encourages the parties to attempt to resolve such objections through negotiation.

[\*18] IV

#### Comity

Finally, it is premature to consider the issue of international comity at this stage of the investigation. See Associated Container, 705 F.2d at 61 (declining to halt investigation under act of state doctrine where Justice Department had met Oklahoma Press standard of demonstrating reasonable basis to believe that requested information was relevant to a legitimate antitrust investigation). HN10[<sup>19</sup>] The Executive Branch, of which the Justice Department is

a part, is charged with determining whether "the importance of antitrust enforcement outweighs any relevant foreign policy concerns: "It is not the Court's role to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances." *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990), aff'd, 285 U.S. App. D.C. 222, 908 F.2d 981 (D.C. Cir. 1990). To that end, the Court defers to the executive branch's judgment as to comity and declines to halt an on-going investigation.

The decision that the Oklahoma Press doctrine and the FTAIA do not bar enforcement of the challenged CIDs merely means that the investigation may go forward. The Court in no [\*19] way indicates how it or any other court would rule on the merits after the investigation is completed, in the event that the Justice Department decides to charge respondents with antitrust violations.

The petition to enforce the civil investigative demands will be granted.

HAROLD H. GREENE

United States District Judge

ORDER

For the reasons stated in the opinion issued on this same date, it is:

ORDERED that the petition of the United States to enforce the civil investigative demands issued by the Department of Justice is GRANTED.

January 22, 1997

HAROLD H. GREENE

United States District Judge

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End of Document



## Yeager's Fuel v. Pennsylvania Power & Light Co.

United States District Court for the Eastern District of Pennsylvania

January 27, 1997, Decided

CIVIL ACTION NO. 91-5176, CIVIL ACTION NO. 92-2359

### **Reporter**

953 F. Supp. 617 \*; 1997 U.S. Dist. LEXIS 1134 \*\*; 1997-1 Trade Cas. (CCH) P71,739

YEAGER'S FUEL, INC., et al. v. PENNSYLVANIA POWER & LIGHT COMPANY; LOSCH BOILER SALES & SERVICE COMPANY v. PENNSYLVANIA POWER & LIGHT COMPANY

**Disposition:** **[\*\*1]** Defendant's Motion GRANTED with respect to (a.) Plaintiffs' claim of actual monopolization under [§ 2](#) of Sherman Act; (b.) Plaintiffs' claims involving conversion grants under both [§ 1](#) of Sherman Act and § 3 of Clayton Act; (c.) Plaintiffs' claim under [§ 2\(c\)](#) of Robinson-Patman Act and (d.) Plaintiffs' common-law restraint of trade claim (conversion grants only). Defendant's Motion DENIED in all other respects.

## **Core Terms**

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heating, all-electric, electricity, installation, relevant market, monopolize, conversion, oil, market share, new home, submarket, monopoly power, developers, customers, remarking, residential, Sherman Act, heat pump, heating system, prices, market power, competitor, homeowners, marketing, monopoly, costs, antitrust, specific intent, barriers, buyer

## **LexisNexis® Headnotes**

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

### **[HN1](#) [?] Summary Judgment, Entitlement as Matter of Law**

In a motion for summary judgment in an antitrust case, the United States Supreme Court applies the standard used under [Fed. R. Civ. P. 56\(c\)](#).

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

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

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

953 F. Supp. 617, \*617L<sup>A</sup> 1997 U.S. Dist. LEXIS 1134, \*\*1

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

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

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

## **HN2** [down] Entitlement as Matter of Law, Genuine Disputes

*Rule 56(c) of the Federal Rules of Civil Procedure* provides for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). An issue is "genuine" only if there is sufficient evidence for a reasonable jury to find for the non-movant. Bearing in mind that all uncertainties are resolved in favor of the non-movant, a factual dispute is only "material" if it might affect the outcome of the case. [Rule 56\(c\)](#) directs summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to its case, and on which it will bear the burden of proof at trial.

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

Antitrust & Trade Law > Sherman Act > Penalties

## **HN3** [down] Regulated Practices, Monopolies & Monopolization

See [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

To establish a successful claim under [15 U.S.C.S. § 2](#) of the Sherman Act for attempted monopolization, a plaintiff must present concrete evidence that: (1) defendant engaged in predatory conduct or anticompetitive conduct with (2) specific intent to monopolize, and with (3) a dangerous probability of achieving monopoly power.

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

Antitrust & Trade Law > Sherman Act > General Overview

## **HN5** [down] Monopolies & Monopolization, Attempts to Monopolize

Plaintiffs alleging attempted monopolization under [15 U.S.C.S. § 2](#) must produce intent evidence. Specific intent is the intent to accomplish the forbidden objective, an intent that goes beyond the mere intent to do the act. Intent may

be inferred by anticompetitive practices or proven by direct evidence. In establishing specific intent, a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were not predominantly motivated by legitimate business aims.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Derivative Evidence

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

#### **HN6** [down] **Antitrust & Trade Law, Sherman Act**

In evaluating a claim of attempted monopolization under [15 U.S.C.S. § 2](#), when direct evidence of specific intent is marginal, a court examines indicia of anticompetitive or exclusionary conduct as indirect, corroborating evidence of specific intent to supplement the direct evidence proffered.

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

#### **HN7** [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

Under antitrust law, predatory or anticompetitive conduct is that which unfairly tends to be exclusionary or tends to destroy competition. The question of whether the court may consider conduct exclusionary cannot be answered by simply considering its effect on the plaintiff. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.

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

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

#### **HN8** [down] **Monopolies & Monopolization, Attempts to Monopolize**

Evaluation of an attempted monopolization claim involves a finding of a dangerous probability of achieving monopoly power. This determination requires an inquiry into the relevant product and geographic market and the defendant's economic power in that market.

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

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

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

#### **HN9** [down] **Monopolies & Monopolization, Attempts to Monopolize**

In order to determine the dangerous probability of monopoly power in **antitrust law**, a court must first establish the definition of the relevant market. A plaintiff bears the burden of defining the relevant market. The relevant product market consists of commodities reasonably interchangeable by consumers for the same purposes. Factors to be considered include price, use, and qualities. Accordingly, the products in a relevant product market are characterized by a cross-elasticity of demand. Courts also examine the relevant "geographic" market that includes the area in which a potential buyer may rationally look for the goods or services he or she seeks. Within the relevant market, a "submarket" may exist, evidenced by such practical indicia as industry or public recognition of the "submarket" as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

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

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

#### **HN10**[ **Regulated Practices, Market Definition**

In determining whether a dangerous probability of monopoly power exists requisite to a claim of attempted monopolization under **15 U.S.C.S. § 2**, market definition presents a question of fact for jury resolution that a court may resolve on a motion for summary judgment if the record does not present any material factual disputes. Similarly, whether a "submarket" exists within the relevant market presents a factual dispute for jury resolution.

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

#### **HN11**[ **Monopolies & Monopolization, Attempts to Monopolize**

In determining whether a defendant possesses enough monopoly power to come dangerously close to success in establishing a monopoly within the relevant market and "submarket," several factors are applicable: 1) the strength of the competition, 2) probable development of the industry, 3) the barriers to entry, 4) the nature of the anticompetitive conduct, and 5) the elasticity of consumer demand. Most significant, however, is the defendant's share of the relevant market.

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

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

#### **HN12**[ **Monopolies & Monopolization, Attempts to Monopolize**

In a claim of attempted monopolization under **15 U.S.C.S. § 2**, a dangerous probability of monopoly power exists where the defendant possesses a significant market share when it undertakes the challenged anticompetitive conduct. Nonetheless, while the size of a defendant's market share is a significant determinant of whether the defendant has a dangerous probability of successfully monopolizing the relevant market, it is not exclusive.

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

#### **HN13**[ **Monopolies & Monopolization, Attempts to Monopolize**

Courts will typically be able to find a dangerous probability of success at monopolization where defendants have a 50 percent or more share of the relevant market. Defendants with shares less than 30 percent are rarely

determined to possess a dangerous probability. Those with a share between 30 and 50 will have a dangerous probability if other factors are present.

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

#### **HN14** [blue icon] **Regulated Practices, Monopolies & Monopolization**

In **antitrust law**, entry barriers refer either to long-run costs that were not incurred by incumbent firms but must be incurred by new entrants or to factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.

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

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

#### **HN15** [blue icon] **Monopolies & Monopolization, Actual Monopolization**

The offense of monopoly under **15 U.S.C.S. § 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 superior product, business acumen, or historical accident. Plaintiffs must also establish that they suffered antitrust injury.

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

#### **HN16** [blue icon] **Regulated Practices, Monopolies & Monopolization**

Monopoly power is the power to control prices or exclude competition. The United States Third Judicial Circuit examines these two factors conjunctively. The size of market share is a primary determinant of whether monopoly power exists.

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

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

#### **HN17** [blue icon] **Market Definition, Relevant Market**

The same tests used to determine the relevant market in cases of actual monopolization are applied in attempted monopolization actions.

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

#### **HN18** [blue icon] **Regulated Practices, Monopolies & Monopolization**

In the United States Third Judicial Circuit, a market share of 31 percent is insufficient as a matter of law to establish monopoly power.

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

## [\*\*HN19\*\*](#) [down] **Regulated Practices, Monopolies & Monopolization**

Leveraging involves the use of monopoly power in one market to gain an advantage in another market, and the use of such power violates [15 U.S.C.S. § 2](#) of the Sherman Act. The essence of a leveraging claim is the use of monopoly power at one stage of production or in one market to gain a monopoly or a competitive advantage at another stage of production or in another, related market. In the United States Third Judicial Circuit, a plaintiff must show that the defendant gained more than a mere competitive advantage in the residential heating market. Rather, in order to prevail upon a theory of monopoly leveraging, a plaintiff must prove threatened or actual monopoly in the leveraged market.

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

## [\*\*HN20\*\*](#) [down] **Regulated Practices, Price Fixing & Restraints of Trade**

See [15 U.S.C.S. § 1](#).

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

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

## [\*\*HN21\*\*](#) [down] **Regulated Practices, Price Fixing & Restraints of Trade**

In order to present a valid claim for illegal restraint of trade under [15 U.S.C.S. § 1](#) of the Sherman Act, a plaintiff must prove: 1) the defendants contracted, combined or conspired among each other, 2) the combination or conspiracy produced anticompetitive effects within the relevant product and geographic markets; 3) the objects of the conduct pursuant to that contract or conspiracy were illegal; and 4) the plaintiffs were injured as a result of that conspiracy.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Contracts Law > Defenses > Illegal Bargains

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

953 F. Supp. 617, \*617L<sup>A</sup> 1997 U.S. Dist. LEXIS 1134, \*\*1

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

## [\*\*HN22\*\*](#) [] Practices Governed by Per Se Rule, Boycotts

Since virtually all business agreements restrain trade to some extent, [15 U.S.C.S. § 1](#) of the Sherman Act is construed to make illegal only those contracts that constitute unreasonable restraints of trade. Certain agreements, 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. Such plainly anticompetitive agreements are illegal per se. Examples of per se violations include tying agreements and group boycotts.

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

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

## [\*\*HN23\*\*](#) [] Price Fixing & Restraints of Trade, Tying Arrangements

Under [antitrust law](#), in a tying arrangement, the seller sells one item, known as the tying product, on the condition that the buyer also purchases another item, known as the tied product. Before a court can conclude that a tying arrangement exists, however, it must find that the "tied" product and the "tying" product are two separate products.

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

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

## [\*\*HN24\*\*](#) [] Price Fixing & Restraints of Trade, Tying Arrangements

In analyzing whether two products are separate for purposes of determining the existence of a tying arrangement, the fact that there are not dual markets strongly suggests that there are not separate products.

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

## [\*\*HN25\*\*](#) [] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A group boycott is a concerted effort by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Typically, the boycotting group combines to deprive would-be competitors of a trade relationship that they need in order to enter, or survive in, the level wherein the group operates.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > General Overview

953 F. Supp. 617, \*617L<sup>A</sup> 1997 U.S. Dist. LEXIS 1134, \*\*1

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

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

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

#### [\*\*HN26\*\*](#) [blue icon] **Price Fixing & Restraints of Trade, Vertical Restraints**

Under **antitrust law**, a vertical restraint of trade is between entities operating at different levels of the market structure, such as manufacturers and distributors. A horizontal restraint of trade is among competitors at the same level of distribution. A purely vertical arrangement, by which, for example, a supplier or dealer makes an arrangement exclusively to supply or serve a manufacturer, is not a group boycott.

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

#### [\*\*HN27\*\*](#) [blue icon] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A mere promotional incentive which may tend to persuade economic actors to choose one product or service over another cannot be classified as a group boycott under **antitrust law**.

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

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

#### [\*\*HN28\*\*](#) [blue icon] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In determining whether restraints of trade violate **antitrust law**, the "quick look" rule of reason analysis applies where per se condemnation is inappropriate, but a full-blown industry analysis is not required to demonstrate the anticompetitive character of an inherently suspect restraint.

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

Commercial Law (UCC) > ... > Contract Terms > Gap Filler Provisions > Output, Exclusive & Requirements Agreements

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

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

#### [\*\*HN29\*\*](#) [blue icon] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

In **antitrust law**, an exclusive dealing agreement requires the purchaser not to deal in the goods of a competitor of the seller. Generally, the seller agrees to sell to a buyer on the condition that the buyer agrees not to deal in competitive products.

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

### **HN30** [+] Exclusive & Reciprocal Dealing, Exclusive Dealing

Under **antitrust law**, an exclusive dealing contract conditions future dealing on the purchaser's agreement not to deal with the supplier's competitors.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

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

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

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

### **HN31** [+] Exclusive & Reciprocal Dealing, Exclusive Dealing

In applying **antitrust law**, a court evaluates both exclusive dealing arrangements and vertical restraints under the "rule of reason" analysis. The inquiry mandated by the rule of reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. The rule of reason analysis requires a court to consider all relevant factors in examining a defendant's purpose in implementing a restraint and the restraint's effect on competition.

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

Evidence > Burdens of Proof > General Overview

### **HN32** [+] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the rule of reason analysis in **antitrust law**, a plaintiff bears the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic

markets. The adverse impact must be on competition, not on any individual competitor or plaintiff's business. A plaintiff satisfies 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.

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

### [\*\*HN33\*\*](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the traditional rule of reason, the true test of illegality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question, a court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, and all relevant facts.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Evidence > Burdens of Proof > General Overview

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

### [\*\*HN34\*\*](#) Per Se Rule Tests, Manifestly Anticompetitive Effects

Under the rule of reason analysis in ***antitrust law***, once the plaintiff meets the initial burden of adducing adequate evidence of defendant's market power or actual anticompetitive effects, the burden shifts to defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective. To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.

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

### [\*\*HN35\*\*](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In applying the rule of reason analysis under ***antitrust law***, while not controlling, an examination of a defendant's market power provides a starting point for a court's evaluation of the challenged restraint's impact on competition.

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

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN36\*\*](#) Regulated Practices, Price Fixing & Restraints of Trade

In determining market power requisite to analyzing a claim under [15 U.S.C.S. § 1](#) under the Sherman Act, when considered in conjunction with other factors like barriers to entry, control over a superior resource, relative size, strength of the competition, and other market specific characteristics, market share may indicate market power.

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

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN37\*\*](#) **Regulated Practices, Price Fixing & Restraints of Trade**

A declining market share may reflect an absence of market power for purposes of a claim under [15 U.S.C.S. § 1](#) of the Sherman Act, but it does not foreclose a finding of such power.

Antitrust & Trade Law > Sherman Act > Defenses

Contracts Law > Defenses > Illegal Bargains

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

### [\*\*HN38\*\*](#) **Sherman Act, Defenses**

In applying the rule of reason, when a plaintiff presents a pro-competitive justification to rebut a claim of illegal trade agreements under [15 U.S.C.S. § 1](#), a court must then examine the pro-competitive justification's anticompetitive effects.

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

### [\*\*HN39\*\*](#) **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In applying the rule of reason to determine whether trade agreements are illegal under [15 U.S.C.S. § 1](#), a court must take into account whether the competition eliminated by the clause is significant within the context of the total competition extant in the industry and attempt to measure the effect of the challenged restriction on the market structure.

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

### [\*\*HN40\*\*](#) **Regulated Practices, Price Fixing & Restraints of Trade**

In determining whether antitrust injury exists requisite to a claim of illegal restraint of trade under [15 U.S.C.S. § 1](#), a court must analyze the antitrust injury from the viewpoint of the consumer. An antitrust plaintiff must prove the challenged conduct affected the prices, quantity, or quality of goods or services, not just his own welfare.

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

Antitrust & Trade Law > Clayton Act > General Overview

#### **HN41** [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

See [15 U.S.C.S. § 14](#).

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

#### **HN42** [blue icon] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Section 3 of the Clayton Act, [15 U.S.C.S. § 14](#), establishing liability for certain restrictive trade agreements, applies to a narrower range of transactions than does [15 U.S.C.S. § 1](#) of the Sherman Act, including goods or commodities but not including real property, advertising, or services. Furthermore, a lesser degree of anticompetitive injury need be demonstrated under section 3 of the Clayton Act than [section 1](#) of the Sherman Act. While [section 1](#) of the Sherman Act applies to actual restraints of trade, section 3 of the Clayton Act condemns sales or agreements where the effect of such sale or contract would, under the circumstances disclosed, probably lessen competition or create an actual tendency to monopoly. The legality of an exclusive dealing arrangement under the Clayton Act depends on whether the competition foreclosed constitutes a substantial share of the relevant market.

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

Energy & Utilities Law > Oil & Petroleum Products > Franchising & Marketing

Antitrust & Trade Law > Clayton Act > General Overview

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

Energy & Utilities Law > Oil & Petroleum Products > Processing & Refining > General Overview

#### **HN43** [blue icon] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Under a "quantitative substantiality" test to determine liability under section 3 of the Clayton Act, [15 U.S.C.S. § 14](#), a case will be made out upon a showing that the exclusive dealing arrangement involved a significant share of the relevant market, or possibly even upon a showing that the arrangement involved a substantial volume of commerce.

Under this test, the only relevant economic indicator is the percentage of the market the contracts foreclose. While the United States Supreme Court relaxes this analysis under the "qualitative substantiality" test, the United States Supreme Court's holding applying the quantitative test remains viable authority.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

#### **HN44**[] **Regulated Practices, Price Fixing & Restraints of Trade**

The manner in which the relevant market is identified under section 3 of the Clayton Act, [15 U.S.C.S. § 14](#) is the same under the Sherman Act.

Antitrust & Trade Law > Clayton Act > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

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

#### **HN45**[] **Antitrust & Trade Law, Clayton Act**

In determining whether a violation of [15 U.S.C.S. § 14](#) exists, the qualitative substantiality test examines three factors. The test weighs 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. Under this test, the degree of market foreclosure is only one of the factors involved in determining the legality of an exclusive dealing arrangement. The United States Third Judicial Circuit applies the qualitative substantiality test.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

#### **HN46**[] **Robinson-Patman Act, Claims**

A considerable number of courts hold that electricity is a commodity for purposes of the Clayton and Robinson-Patman Acts.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

#### **HN47** [ ] **Robinson-Patman Act, Claims**

See [15 U.S.C.S. § 13\(c\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

#### **HN48** [ ] **Robinson-Patman Act, Claims**

The provisions of [15 U.S.C.S. § 13\(c\)](#) of the Robinson-Patman Act are designed to eliminate the competitive advantage large buyers and sellers attained over their smaller competitors by virtue of their economic clout and bargaining power. The section forbids payment of unearned monies to the other party to a transaction or to an agent who is subject to the control of a person other than the one making the payment. Although the purpose of that section is to eliminate unfair price discrimination, existence of that factor is not a prerequisite to liability.

Business & Corporate Compliance > ... > Exports & Imports > Duties, Fees & Taxes > Duty Free Merchandise

Business & Corporate Law > Agency Relationships > Fiduciaries > Fiduciary Duties

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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Business & Corporate Law > Agency Relationships > Fiduciaries > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Governments > Fiduciaries

#### **HN49** [ ] **Duties, Fees & Taxes, Duty Free Merchandise**

[15 U.S.C.S. § 13\(c\)](#) encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent, representative, or other intermediary in a transaction involving the sale or purchase of goods. For a finding of commercial bribery, a plaintiff must show that the illegal payments in question crossed the line from buyer to seller or vice-versa.

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

#### [\*\*HN50\*\*](#) [] **Commercial Interference, Contracts**

Under an action for tortious interference with contractual relations at Pennsylvania common-law, one who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

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

#### [\*\*HN51\*\*](#) [] **Commercial Interference, Contracts**

In analyzing a claim for tortious interference with contractual relations, the plaintiff's interest in his contractual rights and expectancies must be weighed against the defendant's interest in freedom of action. If the defendant's conduct is predatory, the scale on his side may weigh very lightly, but if his conduct is not predatory, it may weigh heavily. The issue is whether in the given circumstances his interest and the social interest in allowing the freedom claimed by him are sufficient to outweigh the harm that his conduct is designed to produce. In deciding the issue, the nature of his conduct is an important factor.

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

#### [\*\*HN52\*\*](#) [] **Commercial Interference, Contracts**

In determining the impropriety of an actor's conduct in a claim of tortious interference of contractual relations, Pennsylvania courts consider seven factors: 1) the nature of the actor's conduct; 2) the actor's motive; 3) the interests of the other with which the actor's conduct interferes; 4) the interests sought to be advanced by the actor; 5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; 6) the proximity or remoteness of the actor's conduct to the interference, and 7) the relations between the parties.

Torts > Business Torts > General Overview

#### [\*\*HN53\*\*](#) [] **Torts, Business Torts**

A defendant's actions need not be unlawful under federal antitrust statutes to be tortious.

Torts > Business Torts > General Overview

#### [\*\*HN54\*\*](#) [] **Torts, Business Torts**

Under a common-law claim of unfair competition, one who causes harm to the commercial relations of another by engaging in a business or trade is not subject to liability to the other for harm unless: 1) the harm results from other actions or practices of the actor determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public; or 2) the acts or practices of the actor are actionable by the other under federal or state statutes. This includes a residual category encompassing other business practices determined to be unfair. An act or practice is likely to be judged unfair only if it substantially interferes with the ability of others to compete on the merits of their products.

Antitrust & Trade Law > Sherman Act > General Overview

## [HN55](#) [+] Antitrust & Trade Law, Sherman Act

The Sherman Act is merely the application of the common-law doctrine concerning the restraint of trade to the field of interstate commerce.

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

Torts > ... > Concerted Action > Civil Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

## [HN56](#) [+] Conspiracy, Elements

To establish civil conspiracy, a plaintiff must demonstrate that two or more persons combined or agreed with the intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy. This unlawful intent must be absent justification.

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For YEAGER FUEL, INC., RESPONDENT (92-CV-2359): CATHERINE PANCHOU COX, HARVEY, PENNINGTON, HERTING & RENNEISEN, LTD., PHILA, PA USA.

**Judges:** John R. Padova, J.

**Opinion by:** John R. Padova

## Opinion

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**OPINION**

**Padova, J.**

January 27, 1997

The Court commences another chapter in this protracted and multifarious litigation. Defendant, Pennsylvania Power and Light ("PP&L"), operates an electric utility in central and northeastern Pennsylvania and [\[\\*\\*5\]](#) constitutes the sole source of electric power in those regions. Plaintiffs, fuel oil dealers,<sup>1</sup> compete directly with PP&L in the market for residential heating and related equipment in PP&L's service area. Plaintiffs contend that PP&L unlawfully restrained trade through business practices and marketing schemes in violation of both federal antitrust laws and state common-law. PP&L currently submits, for the Court's consideration, its Motion for Summary Judgment.

It should be noted at the outset that both parties have presented the Court well drafted, comprehensive, concise, [\[\\*\\*6\]](#) and organized briefs, with relevant submissions attached thereto. During oral argument on the Motion, both sides crafted compelling arguments, and the Court, in evaluating this Motion, faces a difficult task. After much deliberation, and for the following reasons, the Court will grant in part and deny in part PP&L's Motion.

**I. INTRODUCTION**

**A. PROCEDURAL HISTORY**

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<sup>1</sup> Plaintiffs are: Apgar Oil Co.; Atlantic Oil; H. John Davis, Inc.; Deiter Brothers Fuel; Desousa Oil; Freyham's Fuel Oil; Harned Durham Oil; Guy Heavener, Inc.; Carlos R. Leffler; C.A. Lessig, Inc.; Mansfeld Fuel Oil Co.; W.C. Reichenbach; Schwanger Brothers; Senick, Inc.; Sico Co.; Arthur J. Ulrich; Union Fuel Co.; Ralph D. Weaver, Inc.; Whitlock & Woerth; Yeager's Fuel, Inc.; Zongora Fuel, Inc.; and Losch Boiler Sales & Servs. Co.

## 1. The Initial Complaint

In August, 1991, various fuel oil dealers filed a complaint in this Court alleging violations of [§§ 1](#) and [2](#) of the Sherman Antitrust Act ("Sherman Act"), [15 U.S.C.A. §§ 1, 2 \(West Supp. 1996\)](#); [section 2\(c\)](#) of the Robinson-Patman Price Discrimination Act ("Robinson-Patman Act"), [15 U.S.C.A. § 13\(c\) \(West 1973\)](#); section 3 of the Clayton Antitrust [\[\\*632\]](#) Act ("Clayton Act"), [15 U.S.C.A. § 14 \(West 1973\)](#); and section 1962(c) of the Racketeer Influenced and Corrupt Organization Act ("RICO"), [18 U.S.C.A. §§ 1961-1968](#) (West 1984 & Supp. 1995). In April, 1992, Losch Boiler Sales & Service Company, a fuel oil and related equipment dealer, filed a separate complaint against PP&L in this Court asserting essentially the same claims, with the addition of a claim under § 3 of the Robinson-Patman [\[\\*\\*7\]](#) Act, [15 U.S.C.A. § 13a \(West 1973\)](#) and state-law claims of unfair competition and civil conspiracy. Both Complaints rested on the same factual allegations, and the Court consolidated the cases. (See Doc. Nos. 89, 144 (consolidating cases)). Generally, Plaintiffs alleged that PP&L engaged in illegal promotional strategies, such as cash incentives, reduced electric rates, rebates, and subsidized advertising, in an effort to encourage the installation of electric heat pumps in homes located in its service area.

## 2. PP&L's First Motion For Summary Judgment

In early 1992, PP&L moved for summary judgment. By Opinion and Order dated September 8, 1992, this Court granted in part and denied in part PP&L's Motion. See [Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 804 F. Supp. 700 \(E.D. Pa. 1992\)](#), *aff'd in part, rev'd in part, 22 F.3d 1260 (3d Cir. 1994)* ("Yeagers I"). Accepting PP&L's contention that the challenged conduct constituted part and parcel of the Commonwealth of Pennsylvania's energy conservation policies, and having determined that the allegedly anticompetitive behavior was conducted "pursuant to a clearly articulated state policy and under active [\[\\*\\*8\]](#) state supervision," the Court determined that [Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 \(1943\)](#), immunized PP&L from federal antitrust and racketeering liability. [Yeagers I, 804 F. Supp. at 702](#). Similarly, the Court dismissed the RICO claim in the absence of a properly pleaded predicate act.

The United States Court of Appeals for the Third Circuit affirmed in part and reversed in part in [Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 22 F.3d 1260, 1263 \(3d Cir. 1994\)](#) ("Yeagers II"). Reversing this Court's decision regarding the federal antitrust claims, Yeagers II narrowed the focus of those claims considerably, extending immunity to PP&L's practice of "offering builders and developers cash grants and other incentives, and . . . offering consumers a special electric rate for installation of high efficiency electric heating systems." [Id. at 1263](#). This protection did *not*, however, insulate PP&L "to the extent that [PP&L] made these offers contingent upon the all-electric development agreements . . . , i.e., for actions undertaken in connection with all-electric development agreements." [Id. at 1263, 1272](#). The Third Circuit [\[\\*\\*9\]](#) described the all-electric development agreements ("all-electric agreements") as follows:

Although not specifically alleged in the Oil Dealers' Complaints, PP&L apparently included in some of its incentive offers provisions such as the following:

Developer must agree that the entire development will consist of only electrically heated units during the term of this Agreement. Completion of a non-electrically heated unit shall void this Agreement and the System grants for future units in the development will revert to whatever applicable program, if any, is in effect at the time.

[Id. at 1263.](#)

In allowing to proceed those antitrust claims which alleged that "PP&L provided benefits to builders and developers in exchange for entry into all-electric development agreements," [id. at 1263](#), Yeagers II bestowed immunity on PP&L with respect to the "RTS Rate" and other incentive programs that it offered "free of all-electric development agreements to builders and developers pursuant to a clearly articulated and affirmatively expressed policy." [Yeagers II, 22 F.3d at 1264, 1266](#) (defining "RTS Systems" as those which "promote load management by heating [\[\\*\\*10\]](#) water during off-peak hours . . . and storing it for use during peak hours . . . . PP&L offered a special

rate (the 'RTS Rate') to homeowners purchasing homes with these units because RTS systems are more expensive than electric baseboard heating"). To the extent that those incentives [\*633] were offered in conjunction with the all-electric agreements, however, PP&L received no immunity.

### **3. The Utility Commission**

The Bureau of Conservation, Economics & Energy Planning (the "Bureau") is an arm of the Pennsylvania Public Utilities Commission ("PUC"). In an 1989 internal report, the Bureau "found that PP&L's offering of certain incentives to owners and builders to install high efficiency electric heating systems in new homes was a legitimate load management program." *Id. at 1268*. Despite the 1989 report approving PP&L's use of cash incentives, in March 1993, the PUC altered its policy, disallowing the use of such incentives. The PUC now requires approval of certain promotional activities implemented by utilities, "prohibits the use of cash to influence builders and developers[,] . . . [and forbids] delivery of allowances such as cash or appliances to builders and developers" [\*\*11] in order to influence their choice of energy for use in new residential developments." *Id. at 1269* (citing 52 Pa. Code § 57.63). Under the new PUC regulations -- issued March 19, 1993 and effective July 24, 1993 - a "promotional activity" includes:

[a] thing done by a utility with the object of bringing about an increase, or preventing a decrease, in the quantity of its service purchased by the public or with the object of inducing any person to purchase its service, or select or install any appliance or equipment designed to use its service, in preference to a competing form of energy. A demand-side management program approved by the Commission, with the object of encouraging customers to conserve energy or to shift demand from or reduce demand during peak periods, shall not be considered a promotional activity for the purpose of this subchapter.

(Pl.'s Mem. Opp. Ex. 57 ("Pl.'s Ex. ") (citing 52 Pa. Code. § 57.61)). The new regulations specifically forbid any utility, in the absence of PUC approval, from *inter alia* "delivering anything of more than token value to an architect, engineer, builder, developer, or other person for services performed" [\*\*12] or to be performed in connection with realty, other than realty acquired or intended for acquisition by the utility for use in the conduct of its own business." *Id.* (citing 52 Pa. Code § 57.63(2)).

In light of the PUC's changed position, *Yeagers II* further limited PP&L's immunity to *past* conduct: "the fact that the PUC now prohibits such actions does not mean that PP&L should be denied state action immunity for its past activity." *Yeagers II*, 22 F.3d at 1269.

### **4. The Amended and Consolidated Complaint**

On August 11, 1995, Plaintiffs filed an Amended and Consolidated Complaint ("Am. Compl.") containing additional factual allegations. Specifically, the Amended Complaint alleges that PP&L received advanced notice of all new construction in its service area, offered developers and builders cash grants for the installation of electric heat, and sought commitments from developers and builders to exclude fossil fuel from new developments. According to Plaintiffs, PP&L also offered and made cash payments to contractors and customers whose residences were already heated by fossil fuel in an effort to persuade them to convert those heating systems to electric ("conversion" [\*\*13] grants"). In exchange for the grants, the contractors and homeowners had to agree that the electric heating device would not be supplemented by any fossil fuel device.

The Amended Complaint presents eight Counts: § 1 of the Sherman Act (Count I); section 2 of the Sherman Act (Count II); section 2(c) of the Robinson-Patman Act (Count III); section 3 of the Clayton Act (Count IV); common-law restraint of trade (Count V); tortious interference with contractual relations (Count VI); unfair methods of competition (Count VII); and civil conspiracy (Count VIII). (See Def.'s Mem. Supp. Mot. Summ. J. Ex. 1) ("Def.'s Ex. ").<sup>2</sup>

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<sup>2</sup> By Order dated September 26, 1995, United States Magistrate Judge Charles B. Smith refined the allegations by striking all RICO claims previously dismissed; all antitrust claims concerning the RTS Rate that were previously dismissed; all class

**[\*\*14] [\*634] 5. Scope of the Remand**

PP&L is immunized only for the cash grants and other incentives it offered before July 24, 1993 -- including special rates for customers who installed high-efficiency heating systems -- that were *not* conditioned on, or exchanged for, an agreement to exclude oil or fossil fuel for such residential uses. All other alleged incentives -- including both the conversion grants and the all-electric agreements -- which properly fall within the purview of the Amended and Consolidated Complaint, and which the Court has not dismissed, constitute the present scope of this litigation. The Court will examine such conduct herein, if and as implicated by PP&L's Motion.

**B. FACTUAL BACKGROUND**

In the instant case, the parties performed extensive briefing and offered submissions designed to substantiate their respective theories of the case. They present different interpretations of the events that transpired in the heating, fuel, and equipment market in central and northeastern Pennsylvania between the late 1970s and the early 1990s. At this point, the Court examines both Plaintiffs' and PP&L's positions.

**1. Plaintiffs' Position**

**(a). Costs and Efficiency**

[\*\*15] Oil and fossil fuel present the most cost-efficient heating systems and are less to install and operate than their gas and electric counterparts. Electric heat involves heat pump systems as well as baseboard heating systems. When heating a space, the heat pump gathers outside air, funnels it through the pump, increases the air's temperature, and releases the air through vents into the space being heated. If the temperature drops below 45 degrees, the heat pump becomes inefficient. (Pl.'s Ex. 4 at 103).

"Resistance" or baseboard heat costs much less to install than oil or gas but its operating costs are two and three times the price of oil or gas. (Pl.'s Ex. 1 at 161; Ex. 22 at 8). While the heat pump presents a more efficient alternative to the electric baseboard, its operating costs are 30% to 40% higher than fossil fuel. (Pl.'s Ex. 22 at 8). In the space heating context, oil costs \$ 11.07 per million Btu, gas \$ 11.40, electric baseboard heat \$ 22.56, and heat pump heat \$ 13.77. (Pl.'s Ex. 48).<sup>3</sup> When heating water, the heat pump costs \$ 10.25 per million Btu, with gas and oil costing \$ 9.79 and \$ 9.37 respectively. (*Id.*). When combined with oil as a supplemental heating system, [\*\*16] however, the heat pump presents a lower operating cost than any single source of heat, lower than regular electricity, oil, propane, or the ordinary, unsupplemented heat pump. (Pl.'s Ex. 1 at 343; Ex. 17).

Electric heat also imposes higher installation costs. Specifically, in 1989, gas (forced air) cost \$ 1,600 to install and \$ 450 per year to operate, while the same numbers for oil, electric baseboard, and heat pump systems were \$ 1,900/\$ 429, \$ 800/\$ 1,245, and \$ 3,000/\$ 623 respectively. (Pl.'s Ex. 26 at 2). Electric rates have generally increased more rapidly than oil or gas. Between 1980 and 1990, electric rates increased 91%, gas rates increased 43%, and oil rates decreased 8% (Pl.'s Ex. 49). Electric heating equipment also depreciates and becomes obsolete faster than oil heating equipment. A heat pump only lasts for 10 to 15 years while [\*\*17] oil heating equipment might last 30 years. (Pl.'s Ex. 58 at 16; Ex. 8 at 148).

**(b). Programs and Initiatives**

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certification claims; the § 3 Robinson-Patman Act claim; paragraph 37 -- alleging "as part of its scheme, PP&L initiated a pricing schedule for its off-peak electric heating customers which provided electricity for such heating at less than PP&L's cost" -- without prejudice to be addressed through a motion *in limine*; and the added claims of restraint of trade and tortious interference with contractual relations. (See Def.'s Ex. 2).

<sup>3</sup> "Btu" refers to "British thermal unit:" "the amount of heat required to raise a pound of water one degree Fahrenheit." *Black's Law Dictionary* 192 (6th ed. 1990).

"As PP&L emerged from conservation directed programs in the 1970s and early 1980s, emphasis was directed to revenue growth while uncoupling the rate-of-demand growth." (Pl.'s Ex. 49 at 8). PP&L's revenue comes from three major sources, the [\*635] residential market (\$ 800,587,000); the commercial market (\$ 647,949,000); and the industrial market (\$ 503,806,000). (Pl.'s Ex. 41). The residential market, by far the largest, became the target for revenue growth. In 1982 and 1983, PP&L sought to increase its sales by 3 1/2% (Pl.'s Ex. 9 at 56-57).

Several PUC decisions, however, undercut PP&L's ability to generate revenue. Between 1978 and 1979, the PUC found that PP&L could no longer use the savings it achieved through sales to other electric utilities on an interchange to improve the earnings and profits of the company. Rather, the PUC ruled that any savings accumulated had to be used to reduce the energy cost rate. (Pl.'s Ex. 9 at 52). Furthermore, in the early 1980s, PP&L constructed two nuclear power plants. Specifically, "Unit 1" of PP&L's Susquehanna nuclear power plant [\*\*18] began commercial operation in 1983, and "Unit 2" at Susquehanna began commercial operation in 1985. PP&L appealed, albeit unsuccessfully, to the PUC in both 1983 and 1985, asking for a rate increase to offset the increased costs associated with constructing Unit 1 and Unit 2. The PUC found, however, that PP&L was experiencing capacity that exceeded its requirements for the remainder of the century. (Def.'s Ex. 66 at 2-3; Pl.'s Ex. 9 at 53).

In order to increase its revenues, PP&L now had to make "sales through [its] own customers or through contract sales to other entities." (Pl.'s Ex. 52). PP&L looked to the residential market, specifically heat pumps, as the vehicle to increase kilowatt hour sales. (See Pl.'s Ex. 9 at 90; Ex. 28 (describing heat pumps as "the solution to PP&L's long term marketing needs"); Ex. 49 (remarking "the electric heat pump is the primary competitor of gas heat in both single family and multi-family houses")). PP&L also began offering cash incentives for the installation of "off-peak" electric thermal storage systems which used heat pumps. As early as 1981, PP&L had been providing cash grants to customers. (Pl.'s Ex. 9 at 69). Between 1985 and 1989, [\*\*19] PP&L awarded between \$ 750 and \$ 1,200 per heat pump in "New Construction Grants" to customers who installed heat pumps. (Pl.'s Ex. 45 at 539; Ex. 55 at 1804-05; Def.'s Ex. 57). PP&L also began to approach developers to advance them advertising subsidies. (Pl.'s Ex. 9 at 75, 95).

PP&L has always been cognizant that (1) builders decide what type of heating equipment will be placed in a home and (2) installation cost is a "critical" concern for new home builders. (Pl.'s Ex. 1 at 124-25; Ex. 26 at 2). PP&L therefore began to leverage its strong rapport with developers, assigning its best consultants to develop long term relationships. PP&L recognized that neither the oil nor gas companies, both of which lacked extensive personnel and organization, could match this effort. (Pl.'s Ex. 9 at 73; Ex. 25). PP&L also reached out, in this respect, to the actual equipment contractors, forming the Central Eastern Pennsylvania Heat Pump Association ("CEPHPA"). PP&L required, as a condition for receiving grant payments, that a CEPHPA member install the heat pump. (Pl.'s Ex. 38 at 154650). In addition, PP&L engaged in cooperative advertising programs with heat pump contractors, furnished both labor [\*\*20] and equipment warranties for heat pumps sold by those contractors, and offered installation bonuses for those contractors. (Pl.'s Ex. 22 at 7).

### **(c). Specific Anticompetitive Conduct**

Between 1983 and 1995, PP&L paid in excess of \$ 25 million in grants to builders, developers, and homeowners in an effort to induce the use of electric home heating in its service territory. (Pl.'s Ex. 60). PP&L designed these grant programs to block the extension of gas and fossil fuels into newly constructed developments. PP&L paid some grants in advance, in the hope that all homes in a new development would contain electric heating. (Pl.'s Ex. 22 at 5). In addition to cash incentives, PP&L provided builders with model homes and cooperative advertising arrangements. (Pl.'s Ex. 22 at 4; Ex. 24). The model home grants involved payments of up to \$ 3,100 per model home, with PP&L paying the builder or contractor to install electric storage heating and water heating in the model. Under the cooperative advertising arrangements, PP&L would [\*636] provide grants for the model home installation of heat pumps, extend advertising allowances, pay as much as 50% of a builder's advertising costs, and provide development [\*\*21] or on-sight signs and promotional materials. (Pl.'s Ex. 22 at 4-5).

In 1986, the price of gas and oil dropped substantially, increasing competition from both gas and oil companies in the heating market. (Pl.'s Ex. 9 at 93-94). In an effort to respond to this surge in competition, PP&L began using, as

early as 1987; the all-electric agreements. (Pl.'s Ex. 24). The all-electric agreement was essentially a contract entered into between PP&L and a builder or developer that typically contained the following provision: "developer agrees that the entire Development will consist of only electrically heated houses. Completion of a nonelectrically heated house shall void this Agreement, and the System grants for future houses in Development will be those announced by PP&L for the applicable time period." (Pl.'s Ex. 31).

The all-electric agreement required that (1) the structure built would be a "new single, town, twin, condominium, apartment, or manufactured home with a high efficiency air- or ground-sourced heat pump;" (2) the customer would install electric domestic water heating; (3) CEPHPA, and only CEPHPA, would install the heat pump; and (4) the heat pump would not be supplemented by [\*\*22] oil, kerosine, coal, or natural or bottled gas. PP&L, although not a manufacturer of heat pumps, agreed to furnish extended warranties for heat pumps installed by CEPHPA. In exchange, the builder would receive a string of cash grants upon the installation of each system (or sometimes in advance), a cooperative advertising allowance, and reimbursement of cooperative advertising expenditures. In addition, the builder or developer agreed to actively promote heat pumps and to inform PP&L of the names of prospective home buyers for contact by PP&L. (Pl.'s Ex. 22; Ex. 31; Ex. 74). The agreements also applied to a developers' conversion of an existing home, imposing the same no supplementation requirement. While PP&L employed the all-electric agreements as marketing tools as early as 1987, it did not inform the PUC of this practice until May, 1995. (Pl.'s Ex. 30; Ex. 31; Ex. 36; Ex. 38; Ex. 61; Ex. 63; Ex. 64; Ex. 65; Ex. 67).

Certain benefits associated with its status as the sole source of electric power in the region provided PP&L with unfair advantages. PP&L identified the significant home developments through its "Major Load Study." (See Pl.'s Ex. 70 (using Major Load Study results [\*\*23] to identify developments "that have committed a portion or the entire development for the installation of fossil fuel heating systems" and suggesting that action be taken to contact the builders and convince them that electric is a better alternative than fossil fuels)). PP&L received advance notice of new construction; enclosed "bill inserts" in electric bills as advertisements; provided underground wiring allowances to builders in contravention of a PUC ruling that builders were responsible for trenching and backfilling; disbursed payments through its thermal integrity program; and reimbursed builders for the costs of interior improvements. (Pl.'s Ex. 8 at 144-47, 218-19; Ex. 9 at 127-28, 148; Ex. 39; Ex. 43 at 4; Ex. 66; Ex. 74; Def.'s Ex. 59 at 410). PP&L also began initiatives to convert non-electric, existing homes to electric heat by using its customer database and the aforementioned bill inserts to target customers and by extending low-interest loans. A homeowner making the conversion could not supplement the electric system with an oil or gas system. (Pl.'s Ex. 9 at 127; Ex. 43 (stating "the only market which has significant potential above and beyond that which we are presently [\*\*24] addressing is the residential conversion market"); Ex. 72; Def.'s Mem. Supp. Mot. Summ. J. at 8; Def.'s Ex. 52; Ex. 53).

PP&L increased its market share of the new home market from 61.5% in 1981 to about 84% in 1986. This saturation (84% of the market) was 17% higher than the nearest utility, the Philadelphia Electric Co. (Pl.'s Ex. 8 at 135). As of November, 1987, only 9% of all new construction had oil heat. (Pl.'s Ex. 22 at 2). Despite PP&L's near control of the new construction market in 1986, it initiated the all-electric agreement program in the following year (1987) to further [\*637] the anticompetitive goal of complete domination. Between 1981 and 1995, 72% of all new homes built in PP&L's service area were electrically heated. (Pl.'s Ex. 46). According to estimates computed by PP&L in 1987, the absence of these marketing efforts would have reduced its share of the new home market to 55%. (Pl.'s Ex. 22 at 2).

In 1980, the last year before the grant program was initiated, heat pumps were found in only 12.1% of new residences. Between 1987 and 1995, 42,797 heat pumps were installed in 133,756 newly constructed residences, and the market saturation of heat pumps increased to an average [\*\*25] of 32% during this period. (Pl.'s Ex. 46). In 1990, oil-heated households accounted for 41% of the market in the entire northeastern United States and 40% of the market in PP&L's service area. (Pl.'s Ex. 49 at 2).

## 2. PP&L's Position

PP&L offers a different interpretation of the facts regarding the home heating market in its service area. In the late 1970s, the PUC imposed strict regulations on gas companies that severely constrained line extension and

essentially removed gas as a competitor from the heating market. The stringent PUC guidelines acted as a *de facto* "gas ban." (Def.'s Ex. 10 at 36-37). Beginning in 1981, PP&L began promoting the use of residential electric heating systems which used energy in off-peak periods. In 1982, PP&L offered cash grants of up to \$ 1,200 to approximately 250 customers to encourage the installation of these systems and to offset their high installation costs. (Def.'s Ex. 57 at 378). PP&L required that, in exchange for these grants, the customer would agree to refrain from supplementing the system with another heat source. PP&L imposed this requirement to recoup its initial investment in disbursing the grant. (Def.'s Ex. 8 at 141). **[\*\*26]** This system has carried different names over the years, i.e., the RTS System, the Electric Thermal Storage ("ETS") system, and the Supplemental Electric Storage Systems ("SESS") system.

In 1983, PP&L initiated the conversion grant program that offered cash grants for customers who converted from fossil fuel to off-peak electric heating systems. In 1987, PP&L added high-efficiency electric heat pumps to the list of heating systems that entitled customers to cash grants. (Pl.'s Ex. 43). A typical conversion agreement required that CEPHPA install the heat pump, that the customer not supplement the system with a fossil fueled system, and that the customer install electric domestic water heating. Between 1988 and 1990, PP&L converted 350 homes. (Def.'s Ex. 15; Ex. 52; Ex. 53; Ex. 59). During the same period, PP&L was losing between 2,000 and 3,000 electric heat accounts per year. (Def.'s Ex. 11 at 228).

#### **(a). Gas Utility**

The PUC lifted the gas ban in the mid-1980s, and gas companies, specifically UGI Utilities ("UGI"), launched aggressive marketing initiatives designed to increase their share of the residential heating market. In 1987, UGI intensified marketing efforts in both commercial **[\*\*27]** and residential markets against electric and fuel oil companies, resulting in increased market share. Specifically, UGI's share of the market for new homes constructed in its territory grew from 12% in 1987 to over 50% in 1995, and in 1995, UGI held a 98% market share in new residential developments where natural gas was available. In 1995, 60% of UGI's additions came from new home construction and 40% came from conversions from other fuels, principally oil. In the aggregate, between 1987 and 1995, UGI converted approximately 20,857 residential customers from other heating fuels to natural gas, 68% of which came from oil and 16% of which came from electric. Like PP&L, UGI uses cash rebates, enters into agreements with builders and developers, extends gas mains at no charge, offers reduced rates, engages in cooperative advertising with builders and developers, uses grants to induce conversion, and sells gas appliances at retail. (Def.'s Ex. 49 PP 4, 5, 8, 10, 11, 14, 15; Pl.'s Ex. 49).

#### **(b). All-Electric Development Agreements**

In 1987, as competitive pressure from the gas utilities mounted, PP&L responded **[\*638]** with the all-electric agreements, requiring that each development be "all-electric" **[\*\*28]** and contain a minimum of 10 lots. (Def.'s Ex. 10 at 90; Ex. 16; Ex. 21). Because developers build over an extended period of time, they grew concerned that the grant levels might be reduced and that the payment of sequential grants as the homes reached completion would prove inadequate. To allay these fears, PP&L began to advance the grant money. (Def.'s Ex. 9 at 235-36). In 1989, PP&L expanded the new construction grant programs and the all-electric agreements to encompass the installation of high-efficiency heat pumps. (Def.'s Ex. 8 at 148-49; Ex. 9 at 218; Ex. 18). PP&L ceased using the all-electric agreements as a marketing tool after the PUC changed its regulations with regard to promotional activities in July, 1993. (Def.'s Ex. 66 at 4-5).<sup>4</sup>

#### **[\*\*29] (c). Market Reaction**

Between 1984 and 1995, PP&L's share of the entire home heating market never exceeded 31%. Beginning in 1972, PP&L's share of new residential connections was 44%. This number increased steadily until reaching an all time high in 1986 of 84%. From 1986 to 1995, however, that share declined to 53%. From 1981 through 1986, as

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<sup>4</sup> Plaintiffs contend that PP&L continued to use the all-electric agreements after July, 1993. (Def.'s Ex. 66 (stating "PP&L has signed approximately 25 agreements and proposed agreements with builders/developers since July 23, 1993. Of these, only four contained an all-electric commitment, two dated July, 1993, one dated August, 1993, and one dated September, 1993").)

PP&L's market share increased, PP&L paid grants for off-peak electric systems with respect to 1,587 new homes out of a potential 74,924 in its service area, only 2%. In 1986, when PP&L achieved its highest market share of new residential units, PP&L had not yet employed the all-electric agreements as a marketing tool (first used in 1987), and there was no program in effect to disburse heat pump grants (until 1989). (Def.'s Ex. 14; Ex. 17; Ex. 24; Ex. 55; Pl.'s Ex. 52). PP&L holds a smaller market share (31% or 333,317) of all homes in its service area (1,074,015) than the oil dealers (35.4% or 380,463). (Def.'s Ex. 14; Ex. 20).

Between 1981 and 1995, PP&L paid grants for electric heat installations in only 29,512 homes out of a potential 208,681 new home connections made in those years. In the years between 1987 and 1995, PP&L entered [\*\*30] into only 120 all-electric agreements out of a potential 1,500 new residential developments started in its area. (Def.'s Ex. 10 at 253; Ex. 24). Similarly, the provisions in those agreements requiring that all units contain electric heating systems proved ineffective. From 1987 through 1995, PP&L's share of the new residential market steadily declined. Indeed, several builders and developers testified that they installed the heating system of their choice irrespective of the language articulated in the all-electric agreements. Out of the new developments started in PP&L's service area, some 85% chose *not* to enter into grant agreements with PP&L. (Def.'s Ex. 21; Ex. 25; Ex. 29; Ex. 30; Ex. 31; Ex. 35; Ex. 41; Ex. 44; Pl.'s Ex. 49).

## II. STANDARD OF REVIEW

"At one time, the Supreme Court endorsed a slightly stricter standard of review when a summary judgment order was challenged in an antitrust case." [Ideal Dairy Farms, Inc. v. John Labatt, Ltd.](#), 90 F.3d 737, 747 (3d Cir. 1996) (citations omitted). The Supreme Court abandoned that approach, however, in 1992, and [HN1](#)[<sup>A</sup>] the ordinary [Rule 56](#) standard still applies. *Id.* (citing [Eastman Kodak Co. v. Image Technical Servs., Inc.](#), 504 U.S. 451, 468-69, 112 S. Ct. 2072, 2083, 119 L. Ed. 2d 265 (1992)). See [Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.](#), 959 F.2d 468, 481 (3d Cir.) (stating "it may be that because antitrust cases are so factually intensive that summary judgment occurs proportionately less frequently there than in other types of litigation, but the standard of F.R.C.P. remains the same"), cert. denied, 506 U.S. 868, 113 S. Ct. 196, 121 L. Ed. 2d 139 (1992).

[Rule 56\(c\) of the Federal Rules of Civil Procedure](#) [HN2](#)[<sup>A</sup>] provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and [\*639] admissions on file, together with 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\(c\)](#). An issue is "genuine" only if there is sufficient evidence for a reasonable jury to find for the non-moving party. See [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a [\*\*32] factual dispute is only "material" if it might affect the outcome of the case. *Id.* [Rule 56\(c\)](#) directs summary judgment "after adequate time for discovery . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

## III. FEDERAL ANTITRUST LAWSA. Sherman Act §2

[Section 2](#) of the Sherman Act provides: [HN3](#)[<sup>A</sup>] "**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." [15 U.S.C.A. § 2 \(West Supp. 1996\)](#). Plaintiffs' [§ 2](#) claim alleges "PP&L's actions constitute abuse of monopoly power, attempt to monopolize, leveraging of monopoly, predation through governmental processes and conspiracy to monopolize." Am. Compl. P 64. PP&L's Motion seeks summary judgment on these claims, maintaining (1) it "has not monopolized [\*\*33] or attempted to monopolize the home heating market in violation of Sherman Act [§ 2](#)," (2) that absent market power, there is no "predatory conduct" within the meaning of [§ 2](#) of the Sherman Act, and (3) "Plaintiffs' Monopoly leveraging theory has no merit." (See Def.'s Mem. Supp. Mot. Summ J. at 18, 42).

## 1. Attempted Monopolization

**HN4** [↑] To establish a successful claim under § 2 of the Sherman Act for attempted monopolization, Plaintiffs must "present concrete evidence that (1) [PP&L] had engaged in predatory conduct or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power." *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 750 (3d Cir. 1996). See also *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania*, 745 F.2d 248, 260 (3d Cir. 1984) (listing only two elements for attempted monopolization claim, "(1) a specific intent to monopolize; and (2) the consequent dangerous probability of success within the relevant geographic and product markets" but stating "direct evidence of specific intent need not be shown; it may be inferred from predatory or exclusionary conduct") [\*\*34] (citing *inter alia Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939); *United States v. Jerrold Elec. Corp.*, 187 F. Supp. 545, 567 (E.D. Pa. 1960), aff'd, 365 U.S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806 (1961)), cert. denied, 471 U.S. 1016, 105 S. Ct. 2021 (1985).

### (a). Specific Intent

**HN5** [↑] "Plaintiffs alleging [attempted] monopolization under § 2 must produce intent evidence." *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1199 (3d Cir. 1995). "Specific intent is the intent to accomplish the forbidden objective, an intent that goes beyond the mere intent to do the act. Intent may be inferred by anticompetitive practices or proven by direct evidence." *Great W. Directories, Inc. v. Southwestern Bell Tel. Co.*, 63 F.3d 1378, 1385 (5th Cir. 1995), withdrawn and superseded in part, 74 F.3d 613 (5th Cir. 1996). In establishing specific intent, "a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were [\*\*35] not predominantly motivated by legitimate business aims." *Pennsylvania Dental*, 745 F.2d at 260-61 (citations omitted).

[\*640] Plaintiffs maintain that the record contains ample evidence of PP&L's specific intent to monopolize the residential heating market. Furnishing direct evidence, Plaintiffs point to a statement made by a PP&L marketing executive that "we're striving for total dominance in the new home market. We believe you can put electric heat into at least 85% of all new homes built in our service area this year." (Pl.'s Ex. 43 at 4). PP&L's consistent attempts to increase market share, even after achieving an 84% share in the new home market and a 98% share in the vacation home market, argue Plaintiffs, indicates an unrelenting intent to monopolize. (Pl.'s Ex. 1 at 65-66; Ex. 5 at 85-87).<sup>5</sup> Plaintiffs also point to restrictive covenants PP&L inserted in property deeds requiring that electricity constitute the sole source of energy for homes constructed on the land. (Pl.'s Ex. 53). Plaintiffs rely on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 609 n.39, 105 S. Ct. 2847, 2860 n.39, 86 L. Ed. 2d 467 (1985) (stating "proof of specific intent to engage in [\*\*36] predation may be in the form of statements made by officers or agents of the company . . . or evidence that the conduct was not related to any apparent efficiency") (citation omitted) and *Kelco Disposal, Inc. v. Browning Ferris Indus. of Vermont, Inc.*, 845 F.2d 404, 408 (2d Cir. 1988) (remarking that "tough talk by defendant's employees, coupled with the proof of predatory pricing, more than supports the jury's finding of a specific intent to monopolize"), aff'd, 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989).

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<sup>5</sup> Plaintiffs expert report refers to documents revealing PP&L's intent to maintain or increase market share. These documents state that (1) PP&L aimed for saturation levels of 85% for single homes and 75% for apartments; (2) programs were needed to improve saturation results; "[3] our efforts in the first 3 years have been in the new construction market and we have taken total saturation of electric heat from 61% to 84% in 1986 . . . There are 750,000 homes in our service area with fossil fuel systems as the only potential market which can add significantly to . . . growth;" "[4] the only market which has significant potential above what we are presently addressing is the residential conversion market;" the heat pump program was proposed "to maintain our market share and counter anti-heat pump efforts by the gas and oil companies;" (5) PP&L needed to obtain a higher heat saturation in new construction; and "[6] competition in the residential heating market has intensified and PP&L must expand marketing efforts for the electric heat pump to achieve market share goals." (Def.'s Ex. 22 at 20-23).

[\*\*37] Plaintiffs suggest the record also contains proof of predatory conduct that serves as indirect evidence of specific intent. Plaintiffs first point to PP&L's use of grants, model homes, and cooperative advertising to foreclose competition. Plaintiffs also note that PP&L's director of marketing wrote, in an October 1989 paper titled "Division Operations Strategic Planning Conference:" "Are less profitable market segments valuable if they help block the competition's market development? Through a multi-market electric heat strategy, PP&L has limited the extension of gas lines, thus increasing sales in all segments." (Pl.'s Ex. 27 at 2). Plaintiffs consider this statement indicative of PP&L's intent to forgo profits in an effort to foreclose competition.

Plaintiffs' expert's report suggests that the following illustrates PP&L's intent to monopolize: (1) the exclusionary nature of the all-electric agreements; (2) marketing documents calling for the establishment of a strike force to counter competitive threats; (3) furnishing low-interest loans to homeowners willing to replace existing gas or oil systems with electricity; (4) PP&L documents describing grants and advertising subsidies [\*\*38] as promotional incentives designed to block gas extensions into new developments and displace less costly competing sources of heat; and (5) an internal PP&L document stating "we are experiencing some of the highest saturation rates in the nation," stating PP&L enjoyed "an overall 85% saturation," and warning against "rapidly increasing competition from gas utilities and oil companies in the new home market." (Def.'s Ex. 22 at 8-16).

The expert concluded *inter alia* that PP&L aimed to increase market share, "even if the added growth did not meet its normal rate of return" because, in the words of a PP&L employee, "marketing is here to stay . . . I don't think we will ever return to the conservation days." (Def.'s Ex. 22 at 24). Plaintiffs' expert also believes PP&L relied on residential heating as a major opportunity [\*641] to achieve growth and market penetration and that PP&L "attempted to achieve its goals by excluding competition even though affirmative methods of home heating were more cost effective." *Id.*

PP&L characterizes Plaintiffs' proofs, specifically the statements made by PP&L employees, as nothing more than marketing rhetoric, pointing to [Advo, 51 F.3d at 1199](#) [\*\*39] (interpreting the statements "[1] the ultimate benefit of the TMC program was that [defendant] would be the 'one stop buy,' i.e., the only competitor left, in the eight county Philadelphia market when rates would become 'upwardly adjustable'" and "[2] when you see the competition drowning, stick a water hose down their throat" as "isolated and unrelated snippet[s]" of "colorful, vigorous hyperbole" that "the antitrust statutes do not condemn"). Any attempts to increase market share, argues PP&L, were both expected and lawful. See *id.* (remarking that firms "would try, as a first step, to wrest one or more of the[] large accounts away from [plaintiff]. [Defendant's] proposals to [plaintiff's] largest customers are exactly what we'd expect from a legitimate competitor. That such behavior might be consistent with predation does not mean that [plaintiff] can survive [defendant's] motion for summary judgment").

PP&L reminds the Court that the 84% market share figure discussed referred only to *new* homes and not *all* homes in PP&L's service area. Furthermore, PP&L's share of new homes has eroded since 1986, and its share of the entire residential market [\*\*40] is below Plaintiffs'. According to PP&L, a regulated utility lacks any motivation to monopolize a market; once monopolized, it could not raise prices without PUC approval. In the past, PP&L has received PUC approval with sporadic success. PP&L points to the deposition of the PP&L employee explaining the "total dominance" remark: "It's marketing talk for aggressive marketing to -- to compete strongly in a highly competitive marketplace and to strive for success [not seeking 100% of the market]." (Def.'s Ex. 93 at 90). Finally, attacking the restrictive covenant in the property deeds, PP&L notes that the deeds are dated 1966 and only ran for 10 years. (Pl.'s Ex. 53).

The Court finds that the statements proffered in the instant case provide stronger intent evidence than those evaluated in *Advo*. While *Advo* involved remarks appropriately characterized as nothing more than "aggressive" and "marketing rhetoric," those comments spoke of economic benefits and were couched in motivational statements. By contrast, the record here contains statements reflecting a strategy of total domination of the residential heating market made by an employee of a monopoly with the financial resources [\*\*41] to effectuate that objective. These statements reveal a shift in general policy from a conservationist approach in the late 1970s to an aggressive marketing approach in the mid 1980s that sought an increase in usage. Moreover, the remarks were uttered at a point in time when PP&L controlled a major segment of the new residential construction submarket, and their exclusionary language pertains to *all* companies competing in the residential fuel market as opposed to a specific

and isolated competitor. See [\*Syufy Enter. v. American Multicinema, Inc., 793 F.2d 990, 999 \(9th Cir. 1986\)\*](#) (finding "although Mr. Syufy's remarks to Mr. Durwood are arguably consistent with a simple desire to succeed in free and open competition, the jury could reasonably have inferred a specific intent to monopolize from the threat to run AMC out of town"), cert. denied, 479 U.S. 1034, 107 S. Ct. 884, 93 L. Ed. 2d 838 (1987).

While the Court considers the statements presented more inculpatory and virulent than those examined in *Advo*, it concedes that other cases finding a specific intent to monopolize contained even stronger direct evidence. See [\*Tasty Baking Co. v. Ralston Purina, \[\\*42\] Inc., 653 F. Supp. 1250, 1271-72 \(E.D. Pa. 1987\)\*](#) (finding specific intent evidence through (1) statements that defendant wanted to "take the competition out" and "then increase price" in a "basically non-competitive atmosphere;" (2) the non-discovery of documents wherein defendants "considered the antitrust consequences" of their actions; (3) evidence defendants knew their conduct would implicate antitrust concerns; [\*642] and (4) evidence defendants engaged in pre-acquisition considerations of how defendant would raise prices after the commission of predatory acts). In the case *sub judice*, the aforementioned statements, without more, provide only marginal direct evidence of a specific intent to survive a motion for summary judgment. [\*\*HN6\*\*](#) Accordingly, the Court searches for indicia of anticompetitive or exclusionary conduct as indirect, corroborating evidence of specific intent to supplement the direct evidence proffered. The Court therefore defers ruling on the specific intent issue until it considers the predatory conduct prong of the attempted monopolization elements. See [\*Conoco, Inc. v. Inman Oil Co., Inc., 774 F.2d 895, 905 \(8th Cir. 1985\)\*](#) (stating "isolated statements by [\*43] a single Conoco official . . . whose primary function was to advance WCO's competitive position, are insufficient to prove Conoco's intent to monopolize in the absence of corroborating conduct"); [\*Ashkanazy v. I. Rokeach & Sons, Inc., 757 F. Supp. 1527, 1536 \(N.D. Ill. 1991\)\*](#) (concluding "although fairly virulent, these statements, without more, do not give rise to a reasonable conclusion that Rokeach intended to monopolize -- as opposed to gain a larger share of -- the relevant market, and therefore we reserve judgment on the specific intent issue until we consider evidence of anticompetitive conduct").

### **(b). Predatory Conduct**

Plaintiffs substantiate their allegation of predatory and anticompetitive conduct by looking to the all-electric agreements, cash incentives, and other activity. The all-electric agreements, argue Plaintiffs, used grants, model homes, cooperative advertising, and no supplementation clauses to insure the installation of equipment, i.e., the heat pump, that required a permanent source of electricity. Many of these agreements provided the cash grants in advance, and, according to Plaintiffs, PP&L designed these agreements to block the use or extension [\*44] of fossil fuel in new residential developments. (Pl.'s Ex. 38; Ex. 65).

Plaintiffs also maintain that PP&L obtained agreements from builders stating that, in exchange for cash grants, the builders would refrain from installing gas line extensions. PP&L also reimbursed builders for trenching and backfilling costs. (Pl.'s Ex. 39; Ex. 64 (referring to agreement with "developer whereby he would not extend the gas lines beyond the first home, that has already been committed, if [PP&L] would reimburse him the cost of his trenching and backfilling"). Plaintiffs suggest that builders also resisted homeowners' efforts to install sources of heating other than the heat pump. (Pl.'s Ex. 94 at P 4). Plaintiffs characterize this activity as predatory, designed to increase market share and not to produce superior efficiency, pointing to [\*Aspen, 472 U.S. at 605, 105 S. Ct. at 2859\*](#) (noting "if a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory").

PP&L protests that its lack of market power and its inability to coerce buyers prevents the all-electric agreements from violating the antitrust laws. The all-electric [\*45] agreements, notes PP&L, affected only 120 out of 1,500 potential developments and had no effect on 85% of the new homes built from mid-1981 through 1995 in PP&L's service area. ( [\*Def.'s Ex. 24 P. 24\*](#)). PP&L points to Plaintiffs' deposition testimony that competition would not be restricted if 80% of the market was available. (Def.'s Ex. 70 at 203-04; Ex. 72 at 278-79).

According to PP&L, the all-electric agreements constituted nothing more than legal and permissible discounts made on the condition that the buyer use PP&L's product; PP&L relies on [\*Advo, 51 F.3d at 1203\*](#) & n.13 (finding discounts based on the total amount of advertising purchased by a customer, in conjunction with defendant's failure to

threaten to deny services to refusing customers, did not "offend antitrust principles," especially where plaintiff offered the same discounts). PP&L also notes that both Plaintiffs and UGI offered similar agreements with developers. ( [Def.'s Ex. 49 P. 14](#)(c) (mentioning program whereby UGI agrees to extend gas mains in exchange for non-written agreement from developer that gas usage would justify this investment); Ex. 81 at 128 (referring to program where in return for free use of the oil **["\*\*46"]** tank, the customer had to **["\*643"]** purchase all their heating oil from that specific company)).

The evidence, maintains PP&L, reveals that the all-electric agreements did not prevent builders and developers from offering, choosing, or installing heating systems other than electric; PP&L did not penalize the builders who installed alternative heating systems in violation of the all-electric agreements by withholding electric service; developers agreements with PP&L reflected the developers' own choices; and consumers felt no impact from the agreements because builders constructed "what buyers wanted." (Def.'s Ex. 29 at 39; Ex. 31 PP 4(f), 8; Ex. 32 PP 4(a), 6; [Ex. 33 P. 12](#); Ex. 34 PP 6, 7; [Ex. 35 P. 5\(n\)](#); [Ex. 36 P. 3\(a\)](#); [Ex. 39 P. 4](#); Ex. 40 PP 2-4; Ex. 41 PP 6-8; Ex. 42 PP 4, 10; Ex. 44 PP 3(g), 5). PP&L blames Plaintiffs' inability to effectively compete for new residential development business on their failure to aggressively and competently market oil heat. PP&L points to deposition testimony that Plaintiffs did not know the identity of many of the builders or developers in their area. (Def.'s Ex. 31 PP 7, 8; [Ex. 38 P. 6](#); [Ex. 39 P. 13](#); Ex. 68 at 277-82; Ex. 70 at 193-94; Ex. 79 at 236-39; Ex. **["\*\*47"]** 80 at 243-48; Ex. 83 at 235-43; Ex. 85 at 212-14; Ex. 89 at 185-93).

PP&L proffers legitimate explanations for the "no supplementation" clause: it allowed PP&L to recoup its investment in the grant program, and rate payers experienced increased benefits from the utilization of off-peak capacity. PP&L notes that Plaintiffs do not sell supplementary heating systems, and customers do not request them because of their high costs, i.e., the construction of a chimney for installation, and disadvantages associated therewith, such as reliability of supply, dirt, smell etc. (Def.'s Ex. 8 at 140-41; Ex. 11 at 216; Ex. 25 at 18-19; Ex. 27 at 61; Ex. 29 at 67-68; Ex. 45 PP 3-4; [Ex. 46 P. 3](#); Ex. 47 at PP 3, 6; Ex. 48; Ex. 74 at 88).

PP&L describes Plaintiffs' allegations as disguised complaints about the competitiveness of PP&L's legitimate marketing efforts, size, efficiency, and resources. According to PP&L, Plaintiffs have the same advance notice of new home developments but choose not to take advantage of it. To effectively market electric heating to builders and developers, PP&L personnel relied on nothing more than personal communication, attendance at land use planning meetings, systematic **["\*\*48"]** review of the newspaper, and other similar means. (Def.'s Ex. 3; Ex. 5 at 438-39; Ex. 6 at 11; Ex. 25 at 22-23; Ex. 70 at 196-98; Ex. 74 at 100-04; Ex. 75 at 105; Ex. 77 at 167; Ex. 78 at 173; Ex. 87 at 72-73). PP&L maintains it created "CEPHPA" for the pro-competitive purpose of increasing the quality of heat pump installations and customer satisfaction, and CEPHPA never denied membership to any Plaintiff. (Def.'s Ex. 11 at 214-16; Ex. 12 at 127-28; Ex. 67; Ex. 77 at 93-94). Finally, PP&L contends that the 30 year old deed restrictions covered a meager 51 building lots for a 10 year period.

**[HN7](#)** "Predatory or anticompetitive conduct is that which unfairly tends to be exclusionary or tends to destroy competition." [Great W., 63 F.3d at 1385](#). See also [Great Escape, Inc. v. Union City Body Co., Inc., 791 F.2d 532, 541 \(7th Cir. 1986\)](#) (remarking "predatory conduct may be broadly defined as conduct that is in itself a violation of the antitrust laws or has no legitimate business justification other than to destroy or damage competition"); [Aurora Enter. v. National Broadcasting Co., Inc., 688 F.2d 689, 695 \(9th Cir. 1982\)](#) (defining predatory conduct to include "conduct amounting **["\*\*49"]** to a substantial claim of restraint of trade or conduct clearly threatening to competition or exclusionary"). The question of whether the Court may consider conduct exclusionary "cannot be answered by simply considering its effect on [plaintiff]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." [Aspen, 472 U.S. at 605, 105 S. Ct. at 2858-59](#).

Viewing the submissions in the light most favorable to Plaintiffs, the Court finds evidence of conduct that a jury could consider predatory. Here, a monopolist with enormous financial resources persuaded builders and developers to exclude competing sources of heat through aggressive marketing strategies that involved cash incentives, advertising promotions, and advance notice of new construction. **["\*644"]** PP&L targeted builders knowing they are the primary decision makers regarding the installation of heat systems in new homes and entered into exclusive dealing arrangements with them that may have violated [§ 1](#) of the Sherman Act. As the sole provider of electricity,

the all-electric agreements translate into "all-PP&L" agreements and guarantee PP&L a steady [\*\*50] stream of future cash flow. These all-electric agreements applied to both new homes and any existing homes that the builders developed.

PP&L essentially used its position to establish itself as a major force in the new construction market by excluding others on some basis other than superior efficiency. Consumers suffered from this conduct because PP&L locked new homeowners into inefficient and expensive sources of heat, restraining their ability to obtain less-costly and more efficient heating systems.

Revisiting the question of specific intent, the Court concludes that the aforementioned statements could convince a jury that PP&L intended to dominate the new residential heating submarket, that PP&L advanced that intent, and that the all-electric agreements codified PP&L's desire to dominate and assisted in the realization of that objective. When considered in conjunction with exclusionary conduct, a jury could conclude that the aforementioned statements evince PP&L's specific intent to monopolize the residential heating of new homes.

The different interpretations of market trends and economic performance proffered by the parties reveal genuine issues of material fact concerning [\*\*51] both the presence or absence of specific intent and the character, either predatory or competitive, of the conduct designed to actualize that intent. For example, a jury could reach two different factual conclusions regarding PP&L's choice to implement the all-electric agreement program in 1987 after achieving an 84% share of the new construction submarket in 1986: (1) PP&L aimed to dominate the new construction submarket; or (2) PP&L had to increase the virulence of its marketing programs to counter fierce competition from rapidly expanding gas companies. Accordingly, the Court finds genuine issues of material fact with regard to the special intent and predatory conduct elements of Plaintiffs' attempted monopolization claim.

### **(c). Dangerous Probability of Success**

**HN8** Evaluation of an attempted monopolization claim also involves a finding of a dangerous probability of achieving monopoly power. This determination requires an "inquiry into the relevant product and geographic market and the defendant's economic power in that market." *Pastore v. Bell Tel. Co. of Pennsylvania*, 24 F.3d 508, 512-14 (3d Cir. 1994) (remarking "the law directs itself to conduct which unfairly tends to [\*\*52] destroy competition itself . . . . [Section] 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so") (citation omitted). See also *Great W.*, 63 F.3d at 1385 (stating "dangerous probability of achieving an actual monopoly position is customarily assessed by looking at the defendant's market share. If the defendant possesses a large share, it will likely be concluded that the defendant's conduct, if undeterred, will result in an actual monopoly"); 3 Von Kalinowski, *Antitrust Laws and Trade Regulation* § 20.01[5] (1996) (remarking "in deciding whether there is a dangerous probability of success, courts analyze the defendant's market share in light of the market structure") (citation omitted) ("Von Kalinowski").

#### **(i). Relevant Market**

**HN9** In order to determine the dangerous probability of monopoly power, the Court must first establish the definition of the relevant market. Plaintiffs bear the burden of defining the relevant market. *Pastore*, 24 F.3d at 512. The relevant product market consists of "commodities reasonably interchangeable by consumers for the same purposes. Factors to be considered include [\*\*53] price, use and qualities. Accordingly, the products in a relevant product market would be characterized by a cross-elasticity of demand." *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 198-99 (3d Cir. 1992) (citations omitted), cert. denied, 507 U.S. 921, 113 S. Ct. 1285, 122 L. Ed. 2d 677 [\*645] (1993). See also *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.) (describing the relevant product market as "those groups of producers which, because of the similarity of their products, have the ability -- actual or potential -- to take significant amounts of business away from each other"), cert. denied, 439 U.S. 838, 99 S. Ct. 123, 58 L. Ed. 2d 134 (1978). Courts also examine the relevant "geographic" market that includes "the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Pennsylvania Dental*, 745 F.2d at 260 (citation omitted). Within the relevant market, a "submarket" may exist, "evidenced by such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's

peculiar characteristics and uses, unique production facilities, distinct [\*\*54] customers, distinct prices, sensitivity to price changes, and specialized vendors." [Pastore, 24 F.3d at 513](#) (citation omitted).

**HN10** [Footnote] Market definition presents a question of fact for jury resolution that the Court may resolve on a motion for summary judgment if the record does not present any material factual disputes. See [Town Sound, 959 F.2d at 497](#) (Sloviter J., concurring and dissenting) (remarking "although plaintiffs are correct that the scope of the relevant market may be a question of fact for jury resolution, in this case they may have failed to create a material factual dispute") (citations omitted); [Weiss v. York Hosp., 745 F.2d 786, 825 \(3d Cir. 1984\)](#) (remarking "market definition is a question of fact and we therefore must affirm the jury's conclusion unless the record is devoid of evidence upon which the jury might reasonably base its conclusion") (citations omitted), cert. denied, 470 U.S. 1060, 105 S. Ct. 1777, 84 L. Ed. 2d 836 (1985); 3 Von Kalinowski § 19.02[2] (remarking that the definition of a relevant market may be decided on summary judgment if the moving party satisfies [Rule 56](#) requirements and "shows its market theory describes the [\*\*55] actual market behavior so accurately that the nonmoving party's assertion of the moving party's market power if not implausible, is at least unreasonable. The Supreme Court has defined this burden as substantial"). Similarly, whether a submarket exists presents a factual dispute for jury resolution. See [Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 369 F.2d 449, 456 \(9th Cir. 1966\)](#) (stating "there may be a well-defined submarket which constitutes the relevant market for antitrust purposes which . . . is a question of fact in the particular case"), rev'd on other grounds, [389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621 \(1967\)](#).

Plaintiffs and PP&L agree that the relevant product and geographic markets can be defined as the market for residential heating and related equipment within PP&L's service area, approximately 1,074,015 homes. (Pl.'s Ex. 52). (Compare Def.'s Ex. 22 at 55 (Plaintiffs' expert's report defining the relevant market as "the heating fuel market within that portion of Central Eastern Pennsylvania comprising of PP&L's service area") with ([Def.'s Ex. 24 P. 58](#)) (PP&L's expert's report defining relevant market as "the market for residential heating fuel [\*\*56] within PP&L's service area"). Plaintiffs, however, characterize the new housing market as a submarket, claiming that both the public and industry recognize it as a submarket. A high cost of conversion, argue Plaintiffs, prevents existing homes from changing heat sources. (Pl.'s Ex. 10 at 63-66; Ex. 26; Def.'s Ex. 22 at 26). PP&L objects to Plaintiffs' description of the new residential heating market as a "submarket," arguing that Plaintiffs' expert refused to define it as such. (Pl.'s Ex. 10 at 55-56 (stating, during a deposition, that the market for heating fuel in newly installed residences is a significant segment of the overall market "so long as you don't mean submarket by 'segment'")). Accordingly, genuine issues of material fact exist as to whether the new home market qualifies as a submarket.

Viewing the submissions in the light most favorable to Plaintiffs suggests to the Court that the new home market does constitute a submarket. PP&L's position is inconsistent with its marketing initiatives. PP&L initiated "Residential New Home Marketing Programs;" designed "Four-Star Home Programs" to respond "as the competition with gas and oil intensified in the new home market;" dedicated [\*\*57] its residential marketing program between 1982 and 1988 to encouraging [\*646] "the installation of off-peak space and water heating installations into new homes;" divided its residential strategy into two categories, "New Homes" and "Existing Homes;" strategized methods for increasing saturation in "new house construction;" developed marketing proposals for "New Construction" and "Conversions;" and targeted new "developments." (Pl.'s Ex. 22; Ex. 24; Ex. 25; Ex. 26; Ex. 43; Ex. 49; Ex. 54; Ex. 55; Ex. 61; Def.'s Ex. 60). But see Pl.'s Ex. 48 (PP&L memorandum referring to "New Dwelling Units" as a "market segment"). Others in the industry recognize the "new residential construction" submarket, including the PUC. (Pl.'s Ex. 56 (PUC report dividing its analysis of PP&L promotional techniques between "New Construction" and "Conversions")).

Furthermore, the high costs associated with converting an existing heating system suggest that new residences present a unique submarket. The marketing programs targeting existing homes differ dramatically from those designed to encourage the installation of a system in a new home because of the different concerns each implicates. Those programs seeking [\*\*58] to convert existing homes face a more difficult task than those aiming to install new systems. In the former, the customer incurs substantial costs associated with the conversion in addition to the monies expended for the system itself, while in the latter, the consumer bears only the cost associated with the system. Once the customer chooses a new system, it becomes an attached fixture to the home, i.e., an installed heat pump, furnace, etc., and conduits are installed to transmit the heat through the home, i.e., vents, radiators, etc.

Unlike either gas or electric heat, the installation of oil heat requires the construction of a chimney. Should the homeowner choose to convert the existing system, he or she must remove the heating unit and possibly the conduits compatible with that system. (Pl.'s Ex. 26 (PP&L position paper remarking "reaching the conversion customer at the time the decision is made to replace a heating system is very difficult. Promotional efforts must be broad based and thus expensive per contact"); Ex. 54 (PP&L report stating "how well an older home, which previously used fossil fuel, can be retrofitted to use electric as a heat source is also a troubling question"); [\*\*59] Ex. 95 (affidavit of customer dissatisfied with electric heat but wary of high conversion costs)). Thus, targeting new residential construction allows the supplier to "get in early" when the consumer need not consider the costs of conversion in making a decision. Prohibitive conversion costs essentially remove an existing home from the relevant market.

Plaintiffs have proffered sufficient evidence to support a finding that the new residential market constitutes a submarket and thereby create a genuine issue of material fact. The Court now assess whether PP&L possessed enough monopoly power to come dangerously close to success within the relevant market and submarket. **HN11**[] In the absence of a formula for reaching this decision, several factors emerge: "[1] the strength of the competition, [2] probable development of the industry, [3] the barriers to entry, [4] the nature of the anticompetitive conduct, and [5] the elasticity of consumer demand. Most significant, however, is the defendant's share of the relevant market." Pastore, 24 F.3d at 513 (citations omitted). See also 3 Von Kalinowski § 20.01[5] (remarking that "market share alone may not suffice to demonstrate [\*\*60] a dangerous probability of success" and listing other factors including barriers to entry, relative size of defendant, and "whether the defendant's market share is rising or declining").

## (ii). Market Share

**HN12**[] A dangerous probability of monopoly power exists where "the defendant firm possesses a significant market share when it undertakes the challenged anticompetitive conduct." Barr Lab., Inc. v. Abbott Lab., 978 F.2d 98, 112 (3d Cir. 1992) (citation omitted). Nonetheless, while "the size of a defendant's market share is a significant determinant of whether the defendant has a dangerous probability of successfully monopolizing the relevant market, it is not exclusive." *Id.* See also Pastore, 24 F.3d at 513 (remarking "[there is a] presumption that attempt does not occur in the absence of a rather significant market share").

[\*647] Plaintiffs submit that PP&L's share of the relevant market suggests that monopolization could result. The percentage has increased every year for the past 19 years without interruption, from 18.19% in 1977 to 31.03% in 1995. According to Plaintiffs, no single oil dealer holds more than a 1.4% share of the market, and Plaintiffs collectively [\*\*61] have less than a 6% share of the market. (Pl.'s Reply Mem. at 17 n. 10-11; Ex. 96). Plaintiffs also point to PP&L's share of the new housing submarket, which reached 84% in 1986 and averaged 70% between 1987 and 1995, describing PP&L's position in this submarket as "dominant."

PP&L protests that 69% of consumers have chosen other sources for home heating. (Def.'s Ex. 24 PP 34, 69; Ex. 23 at 230). PP&L notes that more homes in the relevant market were heated by oil, 380,463 homes, than by electricity, 333,317 homes. (Def.'s Ex. 14; Ex. 20 at 4). PP&L stresses that its share of the new home submarket has fallen steadily over the past decade, from 84% in 1986 to 53% in 1995. According to PP&L, only 21% of the new homes built received construction grants, leaving 79% unaffected, and PP&L's attempts to convert oil and gas customers to electric heat have been unsuccessful. (Def.'s Ex. 4 at 122-23; Ex. 17; Ex. 23 at 495; Ex. 24 at PP 72, 108). PP&L attributes the rise and fall of its share of the new home market from the late 1970s through 1995 to the fluctuating competition from gas companies. The PUC's removal of the gas ban in the mid 1980s -- which eliminated gas utilities as strong competitors [\*\*62] in the late 1970s -- led to an increase in the market share of gas utilities at the expense of PP&L. In its own service area, UGI's share has grown from 12% in 1987 to over 50% in 1995.

The Court considers PP&L's 31% market share alone inadequate to demonstrate, as a matter of law, that PP&L possessed sufficient market presence to come dangerously close to achieving monopoly power. A market share of 31% is not significant enough, without more, to create a conclusive presumption of attempted monopoly. See Barr, 978 F.2d at 112 (remarking "market share of 47-50% alone [is] not enough to establish dangerous probability of

success") (citation omitted); 3 Von Kalinowski § 20.01[5] (stating [HN13](#) [↑] "courts will typically be able to find a dangerous probability where defendants have a 50% or more share. Defendants with shares less than 30% are rarely determined to possess a dangerous probability. Those with a share between 30 and 50 will have a dangerous probability if other factors are present") (substantiating with case law). Therefore, the Court proceeds to examine the other factors.

### (iii). Pricing

Plaintiffs suggest that PP&L's monopoly power is demonstrated by the inflated [\[\\*\\*63\]](#) prices it obtains in the heating fuel market. As a heating fuel, PP&L prices electricity 40% higher than fossil fuel when heat pumps are used and more than 2 1/2 times the price of fossil fuel when electric baseboard heating is used. (Pl.'s Ex. 23 (PP&L document listing respectively the following costs per 1,000 sq. ft: coal (\$ 182), natural gas (\$ 230), oil (\$ 240), electric heat pump (\$ 334), electric baseboard (\$ 651), heat pump plus (\$ 221), and ceramic storage heaters (\$ 430)); Ex. 26 (document listing cost per Btu for gas (\$ 8.10), oil (\$ 7.70), electric baseboard (\$ 22.50), heat cycle heat pump (\$ 11.20), ceramic heating (\$ 11.70), and heat pump plus (\$ 7.50); Ex. 48 (listing cost per million BTU for electric baseboard (\$ 22.56), heat pump (\$ 13.67), heat pump plus (\$ 12.77), ceramic (\$ 13.77), conventional oil (\$ 11.07), pulse oil (\$ 8.70), conventional gas (\$ 11.40), and pulse gas (\$ 8.56)). Plaintiffs suggest that the low rate associated with the heat pump plus system is misleading and inaccurate. (Pl.'s Ex. 87). Plaintiffs maintain that PP&L extracts a supracompetitive price for a heating system that does not present a more desirable alternative to gas or oil. (Pl.'s Ex. [\[\\*\\*64\]](#) 76; Ex. 77; Ex. 94; Ex. 95 (affidavits of dissatisfied customers of electric heat)). Finally, according to Plaintiffs' expert, "a competitive market is characterized by price elasticity. The ability to increase market share in the face of increasing price disadvantage is the antithesis of a competitive market." (Def.'s Ex. 22 at 29).

PP&L maintains its prices have remained stable for almost a decade between 1985 and [\[\\*648\]](#) 1995 with no general rate increase. ([Def.'s Ex. 24 P. 82](#)). PP&L also notes that the PUC regulates its prices. Furthermore, PP&L's expert suggests that other factors, like the superiority of electric heating, contribute to PP&L's ability to increase market share in spite of higher prices. (Def.'s Ex. 24 at P 89).

### (iv). Barriers To Entry & Competition

Plaintiffs claim that substantial barriers to competition exist in this field. Plaintiffs remind the Court that both PP&L and UGI, as exclusive suppliers of electric and natural gas respectively, hold monopoly positions in this market that allow them guaranteed profit streams once the subsidized heating systems are installed. (Pl.'s Ex. 40) (comparative analysis of "payback calculations" for heat pumps installed). The [\[\\*\\*65\]](#) high cost of installing or converting a heating system insures that once the homeowner has selected a heating system, the probability of the homeowner changing that system is small. Plaintiffs complain of stringent competition in a market saturated with fuel dealers, all of whom sell at competitive prices. Plaintiffs must do more than offer efficient systems that cost less; they need to overcome the additional barrier of high installation and conversion costs. Furthermore, with sales of roughly \$ 2.7 billion, PP&L is about 400 times the size of the average oil dealer. (Pl.'s Ex. 5 at 182). PP&L's expert's report corroborates this position. (Pl.'s Ex. 22 at 26).

Plaintiffs suggest that PP&L also enjoys exclusive and unlimited access to the builder market, and the builder chooses the type of heating system installed in a new home 85% of the time. This access usually begins long before Plaintiffs receive public notice of new construction, enabling PP&L to obtain early commitments. (Pl.'s Ex. 6 at 247-51; Ex. 8 at 218-19; Ex. 59). According to Plaintiffs, PP&L shifts costs to its regulated activities, those which, by nature of PP&L's status as regulated utility, are guaranteed to return [\[\\*\\*66\]](#) a reasonable profit that is recovered from ratepayers. This enables PP&L to lower prices in the unregulated market. Similarly, argue Plaintiffs, PP&L applies advantages it enjoys in the regulated market, like the "customer service department" -- whose salaries are paid by the rate-payers -- to arrange electric service for builders and developers. (Pl.'s Ex. 3 at 17 (deposition revealing marketing was referred to customer service); Ex. 25 (referring to oil and gas companies' inability to match the depth of PP&L's personnel)). Finally, Plaintiffs describe PP&L's mention of the resurgence of UGI's competitiveness as a red herring, noting UGI's rapid and substantial increase in market share occurred within its own service area, which differs from PP&L's service area.

PP&L characterizes the barriers to entry in the home heating market as low, maintaining that participation requires neither sophistication, patents, large capital expenditures, storage tanks, nor government approval. (Def.'s Ex. 23 at 108; Ex. 24 at PP 77-79 (expert opinion corroborating PP&L's position); Ex. 67 at 68-77; Ex. 69 at 27-28, 50; Ex. 72 at 23; Ex. 75 at 32; Ex. 77 at 56-59; Ex. 79 at 43; Ex. 83 at 34; Ex. 87 [\*\*67] at 25; Ex. 90 at 49; Ex. 91 at 22). PP&L points to other court decisions in similar industries that found no significant barriers to entry, referring specifically to [United States v. Empire Gas Corp., 537 F.2d 296, 305 \(8th Cir. 1976\)](#) (noting that in the liquid petroleum retail gas business, "barriers to entry in this industry are minimal; all that are needed are a supply of [liquid petroleum], a truck, and perhaps a storage tank"), cert. denied, 429 U.S. 1122, 97 S. Ct. 1158, 51 L. Ed. 2d 572 (1977). PP&L describes the competition as strong, well capitalized, and lucrative, noting UGI has assets of more than \$ 2 billion and revenues of \$ 877 million, PECO has assets of \$ 14 billion and revenues of \$ 4 billion, Plaintiff SICO earned over \$ 400 million in revenues in 1995, and PG Energy enjoyed 1995 revenues of \$ 152.8 million. (Def.'s Ex. 49 at Exhibit A; Ex. 64 at 20, 22; Ex. 65).

#### (v). Probability Conclusion

The submissions on both sides of this question have created a genuine issue of material fact for jury resolution of whether a dangerous probability exists that PP&L could [\*649] achieve monopoly power in the relevant market and submarkets. The Court finds evidence [\*\*68] suggesting, if credited, that such a probability exists. PP&L's 31% share of the relevant market is an insufficient indicator on its own. When considered in conjunction with other factors, however, the 31% market share suggests a possibility of achieving monopoly power. A jury could find PP&L's significantly larger share of the new construction submarket especially indicative of monopoly power in light of the fact that the majority of the charged predatory conduct involves PP&L's marketing strategies for this submarket. Entering into this consideration would be the issue of supracompetitive pricing. Plaintiffs describe PP&L's prices as anticompetitive while PP&L suggests other factors play a role in the selection of a heating system.

The parties also diverge on the issue of barriers to competition. [HN14](#)<sup>↑</sup> Entry barriers refer either to "long run-costs that were not incurred by incumbent firms but must be incurred by new entrants or [to] factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." [Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427-28 \(9th Cir. 1993\)](#), cert. denied, 510 U.S. 1197, 114 S. Ct. 1307, 127 L. Ed. 2d 658 [\*\*69] (1994). See also [Southern Pac. Communications Co. v. American Tel. and Tel., Inc., 238 U.S. App. D.C. 309, 740 F.2d 980, 1001 \(D.C. Cir. 1984\)](#) (defining barrier to entry as "any market condition that makes entry more costly or time-consuming and thus reduces the effectiveness of potential competition as a constraint on the pricing behavior of the dominant firm"), cert. denied, 470 U.S. 1005, 105 S. Ct. 1359, 84 L. Ed. 2d 380 (1985). In the actual case, the Court finds sufficient evidence in the submissions to justify a jury finding that this industry suffers from high entry barriers.

Evidence that while PP&L's prices exceed those of the competition, its market share consistently increases, could convince a jury that the relevant market contains insufficient competition to restrain PP&L from earning monopoly returns. PP&L points to two cases from the Third Circuit suggesting that capital requirements of a few million dollars do not create barriers to entry. See [Advo, 51 F.3d at 1200-1201](#) (finding no barriers to entry of pre-printed advertising circular market; describing a start up investment of "a couple of million dollars" as "not so high that it would [\*\*70] prevent new competitors from jumping in if [defendant] tried to charge supracompetitive prices"); [Barr, 978 F.2d at 113-14](#) (finding low barriers to entry in pharmaceutical drug market).

Concededly, the record in the instant case does not contain evidence of prohibitively high costs associated with entering this industry. Instead, the Court chooses to employ an expansive definition of "barriers to entry" more suitably tailored for the unique facts presented, looking to "(1) legal licenses; (2) control over a superior resource; (3) entrenched buyer preferences for established brands or company reputations; and (4) capital market evaluations imposing higher capital costs on new entrants." [Los Angeles, 6 F.3d at 1428 n. 4](#) (citation omitted). See also [Southern Pac., 740 F.2d at 1001](#) (including "the costs and delays of the regulatory process . . . . the creation of bottlenecks, entrenched customer preferences . . . large capital requirements, access to technical information, and disparities in risk" in definitions of barriers to entry) (citation omitted).

The Court's conclusion rests, in part, on the uniqueness of the residential heating market in PP&L's service area. **[\*\*71]** The two largest players in this market are regulated monopolies who face no competition within their respective fields. PP&L provides the *exclusive* source of electric energy in Plaintiffs' service area, and the barriers to entry in the electric supply arena are absolute. If PP&L decides to raise rates, and the PUC approves this decision, PP&L will not be checked by the entry of different suppliers of electricity willing to charge a lower price. Once arrangements are made for a particular home to have either gas or electric, either UGI or PP&L is assured the revenue stream from that home and rests comfortably knowing that no competitor selling gas or electricity will wrestle that client away; "all-electric" and "all-gas" mean "all-PP&L" and "all-UGI."<sup>6</sup>

**[\*650]** The remainder of the market consists of small fuel oil dealers, some of whom have limited financial resources. Plaintiffs strive to compete in a market populated by two well endowed and heavily regulated monopolies. Anyone wishing to enter the unregulated portion of the residential heating market is thrown in among the fuel oil dealers. While the costs associated with entering the market may not be prohibitive, the high level of competition **[\*\*72]** among the regulated monopolies and the fragmented fuel oil dealers could prevent entrants from restraining PP&L.<sup>6</sup>

Finally, the high conversion costs associated with changing heating systems insures that **[\*\*73]** once a home contains a particular system, the supplier can count on consistent revenue from that house. These high conversion costs limit the customers' options, lessen the probability that a new competitor will succeed, and increase the importance of the new residential construction submarket. The "permanence" of an existing system makes the new construction submarket crucial to the economic sustenance of the competitors in the relevant market, and the inability to access this submarket has deleterious effects on Plaintiffs' competitiveness in the relevant market. The Court therefore finds ample evidence in the record to create a factual issue as to whether near monopolization of the new construction submarket yields a high probability that PP&L could successfully monopolize the entire residential market.

Accordingly, in the face of jury questions regarding an intent to monopolize, a dangerous probability of achieving monopoly power, and predatory conduct, the Court cannot award summary judgment on Plaintiffs' attempted monopolization claim. (*Compare* Def.'s Ex. 22 at 4-7 (Plaintiffs' expert claiming the presence of monopoly power), at 7-24 (finding evidence of specific intent), **[\*\*74]** at 30 (describing PP&L's activity as "anticompetitive") *with* Def.'s Ex. 24 at PP 58-88 (PP&L's expert proclaiming PP&L has no market power), at PP 117-23 (denying specific intent to monopolize), at PP 83-88 (denying PP&L's conduct was predatory). This claim will proceed.

## 2. Actual Monopolization

PP&L moves for summary judgment on Plaintiffs' claim of actual monopolization under [§ 2](#) of the Sherman Act. [HN15](#) **[\*\*75]** "The offense of monopoly under [§ 2](#) of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historical accident." [Eastman Kodak Co. v. Image Tech. Servs., Inc.](#), 504 U.S. 451, 481, 112 S. Ct. 2072, 2089, 119 L. Ed. 2d 265 (1992) (citing [United States v. Grinnell Corp.](#), 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)). Plaintiffs must also establish that they suffered antitrust injury. See [Houser v. Fox Theatres Management Corp.](#), 845 F.2d 1225, 1233 (3d Cir. 1988) (remarking "plaintiffs must prove *antitrust* injury, which is to say injury **[\*\*75]** of the

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<sup>6</sup>The Court is not persuaded by PP&L's reliance on *Empire Gas*. While *Empire Gas* found low barriers to entry in the liquid petroleum retail gas industry, the Court considers the competitive forces unique to this relevant market dispositive. A finding contrary to *Empire Gas* from a different region suggests that concerns unique to the market in question control, and no established rule exists that a certain industry has low or high barriers to entry. The Court believes this finding varies from case to case. See [Oahu Gas Serv., Inc. v. Pacific Resources, Inc.](#), 838 F.2d 360, 367 (9th Cir.) (finding sufficient evidence to support the "conclusion that high barriers to entry existed in the Hawaiian propane market"), cert. denied, 488 U.S. 870, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988).

type the antitrust laws were intended to prevent and that flows from that which makes defendants acts unlawful") (citation omitted).

### (a). Monopoly Power

**HN16**<sup>7</sup> Monopoly power is "the power to control prices or exclude competition." *United States v. E.I. DuPont De Nemours and Co.*, 351 U.S. 377, 391, 76 S. Ct. 994, 1005, 100 L. Ed. 1264 (1956). The Third Circuit examines these two factors conjunctively. See *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982) (defining monopoly power as the power to [\*651] control prices and exclude competition). "The size of market share is a primary determinant of whether monopoly power exists." *Pennsylvania Dental*, 745 F.2d at 260 (citation omitted). See also *Fineman*, 980 F.2d at 201 noting monopoly power "may ordinarily be inferred from a predominant share of the relevant market" (citation omitted); *Weiss*, 745 F.2d at 827 (stating "[a] primary criterion used to assess the existence of monopoly power is the defendant's market share").<sup>7</sup>

[\*\*76] In the instant case, PP&L's share of the relevant market has climbed steadily from 17.30% in 1978 to 31.03% in 1995. The Court considers these figures inadequate. **HN18**<sup>7</sup> Under the decisions in this Circuit, a market share of 31% is insufficient as a matter of law to establish monopoly power. See *Ideal*, 90 F.3d at 749-50 (finding a 47% share inadequate); *Fineman*, 980 F.2d at 201 (finding as a matter of law that "absent other relevant factors, 55 percent market share will not prove the existence of monopoly power" and noting "90% is enough, 60% is not likely to suffice, and 33% is insufficient") (citation omitted); *Pennsylvania Dental*, 745 F.2d at 261 (finding a market share of between 32% and 35% insufficient as a matter of law to establish monopolization); 3 Von Kalinowski § 19.02[3] (remarking that lower courts find that a high market share "generally above 70% [] by itself demonstrates monopoly power . . . [A] low market share (generally below 40%) either precludes a finding of monopoly power or requires a finding of no monopoly power . . . In the middle range (generally 40% to 70%) courts have split over whether market share alone suffices to establish monopoly [\*\*77] power").

Because PP&L's share of the relevant market is insufficient to support a finding of monopoly power, the Court concludes as a matter of law that Plaintiffs cannot proceed on their claim for actual monopolization. The Court recognizes that in *Weiss*, the Third Circuit remarked that courts have the discretion to examine other factors beyond market share in assessing monopoly power. That decision also instructs, however, that a 33% share of the relevant market is insufficient to find monopoly power. See *Weiss*, 745 F.2d at 827 & n.72 (citations omitted). Finally, while the Court did not regard PP&L's 31% share as inadequate when evaluating the attempted monopolization claim, the threshold finding in an actual monopolization analysis is higher. See 3 Von Kalinowski § 19.03 (remarking that "the defendant crosses the 'dangerous probability' threshold with substantially less market share than the defendant who crosses the 'monopolization' portal"). The Court therefore grants PP&L's Motion for Summary Judgment with respect to Plaintiffs' claim of actual monopolization.

### 3. Monopoly Leveraging

Plaintiffs charge PP&L with leveraging its monopoly power as the sole **[\*\*78]** provider of electricity in violation of § 2 of the Sherman Act. Specifically, Plaintiffs maintain that PP&L had an excess of electricity from the Susquehanna nuclear facilities. According to Plaintiffs, if PP&L "sold that electricity to other utilities on the interchange, the proceeds of those sales would be used to reduce the energy cost rate which the PUC allowed it to recover." (Pl.'s Mem. Opp. at 48). Plaintiffs posit that if PP&L "could make sales to its jurisdictional ratepayers, the PUC would allow a return on the cost of those sales which increased PP&L's profits." (*Id.*) (See Pl.'s Ex. 9 at 51-53 (stating that

<sup>7</sup> **HN17**<sup>7</sup> In assessing whether monopoly power exists, the Court applies the same definitions of relevant market and submarket crafted *supra* in the attempted monopolization analysis. See 3 Von Kalinowski §§ 19.02[2], 20.01[2][b] (1996) (stating "to determine if monopoly power exists, it is first necessary to define the relevant market in which the power to control prices or and/or exclude competitors exists . . . The same tests used to determine the relevant market in cases of actual monopolization are applied in attempted monopolization actions") (citing *inter alia* *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)).

PP&L used to achieve savings by making sales on the interchange that improved earnings but the PUC changed its position, requiring that any improvement in earnings position come from sales to customers); Ex. 22 at 2 (Plaintiffs' expert speculating "PP&L leveraged a regulated monopoly position as an electric power provider in an [\*652] attempt to monopolize the heating fuel market in its service area)). According to Plaintiffs, PP&L targeted the home heating market to increase revenues and profits, and PP&L used the all-electric agreements and other practices to obstruct [\*\*79] the competition from entering that market.

PP&L attacks Plaintiffs' leveraging claim, relying exclusively on *Advo*. There, the Third Circuit refused a monopoly leveraging claim where the industry was marked by low barriers to entry, any attempt to recoup foregone profits would lead to a flood of new entrants in the market, the record contained no evidence of leverage, and defendants' offering of discounts did not offend antitrust practices. PP&L considers itself in a similar situation, maintaining the market has low barriers to entry, PP&L cannot raise prices because of the PUC, and the record contains no evidence of leveraging. (Def.'s Ex. 24 PP 114-16 (PP&L's expert denying leverage)). The Court disagrees.

[HN19](#) [↑] "Leveraging involves the use of monopoly power in one market to gain an advantage in another market," and the use of such power violates [§ 2](#) of the Sherman Act. 3 Von Kalinowski § 19.05[3]. The essence of a leveraging claim "is the use of monopoly power at one stage of production or in one market to gain a monopoly or a competitive advantage at another stage of production or in another, related market." [Trans Sport, Inc. v. Starter Sportswear, Inc., 775 F. Supp. 536, 1\\*\\*801 540 \(N.D.N.Y. 1991\)](#) (citations omitted), aff'd, [964 F.2d 186 \(2d Cir. 1992\)](#). See also [Eastman, 504 U.S. at 480 n.29, 112 S. Ct. at 2089 n.29](#) (remarking "power gained through some natural and legal advantage, such as a patent, copyright, or business acumen, can give rise to liability if a seller exploits his dominant position in one market to expand his empire in the next") (citations omitted); [Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 996 \(N.D. Ga. 1992\)](#) (defining monopoly leveraging as the "use of power in one market to dominate or control a secondary market"). In this Circuit, Plaintiffs must show that PP&L gained more than a mere competitive advantage in the residential heating market. Rather, "in order to prevail upon a theory of monopoly leveraging, a plaintiff must prove threatened or actual monopoly in the leveraged market." *Fineman*, 980 F.2d at 206. See also 3 Von Kalinowski § 19.05[3][c] (adopting *Fineman* approach and suggesting "monopoly leveraging only should be an offense when the defendant has either monopolized the second market or obtained sufficient market power in it to be liable for attempted monopolization").

[\*\*81] Plaintiffs' leveraging claim survives summary judgment. Accepting Plaintiffs' theory as true, the Court finds a genuine issue of material fact concerning whether PP&L targeted the home heating market both to increase revenue in the unregulated market and to offset its inability to broker out excess energy to other utilities under regulatory supervision. A jury, accepting the record as framed by Plaintiffs, could find that PP&L leveraged its monopoly power, attempted to monopolize a second market, and enjoyed more than just a competitive advantage in that second market.

*Advo* provides no support for PP&L. Unlike the market in *Advo*, the relevant market in the instant case contains high barriers to entry. The record demonstrates that PP&L enjoys a consistent, albeit small, increase in market share each year even though its heating systems, with the exception of the heat pump plus, are the costliest form of heat. To date, PP&L has not suffered a wave of new entrants driving prices down to competitive levels. Similarly, PP&L's status as a monopoly allows it to extract home heating higher prices without the fear that other competitors will enter the market. Once PP&L obtains an [\*\*82] agreement from a builder that all homes in a development will be electrically heated, PP&L is guaranteed that all homes must look to PP&L for power. Finally, the marketing programs employed by PP&L in its attempt to monopolize the relevant market, unlike those in *Advo*, may very well offend antitrust principles.

## B. SHERMAN ACT [§ 1](#)

[Section 1](#) of the Sherman Act provides: [HN20](#) [↑] "Trusts, etc., in restraint of trade illegal; penalty[:] Every contract, combination in the form of trust or otherwise, or [\*653] conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U.S.C.A. § 1](#). [HN21](#) [↑] In order to present a valid claim under [§ 1](#), Plaintiffs must prove "(1) the defendants contracted, combined or conspired among

each other, (2) the combination or conspiracy produced anticompetitive effects within the relevant product and geographic markets; (3) the objects of the conduct pursuant to that contract or conspiracy were illegal; and (4) the plaintiffs were injured as a result of that conspiracy." [Ideal, 90 F.3d at 748 n.5](#) (citation omitted).

## 2. Per Se Illegality of the Contested Agreements

[HN22](#) Since "virtually [\*\*83] all business agreements restrain trade to some extent," [§ 1](#) of the Sherman Act "has been construed to make illegal only those contracts that constitute unreasonable restraints of trade." [Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 \(3d Cir. 1996\)](#) (citation omitted). Certain agreements, "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. Such plainly anticompetitive agreements are illegal *per se*." [Id. at 1367 n.9](#). Examples of *per se* violations include tying agreements and group boycotts. See [Town Sound, 959 F.2d at 476-77](#) (stating "the Court long ago established a so-called 'per se' rule against tying arrangements in cases where it thought exploitation of leverage is probable") (citation omitted); [Miller v. Indiana Hospital, 843 F.2d 139, 144 n.6](#) (3d Cir.) (remarking "a group boycott . . . is illegal *per se* under [section 1](#) of the Sherman Act") (citation omitted), cert. denied, 488 U.S. 870, 109 S. Ct. 178, 102 L. Ed. 2d 147 (1988). [\*\*84]

PP&L contends that the Court cannot designate the all-electric agreements as *per se* illegal. According to PP&L, the instant case does not provide an example of "horizontal agreements" because PP&L did not contract with gas companies, propane sellers, and fuel dealers. The only agreements at issue, as far as PP&L is concerned, are "vertical agreements" between the sellers and buyers of electricity, and "vertical restraints of trade, which do not present an express or implied agreement to set resale prices, are evaluated under the rule of reason." [Orson, 79 F.3d at 1368](#). Plaintiffs characterize both the all-electric agreements and the conversion grants as *per se* illegal, describing them as either tying agreements or group boycotts.

The Court concludes that the agreements constituted neither tying arrangements nor group boycotts. [HN23](#) "In a tying arrangement, the seller sells one item, known as the tying product, on the condition that the buyer also purchases another item, known as the tied product." [Allen-Myland v. Int'l Business Mach. Corp., 33 F.3d 194, 200](#) (3d Cir.) (citation omitted), cert. denied, 115 S. Ct. 684 (1994). At first blush, the all-electric [\*\*85] agreements resemble tying arrangements -- PP&L sells one product, electricity, on the condition that the developer purchase another product, the heat pump. Once the heat pump is connected, PP&L enjoys a permanent customer. Before the Court can conclude that a tying arrangement exists, however, it must find that the "tied" product and the "tying" product are two separate products. See [Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614, 73 S. Ct. 872, 883, 97 L. Ed. 1277 \(1953\)](#) (referring to the "common core of the adjudicated unlawful tying arrangements" as "the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market"). Examples of tying arrangements involving separate products include a defendant's refusal to lease salt dispensing machines unless the lessee agrees, in addition, to purchase from defendant the salt used therein, [International Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 \(1947\)](#), and a railroad's insertion, in a lease, of a "preferential routing" clause requiring that the lessees give the railroad preference in [\*\*86] transporting goods originating from the leased lands, [Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 \(1958\)](#).

[\*654] The agreements are *not* tying arrangements. The underlying product in this antitrust litigation is residential heating. Admittedly, that product has separate components. After adjustments are made to an electric thermostat, the heat pump extracts air from the outside, treats the air, and forces it, through vents, into the living area. This entire process, however, depends exclusively on electricity. The Court therefore finds that PP&L sold only one product through the all-electric agreements and the conversion grants: electricity for residential heating. While it also arranged for the installation of heat pumps, the heat pumps play, at best, an ancillary role, amounting to nothing more than a conduit for electricity that transforms it into a heating source. In the absence of a second product, a tying arrangement cannot exist.

In reaching this conclusion, the Court adopts the rationale employed in [Washington Gas Light Co. v. Virginia Elec. and Power Co., 438 F.2d 248 \(4th Cir. 1971\)](#) which rejected a gas utility's allegation that [\*\*87] an electric utility's

practice of reducing the costs, to a contractor, of installation for an underground residential distribution line, in exchange for a commitment by the contractor to build an all-electric house, constituted a tying arrangement and hence a *per se* violation of [§ 1](#) of the Sherman Act. The electric utility also furnished credit, based on anticipated electrical usage, for underground residential distribution installation. The court concluded that the electric utility did not conduct a tying arrangement because it sold only one product, electricity. It characterized the delivery of electricity as "an ancillary and necessary part of the business of producing and selling electrical power. This was simply a new method of delivery . . . . There was no separate market for the installation of underground wiring . . . .

[HN24](#)[<sup>↑</sup>] That there are not dual markets strongly suggests that there are not separate products." *Id.* at 252 (referring to *Times-Picayune*, 345 U.S. at 614, 73 S. Ct. at 872). See also *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 571 F. Supp. 1504, 1527 (E.D. Cal. 1983) (finding "electrical energy systems" are not "a product distinct from [\*\*88] retail electric energy"). While the heat pump lies farther down the chain of distribution than underground wiring, it does nothing more than transform electric energy into a viable heating source.

Similarly, Plaintiffs' allegation of a classic group boycott fails. [HN25](#)[<sup>↑</sup>] A group boycott is a concerted effort by a group of competitors "at one level to protect themselves from competition from non-group members who seek to compete at that level. Typically, the boycotting group combines to deprive would be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates." *Larry v. Muko, Inc. v. Southwestern Pennsylvania Bldg. and Constr. Trades Council*, 670 F.2d 421, 429 n.11 (3d Cir.) (citation omitted), cert. denied, 459 U.S. 916, 103 S. Ct. 229, 74 L. Ed. 2d 182 (1982). The activity alleged here involves neither a boycott nor a refusal to deal. The only consequence associated with the failure to abide by the terms associated with either the all-electric agreements or the conversion grants was ineligibility for cash incentives, not a concerted refusal to do business.

The Court agrees with PP&L's assertion that the agreements [\*\*89] constitute vertical restraints of trade and not horizontal restraints of trade. The agreements are [HN26](#)[<sup>↑</sup>] "vertical" -- between "entities operating at different levels of the market structure, such as manufacturers and distributors" -- and *not* "horizontal" -- "among competitors at the same level of distribution." *Black's Law Dictionary* 1563, 737 (6th ed. 1991). PP&L, a supplier of electricity, entered into an agreement with builders acting at a different level of distribution. "[A] purely vertical arrangement, by which (for example) a supplier or dealer makes an arrangement exclusively to supply or serve a manufacturer, is not a group boycott." *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993) (referring to *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212, 79 S. Ct. 705, 709, 3 L. Ed. 2d 741 (1959)).

The Court considers both cases relied on by Plaintiffs distinguishable. *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, 364 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961) involved an antitrust suit brought by a [\*655] gas burner manufacturer against an association of suppliers of natural gas. Similarly, in *Fashion Originators' Guild Int'l of America, Inc. v. Federal Trade Comm'n*, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941), garment manufacturers and textile manufacturers dealt only with buyers who would not use textiles that had been copied. Both cases dealt with concerted agreements among many, if not all, competing suppliers to refuse to sell their products unless certain conditions were met. The penalties for noncompliance with the underlying agreements were boycotts amounting to outright refusals to deal.

By contrast, the instant lawsuit, brought by suppliers of oil heat against the sole supplier of an alternative source of energy, attacks *inter alia* an agreement between that competitor and the builders who select the form of energy to be placed in new homes. Assuming, for the purposes of this analysis only, that the builders acted as retailers in that they connected PP&L with consumers, the record contains no evidence of a concerted refusal to deal or sell among competing suppliers at the same level of production. The only penalty for noncompliance involved the withholding of a promotional cash incentive. See Earl W. Kintner, *Federal Antitrust Law* § 10.29 (remarking [HN27](#)[<sup>↑</sup>] "a mere promotional [\*\*91] incentive which may tend to persuade economic actors to choose one product or service over

another cannot be classified as a group boycott") (referring to *Sulmeyer v. Coca-Cola Co.*, 515 F.2d 835, 845 (5th Cir. 1975), cert. denied, 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 341 (1976)).<sup>8</sup>

### [\*\*92] (b). The Agreements are Exclusive Dealing Arrangements

While the Court finds great difficulty in pigeonholing the challenged activity into one of the definitions of *per se* illegal activity, the contested agreements easily qualify as "exclusive dealing arrangements." [HN29](#)<sup>↑</sup> An exclusive dealing agreement requires "the purchaser not to deal in the goods of a competitor of the seller." [Town Sound, 959 F.2d at 473 n.2](#). Generally, the "seller agrees to sell to a buyer on the condition that the buyer agrees not to deal in competitive products." 2 Von Kalinowski § 6G.01[1]. See also Earl W. Kintner, *Federal Antitrust Law* § 10.39 (1980) (stating exclusive dealing arrangements "condition business dealings upon some ancillary or non-ancillary action or inaction on the part of those entering into the arrangement"); Lawrence A. Sullivan, *Antitrust* § 163 (1977) (remarking an "exclusive dealing contract involves a commitment by a buyer to deal only with a particular seller"). In the instant case, the all-electric agreements specifically required a builder to ensure that all homes in the development had electric heating systems that would not be supplemented by an [\[\\*\\*93\]](#) alternative source of energy.

PP&L denies that the all-electric agreements constitute exclusive dealing contracts, suggesting the agreements affected "less than all purchases." See [Barr, 978 F.2d at 110 n.24](#) (noting "an agreement affecting less than all purchases does not amount to true exclusive dealing") (citing [Kellam-Energy, Inc. v. Duncan, 668 F. Supp. 861, 883-84 \(D. Del. 1987\)](#)). In support of this assertion, they point to testimony from various developers averring that in spite of the language of the all-electric agreements, the developers knew they could purchase oil or gas heating systems with no consequence and proceeded, on some occasions, to install alternative residential heating systems in developments subject to the all-electric agreements. PP&L likens the all-electric agreements to nothing more than ordinary volume discount offers. Plaintiffs protest that in spite of PP&L's contention that the developers ignored the restrictive language contained in the all-electric agreements, a PP&L employee testified that he "could not speak" to the question [\[\\*656\]](#) whether "all the builders knew [PP&L] would not enforce this agreement" and stated, "why would we produce an [\[\\*\\*94\]](#) agreement that is designed to market our product and then tell a person . . . 'It doesn't mean anything.'" (Pl.'s Ex. 8 at 121-22). The Court therefore faces a fact dispute concerning the developers' supposed belief that the language contained in the all-electric agreements was not binding, precluding a finding, at this stage, that the developers dealt freely with other suppliers of residential heating systems. See [Kellam-Energy, 668 F. Supp. at 883](#) (finding "nothing in the requirements contracts between the parties restricts [purchaser] from purchasing gasoline from other suppliers at [purchaser's other outlets]. Each contract applies only to a particular location, and the record reveals that [purchaser] dealt openly with other wholesalers. Five of [purchaser's] locations were not supplied by [supplier]").

Viewing the submissions in the light most favorable to Plaintiffs compels the conclusion that the all-electric agreements implicated both the spirit and the purpose of the exclusive dealing arrangement definition. PP&L required developers not to deal with its competitors and to install electric residential heat. A developer's failure to comply with this condition [\[\\*\\*95\]](#) resulted in a penalty to the builder. Additionally, the clauses forbidding the supplementation of the electric heating systems with fossil fuels and other competing energy sources conditioned future dealings between PP&L and the developers on the developers' refusal to deal with PP&L's competition. See 2 Von Kalinowski § 6G.01[1] (stating that [HN30](#)<sup>↑</sup> an exclusive dealing contract "conditions future dealing on the purchaser's agreement not to deal with the supplier's competitors").

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<sup>8</sup> Asserting the agreements are inherently suspect restraints, Plaintiffs ask the Court, in the alternative, to apply the abbreviated [HN28](#)<sup>↑</sup> "quick look" rule of reason analysis. This approach applies "where *per se* condemnation is inappropriate, but a full-blown industry analysis is not required to demonstrate the anticompetitive character of an inherently suspect restraint." *Orson*, 79 F.3d at n.9 (citation omitted). In the instant case, in order to assess the anticompetitive effects, if any, of PP&L's allegedly violative conduct, the Court must conduct a rather comprehensive examination of the home heating industry in PP&L's service area. Accordingly, the Court does not consider the "quick look" approach applicable.

**HN31**[] The Court evaluates both exclusive dealing arrangement's and vertical restraints under the "rule of reason" analysis. See [Jefferson Parish Hosp. Dist. Number 2 v. Hyde, 466 U.S. 2, 44, 104 S. Ct. 1551, 1575, 80 L. Ed. 2d 2](#) (O'Connor, J. concurring) (remarking "exclusive dealing arrangements are independently subject to scrutiny under § 1 of the Sherman Act, and are also analyzed under the rule of reason") (citing [Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333-35, 81 S. Ct. 623, 631-32, 5 L. Ed. 2d 580 \(1961\)](#)); [Orson, 79 F.3d at 1368](#) (remarking "the Supreme Court has instructed that vertical restraints of trade, which do not present an express or implied agreement to set resale [\*\*96] prices, are evaluated under the rule of reason"); [U.S. Healthcare, 986 F.2d at 595](#) (suggesting that to condemn exclusive dealing arrangements requires "the normal treatment afforded by the rule of reason"); [Williams v. Indep. News Co., Inc., 485 F.2d 1099, 1104 \(3d Cir. 1973\)](#) (stating "by definition an exclusive dealing contract excludes potential customers from competition with the exclusive dealer[,] such a restraint is not per se unreasonable").

"The inquiry mandated by the rule of reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." [National Society of Professional Engineers v. United States, 435 U.S. 679, 691, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 \(1978\)](#). The rule of reason analysis requires the Court to consider "all relevant factors in examining a defendant's purpose in implementing a restraint and the restraint's effect on competition." [Orson, 79 F.3d at 1367](#) (citation omitted). <sup>9</sup> **HN32**[] Plaintiffs "bear the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets." [Id. at 1368](#) (citation omitted). [\*\*97] "The adverse impact must be on [\*657] competition, not on any individual competitor or plaintiff's business." [Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 899 F.2d 951, 960 \(10th Cir.\), cert. denied, 497 U.S. 1005, 110 S. Ct. 3241, 111 L. Ed. 2d 752 \(1990\)](#). Plaintiffs 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." [Orson, 79 F.3d at 1367](#) (citation omitted).

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.

*Id.* (citations omitted).

[\*\*98] **HN34**[] Once plaintiff meets this initial burden of "adducing adequate evidence of market power or actual anticompetitive effects, the burden shifts to defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective. To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective." [Id. at 1367-68](#) (citations omitted).

### 3. Application of the Rule of Reason

Plaintiffs contend that both the all-electric agreements and the conversion grants violate § 1 of the Sherman Act, relying heavily on [Advanced Health Care Servs., Inc. v. Radford Community Hosp., 910 F.2d 139 \(4th Cir. 1990\)](#) (finding for purposes of a 12(b)(6) motion to dismiss, a durable medical equipment supplier stated a § 1 claim against its competitor and several hospitals by alleging that they conspired to exclude all competition in the durable

<sup>9</sup> **HN33**[] Under the traditional rule of reason:

The true test of illegality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, and all relevant facts.

[United States v. Brown Univ. in Providence in the State of Rhode Island, 5 F.3d 658, 668 n.8 \(3d Cir. 1993\)](#) (citing [Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 243-44, 62 L. Ed. 683 \(1918\)](#)).

medical equipment markets and that this exclusion was not the result of business acumen, but of anticompetitive monopolistic intentions executed through marketing strategies and kickback schemes; the hospitals received 65% of all revenues generated by rentals of competitors' products to discharged [\*\*99] patients). According to Plaintiffs, PP&L foreclosed the homeowner's ability to select the most economical and desirable heating system. Finally, Plaintiffs suggest that at the very least, whether PP&L possesses "market power" presents a question of fact for jury resolution.

PP&L claims that the record contains insufficient evidence of market power because the oil dealers hold a greater share of the relevant market than PP&L. According to PP&L, the 29,512 grants affected no more than 3% of the total 1,074,015 homes in the relevant market, 97% of the homes in the relevant market were unaffected by the alleged anticompetitive activity, only 120 out of 1,500 developments operated under the all-electric agreements, and approximately 90% of the residential developments constructed were unaffected by the all-electric agreements. (Def.'s Ex. 14; Pl.'s Ex. 46).

**HN35**[<sup>10</sup>] While not controlling, an examination of PP&L's market power provides a starting point for the Court's evaluation of the challenged restraint's impact on competition. Compare *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 878 (3d Cir. 1995) (remarking "market power" is relevant only to the extent that it is a factor in the determination [\*\*100] of the reasonableness of the restraint") with *Reazin*, 899 F.2d at 967-68 & n.24 (highlighting the disagreement among courts over whether "a particular market share should be given conclusive or merely presumptive effect . . . or whether market share is only a starting point in the inquiry") (citing cases) and *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987) (describing defendant's possession of market power as a "threshold inquiry" and remarking "only if [plaintiff] can allege facts that give rise to an inference that [defendant] had sufficient market power to control liquor prices must we proceed to the first step in the Rule of Reason analysis"), cert. denied, 484 U.S. 977, 108 S. Ct. 488, 98 L. Ed. 2d 486 (1987).

Had the Court concluded that PP&L possessed sufficient monopoly power as a matter of law to establish a claim of actual monopolization under the § 2 of the Sherman Act, it could easily find market power under [\*658] § 1. See *Eastman*, 504 U.S. at 481, 112 S. Ct. at 2090 (finding "monopoly power under § 2 [actual monopolization claim] requires, of course, something greater than market power under § 1" and [\*\*101] describing § 2 as the "more stringent monopoly standard"); *Reazin*, 899 F.2d at 967 (remarking that market and monopoly power "differ only in degree -- monopoly power is commonly thought of as 'substantial' market power"); 3 Von Kalinowski § 17.01[2] (finding that "since the existence of actual or near monopoly power is a requisite element of actual . . . monopolization under section 2, commentators sometimes have said that the quantum of proof required under that section exceeds that required by section 1"). In the absence of such a finding, the Court conducts a comprehensive evaluation of PP&L's market power.

PP&L's market shares of 31% of the relevant market and 53% of the new construction submarket neither constitute *prima facie* evidence of market power nor preclude a finding of market power. See *Valley*, 822 F.2d at 666 (finding "70%-75% of market share constitutes market power . . . and that a 20%-25% market share or less does not constitute market power").<sup>10</sup> **HN36**[<sup>10</sup>] When considered in conjunction with other factors like barriers to entry, control over a superior resource, relative size, strength of the competition, and other market specific characteristics, [\*\*102] market share may indicate market power. See *Reazin*, 899 F.2d at 967 & n.23 (remarking "market share is relevant to the determination of the existence of market or monopoly power, but 'market share alone is insufficient to establish market power'" and listing relevant factors as *inter alia* "power of price and power of competition . . . the

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<sup>10</sup> In assessing PP&L's market share, the Court defines the relevant market as residential home heating in PP&L's service area and the submarket as new residential construction in PP&L's service area. While this definition mirrors that employed in disposing of the Sherman Act § 2 claim, the Court cannot fashion, and the parties have not put forth, a more germane definition designed specifically for the Sherman Act § 1 claim. Compare 2 Von Kalinowski § 6.02[2] (stating that while "market power under § 1 is not necessarily the same as monopoly power under § 2 of the Sherman Act, defining markets under § 1 involves the same analysis as under § 2 of the Sherman Act") with *Kellam*, 668 F. Supp. at 889 n.41 ("defining the relevant market for purposes of an attempted monopolization claim is different than defining the market for an exclusive dealing claim. In an exclusive dealing context, the law is only concerned with the market in the product under contract").

existence and intensity of entry barriers, elasticity of supply and demand, the number of firms in the market, and market trends") (citation omitted); [Valley, 822 F.2d at 666](#) (finding "market power is normally inferred from the possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography") (citation omitted).

[\*\*103] In the instant case, assessing PP&L's market share in light of other factors, the Court cannot conclude as a matter of law, that PP&L does not possess market power as understood and defined under [§ 1](#) of the Sherman Act. The Court has already found evidence of high barriers to entry. Viewing the facts in a light most favorable to Plaintiffs reveals that they compete in a market populated by at least one monopolist, PP&L, a large gas company enjoying a significant share of the gas heating market, and a panoply of oil dealers, none of whom controls a significant portion of the market. PP&L's relative size and status as the sole provider of electricity provide it with considerable advantages over the Plaintiffs, all of whom compete in the highly fragmented oil segment. PP&L enjoys exclusive control over this resource and therefore possesses *durable* market power. PP&L's market share in the relevant market has increased consistently (despite its supracompetitive prices), and its declining market share in the new construction submarket, from 84% in 1986, does not foreclose a finding of market power. See [Reazin, 899 F.2d at 970](#) (stating [HN37](#) [↑] "[a] declining market share may reflect [\*\*104] an absence of market power, but it does not foreclose a finding of such power") (citation omitted).

The Court now looks to PP&L to demonstrate that the all-electric agreements promote a sufficiently procompetitive objective. PP&L proffers that the all-electric agreements produced inherent advantages in price, convenience, and service. According [[\\*659](#)] to PP&L, builders obtained the benefit of predictability through the provision of a continuous stream of cash grants, increased good will and marketing success, full discretion in their dealings, and limited penalties for noncompliance. (Def.'s Ex. 5 at 96, 102; [Ex. 31 P. 4\(f\)](#); [32 P. 4\(b\)](#); [Ex. 35 P. 5](#); [Ex. 40 P. 6](#); [Ex. 41 P. 6](#); [Ex. 42 P. 7\(c\)](#)). Plaintiffs, argue PP&L, made no efforts to either develop and procure builder business or effectively market to the builders.

[HN38](#) [↑] In the presence of a procompetitive justification for the all-electric agreements, the Court examines their anticompetitive effects. See [Brown, 5 F.3d at 669](#) (stating once "defendant offers sound pro-competitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis"). Given the anticompetitive [[\\*\\*105](#)] nature of the all-electric agreements, the Court cannot conclude, as a matter of law, that these agreements did not constitute unreasonable restraints of trade. Furnishing cash grants and other financial incentives -- which PP&L was able to do because of its size relative to the competition and its monopoly on electricity -- allowed PP&L to close the market off to alternate heating sources. PP&L leveraged advantages it enjoyed as the sole provider of electricity into the new residential submarket, taking advantage of advance notice of new construction, using its customer service department to increase sales, and marketing through billing inserts. PP&L targeted builders in order to control, from the inception, what type of heating system would be installed in a new home. With respect to the all-electric agreements, it should be noted that "all-electric" means "all-PP&L." Once PP&L negotiated an all-electric agreement, it was guaranteed a future supply of customers that could turn only to PP&L. The oil dealers do not enjoy the same benefits. An "all-oil" agreement would not assure any dealer business; they would still compete among themselves for the customer.

The nature of the agreements [[\\*\\*106](#)] reveals their deleterious effects. In exchange for an agreement to exclude competitive fossil fuels and prevent supplementation with non-electric sources, builders received cash grants, often times in advance, tightening PP&L's grip on the development. The agreements clearly suppressed, rather than promoted, competition and effectively diminished Plaintiffs' presence in the new residential heating submarket. They were certainly effective; 95% of the homes constructed under all-electric agreements received electric heat while only 49.6% of those homes constructed in developments that were not controlled by all-electric agreements received electric heat. (Pl.'s Ex. 62). Prior to the agreements, Plaintiffs faced a more level playing field in this submarket. Once signed, the all-electric agreements block gas and oil from the development and forbid the homeowner to purchase a supplementary system from non-electric sources. Having found sufficient evidence of PP&L's specific intent to monopolize to survive summary judgment, the Court, drawing inferences in Plaintiffs' favor, reasons that PP&L devised these all-electric agreements in an attempt to dominate the new construction submarket.

[\*\*107] [HN39](#) The Court must also "take into account whether the competition eliminated by the clause is significant within the context of the total competition extant in the industry . . . [and attempt] to measure the effect of the challenged restriction on the market structure." *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1247 (3d Cir. 1975). Between 1981 and 1995, PP&L awarded 29,512 grants while 208,681 new residential connections were established during that period, and between 1987 and 1995, PP&L awarded 27,925 grants while 133,756 new connections were established. (Pl.'s Ex. 46). Admittedly, the 29,512 grants constitute only 2.7% of the 1,074,015 homes in the relevant market. The Court considers that statistic misleading, however, because of the peculiar nature of the market at issue. Converting a heating system entails substantial costs. Often, significant hardware must be removed, such as a chimney, furnace, or heat pump, and corresponding changes in the method of distributing the heat must be made, requiring alterations to vents, radiators, baseboards, etc. Such expenses diminish the willingness of homeowners to convert [\*660] an existing heating system. This suggests [\*\*108] that once a heating system is installed, that house is no longer part of the relevant market. High conversion costs mean that while PP&L has over 1,000,000 homes in its service area, those homes with existing heating systems are extremely difficult to reach, and only a small fraction -- those with the financial resources and desire to convert their system -- are susceptible to marketing.

The high costs of conversion, and the veritable removal from the market of those homes with existing systems, suggest that the new home submarket is crucial to the economic sustenance of residential heating suppliers. The Court therefore considers the 29,512 grants in light of the 208,681 new residential connections made between 1981 and 1995 and the 133,756 new connections made between 1987 and 1995. These significantly higher percentages for the new construction submarket provide a more accurate reflection of the all-electric agreements' anticompetitive effects.

The record also contains evidence of antitrust injury. See *Mathews v. Lancaster General Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996) (requiring [HN40](#) a court to "analyze the antitrust injury from the viewpoint of the consumer. An antitrust [\*\*109] plaintiff must prove the challenged conduct affected the prices, quantity or quality of goods or services, not just his own welfare") (citations omitted). The agreements lessened choices for new homeowners and made builders and developers resistant to the installation of alternative heating sources. They required new home purchasers to incur the increased costs associated with an electric heating system and forego a less expensive and more efficient oil or gas system. By inducing builders to install electric heating systems with grants, PP&L effectively strapped new homeowners with an electric heating system that required them to pay supracompetitive prices for a less desirable system that they did not specifically choose. In a purely competitive market, the new home purchaser could freely choose among gas, oil, or electric based on the advantages and disadvantages presented by each system. Finally, Plaintiffs presented an extensive expert report outlining the injury they suffered as competitors. (Pl.'s Ex. 96). PP&L's expert's report, however, which urges that Plaintiffs can point to no evidence of antitrust injury, creates a genuine issue of material fact for jury resolution. (Def.'s [\*\*110] Ex. 24 PP 124-32). Accordingly, the Court cannot conclude as a matter of law that the all-electric agreements did not constitute an unreasonable restraint of trade.

## 5. Conversion Grants

An examination of the conversion grants, however, compels a different result. The unique factors implicated by the all-electric agreements, which dealt largely with *new* home construction, have no applicability to conversion grants which were awarded to *existing* homeowners. The submissions relied on by Plaintiffs fail to establish that such conversion grants had any significant impact on the relevant market.

PP&L initiated the conversion grant program in 1983, and conversion grants enabled PP&L to lessen the financial drawbacks associated with converting a heating system. (Pl.'s Ex. 60). While the record does not reveal the exact number of conversion grants PP&L paid to existing homeowners, it states that PP&L converted 218 homes in 1987, 346 homes between 1988 and 1990, and 72 homes between 1990 and 1994. In its "Annual Conservation and Load Management Report for 1987," PP&L stated "the projection for 1988 is to have 400 storage space and water heating systems installed as replacements [\*\*111] to present fossil-fueled space heating and water heating systems." PP&L set the same number at 250 in its 1988 Report. (Pl.'s Ex. 60 at 510, 527; Def.'s Ex. 15).

These numbers can only be considered in the context of the *existing* homes in the relevant market. Between 1983 and 1995, there were 192,519 homes constructed in a relevant market of 1,074,015 homes, leaving 881,496 existing homes during this period for conversions. Assuming PP&L converted its targeted 400 homes per year between 1983 and 1995 (a total of 4,800 homes), these conversion grants affected only 0.5% of 881,496 existing homes in the relevant market. Plaintiffs have failed to establish that the [\*661] conversion grants eliminated a significant amount of competition to raise a genuine issue of material fact with regard to whether the conversion grants constitute an unreasonable restraint of trade. See 2 Von Kalinowski § 6G.03[2] (establishing numerical guidelines for § 1 violations and finding "under the rule of reason, an exclusive dealing or requirements contract probably would not violate Section 1 of the Sherman Act unless it affected over 50% of the relevant market").

## **6. Conclusion -- Sherman Act § 1**

[\*\*112] Accordingly, Plaintiffs' claims under § 1 of the Sherman Act only survive with respect to the all-electric agreements insofar as those agreements affect *new* homes. To the extent that Plaintiffs allege that PP&L unreasonably restrained trade by (1) offering cash incentives and financial aid to convert existing homeowners to electric heat and (2) offering builders cash incentives through the all-electric agreements to convert existing homes, the Court grants summary judgment to PP&L.

## **C. Clayton Act § 3**

Plaintiffs assert that the all-electric agreements violate § 3 of the Clayton Act. At a minimum, argue Plaintiffs, a triable fact issue exists as to whether the agreements substantially foreclosed competition in the relevant market. Considering that the all-electric agreements foreclosed 14% of the new home submarket (setting the damage period between 1981 and 1995 and 21% for the period between 1987 and 1995), Plaintiffs suggest that a jury could find substantial foreclosure. These percentages, urge Plaintiffs, when considered in conjunction with PP&L's size, its achievement of an 84% share of the submarket in 1986, its achievement of more than 70% saturation in the new [\*\*113] home submarket between 1987 and 1995, and the fact that homeowners must pay substantially higher prices for electric heat, support a finding of substantial foreclosure offensive to § 3. (Pl.'s Ex. 37; Ex. 46; Ex. 67; Ex. 69; Def.'s Ex. 66 at 4-5). According to Plaintiffs, the substantial market effect is seen in the consumers paying higher prices for electric energy than they would if oil was widely used. Furthermore, argue Plaintiffs, PP&L nearly doubled its saturation with the agreements: 95% of homes in developments controlled by all-electric agreements contain electric heat compared to 49.6% of new homes in developments not governed by the all-electric agreements.

PP&L argues that Plaintiffs cannot demonstrate substantial foreclosure when only (1) 8% of new developments, 120 out of 1,500, were governed by the all-electric agreements, (2) 3% of the relevant market (29,512 out of 1,074,015 homes) has been affected, and (3) 14% of the submarket (29,512 out of 208,681 new homes constructed) has been affected. This left open 85% of all new homes constructed and 97% of all homes in the relevant market, percentages Plaintiffs admitted indicate strong business possibilities. According [\*\*114] to PP&L, the Clayton Act applies only to the sale of goods, wares, merchandise, machinery, supplies, or other commodities and *not* electricity; PP&L relies on Groton v. Connecticut Light & Power Co., 497 F. Supp. 1040, 1052 n.14 (D. Conn.) (finding, for purposes of § 2(a) of the Clayton Act (15 U.S.C.A. § 13(a)) that "electricity is not a commodity") (citing City of Newark v. Delmarva Power & Light, 467 F. Supp. 763, 773-74 (D. Del. 1979) (remarking "the wording of the statute, its legislative history, and the regulation of the electric utility industry which existed at the time [of] the adoption of the Robinson-Patman Act, all suggest that 'commodity' was not intended to encompass electric power")), *aff'd in part and remanded*, 662 F.2d 921 (2d Cir. 1980).

## **1. Distinguished From Sherman Act § 1**

Section 3 of the Clayton Act provides:

**Sale, etc., on agreement not to use goods of competitor**

[\*\*HN41\*\*](#)[] 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, whether patented or unpatented, for use, consumption, [\[\\*\\*115\]](#) or resale within the United States . . . or fix a price charged therefor, [\[\\*662\]](#) 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.

[15 U.S.C.A. § 14 \(West 1973\)](#). "Section 3 [\*\*HN42\*\*](#)[] applies to a narrower range of transactions than does [Section 1](#) [including goods or commodities but not including real property, advertising, or services. Furthermore, a] lesser degree of anticompetitive injury need be demonstrated under Section 3 than under [Section 1](#)." 2 Von Kalinowski § 6G.03.

While [§ 1](#) applies to actual restraints of trade, § 3 "condemn[s] sales or agreements where the effect of such sale or contract would, under the circumstances disclosed, probably lessen competition or create an actual tendency to monopoly." [Tampa, 365 U.S. at 326, 81 S. Ct. at 627](#) (citation [\[\\*\\*116\]](#) omitted). "The legality of an exclusive dealing arrangement under the Clayton Act depends on whether the competition foreclosed constitutes a substantial share of the relevant market." [Barr, 978 F.2d at 110](#) (citation omitted). The two leading § 3 cases are *Tampa* (1961) and [Standard Oil Co. of California and Standard Stations, Inc. v. United States, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 \(1949\)](#).

## 2. Quantitative Substantiality Test

In *Standard*, the Supreme Court found that agreements requiring contracting retailers to purchase all their gasoline from the Standard Oil substantially lessened competition. Accounting for 23% of sales, Standard Oil was the largest gasoline retailer in the area. These exclusive supply contracts covered 6.7% of the area's sales and foreclosed competing refiners from marketing their product through 16% of the independent retail gasoline outlets in the region. [Standard, 337 U.S. at 295, 69 S. Ct. at 1053](#). The Supreme Court adopted [\*\*HN43\*\*](#)[] a "quantitative substantiality" test whereby a § 3 case would be made out "upon a showing that the exclusive dealing arrangement involved a significant share of the relevant market, or possibly even [\[\\*\\*117\]](#) upon a showing that the arrangement involved a substantial volume of commerce." [American, 521 F.2d at 1251 n.75](#) (citing [Standard, 337 U.S. at 299, 310-14, 69 S. Ct. at 1051, 1062](#)). Applying *Standard*, "the only relevant economic indicator is the percentage of the market the contracts foreclose." [Barr, 978 F.2d at 110](#) (citation omitted). Despite the Supreme Court's later interpretation of § 3 in *Tampa*, *Standard* remains viable authority. See [American, 521 F.2d at 1251 n.75](#) (stating "although the Supreme Court has modified the rigid rule articulated in *Standard Oil*, it has not indicated that the result in *Standard Oil* would differ from *Tampa Electric*").

Taking the *Standard* approach, the all-electric agreements do not violate § 3 because Plaintiffs have failed to produce proof "that competition has been foreclosed in a substantial share of the line of commerce affected." [Standard, 337 U.S. at 314, 69 S. Ct. at 1062](#). The Court relies on the same definitions of relevant market and submarket crafted in dealing with the Sherman Act claims. See 2 Von Kalinowski § 13.03[3] (stating [\*\*HN44\*\*](#)[] "the manner in which the relevant market is identified [\[\\*\\*118\]](#) [under § 3 of the Clayton Act] is the same under the Sherman Act"). The all-electric agreements affected only 3% of the relevant market. Compare [Barr, 978 F.2d at 111](#) (finding 15% preemption, in the presence of other factors, insufficient to make out a § 3 claim) and [American, 521 F.2d at 1252](#) (finding foreclosure of 14% "may well offend limitations which the Clayton Act places on exclusive contracts") with [Tampa, 365 U.S. at 333, 81 S. Ct. at 631](#) (finding .77% insubstantial). See also 2 Von Kalinowski § 6G.04[2] n.39 (stating "the lowest percentage of sales volume in the relevant market to be termed substantial was . . . about 5%") (citing [Lessig v. Tidewater Oil Co., 327 F.2d 459](#) (9th Cir.), cert. denied, 377 U.S. 993, 84 S. Ct. 1920, 12 L. Ed. 2d 1046 (1964)). While the all-electric agreements affected 21% of the new construction submarket, the Court reserves discussion of the [\[\\*663\]](#) unique implications associated with that statistic for its "qualitative" analysis.

### 3. Qualitative Substantiality Test

Evaluating a requirements contract providing a utility company with an assured supply of coal for its generating plants that foreclosed [\*\*119] only .77% of the relevant market, *Tampa* spawned the "qualitative substantiality test." *Tampa* considered the requirements contract lawful in light of the small percentage of the market foreclosed, the non-dominant position of the seller, and the failure of the exclusive dealing arrangements to hamper competition in the coal industry. [HN45](#)<sup>↑</sup> The qualitative substantiality test examines three factors:

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 pre-emption of that share of the market might have on effective competition therein.

[\*Tampa\*, 365 U.S. at 329, 81 S. Ct. at 629](#). Under this test, "the degree of market foreclosure is only one of the factors involved in determining the legality of an exclusive dealing arrangement." [\*Barr\*, 978 F.2d at 111](#) (citation omitted). The Third Circuit applies the qualitative substantiality test. See *id.* (applying *Tampa*); [\*American\*, I<sup>\\*\\*120</sup> 521 F.2d at 1251 n.75](#) (remarking that the qualitative test "introduced greater flexibility").

Application of the qualitative substantiality test compels a different conclusion from that reached under the quantitative substantiality test. The nature of the agreements, and PP&L's status as a monopoly, assure that the developments will be "all-PP&L" to the exclusion of oil and gas. The all-electric agreements foreclosed 21% of the submarket. As discussed *supra*, the new construction submarket plays a crucial role in the economic viability of these competitors, and the importance of that market cannot be underestimated. The high costs of conversion lessen the significance of the relevant market, and the "permanence" of an existing system makes the new construction submarket crucial to the sustenance of these competitors. The inability to access this submarket has deleterious effects on Plaintiffs' competitiveness in the relevant market, and blocking expansion into 21% of the new home submarket results in a substantial foreclosure of the relevant market. See [\*American\*, 521 F.2d at 1252](#) (finding foreclosure of 14% "may well offend limitations which the Clayton Act places on exclusive [\*\*121] contracts"); [\*Dictograph Prods., Inc. v. Federal Trade Comm'n\*, 217 F.2d 821, 828 \(2d Cir. 1954\)](#) (considering control of 20% retail outlets through exclusive dealing contracts by a large industry leader substantial foreclosure), *cert. denied*, 349 U.S. 940, 75 S. Ct. 784, 99 L. Ed. 1268 (1955).

The Court does not reach the same result with respect to the conversion grants. The qualitative analysis applicable to the all-electric agreements -- which dealt mostly with *new* home construction -- is not germane to the conversion grants -- which PP&L awarded to *existing* homeowners. The submissions relied on by Plaintiffs reveal that the conversion grants affected only 0.5% of 881,496 existing homes in the relevant market, an insufficient figure to demonstrate that they either had significant impact on competition in the relevant market or involved a substantial portion of commerce in the relevant market. The record in the instant case therefore fails to raise a genuine issue of material fact with regard to whether PP&L's use of the conversion grants violates § 3 of the Clayton Act. See [\*Tampa\*, 365 U.S. at 331, 81 S. Ct. at 630](#) (considering foreclosure of less than [\*\*122] 1% inadequate).

The Court rejects PP&L's contention that electricity is not a commodity for purposes of either the Clayton Act or the Robinson-Patman Act. Admittedly, *City of Newark* refused to include electricity within the definition of commodity. The Court notes, however, that *City of Newark* assessed [§ 2\(a\)](#) of the Robinson-Patman Act, and this Court limits its holding to that section. See [\*City of Newark\*, 467 F. Supp. at 773 n.12](#) (remarking "none of the cases cited by plaintiffs decide the issue of whether the [\*\*664] terms commodity in [Section 2\(a\)](#) includes electric power") (emphasis supplied). Furthermore, [HN46](#)<sup>↑</sup> a considerable number of cases have found that electricity is a commodity for purposes of the Clayton and Robinson-Patman Acts. See [\*Seaboard Supply Co. v. Congoleum Corp.\*, 770 F.2d 367, 371 n.3 \(3d Cir. 1985\)](#) (remarking "the Supreme Court held that [section 2\(c\)](#) was independent of 2(a)") (citation omitted); [\*Kirkwood v. Union Elec. Co.\*, 671 F.2d 1173, 1181-82 \(8th Cir. 1982\)](#) (finding electricity is a commodity for Robinson-Patman purposes; "electric power can be felt, if not touched. It is produced, sold, stored in small quantities, transmitted, and distributed [\*\*123] in discrete quantities"), *cert. denied*, 459 U.S. 1170, 103 S. Ct. 814, 74 L. Ed. 2d 1013 (1983); [\*Rankin County Cablevision v. Pearl River Valley Water Supply Dist.\*, 692 F. Supp.](#)

691, 693 (S.D. Miss. 1988) (remarking "most of the courts which have considered the issue have concluded that electricity is a commodity subject to the [Robinson-Patman] Act"); Concord v. Boston Edison, Co., 676 F. Supp. 396 (D. Mass. 1988) (same); Ellwood City v. Pennsylvania Power Co., 570 F. Supp. 553, 561 (W.D. Pa. 1983) (same); Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258, 1282 (S.D. Fla. 1980) (considering electricity a commodity under both Clayton and Robinson-Patman Acts; finding *City of Newark* decision an "unnecessarily narrow view of Congressional intent in using the word commodity"). Considering that PP&L generates and sells electricity, and the instant case involves the sale of electricity as a manufactured product that PP&L distributes in the form of residential heat, the Court adopts the rationale expressed in the aforementioned cases.

#### 4. Conclusion -- Clayton Act § 3

Accordingly, Plaintiffs' claims under § 3 of the Clayton Act only survive **[\*\*124]** with respect to the all-electric agreements insofar as those agreements affect new homes. To the extent that Plaintiffs allege that PP&L violated § 3 of the Clayton Act by (1) offering cash incentives and financial aid to convert existing homeowners to electric heat and (2) offering builders cash incentives through the all-electric agreements to convert existing homes, the Court grants summary judgment to PP&L.

#### D. Robinson-Patman Act § 2(c)

The Robinson-Patman Act, argue Plaintiffs, prohibits PP&L from providing payments to builders (purchasers of the heat pump) in order to exert influence over the builders' selection of electric heat. Plaintiffs allege that PP&L furnished grants to builders and developers that were not provided in exchange for services rendered by the builders and developers. According to Plaintiffs, a cause of action under § 2(c) does not require proof of predatory pricing. Plaintiffs suggest that § 2(c) requires only that a payment be made in connection with the purchase or sale of goods; it does not specifically require that the seller make the payment. Finally, Plaintiffs attack PP&L's assertion that the transactions in question do not affect **[\*\*125]** interstate commerce, claiming that the heat pumps, as well as the components from which they are manufactured, are produced outside the Commonwealth by Carrier Corporation in Syracuse, New York.

PP&L argues that *Yeagers II* immunizes these cash incentives. According to PP&L, Plaintiffs have failed to produce evidence of either predatory pricing or sales that crossed state lines, two requirements under § 2(c); PP&L relies on Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195, 95 S. Ct. 392, 398, 42 L. Ed. 2d 378 (1974) (stating "the distinct 'in commerce' language of the Clayton and Robinson-Patman Act provisions . . . appears to denote only persons or activities within the flow of interstate commerce"). PP&L contends that the record contains no evidence that it is either a seller or a buyer in the heat pump transactions, and therefore the grants do not pass the "seller-buyer" line. Finally, PP&L protests that Plaintiffs have not shown a fiduciary relationship between the builders and potential homeowners, pointing to Yeagers I, 804 F. Supp. at 715 (finding, that for purposes of a RICO claim, Plaintiffs' Amended Complaint failed to aver "that the developers and/or builders **[\*\*126]** and/or contractors are employees, agents or fiduciaries of anyone from whom they were **[\*665]** required to obtain consent before accepting the payments").

**HN47**  Section 2(c) of the Robinson-Patman Act addresses price discrimination and provides, in part:

#### Discrimination in price, services, or facilities -- Price; selection of customers

\* \* \* \*

#### Payment or acceptance of commission, brokerage or other compensation

(c) 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 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 on 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.

15 U.S.C.A. § 13(c). HN48 This provision "was designed to eliminate the competitive advantage large [\*\*127] buyers and sellers attained over their smaller competitors by virtue of their economic clout and bargaining power." Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 991 n.5 (4th Cir. 1990). Section 2(c) forbids payment of unearned monies "to the other party to a transaction or to an agent who is subject to the control of a person other than the one making the payment . . . . Although the purpose of that section was to eliminate unfair price discrimination, existence of that factor is not a prerequisite to liability." Seaboard, 770 F.2d at 370-71 & n.3 (including commercial bribery within the ambit of § 2(c)).

Section 2(c) HN49 "encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent, representative, or other intermediary in a transaction involving the sale or purchase of goods." Harris v. Duty Free Shoppers Ltd. Partnership, 940 F.2d 1272, 1274 (9th Cir. 1991) (citation omitted). For a finding of commercial bribery, plaintiff "must show that the illegal payments in question crossed the line from buyer to seller or vice-versa." Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, \*\*128 1066 (3d Cir. 1988), aff'd, 493 U.S. 400, 110 S. Ct. 701, 107 L. Ed. 2d 816 (1990). See Ellwood City, 570 F. Supp. at 562 (noting "intrastate sales are subject to the Robinson-Patman Act as long as the sales remain in the flow of interstate commerce").

Application of the aforementioned legal precepts to the facts presented in the instant case requires extreme innovation. The case law suggests that Congress enacted the Robinson-Patman Act in an effort to curtail the exertion of improper influence by large, financially resourceful players over sale transactions. Similarly, "commercial bribery" presents a prototype of the classic arrangement that § 2(c) aimed to eliminate -- a situation where the fiduciary of one party is influenced by another party to the transaction by the payment of brokerage when no services are performed. The transaction in the instant case fails to present the type of arrangement that Congress intended § 2(c) to prevent. The submissions indicate that PP&L furnished money to builders and developers in an effort to exert influence over the builders' decisions to install heat pumps. Plaintiffs obfuscate the issue, however, by focusing on the wrong transaction. \*\*129 The underlying transaction at issue in this case is the sale of electricity by PP&L (seller) to new homeowners (buyers) to operate residential heating systems. The Court considers the sale and installation of heat pumps, and grants paid to builders to induce those sales and installations, ancillary to the sale of electricity by PP&L to new homeowners.

The case *sub judice* would implicate § 2(c) if PP&L paid special consideration to the buyer, an agent of the buyer, or an intermediary subject to the buyer's control. The builders, however, constitute neither (1) agents for the buyer, (2) agents for the seller, nor (3) intermediaries acting on behalf of either the buyer or the seller. The builders \*666 are completely unrelated to, and uninvolved in, PP&L's selling electricity to a new homeowner, even though they may tangentially facilitate that transaction.

Plaintiffs' § 2(c) claim therefore fails because the record does not demonstrate that the protested cash payments crossed the line from buyer to seller. To sustain a § 2(c) claim, Plaintiffs need to illustrate that PP&L's cash payments traveled (1) from PP&L to either the new homeowners or a broker, agent, or intermediary acting \*\*130 on behalf of the new homeowners; or (2) from a broker, agent, or intermediary acting on behalf of PP&L to the new homeowners. See Seaboard, 770 F.2d at 372 (finding seller-buyer line was not crossed where a sales agent of the seller bribed the seller's employee and examining a case where "directed verdict for defendant manufacturer" was appropriate because "persons receiving unearned commissions from the manufacturer were not under the control of purchasers or acting on their behalf") (citation omitted); Environmental, 847 F.2d at 1066 (finding a complaint that alleged the illegal payment of monies through controlled corporations to government officials designed to influence the awarding of contracts stated a § 2(c) claim); Ideal Plumbing Co. v. Benco, Inc., 529 F.2d 972, 977 n.4 (8th Cir. 1976) (remarking that § 2(c) seeks to prevent "the practice of certain large buyers to demand the allowance of brokerage directly to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made") (citation omitted).

The absence of any evidence that the [\*\*131] monies paid crossed the line from buyer to seller, or vice-versa, precludes a finding that the payments from PP&L to the builders constituted commercial bribery and eliminates Plaintiffs' standing to bring a § 2(c) claim. See Environmental, 847 F.2d at 1066-67 (stating "a plaintiff must . . . meet the standing requirements to proceed [under § 2(c)] . . . [A] direct competitor of a company that obtains a contract through commercial bribery has standing to press a § 2(c) claim against the briber") (citations omitted). Although Plaintiffs acknowledge that the transaction does not present a classic § 2(c) violation, they apply an aggressive analysis of the facts presented to depict a § 2(c) violation that enjoys no support in the Third Circuit and constitutes an unnecessary extension and application of the rationale articulated in cases from other circuits. The Court instead elects to reach its own determination of this issue, concluding that PP&L's payments to the builders, which may violate other antitrust laws, do not fall within the explicit language of § 2(c). See Seaboard, 770 F.2d at 372 (remarking that "conduct not within the scope of the Act is not [\*\*132] made into an antitrust violation by accompanying conduct which is reprehensible under some moral or ethical standard or even illegal under some other law"). Accordingly, the Court grants PP&L's Motion for Summary Judgment on Plaintiffs' § 2(c) claim.

## E. State-Law Claims

Plaintiffs originally asserted state-law causes of action for civil conspiracy and unfair competition. See Yeagers II, 22 F.3d at 1263. In July, 1994, Plaintiffs moved to amend their Complaint by (1) alleging a claim of tortious interference with contractual relations with respect to the conversion grants and (2) amplifying the unfair competition claim to specify a cause of action for common-law restraint of trade. (See Pl.'s Ex. 93 at PP 5-8; Doc. Nos. 141, 166). The Court permitted the addition of the tortious interference claim but only insofar as it related to the conversion grants. The Court also allowed Plaintiffs to add a claim for common-law restraint of trade. In their initial Complaint, Plaintiffs pled a generic cause of action for unfair competition, and the Court believed that the addition of the restraint of trade claim would amplify Plaintiffs' general pleading.

### 1. Tortious Interference [\*\*133] With Contractual Relations

The Restatement HN50[<sup>↑</sup>] defines a cause of action for tortious interference with contractual relations as follows:

One who intentionally and improperly interferes with the performance of a contract . . . [\*667] between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement (Second) of Torts § 766 (1979). The accompanying commentary to that section envisions a balancing test:

HN51[<sup>↑</sup>] the plaintiff's interest in his contractual rights and expectancies must be weighed, however, against the defendant's interest in freedom of action. If the defendant's conduct is predatory, the scale on his side may weigh very lightly, but if his conduct is not predatory, it may weigh heavily. The issue is whether in the given circumstances his interest and the social interest in allowing the freedom claimed by him are sufficient to outweigh the harm that his conduct is designed to produce. In deciding the issue, the nature of his conduct is an important factor.

[\*\*134] *Id.* at § 766 cmt. c. Section 767 articulates HN52[<sup>↑</sup>] factors to consider in determining the impropriety of an actor's conduct:

- (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.

*Id.* at § 767. The Supreme Court of Pennsylvania has adopted both §§ 766 and *767 of the Restatement (Second) of Torts*. See *Small v. Juniata College*, 682 A.2d 350, 354 & n.1 (Pa. Super. Ct. 1996) (citing *Restatement (Second) of Torts* § 767); *Daniel Adams Assoc., Inc. v. Rimbach Publ'g, Inc.*, 360 Pa. Super. 72, 519 A.2d 997, 1000 (Pa. Super. Ct.) (remarking that the Pennsylvania Supreme Court has adopted *Restatement (Second) of Torts* § 766), *appeal denied*, 535 A.2d 1056 (Pa. 1987).

The significance of the conversion grants varies depending on the legal context in which the Court examines them. Under [\*\*135] § 2 of the Sherman Act, the Court determined that the parties' submissions raise genuine fact issues regarding the possible predatory nature of such grants. The Court nonetheless found that the conversion grants fail under both § 1 of the Sherman Act and § 3 of the Clayton Act because they neither eliminated significant competition nor foreclosed a substantial share of the relevant market.

The Court's conclusions regarding § 1 of the Sherman Act and § 3 of the Clayton Act do not, however, preclude a jury from finding that PP&L offered the conversion grants for an improper purpose and thereby tortiously interfered with Plaintiffs' contractual relations. *HN53* [↑] PP&L's actions need not be unlawful under federal antitrust statutes to be tortious. A jury must evaluate whether PP&L either (1) simply extolled the virtues of its products through promotional incentives or (2) interfered with Plaintiffs' contractual relations with existing homeowners. See *Restatement (Second) of Torts* § 766 cmt. m (remarking that A may induce B to sever his business relations with C by offering "B a better bargain than that which he has with C. Here . . . a nice question of fact is presented. A's freedom [\*\*136] to conduct his business in the usual manner . . . is not restricted by the fact that B has agreed to buy similar goods from C"); *Restatement (Second) of Torts* § 767 cmt. c (stating "conduct specifically in violation of statutory provisions . . . may for that reason make an interference improper. This may be true . . . of conduct that is in violation of antitrust provisions"). PP&L has failed to eliminate from the *Rule 56* record all genuine issues of material fact regarding the use and purpose of the conversion grants. Because a fact question exists whether such use was "improper," the Court declines to award summary judgment.

## 2. Unfair Competition

Count VII of the Amended Complaint states a cause of action styled "Unfair [\*\*668] Methods of Competition" and alleges that the all-electric agreements and conversion grants "constitute an unfair method of competition, in violation of Pennsylvania state law." (Am. Compl. P 81). Plaintiffs fail to articulate, however, the specific Pennsylvania state-law to which they are referring. The Court first assumes that Plaintiffs rely on *73 Pa. Stat. Ann. § 201-2 (4)* (West 1993) (defining "Unfair methods of competition"). The conduct proscribed by [\*\*137] that section, however, does not encompass the conduct complained of in the instant case. See *Horowitz v. Federal Kemper Life Assurance Co.*, 57 F.3d 300, 307 (3d Cir. 1995) (noting "in Pennsylvania, only malfeasance, the improper performance of a contractual obligation, raises a cause of action under the Unfair Trade Practices and Consumer Protection Law, *73 P.S. § 201-1 et seq.*").

The language in § 201-2 sounds in deception, misrepresentation, confusion, disparagement, and fraud. The statute does contain a "catchall" provision that includes, in its definition of "unfair," "engaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding." *73 Pa. Stat. Ann. § 201-2(xvii)*. This provision, however, applies only to fraudulent conduct. See *Hammer v. Nikol*, 659 A.2d 617, 619-20 (Pa. Commw. Ct. 1995) (remarking "to recover under the catchall provision, the elements of common-law fraud must be proven") (citation omitted). While Plaintiffs in the actual case have presented several allegations of antitrust violations, they have not produced any evidence of fraudulent, disparaging conduct that the Unfair Trade Practices and Consumer [\*\*138] Protection Law aims to protect.

*HN54* [↑] The common-law claim of unfair competition does, however, provide Plaintiffs with a cognizable cause of action. *Restatement (Third) of Unfair Competition* § 1 provides, in part:

One who causes harm to the commercial relations of another by engaging in a business or trade is not subject to liability to the other for harm unless:

- (a) the harm results from . . . other actions or practices of the actor determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public; or
- (b) the acts or practices of the actor are actionable by the other under federal or state statutes . . .

*Restatement (Third) of Unfair Competition § 1* (1995). An accompanying comment explains this provision: "subsection (a) therefore includes a residual category encompassing other business practices determined to be unfair . . . An act or practice is likely to be judged unfair only if it substantially interferes with the ability of others to compete on the merits of their products." *Id.* at § 1 cmt. g. See also *Lakeview Ambulance and Medical Servs., Inc. v. Gold Cross Ambulance and Medical Serv., Inc.*, No. 1994-2166, 1995 WL 842000, at \*2-3 (Pa. Ct. Common Pleas Oct. 18, 1995) (finding cause of action under *Restatement (Third) of Unfair Competition § 1*). Because the record contains fact issues concerning whether PP&L violated the various federal antitrust statutes, the Court considers summary judgment on Plaintiffs' common-law claim for unfair competition to be inappropriate.

### 3. Restraint of Trade

**HN55** [↑] "The Sherman Act is merely the application of the common-law doctrine concerning the restraint of trade to the field of interstate commerce." *Lakeview*, 1995 WL 842000, at 4 (citing *Collins v. Main Line Bd. of Realtors*, 452 Pa. 342, 304 A.2d 493, 496 (Pa.), cert. denied, 414 U.S. 979, 94 S. Ct. 291, 38 L. Ed. 2d 223 (1973)). Because of this similarity, the Court's decision regarding Plaintiffs' common-law restraint of trade claim mirrors the conclusion reached in assessing Plaintiffs' claim under § 1 of the Sherman Act. The Court denies summary judgment with respect to the all-electric agreements and grants summary judgment with respect to the conversion grants.

### 4. Civil Conspiracy

Finally, \*\*140 Plaintiffs' cause of action for civil conspiracy survives summary judgment. **HN56** [↑] To establish civil conspiracy, \*669 Plaintiffs must demonstrate "that two or more persons combined or agreed with the intent to do an unlawful act or to do an otherwise lawful act by unlawful means . . . . Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy . . . . This unlawful intent must be absent justification." *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 472 (Pa. 1979) (citations omitted). The record contains sufficient evidence of PP&L's specific intent to raise a genuine issue of material fact as to PP&L's motivation and whether PP&L's conduct was unlawful.

### F. Conclusion

Accordingly, PP&L's Motion for Summary Judgment is granted with respect to (1) Plaintiffs' claim of actual monopolization under § 2 of the Sherman Act; (2) Plaintiffs' claims involving the conversion grants under both § 1 of the Sherman Act and § 3 of the Clayton Act; (3) Plaintiffs' claim under § 2(c) of the Robinson-Patman Act; and (4) Plaintiffs' common-law restraint of trade claim (conversion grants only). The following causes of action proceed to trial: (1) § 1 of \*\*141 the Sherman Act (all-electric agreements/new homes only); (2) § 2 of the Sherman Act (attempted monopolization, leveraging of monopoly, abuse of monopoly power, predation through governmental processes, and conspiracy to monopolize only); (3) § 3 of the Clayton Act (all-electric agreements/new homes only); (4) tortious interference with contractual relations (conversion grants only); (5) restraint of trade (all-electric agreements/new homes only); (6) unfair competition; and (7) civil conspiracy.

An appropriate Order follows.

### **ORDER**

**AND NOW**, this 27th day of January, 1997, upon consideration of Defendant's Motion for Summary Judgment (Doc. Nos. 313, 314) and appendices submitted in support thereof (Doc. Nos. 315-19, 330, 338-41), Plaintiffs' Memorandum in Opposition (Doc. No. 325) and appendices in support thereof (Doc. Nos. 326-28, 333-34), Defendant's Reply (Doc. No. 329), Plaintiffs' Sur-reply (Doc. No. 332), and oral argument held on November 14, 1996 (Doc. Nos. 342, 346), **IT IS HEREBY ORDERED THAT:**

1. Defendant's Motion is **GRANTED** with respect to

- (a.) Plaintiffs' claim of actual monopolization under § 2 of the Sherman Act;
- (b.) **[\*\*142]** Plaintiffs' claims involving the conversion grants under both § 1 of the Sherman Act and § 3 of the Clayton Act;
- (c.) Plaintiffs' claim under § 2(c) of the Robinson-Patman Act; and
- (d.) Plaintiffs' common-law restraint of trade claim (conversion grants only).

2. Defendant's Motion is **DENIED** in all other respects.

BY THE COURT:

John R. Padova, J.

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## Goda v. Abbott Labs.

Superior Court of the District of Columbia, Civil Division

February 3, 1997, Decided

Civil Action No. 01145-96

**Reporter**

1997 D.C. Super. LEXIS 69 \*

Herbert L. Goda, individually and on behalf of himself and all others similarly situated v. Abbott Laboratories, et al.

## **Core Terms**

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damages, overcharge, purchaser, pharmacies, classwide, consumer, retail, class action, certification, cases, indirect, pass-on, antitrust, manufacturers, wrongdoer, collateral source, predominate, wholesalers, conspiracy, ultimate consumer, managed care, questions, prices, class certification, prescription drug, indirect-purchaser, methodologies, class-action, defendants', chain

**Judges:** [\*1] BRAMAN, J.

**Opinion by:** BRAMAN

## **Opinion**

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### **OPINION (ON CLASS CERTIFICATION)**

BRAMAN, J. We are presented with a motion seeking class certification which raises questions of first impression in this jurisdiction. The class-action issues arise in a suit charging a horizontal, price-fixing conspiracy against the leading manufacturers of pharmaceuticals.<sup>1</sup> The difficulties stem from a lack of privity between the defendants and the putative class members. Specifically, while the class members are purchasers and consumers of defendants' pharmaceuticals, they do not purchase directly from defendants.

We are in the domain of [Illinois Brick Co. v. Illinois \[1977-1 Trade Cases ¶ 61,460, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)\]](#), beset by the quandaries [\*2] involved in tracing the effects of alleged conspiratorial overcharges down the relevant line of distribution through successive purchasers who may or may not have passed on the overcharge in whole or in part.

### **Illinois Brick**

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<sup>1</sup> Principal jurisdiction is stated under (he District of Columbia Antitrust Act of 1980, [D.C. Code §28-4508\(a\)](#) (1996 Repl.), which permits a private action against any business that engages, *inter alia*, in any "conspiracy in restraint of trade or commerce all or any part of which is in the District of Columbia. . . ." *Id.* at [§28-4502](#). Alternative counts are pitched under the Consumer Protection Procedures Act. [D.C. Code § 28-3905\(k\)\(1\)](#) (1996 Repl.) and under the common law of unjust enrichment. The ensuing analysis will demonstrate that these alternatives do not substantively alter the merits of class action certifiability.

The Court had decided prior to *Illinois Brick* that a price-lixer could not defend against or mitigate a direct purchaser's claim on the ground that the direct purchaser had passed on the overcharge to its customers and was not, therefore, "injured" within the contemplation of section 4 of the Clayton Act [15 U.S.C. § 15 \(1994\)](#). *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, [1968 Trade Cases ¶ 72,490], 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968). The direct purchaser is thus permitted a full recovery notwithstanding that he has not absorbed the overcharge. The issue in *Illinois Brick* was whether indirect purchasers, such as we have here, would be permitted to claim that the illegal overcharge was successively passed on through the distribution chain and later paid by them. Confronted with *Hanover Shoe*'s rejection of pass-on as a defense when urged by the wrongdoer, the *Illinois Brick* Court also rejected offensive use of the pass-on theory by plaintiffs. Speaking through Mr. Justice White, the Court ruled that indirect or subsequent purchasers were not "injured" and hence were not entitled to recover even [\*3] though they ultimately paid the overcharges imposed by the antitrust violator.

Rejection of the indirect purchaser's plight, was primarily driven by fear that antitrust cases, already noted for their complexities, would be further confounded by inquiries seeking to track the damaging effects of an overcharge on the murky interplay of market forces, including supply and demand, as the levy impacts each relevant purchaser through each successive link in the distribution chain. Faced with the choice of allowing a 100 percent recovery to an undamaged, direct purchaser and apportioning the total impact of the overcharge among its victims, the Court declared that, "until there are clear directions from Congress to the contrary," the antitrust laws are better enforced "by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it ." [Illinois Brick](#), 431 U.S. at 746.<sup>2</sup>

The *Illinois Brick* dissent, authored by Mr. Justice Brennan, was undaunted [\*4] by the difficulties in assessing damages. Admittedly,

the portion of the overcharge passed on may be only approximately determinable. But again, this problem hardly distinguishes this case from other antitrust cases. Reasoned estimation is required in all antitrust cases, but "while the damages [in such cases] may not be determined by mere speculation or guess, it will be enough if the evidence show [sic] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. Lack of precision in apportioning damages between direct and indirect purchasers is thus plainly not a convincing reason for denying purchasers an opportunity to prove their injuries and damages.

[Id. at 759-760](#) (first brackets in original, citations omitted) (quoting [Story Parchment Co. v. Paterson Co.](#), 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931)).

The dissent's faith in "reasoned estimation" that "only approximate[s]" damages, an implicit acceptance of a doctrinal approach to be crafted by experts, was rejected by a skeptical majority for its lack of focus on individual injury and the realities of the market. [Id. at 742-743](#).

## The Legislative Solution

Whereas *Illinois Brick* had favored the direct purchaser and damages that were certain, the District of Columbia legislature opted, as the Court said [\*5] it might, in favor of apportionment among the *de facto* victims of the overcharge regardless of whether they were in privity with the wrongdoer. In 1980, the Council of the District of Columbia passed, and Congress sanctioned, the District of Columbia Antitrust Act which, *inter alia*, look square aim at *Illinois Brick*:

Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured within the meaning of this chapter.

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<sup>2</sup> The risk of multiple liability also prompted the Court to reject the indirect purchaser's claim. We will allude later to this problem. See *infra* [page 79,140].

D.C. Code §28-4509(a) (1996 Repl.).<sup>3</sup> Safeguards against the risk of multiple liability are set forth in sections 28-4509(b) & (c), thus greatly reducing if not entirely eliminating the apprehensions of *Illinois Brick*.

But the presence of *Illinois Brick* is [\*6] not so easily dismissed, for it nevertheless casts a long shadow over class actions in antitrust matters.

### The Instant Case and the Class Motion

The 23 defendants comprise most of the leading manufacturers of brand name prescription drugs, as distinguished from drugs that are sold under their generic names. The plaintiff, a resident of the District, is an ultimate consumer who buys his prescription drugs from retail pharmacies located in the District. Plaintiff charges that the defendants have conspired to fix, raise and maintain prices charged for brand name prescription drugs sold to independent and chain pharmacies while, at the same time, charging substantially lower prices to institutional pharmacies and mail order pharmacies.<sup>4</sup> These more favorable prices are steadfastly refused to independent and chain pharmacies, it is claimed. Wholesalers are also in collusion, it is averred, to impose and maintain this dual pricing structure (although they are not sued). Plaintiff seeks certification of the following class:

[A]ll persons who purchased branded drugs from retail pharmacies in the District which were manufactured, marketed, distributed and sold by Defendants at supra-competitive prices [\*7] . . . during the period commencing four years before the filing of this complaint to the present. . . . Excluded from the Class are officers and directors of the Defendants, any entity in which any of the Defendants has a controlling interest, and the family members, legal representatives, heirs, successors or assigns of any of the foregoing Defendants.

### Rule 23 and the Contentions of the Parties

Plaintiff's compliance with subsection (a) of Rule 23, *SUPER.CT.CIV.R.*, has not been put in question by defendants.<sup>5</sup> Instead, defendants' attack on class recognition concentrates upon Rule 23(b)'s insistence that the applicant also meet one of its criteria. Here the standard is the third, which heightens the demands upon common-question certification by also requiring "that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." [\*8] *Id.* at 23(b)(3).

Defendants maintain that this case quintessentially displays the complexities and individualized circumstances inherent in indirect purchaser suits as *Illinois Brick* apprehended. Viewed from the bottom of the distribution line upwards, the defendants argue that the proof would have to be on a per-purchaser, perpurchase basis, i.e., each purchaser would be required to show, as to each purchase made at a local retail pharmacy, that the drug was tainted by the conspiracy, that he or she was thereby injured and the amount of damage sustained. Viewed from

<sup>3</sup> The report of the Committee on the Judiciary states, "*Illinois Brick* has engendered substantial criticism, commencing with the dissenting opinion of Mr. Justice Brennan joined by Justices Marshall and Blackmun. Section 28-4509(a) makes clear that indirect purchasers can indeed seek damages for overcharges resulting from antitrust violations which are proven to have been passed on to them." Report on Bill 3-107, at 16 (Oct. 8, 1980).

<sup>4</sup> Institutional pharmacies include some health maintenance organizations (HMOs), hospitals, nursing homes, health clinics and other managed-care health organizations. Mail order pharmacies include some HMOs and insurance companies.

<sup>5</sup> Rule 23(a) provides that:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

the top down, a class member would be required to prove that (1) a defendant conspiratorially over-charged one or more wholesalers, (2) the wholesaler passed the overcharge onto the [\*9] class member's pharmacy, (3) the pharmacy then passed on the overcharge to the consumer plaintiff, and (4) the consumer plaintiff, as distinguished from a health benefit plan or other third-party source, actually paid the overcharge. Far from issues of injury and damages being common, the defendants argue they are highly individualized thereby requiring individualized proof. In short, defendants maintain, the individual issues will far and away predominate over the common ones.

Plaintiff, who has the burden of establishing compliance with Rule 23, [\*Yarmolinsky v. Perpetual American Federal Savings and Loan Ass'n\*, 451 A.2d 92, 94](#) (D.C.App. 1982), contends that the conspiracy issue is not only a common issue but the dominant one. It is further argued that District law permits classwide proof on the issues of injury and damages, and plaintiff is prepared through the testimony of an expert economist to quantify the overcharge and the pass-ons, thus enabling injury and damages to be shown by common proof. Other issues impacting a particular class member (e.g., third party payment for a purchase and failure to mitigate damages) may be addressed, it is claimed, in the administrative phase of this proceeding following the main trial. Finally, plaintiff argues that rejection of certification [\*10] of the damage claims for lack of common-issue dominance should not defeat his application for certification of the injunction claim.

### **The MDL Litigation**

In resolving these issues we do not write upon a clean slate. The case at bar trails two federal antitrust proceedings in the Northern District of Illinois brought by retail pharmacies against the same manufacturers of brand name prescription drugs as well as wholesalers. *In re Brand Name Prescription Drugs Antitrust Litig.*, No. MDL 997, 94 C 897 (the "MDL" or multidistrict litigation). The first proceeding is a class action. The second consists of consolidated actions brought by opt-out, independent pharmacies.

The retail pharmacies are indirect purchasers since they purchased from wholesalers, not the defendants. On defendants' motions for summary judgment based, *inter alia*, on *Illinois Brick*, Judge Kocoras held in both proceedings that the wholesalers were unwilling captives and under the control of the manufacturers. [\*Brand Name Prescription Drugs Antitrust Litig.\*, No. MDL 997, 94 C 897, 1996 U.S. Dist. LEXIS 4335, 1996 WL 167350, at \\*30-32](#) (N.D. Ill. Apr. 4, 1996). Hence, the case fell within the "control" exception to the indirect-purchaser bar of [\*Illinois Brick\*, 431 U.S. at 736 n. 16](#), and the pharmacies effectively would be considered direct purchasers of the manufacturers. [\*11] [1996 U.S. Dist. LEXIS 4335, WL at \\*32](#).

I will treat the MDL summary judgment ruling as tantamount to the law of this case. See [\*Parklane Hosiery Co., Inc. v. Shore\*, 439 U.S. 322, 326-333, 99 S. Ct. 645, 58 L. Ed. 2d 552 \(1979\)](#). For our purposes this means that instead of there being two tiers of purchasers between plaintiffs and manufacturers (the wholesale tier and the retail tier), there is only one (the retail tier).<sup>6</sup>

The MDL rulings by Judge Kocoras on two motions for class certification should also be considered. In the first, involving the federal action brought by the pharmacies, class certification was granted. [\*Brand Name Prescription Drugs\*, No. MDL 997, 94 C 897, 1994 U.S. Dist. LEXIS 16658, at \\*3-16](#) (N.D. Ill. Nov. 15, 1994). The second motion arose in a separate state action brought on behalf of ultimate consumers from Alabama. Certification was denied because these plaintiffs, unlike the pharmacies in their suit, failed to make a showing of injury and damages on a classwide basis. For that reason it was held that common issues did not predominate. [\*Id.\* at \\*17-19](#).

Faced with the same issue against most of the same defendants, a lower court in California granted certification to a class composed of ultimate consumers. Its force as persuasive authority is weakened, however, [\*12] because it tests entirely on ultimate conclusions of commonality and predominance without a reasoned basis of support. *Preciado v. Abbott Laboratories*, No. 962294 (San Francisco Super. Ct. Calif Aug. 16, 1996) (order certifying consumer class).

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<sup>6</sup> The consequences of this contraction will be developed when we treat the "Scope of Our Question." See *infra* [page 79,143].

## Predominance of Common v. Individual Issues

Plaintiff advances an array of cases to support the proposition that in a horizontal, price-fixing case the conspiracy is treated as the common and predominant issue for class-certification purposes. But those cases with facts sufficient to permit analysis, show them to be direct-purchaser cases.<sup>7</sup>

Defendants advance a line of [\*13] authorities in indirect-purchaser cases which reject certification. But these cases mostly turn on circumstances where the proof was not common to the putative class.<sup>8</sup>

It is evident that when the class-action remedy intersects price-fixing litigation, the conflict between the philosophies of the majority and dissenting opinions in *Illinois Brick* is sharpened. If we disdain the expert's theories, as does the majority, and demand the singular facts involving particular individuals in the specific context of their market, the class action is virtually doomed in indirect-purchaser cases. But if we assume the commission of a wrong that has resulted in some injury, albeit one difficult to measure, the allowance of "reasoned estimation" and "approximation," as postulated by the expert is not without appeal. The approach is especially persuasive where the wrongdoer's action has itself created the difficulty in proving damages with certainty. *Bigelow v. RKO Radio Pictures, Inc.* [1946-1947 Trade Cases ¶ 57,445], 327 U.S. 251, 264-265, 66 S. Ct. 574, 90 L. Ed. 652 (1946). The *Illinois Brick* dissent opens the way for admission of the expert's formulae to measure the overcharge and successive pass-ons, [\*14] thus establishing injury and damages on a classwide basis. Common questions of fact are thereby increased and individual questions correspondingly reduced.

Classwide formulae have been allowed after all to prove injury and damages in class actions involving direct purchasers. E.g., *In re Fine Paper Antitrust Litig.* [1979-1 Trade Cases ¶ 62,551], 82 F.R.D. 143, 154 (E.D. Pa. 1979), aff'd [1982-2 Trade Cases ¶ 64,843, 685 F.2d 810], 685 F.2d 810 (3d Cir. 1982), cert. den. 459 U.S. 1156, 103 S. Ct. 801, 74 L. Ed. 2d 1003 (1983); *In re Domestic Air Transportation Antitrust Litig.*, 137 F.R.D. at 691; *Transamerican Refining Corp. v. Dravo Corp.* [1990-1 Trade Cases ¶ 68,919], 130 F.R.D. 70, 76 (S.D. Tex. 1990). And in the MDL litigation involving our defendants, Judge Korcos certified a direct-purchaser class after recognizing the "number of different methodologies that can be used in proving damages and injury on a classwide basis." *Brand Name Prescription Drugs*, 1994 U.S. Dist. LEXIS 16658, at \*13.

Again we are spared the difficulty of choosing, for the legislature in opting for the indirect-purchaser remedy also focused upon class actions and classwide proof.

## The Legislative Gloss on Class Actions

<sup>7</sup> *In re Aluminum Phosphide Antitrust Litigation*, 11995-2 Trade Cases ¶ 71,2091, 160 F.R.D. 609 (D. Kan. 1995); *In re Potash Antitrust Litig.* [1995] Trade Cases ¶ 70,8851, 159 F.R.D. 682 (I. Minn. 1995); *In re Catfish Antitrust Litig.* [1993-2 Trade Cases ¶ 70,395, 826 F. Supp. 1019]. (N.D. Miss. 1993); *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516 (M.D. Ala. 1992); *In re Infant Formula Antitrust Litig.*, No. MDL 878, 1992 U.S. Dist. LEXIS 21981, 1992 WL 503465 (N.D. Fla. Jan. 13, 1992); *In re Domestic Air Transportation Antitrust Litig.* [1991-2 TRADE CASES ¶ 69,518], 137 F.R.D. 677 (N.D. Ga. 1991); *New York v. Salem Sanitary Caning Corp.*, No. CV-85-0208, 1989 U.S. Dist. LEXIS 12678, 1989 WL 86997 (E.D.N.Y. July 24, 1989). In support of *In re Amino Acid Lysine Antitrust Litig.*, No. 95-C-7679 (N.D. Ill. Feb. 15, 1996) (granting certification), plaintiff submits the transcript of the oral hearing on class certification. Although the court delivered its views. The underlying facts are obscure and do not reveal whether the purchaser was in privity.

<sup>8</sup> E.g., *In re Coordinated Pretrial Proceeding in Petroleum Products Antitrust Litig.* 1982-83 Trade Cases ¶ 65,028], 691 F.2d 1335 (9th Cir. 1982), cert. den., 464 U.S. 1068, 104 S. Ct. 972, 79 L. Ed. 2d 211 (1984); *Borden, Inc. v. Universal Indus. Corp.* [1981-1 Trade Cases ¶ 63,8961, 88 F.R.D. 708 (N.D. Miss. 1981); *Keating v. Philip Morris, Inc.* [1987-2 Trade Cases ¶ 67,801], 417 N.W.2d 132 (Minn.Ct.App. 1987).

Section 28-4508 of the D.C. Code provides remedies for private parties injured by violations of the District of Columbia Antitrust Act. As respects class actions, the legislature explicitly sanctioned, in section 28-4508(c), the use of common or classwide proof of injury to the class as a whole as well as to its members individually:

In any class action brought under this section by purchasers or sellers, the fact of injury and the amount of damages sustained by members of the class may be proven [\*15] on a class-wide basis, without requiring proof of such matters by each individual member of the class. The percentage of total damages attributable to a member of such class shall be the same as the ratio of such member's purchases or sales to the purchases or sales of the class as a whole.

In this manner has the expert and his formulae gained sway as Mr. Justice Brennan contemplated.<sup>9</sup>

Defendants seek to negate this legislative allowance of classwide proof by arguing that it is in conflict with the requirement of section 28-4509(a), that the indirect purchaser individually prove "payment of all or any part of any overcharge" in order to be deemed "injured." The two provisions mesh perfectly, however. To sue, the plaintiff must be "injured" and section 28-4509(a) provides that upon proof of "payment of all or any part of any overcharge," the indirect, purchaser is "deemed to be injured within the meaning of this chapter." Having told us who is injured, the legislature then deals in section 28-4508(c) with the proof and measure of damages when the injured person is a member of a class. Class damages may [\*16] be reckoned on a classwide basis and the individual member, who has qualified as "injured" under section 28-4509(a), is allowed individual damages under section 28-4508(c) pursuant to the "ratio" payout specified in that section.

While not dispelling *Illinois Brick's* skepticism of experts, section 28-4508(c) does mitigate the majority's apprehension of a plethora of mini-trials on injury and damages by sanctioning classwide proof. But statutory sanctioning of classwide proof does not by itself make the problem go away. The requirements of Rule 23(a) and (b) must still be satisfied.

### The Scope of Our Question

Two limiting circumstances should be noted before we deal with the common *vis a vis* individual questions presented here:

(1) Because summary judgment in the MDL litigation effectively eliminated wholesalers from the distribution chain as being captives of the defendants-manufacturers, we have only one intermediate tier (*i.e.*, the retail pharmacy) between the manufacturer and the ultimate consumer, the putative class member. Accordingly, only one pass-on must be scrutinized as distinguished from two in *Illinois Brick*. The effect, of this contraction of issues is to lessen the individual issues within the contemplation of Rule 23 that would otherwise be spawned [\*17] by this dispute.

(2) The ultimate consumer, at least in one respect, presents an easier question as a plaintiff than a middleman, indirect purchaser. The ultimate consumer has no one to pass on to and there are no damages other than the overcharge he suffers. But the middleman, even though passing on the overcharge in whole or in part, may yet demand additional damages on the theory that his sales were reduced by the increased prices. See Illinois Brick, 431 U.S. 720, 733 n.13, 97 S. Ct. 2061, 52 L. Ed. 2d 707.

Indirect-purchaser cases that do not present these limiting factors may present more difficult and intractable circumstances for class-action treatment than our case at bar. But more significantly, the nature of the classwide proof presented impacts significantly on certifiability.

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<sup>9</sup> Our legislature, in so acting, was following respected authority. See *Newberg on Class Actions*, §§ 10.06, 10.07 (3d ed. 1992) and cases collected therein.

We should also clear at the threshold defendants' argument that no injury can accrue to the class on account of any conspiracy because retail pharmacies, unlike managed care organizations, do not possess sufficient market-share power to command price discounts. Therefore, the theory goes, the prices to the pharmacies would remain unchanged regardless of any alleged conspiracy. The same argument was advanced and rejected in the MDL litigation on the summary judgment motion. [\*18] I find the reasons supporting denial of the motion in the MDL case. [Brand Name Prescription Drugs, 1996 U.S. Dist. LEXIS 4335, 1996 WL 167350, at \\*13.35](#), entirely persuasive here.

### The Proffered Classwide Proof

Plaintiff's expert economist, Dr. Michael J. Sattinger, has advanced by affidavit various econometric methodologies for measuring the overcharge and the extent to which retailers passed it on. This would permit, if accepted, common proof to establish injury and damage to the putative class. His opinions and methodologies have been subjected to extensive cross-examination by deposition and they are heavily attacked.<sup>10</sup>

I am not, however, permitted to assess the persuasive force of plaintiff's expert compared to defendant's expert. Dr. Edward A. Snyder. Nor may I determine whether, in a bench trial. I would credit Dr. Sattinger's opinions and methodologies. The question, instead, is whether they are sufficiently colorable to merit jury consideration. [In re Disposable Contact Lens Antitrust Litig., 170 F.R.D. 524, 531 \(M.D. Fla. Sept. 5, 1996\)](#) (A "colorable method of proving impact" or injury is sufficient for certification purposes.); [In re Potash Antitrust Litig. \[1995-1 Trade Cases ¶ 70,885\], 159 F.R.D. 682, 697 \(D. Minn. 1995\)](#) ("Without trenching on the merits, in considering a class certification motion, a court must consider only whether plaintiffs have made a threshold showing 'that what proof they will offer will be sufficiently generalized in nature that . . . the class action will provide a tremendous savings of time and effort.'"); See 7B Charles Wright. *Et Al.*, FEDERAL PRACTICE & PROCEDURE § 1718 at 7-8 (1986). While [\*20] class-action certification often involves analytical entanglement with the merits, [Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.12, 98 S. Ct. 2454, 57 L. Ed. 2d 351 \(1978\)](#), it does not permit nitpicking testimony to determine who "will prevail on the merits." [Eisen v. Carlisle Jacqueline \[1974-1 Trade Cases ¶ 75,082\]. 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 \(1974\)](#).

The threshold showing here is more than sufficient. Dr. Sattinger's theorems on quantification of an overcharge were accepted in the MDL litigation. [Brand Name Prescription Drugs, 1994 U.S. Dist. Lexis 16658, at \\*13](#). The remainder of his testimony dealing with the pass-on is corroborated *a fortiori* by four experts engaged by five of the defendants in the MDL litigation. They self-servingly opined, as respects the Robinson-Patman Act price discrimination claims also presented there, that 100 percent of any overcharge was in fact passed on by the retailers. Dr. Sattinger's affidavit postulates only a 50 percent pass-on. The literature is also supportive. "[I]ndirect purchasers virtually always can legitimately claim to have suffered overcharge harm as a result of a successful price fixing conspiracy." SECTION OF **ANTITRUST LAW**, A.B.A., PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 184 (1996).<sup>11</sup>

<sup>10</sup> Defendants attack overreaches the deposition transcript in a number of instances. For example, the claim that Dr. Sattinger was unable to rate the accuracy of any of his proposed methodologies in reflecting individual damages (Defendants' Memorandum of Law at 36) turns out to be an inability at the time of deposition to *comparatively rank* the various formulae according to their respective accuracy in reflecting individual damages (Sattinger Dep., 1135-1136), not a failure of any formula to fairly approximate damages. He is also said in have admitted that one of his constructs used in the MDL case "doesn't necessarily tell you 'what the price would [\*19] be absent the conspiracy.'" (Defendants' Memorandum of Law at 34). The cited deposition page (165) does not support the proposition. Even had the witness so testified, admissibility would not be impaired. A construct or formula is not required to "necessarily" prove a conclusion. Probability is sufficient.

<sup>11</sup> See also, *Harris and Sullivan, Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269, 289-290 (1979); Elmer J. Schaefer, *Passing-On Theory in Antitrust Treble Damages Actions: [\*21] An Economic and Legal Analysis*, 16 Wm. & Mary L. Rev. 883, 897 (1975); Cynthia U. Kassis. *The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act Another Congressional Response to Illinois Brick*, [32 Am. U. L. Rev. 1087 n.2 \(1983\)](#).

The proffered testimony here on classwide injury and damages distinguishes our case from the Alabama indirect-purchaser case where, in denying certification. Judge Kocoras noted that plaintiffs "have failed to show that they can establish the fact of injury and damages through common proof on a class-wide basis." [Brand Name Prescription Drugs, 1994 U.S. Dist. LEXIS 16658, at \\*17-18.](#)

Defendants argue that Dr. Sattinger's formulaic approach to injury and damages is a crude effort to get at individual loss. But the concept is sanctioned by [section 28-4508\(c\)](#) and defendants, while hinting at constitutional difficulties, conspicuously stop short of attacking it. It is hard to view the statutory concept (which adopted Mr. Justice Brennan's dissent) as being more crude and unfair in a case like this than the doctrine of the *Illinois Brick* majority, which permits a full recovery to an unharmed, direct purchaser while denying the real victim, the indirect purchaser, any relief at all. Moreover, in terms of fair enforcement of the antitrust laws, it sounds hollow for the alleged wrongdoer, while striking only a [\*22] glancing blow against class-wide damages, to champion the rights of the individual consumer by arguing vigorously that his damages have not been accurately reckoned.

Nor am I impressed at this stage with the alarms of insuperable complexities that will follow class certification. We are told there are 800 different drugs, thousands of retail outlets and tens of thousands of ultimate consumers with a myriad of health plans involved here. If analyzed on a drug-by-drug, retailer-by-retailer and consumer-by-consumer basis, it is claimed that the class action would be overwhelmed with individual questions. The argument is a variation, albeit a significant one, on a theme often raised and rejected in direct-purchaser cases where there is a colorable, expert approach to a classwide assessment of injury and damages.<sup>12</sup> The variation presented here is our putative class of indirect purchasers. This opens the door to the pass-on puzzle. But our statutes authorizing indirect purchaser suits ([§ 28-4509\(a\)](#)) and classwide proof of injury and damages ([§ 28-4508\(c\)](#)) mandate that we be solicitous to the class-action remedy if it is otherwise in conformity with Rule 23 and is manageable. And although we are trading up to the question [\*23] of pass-on, we are rid of the middleman's consequential damage claims stemming from the assertion that, although the overcharge was passed on in whole or in part, sales and profits were lost because of higher costs.

There is yet, however, another substantial obstacle to the class-action remedy or, at least, to the composition of the class as proffered.

### **The Collateral Source Issue**

Defendants point, to the fact that third parties or collateral sources often pay directly, or reimburse the consumer, for drugs purchased at retail pharmacies. Among such collateral sources are insurance companies, managed care plans and medicaid. Depending upon the contract or arrangement, there may be no "injury" within the contemplation of the antitrust laws, it is argued. Indeed, some members of the applicant class may belong to health care organizations who are favored by the discount denied to retail pharmacies. In such cases, defendants contend, the consumer has [\*24] no valid complaint.

The gravamen of plaintiff's claim is the passing on of the conspiratorial overcharge. Without the passing on the consumer is not injured. Clearly, HMO members who are permitted to buy from designated pharmacies are not injured within the contemplation of [section 28-4509\(a\)](#) if the pharmacy effectively absorbs the overcharge (either by moderating the prices charged to members or by rebating to the HMO). Medicaid recipients are also uninjured consumers. Federal law requires that manufacturers of brand name prescription drugs give the D.C. Medicaid program the "best price" provided to any private buyer or a 15 percent discount, whichever is greater, [42 U.S.C. §](#)

<sup>12</sup> E.g., [Brand Name Prescription Drugs, 1994 U.S. Dist. LEXIS 16658, at \\*11-12;](#) *In re Potash*, 159 F.R.D. at 694-695, 697; [In re Carbon Dioxide Antitrust Litigation \[1993-1 Trade Cases ¶ 70,230\]](#), 149 F.R.D. 229, 233-234 (M.D. Fla. 1993); *In re Domestic Air Transportation Litig.*, 137 F.R.D. at 689, 693-694; *In re Wirebound Boxes Antitrust Litig.* [1989-2 Traded Cases ¶ 68,818], 128 F.R.D. 268, 271-272 (I). Minn. 1939); *In re South Central States Bakery Products Antitrust Litig.*, 86 F.R.D. 407, 419, 420-423 (M.D. La. 198); *In re Fine Paper*, 82 F.R.D. at 147, 151-152; *In re Corrugated Container Antitrust Litig.* (1978-2 Trade Cases ¶ 62,220], 80 F.R.D. 244, 246, 249, 250 (S.D. Tex. 1978).

1396r-8 (1994). Accordingly, to be excluded from any class are consumers in those two categories: (1) Medicaid recipients; and (2) Members of health plans which, by dint of their economic clout, oblige independent pharmacies to absorb any overcharge.

Other collateral-source arrangements require further examination, however. No case has been cited dealing with collateral contributions in the context of antitrust injury. But, we must regard Hudson v. Lazarus, 95 U.S. App. D.C. 16, 217 F.2d 344 (1954), even though it is based in the law of personal injury. *Hudson* decided that

an injured person may usually recover in [\*25] full from a wrongdoer regardless of anything he may get from a "collateral source" unconnected with the wrongdoer. . . . [T]he interests of society are likely to be better served if the injured person is benefited than if the wrongdoer is benefited.

Id. at 18-19, 217 P.2d at 346. Applied strictly to this case, an injured consumer would be entitled to a full recovery notwithstanding his health care contract.

It is true, as defendants argue, that a consumer with a managed care plan or insurance policy calling upon him to make a fixed co-payment feels no pinch when drug companies hike prices and the retailers pass-on to the plan or the carrier. But there is nevertheless an injury as a result of a wrong. True it is that the injury is absorbed by the managed care plan or an insurance company, but they were paid to do so by the consumer-beneficiary who paid the premiums directly or indirectly through his employer. There is no reason why a wrongdoer should gain because his target has paid for coverage either through his dollars or through his labors for his employer.<sup>13</sup> In that sense he may be regarded as injured and as stated in *Hudson*, it is better here to benefit the injured than the wrongdoer. The rationale is more appealing [\*26] where the wrong is not mere negligence that usually harms only one person but a deliberate conspiracy that harms many. Effective enforcement of the antitrust laws is thus promoted.

We must not confuse the rights of the consumer as against a wrongdoer with the consumer's rights against his collateral source. While the manufacturer may be liable to the consumer, the insurance company or managed care plan may be entitled to indemnification from him, as would certainly be the case in subrogation. The latter circumstance can be addressed if and when we reach it in the administrative phase of these proceedings.

Nevertheless, problems involving collateral source are such that they deserve special and separate treatment. While insurance policies that simply [\*27] provide for reimbursement of the insured's directly incurred expenses do no appeal to present the complications of managed care plans, the better course at this time is to reserve them for separate scrutiny.

### Subclass Certification

Aided as I am (1) by this jurisdiction's legislation and (2) finding as I do that plaintiff's methodologies on overcharge and pass-on permit common proof of injury and damages sufficient to merit injury consideration, I conclude that the common questions of law and fact do predominate over individual questions. The residual requirement of Rule 23(b)(3), that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," is not genuinely contested. There is in practical terms no alternative remedy since the individual stakes in independent actions are no doubt insufficient to justify the costs. Accordingly, the class action remedy is the only remedy available.

I am mindful of defendants' argument that class-action certification and a single trial would "permit only proof common to the class . . . [and] prevent the defendants from explaining, on a consumer-by-consumer, drug-by-drug, and retailer-by-retailer basis, why many [\*28] individual consumers have no claim, why many individual consumers

<sup>13</sup> To the argument that the consumer with fixed copayments has gotten what he bargained for, fixed costs without the risk of enhanced prices, it may be said that (his artful rationale is one of the analgesics that permits escalating costs in health care. In any event, the predictable result is that, although copayments and/or premiums may be stabilized for one year, they will surely rise in the next to the detriment of the consumer/beneficiary.

would be compensated who (even under plaintiff's own theory) were never injured at all and why many others would be overcompensated for any claimed damage." (Defendants' Memorandum of Law at (6). The point has merit but is exaggerated.

To the extent that these three subject matters of alleged preclusion implicate collateral contributions, the questions are issues of law upon which the court will rule. Those rulings will control individual entitlements. The first matter, that "many individuals have no claim," is unclear. If defendants mean that they will not be able to challenge pass-on in whole or in part, they are mistaken. Nor will they be confined strictly to common proof. If the theorems propounded by the class skew individual damages so far that aggregate damages are in doubt or otherwise suspect, the jury would be entitled to weigh this in determining whether to adopt the methodology advanced by the class.<sup>14</sup> Rule 23(b) does not foreclose the trial of individual issues in a class action suit. It merely requires that the common issues predominate.

As stated, there will be excluded from certification (1) medicare beneficiaries and (2) persons with managed care programs whose brand-name-prescription-drug benefits are such that they negate any pass-on.<sup>15</sup>

Accordingly, this case will go forward as a class action but structured in subclasses pursuant to Rule 23(c)(4). The first subclass will consist of consumers who are without collateral source benefits. The second subclass will consist of those who have unexcluded collateral source benefits. Questions of individual entitlement will, should plaintiffs prevail, be left to the administrative stage subject to determination according to standards of law established by the court. The ratio formula of [section 28-4508\(c\)](#) will assist in the resolution of these matters. Collateral source problems will also be sorted out at this stage as well as problems involving individual mitigation of damages. Recourse to special masters pursuant to Rule 53 may also be helpful.

Whether the complexities of this case are ultimately susceptible to class action treatment is yet unclear. Certification, according to Rule 23(c)(1), "may be conditional and may [\*30] be altered or amended before the decision on the merits." This power will be exercised as the exigencies require.

## Conclusion

As our economy becomes more complex, technologically sophisticated and global, it continues to test the adequacy of the judicial process. The genius of our jurisprudence has always been its creative powers to adapt to the imperatives of our times.<sup>16</sup> Our legislature has taken the lead in this antitrust area with bold legislation endowing old remedies with new concepts and dimensions. The courts should not be found wanting where the subject matter at bar is *prima facie* manageable, as it is here.

Plaintiff is to submit within fourteen days an order which includes a restructuring of the class in conformity with this Opinion. Plaintiff should also submit within the same time period an order providing notice pursuant to Rule 23(c)(2) and setting forth, *inter alia*, the proposed notice, the means of [\*31] notice and provision for the payment of costs.

SO ORDERED.

<sup>14</sup> The latitude allowed for such evidence is obviously a matter of trial court discretion. [\*29]

<sup>15</sup> The class certified in *Prociado* excluded persons who did not purchase from an independent retail pharmacy.

<sup>16</sup> The metamorphic nature of the law has not abated. Its continuing vitality is attested to in cases like [Sindell v. Abbott Laboratories](#), 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980), cert. den. 449 U.S. 912, 101 S. Ct. 285, 101 S. Ct. 286, 66 L. Ed. 2d 140 (1980) (espousing the theory of "market share liability" in limited circumstances) and [Anderson v. Somberg](#), 67 N.J. 291, 338 A.2d 1 (1973), cert. den., 423 U.S. 929, 96 S. Ct. 279, 46 L. Ed. 2d 258 (1975) (endorsing the theory of "alternative liability" in appropriate circumstances).

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## **Bogan v. Northwestern Mut. Life Ins. Co.**

United States District Court for the Southern District of New York

February 5, 1997, Decided

91 Civ. 2221 (WCC)

### **Reporter**

953 F. Supp. 532 \*; 1997 U.S. Dist. LEXIS 1208 \*\*

ROBERT M. BOGAN and SCOTT M. BOGAN, Plaintiffs, - against - NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and AUSTIN E. HODGKINS, JR., Defendants.

**Disposition:** [\*\*1] Defendants' motion for summary judgment on antitrust claim granted and remaining fifteen state claims for resolution in pending state court case dismissed

### **Core Terms**

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general agent, Metropolitan, terminated, conspiracy, conspiring, rule of reason, dealers, horizontal, antitrust, group boycott, vertical, subordinate, territories, franchised, compete, sales agent, relevant market, general agency, state claims, Sherman Act, transfers, insurer, summary judgment, antitrust claim, procompetitive, newspaper, training, effects, records, soliciting agent

### **LexisNexis® Headnotes**

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

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

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

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

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

#### **HN1 [] Entitlement as Matter of Law, Appropriateness**

Summary judgment should be granted when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). When the moving party has carried its burden under [Fed. R. Civ. P. 56\(c\)](#), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. It must establish that there is a genuine issue for trial. In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.

Antitrust & Trade Law > Sherman Act > General Overview

## [HN2](#) Antitrust & Trade Law, Sherman Act

**Antitrust law** limits the range of permissible inferences from ambiguous evidence in a case under the Sherman Act, [15 U.S.C.S. § 1](#). Specifically, conduct as consistent with permissible conduct as with an illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. There must be direct or circumstantial evidence that tends to exclude the possibility that the defendants were acting independently. Moreover, in antitrust cases, if the factual context renders plaintiff's claim implausible -- if the claim is one that simply makes no economic sense -- plaintiff must come forward with more persuasive evidence to support its claim than would otherwise be necessary.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

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

## [HN3](#) Antitrust Actions, Facilities

Employees may challenge antitrust violations that are premised on restraining the employment market but not violations premised on restraining competition in the downstream product market in which their employers sell.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

## [HN4](#) Exemptions & Immunities, McCarran-Ferguson Act Exemption

See [15 U.S.C.S. § 1012](#).

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

## [HN5](#) Exemptions & Immunities, McCarran-Ferguson Act Exemption

To determine whether a particular practice of an insurance company constitutes the "business of insurance," courts have articulated a further three-part test: First, whether the practice has the effect of transferring or spreading a policy holder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Antitrust & Trade Law > Sherman Act > General Overview

## [HN6](#) Antitrust & Trade Law, Sherman Act

A violation of the Sherman Act ([§ 1](#)), [15 U.S.C.S. § 1](#) requires concerted action among two or more persons; [§ 1](#) does not proscribe independent action. A parent could not conspire with its wholly owned subsidiary. 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.

Antitrust & Trade Law > Sherman Act > General Overview

### **HN7** [down arrow] Antitrust & Trade Law, Sherman Act

Collaborative action between a corporation and its employees, or among employees within a corporation, is not regarded as joint action within the meaning of the Sherman Act, [15 U.S.C.S. § 1](#). However, a corporation's wholesalers or dealers are capable of conspiring in violation of [§ 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

Business & Corporate Law > Agency Relationships > General Overview

### **HN8** [down arrow] Antitrust & Trade Law, Sherman Act

Whether two actors constitute distinct economic entities for purposes of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), is determined by the economic realities of their relationship. In the context of the principal/agent relationship this analysis requires consideration of a number of elements which include: whether the agent performs a function on behalf of his principal other than securing an offer from a buyer for the principal's product; the degree to which the agent is authorized to exercise his discretion concerning price and terms under which the principal's product is to be sold; and finally, whether use of the agent constitutes a separate step in the vertical distribution of the principal's product.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

### **HN9** [down arrow] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Although the Sherman Act, [15 U.S.C.S. § 1](#), prohibits any contract, combination, or conspiracy in restraint of trade or commerce among the several states, it has long been established that [§ 1](#) proscribes only unreasonable restraints. The "rule of reason" is the prevailing standard of analysis. Certain business practices are deemed illegal per se, however, because of their pernicious effect on competition and lack of any redeeming virtue. These practices and agreements 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. Some examples of per se illegal arrangements are certain boycotts, horizontal territorial restrictions, and both horizontal and vertical price-fixing schemes.

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

#### [\*\*HN10\*\*](#) [] Practices Governed by Per Se Rule, Boycotts

The classic "group boycott" is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. It is this purpose to exclude competition that has characterized courts invoking the group boycott per se rule.

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 > Cartels & Horizontal Restraints > General Overview

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

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

#### [\*\*HN11\*\*](#) [] Practices Governed by Per Se Rule, Boycotts

An arrangement that has both horizontal and vertical aspects definitely should be tested under the "rule of reason" and possibly under the per se rule applied to group boycotts, if the restraint of trade has no purpose except stifling competition.

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

#### [\*\*HN12\*\*](#) [] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Establishing a violation of the rule of reason involves three 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 could be achieved through alternative means that is less restrictive of competition.

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

#### [\*\*HN13\*\*](#) [] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The antitrust laws are enacted for the protection of competition not competitors. Thus, a plaintiff must show more than that he was harmed by defendant's conduct or that there was an adverse effect on competition among different sellers of the same product. Such intrabrand restrictions can actually enhance market-wide competition by fostering vertical efficiency and maintaining the desired quality of a product. The focus of the inquiry must be the

relevant market as a whole, and any restriction of intrabrand competition must be balanced against any increases in interbrand competition.

Antitrust & Trade Law > Clayton Act > Claims

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

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

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

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

#### **HN14** [blue icon] Clayton Act, Claims

For standing purposes, however, whether there was or was not a per se violation is irrelevant. Regardless of any substantive violation of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), [§§ 4](#) and [16](#) of the Clayton Act still require plaintiffs to establish that the defendants engaged in anticompetitive conduct that caused them an antitrust injury. Although the per se rule relieves plaintiff of the burden of demonstrating an anticompetitive effect, which is assumed, it does not excuse a plaintiff from showing that his injury was caused by the anticompetitive acts.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Securities Law > ... > Subject Matter Jurisdiction > Postofferings & Secondary Distributions > Federal Jurisdiction

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

#### **HN15** [blue icon] Supplemental Jurisdiction, Pendent Claims

The exercise of pendent or supplemental jurisdiction is left to the discretion of the district court. In exercising its discretion, the district court is permitted to weigh several factors, including considerations of judicial economy, convenience, and fairness to litigants.

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**Judges:** William C. Conner, Senior United States District Judge

**Opinion by:** William C. Conner

## **Opinion**

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**[\*534] OPINION AND ORDER****CONNER, SENIOR D.J.**

Plaintiffs Robert M. Bogan ("Bogan" or "Robert") and Scott M. Bogan ("Scott"), jointly and separately, have brought various claims against defendants Northwestern Mutual Life Insurance Company ("NML") and Austin E. Hodgkins, Jr. ("Hodgkins") on sixteen separate causes of action arising out of Robert Bogan's termination as an insurance agent.<sup>1</sup>

**[\*\*2]** The only federal claim in this case is brought by both Robert and Scott Bogan against Hodgkins for federal antitrust violations (1st cause of action). Together they have also brought claims against Hodgkins for state antitrust violations (2nd) and tortious interference with prospective contractual relations with other General and Sales Agents (7th). Against NML they have brought a joint claim for tortious interference with existing contractual relations with Hodgkins (5th). They have also brought a claim for fraud against both Hodgkins and NML (11th).

Robert Bogan alone has brought claims against Hodgkins for: breach of contract (3rd), conspiracy to violate fiduciary duty (10th) and four claims for defamation (causes 14-17). He has brought claims against NML for: breach of written contract (4th), breach of implied contract (8th), and unjust enrichment (9th). Finally, he has brought claims against both defendants for conversion (13th), and tortious interference with his contracts with his Sales Agents (6th).

**[\*535]** The asserted basis for jurisdiction in this case is a federal claim under the antitrust laws, with pendent jurisdiction over the state claims. While there would be diversity **[\*\*3]** jurisdiction over the claims of Scott Bogan, a Connecticut resident, complete diversity does not exist because Hodgkins and Robert Bogan are both New York Residents. Before the Court are Defendant Hodgkins' and Defendant NML's motions for summary judgment on all counts pursuant to [FED. R. CIV. P. 56\(c\)](#).

**BACKGROUND**

Defendant NML insurance is a mutual insurance company that sells life insurance through a system of General Agents, District Agents, Sales Agents and Special Agents. NML contracts with its General Agents and generally assigns them each an exclusive territory. In the New York Metropolitan area, however, five General Agents share the same territory. General Agents, in turn, contract directly with District and Special Agents who are approved by NML. The District Agents in turn contract directly with Sales Agents. On the policies they sell, District, Special and Sales Agents are compensated by commissions on the initial premium and renewal premiums for the next nine years; General Agents receive an override commission on the commissions paid to the District, Special and Sales Agents.

Defendant Hodgkins, a New York resident, was during all times relevant to this dispute, **[\*\*4]** a General Agent for NML in the New York Metropolitan Area. Robert Bogan started with NML as a Sales Agent in 1976. From 1982 to 1987, he managed a District Agency under Hodgkins and in 1987 became a District Agent under Hodgkins' General Agency. On May 29, 1990, he was terminated by Hodgkins with 30 days notice effective June 30, 1990. On June 4, after a dispute involving Bogan's failure to turn over his records to Hodgkins, he was terminated for cause.

Robert's brother Scott joined NML in 1985 as a Special Agent under Hodgkins' predecessor, Hamilton; he later became a Special Agent under Hodgkins. In 1987 he signed a Special Agent's contract under Robert. All of the

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<sup>1</sup> There were originally 17 causes of action, but the 12th, under New York Deceptive Trade Practices, was dismissed by Judge Broderick. (See Order of 11/29/95).

contracts of the Special Agents in Bogan's District Agency, including that of Scott, were terminated when Robert was terminated. As discussed above, Scott joins Robert in five of Robert's sixteen claims.<sup>2</sup>

[\*\*5] As Robert Bogan presents them, the pertinent events leading up to his termination are as follows:

In 1990, Bogan was a highly successful District Agent for NML, ranked approximately fourth out of 300. Up until that point, he had invested over \$ 1.5 million in the development and improvement of his District Agency. During his tenure as District Agent, the District Office size had increased from three to eleven agents, while annual sales had increased from \$ 11 to \$ 120 million. Bog. Aff. PP 141-149.

NML's agency contracts contain strict limitations on its agents' writing business with other carriers (exclusive agency clauses). Prior to his termination, some of Bogan's agents were violating their exclusivity clauses and when Bogan attempted to enforce the clauses, they complained to Hodgkins who "told him [Bogan] not to interfere with what his Soliciting Agents were doing and began to plan to take away Bogan's District Agency and give it to two of Bogan's Soliciting Agents who were friends of Hodgkins." Pl. Br. p. 4-5. On May 29, Hodgkins terminated Bogan without cause "even after NML had repeatedly promised in writing that it would not permit such terminations." Id. In a June [\*\*6] 1 phone conference, Bogan told Dennis Tamscin, NML Senior Vice President - Agencies, some "very, very serious violations of the law have been committed by Hodgkins," that his agents were receiving checks from other insurers, and that "research needs to be done." Hdgk. Exh. J p. 6-8. Tamscin told Bogan to give Hodgkins access to the files or he would support Hodgkins' [\*536] termination of Bogan for cause. Tamscin added that, if Hodgkins so terminated him, he would not be able to take his District Agency with him when he left. Id.

On June 4th at 8:00 a.m., Hodgkins went to Bogan's offices and demanded that he turn over "all of [his] records" and "refused to give him time to consult with his attorney as to his rights and to coordinate with his attorney an orderly transfer." Pl. Br. p. 4. Bogan asserts that there were legitimate questions regarding which records belonged to NML and which were his personal files and that he asked Hodgkins to wait an hour until 9:00 a.m. when Bogan's attorney would be available. Hodgkins refused and notified him that he would be terminated for cause effective at 5:30 that day. Bog. 3(g) stmt. P24. Scott Bogan's contract was also terminated (as were all [\*\*7] of Bogan's Soliciting Agent's contracts), and he was told he could only recontract with the Hodgkins agency. Id. at P29.

Bogan alleges that Hodgkins terminated him wrongfully and that pursuant to an agreement amongst the General Agents he calls the "Metropolitan Agreement,"<sup>3</sup> once he was terminated for cause, he was prevented from either transferring as an active agent, or recontracting after his termination. It is this termination, the events that surrounded it and the alleged Metropolitan Agreement that give rise to the sixteen separate causes of action Bogan has brought before this Court.

<sup>2</sup> Scott Bogan has not submitted separate briefs to this Court but has relied upon Robert Bogan's submissions. Thus, throughout this opinion we will address the arguments presented by Robert Bogan, making explicit reference to Scott Bogan's claims only where they differ from Robert's.

<sup>3</sup> The origin and sponsorship of this "Metropolitan Agreement" are difficult to discern from Bogan's submissions to this court. He states in his 3(g) statement that "beginning no later than 1984, the General Agents reached an agreement called the Metropolitan Agreement which restricted agents in one agency from transferring to another area agency either voluntarily or upon termination." Bog. 3(g) stmt. P 35. He apparently asserts that the substance of this agreement is contained in the document "Company Policy on Metropolitan Transfers." Bog. 3(g) stmt. P 37 ("In 1989, NML decided for legal reasons that the Agreement would look better and have a better legal defense if it were called a company policy.").

For his part, Hodgkins apparently does not dispute that what he calls the "Metropolitan Policy," (see Hdgk. Exh. V), emerged from a 1989 meeting of NML General Agents. However, he asserts that the document is "improperly characterized" as an *agreement* amongst General Agents, when it is merely the NML company *policy*. Although Bogan, as the non-moving party, is entitled to have all disputed facts construed in a light favorable to him, for simplicity's sake, this Court will refer to Exh. V by its title -- the "Metropolitan Policy." However, for purposes of the merits of Bogan's claim, where relevant, this Court will assume that the General Agents agreed to its provisions.

[\*\*8] Defendants' version, though largely in agreement, puts a different slant on the facts. They assert that there were numerous problems in Bogan's district agency, evidenced by the multiple complaints Bogan's Agents had made to NML. According to Tamscin, Bogan's Agents considered him "dictatorial", Tamscin Reply Aff. for NML, P 41, and complained about his policy regarding expense reimbursement and outside business. For example, Bogan allegedly charged his agents \$ 3.50 per page for faxes, and demanded 20% of any commissions on outside business done through his office. *Id.* at PP 14, 15. Tamscin testified that in January of 1990 representatives of the Special Agent's association (SAI -- Special Agents, Inc.) had talked to Bogan about the complaints they had received from his agents; in February 1990, Kent Beebe of NML visited Bogan's agency because of the "problems there;" and in April, Richard Storatz, one of Bogan's agents, wrote a letter to Tamscin in which he described Bogan as "a district agent run amok, subverting the values of the company from within." *Id.* at PP 41, 45, 48.

Hodgkins testified that prior to his termination of Bogan, he and Bogan had attempted to "resolve [\*\*9] some myriad of issues, and were making some progress, certainly in some areas, and other areas we weren't." Hdgr. Depo. p. 21. He states that Bogan offered to step down as District Agent if the difficulties could not be resolved. *Id.* at 189.<sup>4</sup> [\*\*10] He adds that only then did he terminate Bogan without cause and that "Bogan's response . . . was to lock out two agents [Bob Slocum and Paul Winrich]," Hdgr. Br. p. 1., and deny them access to their records including [\*537] "one-card files" essential to an agents' ability to conduct day-to-day business. NML 3(g) stmt. P2. Hodgkins asserts that at that point, the Metropolitan Policy did not apply to Bogan as a former agent terminated without cause, and that he was free to transfer (alone, without his Soliciting Agents). Hodgkins states that only after Bogan refused his and Tamscin's demands to turn over the records did he fire Bogan for cause, thus rendering him unable to transfer to another General Agency.<sup>5</sup>

Hodgkins asserts that he was justified in firing Bogan and that his termination was neither a breach of contract nor part of an antitrust conspiracy, but part of a strategy to improve the management of his General Agency. He has brought a motion for summary judgment on all counts of the Bogans' complaint. Because Bogan's antitrust claim is the asserted basis for federal jurisdiction, [\*\*11] we discuss it first.

## DISCUSSION

### I. SUMMARY JUDGMENT STANDARD

**HN1** [↑] Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(c); Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986)*, cert. denied, 480 U.S. 932, 94 L. Ed. 2d 762, 107 S. Ct. 1570 (1987); see *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. "When the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348*

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<sup>4</sup> See Hdgr. Exh. C, 6/2 Memo from Bogan to Hodgkins, stating: "I'm sure we can find a livable/workable solution even if that means my stepping down."

<sup>5</sup> Hodgkins claims that this termination for cause was perfectly justified under Bogan's District Agency Contract. The contract provides in relevant part:

12. Records - District Agent shall hold and preserve all records relating to transactions by or for the company . . . and shall surrender them to the General Agent or the Company on demand.

20. Term of Agreement - ...

It may be terminated by the General Agent upon written notice to the District Agent, by reason of . . .

(ii) Failure of the District Agent to comply with any of the terms hereof, . . .

It may be terminated by either party at any time, without cause, upon thirty days' written notice.

Exh. A, NML 3(g) stmt.

(1986). It must establish that there is a "genuine issue for trial." Id. at 587. "In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." Knight, 804 F.2d at 11.

However, HN2[] "antitrust law" limits the range of permissible inferences from ambiguous [\*\*12] evidence in a § 1 case." Matsushita, 475 U.S. at 588. Specifically, "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Id. There must be direct or circumstantial evidence that "tends to exclude the possibility that the [defendants] were acting independently." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984). Moreover, in antitrust cases, "if the factual context renders [plaintiff's] claim implausible -- if the claim is one that simply makes no economic sense -- [plaintiff] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." Matsushita, 475 U.S. at 587; Apex Oil v. DiMauro, 822 F.2d 246, 253 (2d Cir.), cert. denied, 484 U.S. 977, 108 S. Ct. 489, 98 L. Ed. 2d 487 (1987) (". . .the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence").

While "several courts have noted that summary judgment disposition of antitrust cases is difficult to obtain because of their inherent factual complexity, . . . that does not mean that [\*\*13] summary disposition is thereby precluded or disfavored in antitrust law." Capital Imaging Assoc., Inc. v. Mohawk Valley Medical Assoc., 996 F.2d 537, 541 (2d Cir.), cert. denied, 510 U.S. 947, 126 L. Ed. 2d 337, 114 S. Ct. 388 (1993). Rather, "as the Supreme Court observed in Matsushita, summary judgment remains a vital procedural [\*538] tool to avoid wasteful trials and may be particularly important in antitrust litigation to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces." Id.

## II. THE ANTITRUST CLAIM

### A. The Nature of the Antitrust Claim

At the heart of Bogan's antitrust claim is the Metropolitan Policy which Bogan alleges was an agreement among NML General Agents not to compete for the services of existing agents by restricting their transfer. According to this document (whose full title is "NML Company Policy on Metropolitan Transfers"), active agents could not transfer between General Agents without the permission of both the agent's former and future General Agent. The Policy next provided that "agents who are 'terminated' by a General Agency will not automatically be prevented from contracting with another [\*\*14] General Agency unless [they were fired for cause]."<sup>6</sup> [\*\*15] Bogan contends his

<sup>6</sup>The copy of the Metropolitan Policy submitted as Exh. V is very poor. This Court has attempted to transcribe it as accurately as possible. It states, in relevant part, that:

Transfers within a metropolitan area are a touchy subject. Our first objective is to operate in the best interests of the Company and its General Agency system. Second, we seek reasonable solutions consistent with applicable federal and state law involving trade and commerce. In addition, we want to minimize Home Office interference in the conduct of local business because we feel it is contrary to the spirit of the General Agency System. However, the Company and the General Agents have to protect investments of time, energy and money in the recruitment, training, development and support of agents and in the General Agency system. Therefore, we need to operate within certain guidelines to provide a modicum of structure and some basic "rules of the road" with reference to transfers, especially in areas where several Agencies operate within the same territory.

Our policy on operating General Agencies in metropolitan areas, as it relates to transfers, is as follows:

1. Active, contracted Agents residing within shared territory shall not transfer between General Agencies without the approval of both General Agents. (This includes proposed transfers where a change in contract to include management or specialist responsibilities is involved.) . . .
  
3. Agents who are "terminated" by a General Agency will not automatically be prevented from contracting with another General Agency unless the reasons for termination involved failure to comply with company rules or ethical practices or to meet other standards for holding a Northwestern Mutual Contract.

firing on 30 days notice and subsequent dismissal for cause were unjustified, and that Hodgkins' actions in agreeing to the Metropolitan Policy and then firing him involve a course of conduct designed to exclude him from the NML system that constitutes "a contract, combination and conspiracy in restraint of trade or commerce in violation of § 1 of the Sherman Act, [15 U.S.C. § 1](#)."<sup>7</sup> As best we can ascertain from Bogan's rather confusing claim, he seems to allege that the Metropolitan policy enabled Hodgkins to: (1) wrongfully prevent Bogan's transfer while he was an active agent (see P 1 of the Policy), and (2) continue to exclude Bogan from recontracting with another NML agency thereafter by deliberately trumping up a "cause" for dismissal (see P 3). Bogan does not accuse the other General Agents or NML itself of violating [§ 1](#).

In response, Hodgkins contends, first, that the Metropolitan Policy is exempt from the antitrust laws under the McCarran-Ferguson Act; second, that he cannot conspire [\*\*16] with other NML General Agents; and third, that the Metropolitan Policy was not a violation of [§ 1](#) but merely a perfectly legal mechanism which NML and the General Agents use to protect their investment in the training [\*539] of their agents. Hodgkins further states that after he fired Bogan, the Policy's restrictions on transfer did not apply to Bogan because Bogan was no longer an active agent, that he justifiably terminated Bogan for cause, and at that point it was NML, not he, who exercised control over Bogan's ability to recontract. We consider these contentions separately in the order listed.

#### B. Antitrust Exemption under the McCarran-Ferguson Act

According to the Supreme Court, the primary purpose of the McCarran-Ferguson Act, [15 U.S.C. § 1011 et seq.](#),<sup>8</sup> was to insure the continued regulation of the insurance industry by the states; its secondary purpose was to allow only a limited exemption from the antitrust laws. [Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 218 n.18, 221, 59 L. Ed. 2d 261, 99 S. Ct. 1067 \(1978\)](#) (emphasis added) (The McCarran-Ferguson Act was designed primarily to enable insurers to collaborate on cooperative rate making without [\*\*17] violating the antitrust laws.). In order to determine whether the Sherman Act applies to particular conduct of an insurer, the Court has developed a three-pronged analysis for construing the McCarran-Ferguson Act: conduct that (a) constitutes the business of insurance (b) is regulated by state law, and (c) does not constitute a boycott, is exempt from the Sherman Act. See Royal Drug Co., 440 U.S. at 207; Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 73 L. Ed. 2d 647, 102 S. Ct. 3002 (1982).

Bog. Exh. V (emphasis added).

<sup>7</sup> As a preliminary matter, we assume that Bogan has standing to bring an antitrust claim here. As a prominent commentator has noted, most courts have concluded that "[HN3](#)" employees may challenge antitrust violations that are premised on restraining the employment market but not violations premised on restraining competition in the downstream product market in which their employers sell." AREEDA, [ANTITRUST LAW](#), P 377a, p. 311. But see *Balaklaw v. Lovell*, 14 F.3d 793, 800 (2d Cir. 1994). Balaklaw held that a doctor excluded by a hospital did not have standing under the antitrust laws because he had not shown anticompetitive effects in the relevant market. Since the question of the proper market is central to the analysis of the underlying antitrust claims, rather than summarily dismissing this case without analysis of the merits of those claims, we reserve consideration of this matter for our discussion of the [§ 1](#) conspiracy claim.

<sup>8</sup> [HN4](#)  [Section 1012](#) of the McCarran-Ferguson Act provides in relevant part:

- (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
- (b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914 known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

[\*\*18] [HN5](#)<sup>↑</sup>

To determine whether a particular practice of an insurance company constitutes the "business of insurance," the Supreme Court has articulated a further three-part test: First, whether the practice has the effect of transferring or spreading a policy holder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. [Pireno, 458 U.S. at 129.](#)

Our application of this test leads us to conclude that restrictions upon the transfer of subordinate agents does not constitute the business of insurance, and that the McCarran-Ferguson Act therefore does not bar Bogan's claims. The basic purpose of the Act was to allow insurance companies to coordinate their policy structures to facilitate spreading their risks. We do not see how the Metropolitan Policy meaningfully furthers this goal. NML's proffered justification -- that transfer restrictions result in increased training and thus better qualified NML Sales Agents -- is evidence of a procompetitive advantage of the Policy. We are not convinced by Hodgkins' argument that this training serves the [\*\*19] purposes of the McCarran Ferguson-Act and satisfies the [Pireno](#) test (promoting the spreading of risks and constituting an integral part of the contract between the insurer and the insured). Moreover, Hodgkins has not adequately established that the Metropolitan Policy is a matter regulated by state law. Thus, we deny Hodgkins' motion insofar as it contends that Bogan's claim is barred by the McCarran-Ferguson Act and proceed to a consideration of the merits of the claim under the Sherman Act.

#### C. The Ability of General Agents to Conspire

[HN6](#)<sup>↑</sup> A violation of [§ 1](#) requires concerted action among two or more persons; [§ 1](#) does not proscribe independent action. [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 1\\*540\] 104 S. Ct. 1464, 79 L. Ed. 2d 775 \(1984\); Schwimmer v. SONY Corp. of Am., 677 F.2d 946, 952](#) (2d Cir.), cert. denied, [459 U.S. 1007, 74 L. Ed. 2d 398, 103 S. Ct. 362 \(1982\)](#). Hodgkins urges that [Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#), establishes that the General Agents are parts of a single corporate entity and cannot conspire as a matter of law. In that case, the Supreme Court held that a parent could [\*\*20] not conspire with its wholly owned subsidiary. The Court explained that "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." [Id. at 771.](#)

The [Copperweld](#) Court provided an important limitation to its decision, however, cautioning that: "We limit our inquiry to the narrow issue squarely presented: whether a *parent* and its *wholly owned subsidiary* are capable of conspiring in violation of [§ 1](#) of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." [Id. at 767](#) (emphasis added). In this case, the General Agents are not wholly owned subsidiaries of NML. Indeed, NML has no ownership interest in the General or District Agencies, S. Bog. Aff. P 16., and NML is not charged with participating in the conspiracy. Thus, [Copperweld](#) is not controlling.

Similarly, the Second Circuit has said that "[HN7](#)<sup>↑</sup> collaborative action between a corporation and its employees, or among employees within [\*\*21] a corporation, is not regarded as joint action within the meaning of [§ 1](#)." [Schwimmer, 677 F.2d at 953](#) (emphasis added). However, a corporation's wholesalers or dealers are capable of conspiring in violation of [§ 1](#). [Id.](#); see also [United States v. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 \(1966\)](#) (franchised auto dealers capable of conspiring with their franchisor); [Bowen v. New York News, 522 F.2d 1242, 1256 \(2d Cir. 1975\)](#) (newspaper publisher guilty of formulating a [§ 1](#) conspiracy with its exclusive franchised dealers to restrict the sale of newspapers to independent resale dealers); [Borger v. Yamaha Intern. Corp., 625 F.2d 390, 395 \(2d Cir. 1980\)](#). In addition, it is clear that, outside of baseball, sports organizations are capable of conspiring with their member clubs in violation of the antitrust laws. See, e.g., [Mackey v. NFL, 543 F.2d 606, 618-19 \(8th Cir.\), cert. dism'd, 434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 \(1977\)](#)<sup>9</sup>; [Chicago Prof'l Sports](#)

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<sup>9</sup> This case and [Smith v. Pro Football, 193 U.S. App. D.C. 19, 593 F.2d 1173 \(D.C. Cir 1978\)](#), were criticized by the Second Circuit as being inconsistent with its ruling in [Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 \(2d Cir. 1987\)](#). See [U.S. Football, 842](#)

Lim. Partnership v. N.B.A., 961 F.2d 667 (7th Cir. 1992). Thus, in order to determine whether NML General Agents are capable of conspiring, it is important to determine whether they are more like employees [\*\*22] or independent franchisees.

[\*\*23] Some of the factors that suggested to the Second Circuit in Bowen that the dealer-franchisees were independent operators were: that they were labeled as "independent contractors" in their contract with the newspaper; that they had sole discretion to hire, discharge and supervise those engaged by them to carry out their delivery function; that they had sole discretion to determine the manner in which collections and deliveries were to be made; and that they had no right to return unsold copies. In addition, subscribers were considered to belong to the franchisees, and the newspaper had the right to buy a franchisee's customer list only if it were terminated. 522 F.2d at 1252-53. Thus, the [\*541] court found that the newspaper had intended to "cast some risk, although relatively slight, on the franchise dealer." Id. at n.8.

In Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025 (2d. Cir.), cert. denied, 444 U.S. 917, 62 L. Ed. 2d 172, 100 S. Ct. 232 (1979), the Second Circuit discussed the important factors in determining whether a corporation is legally capable of conspiring with its agents.<sup>10</sup> As the Second Circuit explained:

**HN8[]** Whether . . . two actors constitute [\*\*24] distinct economic entities for purposes of the Sherman Act is determined by the economic realities of their relationship. In the context of the principal/agent relationship this analysis requires consideration of a number of elements which include: whether the agent performs a function on behalf of his principal other than securing an offer from a buyer for the principal's product; the degree to which the agent is authorized to exercise his discretion concerning price and terms under which the principal's product is to be sold; and finally, whether use of the agent constitutes a separate step in the vertical distribution of the principal's product.

602 F.2d 1025 at 1031 (citations omitted). Since the plaintiffs acted "solely as conduit[s]" through which Amstar would negotiate the initial distribution of its sugar, they never purchased the sugar or competed with Amstar in its distribution or sale, Amstar never held them out as competitors, and the terms of the resultant sale were exclusively determined by Amstar, "rather than representing a separate and independent step in the distribution process, the sugar broker was merely an agent." Id. at n.5. See also Williams v. I\*\*251 Fisher Nevada, 999 F.2d 445, 447 (9th Cir. 1993) (Jack-in-the-Box franchisor incapable of conspiring with franchisee to implement no-transfer agreement because they are part of a common enterprise.").

However, the Second Circuit has found members of a physician's group capable of conspiring under § 1. Capital Imaging v. Mohawk Valley Medical Assoc., 996 F.2d 537, 545 (2d Cir. 1993) (noting that the doctors were not staff physicians of the HMO nor its agents, but independent practitioners with separate economic interests). In finding that a parent and its wholly owned subsidiary are incapable of conspiring, [\*\*26] the Southern District of New York noted that a "single corporation and its agents and employees are normally treated as a single actor for antitrust purposes except where the individuals or subentities are held out as competitors." Reborn Enter., Inc. v. Fine Child,

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F.2d 1335 at 1372. Wood held that a basketball player's claim that certain practices of the NBA teams were a *per se* violation of § 1 was preempted by the collective bargaining provisions of labor law. Wood, 809 F.2d at 958-62 (challenging salary cap, college draft and prohibition of player corporations arrived at through collective bargaining.) Smith ruled that the labor laws do not preempt a challenge to the NFL draft under the antitrust laws. Smith, 593 F.2d at 1179 n.22. Mackey ruled that a challenge to an NFL league rule regarding compensation of free agent's former club by new owners was not preempted by the labor laws because it was not the product of bona fide arm's length bargaining. Mackey, 543 F.2d at 615. It appears that all that the Wood court intended to criticize were the portions of the Smith and Mackey decisions which ruled that there was no preemption.

<sup>10</sup> This discussion was not essential to the holding in Fuchs. Relying upon the insufficiency of evidence of a conspiracy, the Fuchs Court found that a Sugar refiner and its general (non-exclusive) brokers were not guilty of a § 1 conspiracy in restraint of trade because in eliminating the general dealers (in favor of exclusive dealers), the refiner had acted unilaterally. 602 F.2d 1025 at 1031.

Inc., 590 F. Supp. 1423, 1437 (S.D.N.Y. 1984) (emphasis added), citing R. GIVENS, ANTITRUST: AN ECONOMIC APPROACH § 16.03, at 16-11 (1984).

Bogan's relationship with Hodgkins and NML has some similarities to that of the franchised newspapers dealers in Bowen. Bogan's District Agency contract itself recites that he "shall be an independent contractor and nothing herein shall be construed to make District Agent an employee of the Company or General Agent." See Hdgk. Exh. A. The contract goes on to state the "District Agent shall be free to exercise his own judgment as to the persons from whom he will solicit Applications and the time, place and manner of solicitation, but the Company from time to time may adopt regulations respecting the conduct of the business covered hereby, not interfering with such freedom of action of District Agent." Id. While all Agents selected by a District Agent must be **[\*\*27]** approved by NML, the District Agent is responsible for all "expenses, costs causes of action and damages resulting from or growing out of acts or transactions by himself, his employees his agents or persons appointed by him." Id. Thus, according to the terms of the contract at least, while he does not have absolute control over hiring and firing, a District Agent certainly bears more than a "relatively slight" risk. Id.<sup>11</sup> If a District **[\*542]** Agent's position in the Company has aspects that are independent from NML's control, certainly his General Agent would enjoy at least as great a degree of independence, since a District Agent works under the supervision of his General Agent.

**[\*\*28]** Bogan argues that General Agents cannot be considered a part of a single entity because they compete against each other to sell policies and for the services of the best subordinate agents in order to maximize their personal wealth. We agree for several reasons. First, although it appears that, like the sales agents in Fuchs, the General Agents of NML do not exercise discretion concerning the prices and terms of the policies their subordinate agents sell because NML establishes standard policy coverage and rate structures, Bogan argues that General Agents can compete for the sale of policies by permitting their District and Soliciting Agents to vary the level of service to and advocacy for the client. As he describes it, an Agent who puts the client first can offer not only superior services but a superior product. For example, the Agent can "do his best to obtain a non-rated policy or present[] the best policy alternative to the client so that the interests of the client and not the carrier are best served." Bog. Br. p. 27. One example of such a policy alternative offered by Bogan is an Agent's decision to recommend a particular combination of "whole life" versus "term life" **[\*\*29]** coverage. According to Jeffrey Grabel's testimony, whole life policies generally offer greater compensation to Agents. An agent who "puts the client first" might recommend a greater percentage of term-life coverage, even though such a recommendation is contrary to the Agent's -- and his superiors' -- pecuniary interests. Grabel Aff. PP 9-15. In view of the important role agents play in the structuring and servicing of policies, we find that the General Agencies constitute a "separate step" in the vertical distribution of NML's product.

Second, although the commissions paid to Agents are fixed by NML, General Agents allegedly compete for District and Soliciting Agents by varying the amount of training the agents receive, as well as the percentage of rent, supplies and secretarial services for which they are reimbursed. R. Bogan Aff. P 8.

We therefore conclude that the General Agents exercise sufficient independent control over their agencies, have adverse interests and compete among themselves to a sufficient degree to render them legally capable of conspiring against each other.<sup>12</sup>

<sup>11</sup> It is not clear, however, that the contract should be taken at face value. Both parties, at various times, urge that the contract is not representative of the actual relationship between the parties. Although Bogan strenuously urges that the General Agents are not one entity with NML, at another point he contends that "NML has treated all agents as agents of NML and it regularly controls their conduct by various means, up to and including directing or threatening their termination." (Pl. Br. p. 3, Bog. Aff. PP 24-34). Hodgkins, likewise, while insisting that NML and its various agents should be treated as one entity, allegedly has "repeatedly stated" that NML does not control the agents and that they are free to run their own businesses. Tamscin Aff. P 16; S. Bog. Aff. P 16.

<sup>12</sup> Hodgkins urges that this court should follow the Tenth Circuit's lead in Card v. Nat'l Life, 603 F.2d 828 (10th Cir. 1979), affirming a summary judgment for an insurer accused of conspiring with its General Agents to establish and enforce an exclusive agency agreement. There, the General Agents of National Life formed a corporation known as the General Agents Association, which was owned, controlled and financed by National Life General Agents. The General Agents met with officers of National

[\*\*30] [\*543] D. The Applicable Antitrust Analysis

Hodgkins further argues that even if the Metropolitan Policy was an agreement among the General Agents to restrict transfer of subordinate agents, it was not illegal because, in order to establish a violation of the antitrust laws, Bogan must show anticompetitive effect on the (consumer) market under the rule of reason. Bogan counters that the alleged conspiracy should be considered the type of group boycott that is *per se* illegal, or in the alternative should be analyzed under the "quick look" rule of reason. In resolving these issues we must first determine the proper characterization of the Metropolitan Policy under the Sherman Act, and correspondingly, the proper legal standard to apply to this conduct.

**HN9** [↑] Although § 1 of the Sherman Act prohibits any contract, combination, or conspiracy in restraint of trade or commerce among the several states, [15 U.S.C.A. § 1](#), it has long been established that § 1 proscribes only unreasonable restraints. [K.M.B. Warehouse Distrib. v. Walker Mfg.](#), 1994 U.S. Dist. LEXIS 7253, 1994 WL 250115 (S.D.N.Y.), aff'd, 61 F.3d 123 (2d Cir. 1995), (citing [Standard Oil Co. v. United States](#), 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 [\*\*31] (1911)). The Supreme Court has stated, that "since the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis." [Continental T.V., Inc. v. GTE Sylvania Inc.](#), 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). Certain business practices are deemed illegal *per se*, however, "because of their pernicious effect on competition and lack of any redeeming virtue." [Northern Pac. R. Co. v. United States](#), 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). These practices and agreements 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." *Id.* Some examples of *per se* illegal arrangements are certain boycotts, horizontal territorial restrictions, and both horizontal and vertical price-fixing schemes. See [Capital Imaging](#), 996 F.2d at 537-538; [U.S. v. Topco, Inc.](#), 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972); [Klor's Inc. v. Broadway Hale Stores, Inc.](#), 359 U.S. 207, 211-12, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959); [K.M.B. Warehouse](#), 1994 U.S. Dist. LEXIS 7253, 1994 WL 250115 at \*3.

It is difficult [\*\*32] to determine the exact nature of the conspiracy alleged by Bogan and the appropriate label to give it for the purposes of legal analysis, in particular to determine whether such an agreement would constitute a vertical or horizontal restriction on trade. Bogan would have us conclude that it is a horizontal agreement (among the General Agents) to allocate the market for the services of NML agents enforced by a group boycott that is illegal *per se*. As the Second Circuit has noted, the definition of a group boycott that is *per se* illegal is rather elusive and the cases discussing the issue are "fraught with uncertainty and doubt." [US Football League v. Nat'l Football League](#), 842 F.2d 1335, 1372 (2d Cir. 1988), (comparing [Klor's](#), 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 ("group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden [*per se*] category."), with [Jefferson Parish Hospital District No. 2 v. Hyde](#), 466 U.S. 2, 30-31, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984) ("exclusion of physician from hospital staff privileges not violation of antitrust laws 'without a showing of actual adverse effect on competition' in product market"), [\*\*33] and [Northwest Wholesale Stationers](#),

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Life and consulted with them on all major policy decisions. *Id. at 830*. (According to Tamschin, the General Agents of NML also had an "independent" organization, with its own officers and management, to "handle matters of interest to their members and represent their members' interests in matters pertaining to their relationship with NML." [Tamschin Aff.](#) (Scott Bogan) P 8.)

The Tenth Circuit found this Association, as well as individual general agents to be "really part of the National Life Structure" and thus incapable of being regarded as conspirators. *Id. at 834*. See also [Pa. Indep. Bus. Assoc. v. Unicorn Mktg.](#), 1985 WL 2812 at \*3-4 (If a corporation and its independent and separately incorporated subsidiary cannot form an antitrust conspiracy because the required 'different interests' do not exist, then it is highly unlikely that a corporation can conspire with its agents . . . An agent's interests ultimately coincide with those of the corporation and do not constitute the different interest required for concerted action under the antitrust laws.")

However, in addition to having very little solid information as to what the role of the NML General Agents' association was in the formation of NML company policy, we do not believe the exclusive agency agreement at issue in [Card](#) to be analogous to the no-transfer agreement at issue here. In [Card](#), all General Agents had the *same* interest in disallowing the writing of outside business by their subordinate agents -- the loss of prospective commissions. Here, the General Agents have competing interests in recruiting the most productive agents from other General Agencies. Therefore, we do not find [Card](#) compelling.

Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985) ("group boycott was not *per se* illegal absent proof that buying cooperative possessed market power.")).

While the case law is difficult to parse, the Court of Appeals for the District of Columbia has provided some helpful instruction on the matter. It stated that: "HN10<sup>13</sup>] The classic 'group boycott' is a concerted attempt by a group of competitors at one level to protect themselves from competition from **non-group** members who seek to compete at that level. . . . **[\*544]** *It is this purpose to exclude competition that has characterized the Supreme Court's decisions invoking the group boycott per se rule.*" Smith v. Pro Football<sup>13</sup>, 193 U.S. App. D.C. 19, 593 F.2d 1173 (D.C. Cir. 1978) (bold emphasis added), cited in Topps Chewing Gum v. Major League Baseball Players, 641 F. Supp. 1179, 1186-87 (S.D.N.Y. 1986). Like other types of conduct found illegal *per se*, these classic group boycotts "involve a type of arrangement that is so clearly and consistently anticompetitive that it is inherently illegal." Topps, 641 F. Supp. at 1187-88. **[\*\*34]**

This definition does not seem to fit squarely the situation in this case. Though the General Agents occupy the same level in the market and we have assumed that they have sufficient independence to conspire and that they do compete to a certain extent, see section II(C), *supra*, it seems illogical for Bogan to claim that the General Agents have conspired to exclude *themselves* from a most attractive part of the market for labor. Bogan has not alleged that a subset of General Agents are excluding others, or that they are excluding non-NML agents. The Metropolitan Agreement purportedly prevents other General Agents from recontracting with an agent terminated for cause, thus excluding not only subordinate agents, but the General Agents themselves from the excluded **[\*\*35]** agent's continued commissions. In this scenario, there is no classic outsider at the same level being excluded unless the General Agents are excluding themselves -- Bogan does not occupy the same level as the General Agents. Thus, Bogan's claim, if styled as a group boycott, approaches the type of implausible assertion frowned upon in Apex Oil, *supra*.<sup>14</sup>

**[\*\*36]** In addition, NML does not appear to possess the requisite market power required by the Supreme Court in Northwest Wholesale Stationers, *supra*, before a boycott will be found *per se* illegal. According to Hodgkins, NML "holds only 4% of the relevant insurance market." Hdgk. Br. p. 30. Nowhere does Bogan challenge this assertion or suggest that NML has market power in the insurance market.

Furthermore, although Bogan has alleged that only the General Agents were involved in any conspiracy to restrict transfer, the evidence presented to this Court makes it apparent, however, that NML played an indispensable (if not unilateral) role in enforcing the Metropolitan Agreement. Bogan himself testifies "In the Metropolitan New York Area,

<sup>13</sup> Recall from fn.9 that this case and Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir.), cert. dism'd, 434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977), were criticized by the Second Circuit, likely on the issue of labor law preemption of the antitrust laws.

<sup>14</sup> In making this statement, we do not mean to suggest that we are convinced that Hodgkins' proffered justification for firing Bogan was not pretextual and that the Metropolitan Policy did not provide some assistance to Hodgkins in his efforts to end Bogan's relationship with NML. Although Hodgkins offered considerable evidence that some of Bogan's subordinates considered him a difficult and "dictatorial" supervisor, the facts as Bogan presents them paint a picture that he was highly successful and that he was drummed out by Hodgkins, who conditioned his further employment on his allowing his Soliciting Agents to break their exclusive agency contracts with NML. Bogan suggests this was a mere pretext for taking over his agency. Hodgkins counters that he fired Hodgkins for legitimate reasons -- causing unrest in the office and refusing to turn over Slocum and Wintrich's records -- and that the absence of a conspiracy is shown by the fact that another General Agent did agree to contract with Bogan. Hodgkins adds that it was NML (not Hodgkins) that disapproved of the Bogan's proposed contract with another General Agent, that NML was perfectly justified in doing so, and that Bogan's failure to sue NML itself for antitrust violations is instructive. While these facts provide evidence that there was no such conspiracy, they do not establish that conclusion as a matter of law. A reasonable jury might find that through the Metropolitan Policy, Hodgkins and NML used coercion aimed at getting Bogan to "go along" with Hodgkins' alleged policy of "don't ask, don't tell" with respect to the Soliciting Agents' violations of their exclusive agency contracts, that Bogan was not justly fired for cause, and that the Metropolitan Policy that facilitated his permanent termination could be considered a "boycott." All this being said, we still cannot conclude that the challenged pattern of behavior constitutes the type of boycott that is illegal *per se*.

the General Agents and Northwestern Mutual have entered into a separate agreement strictly limiting the ability of any soliciting agent to transfer from one General Agency to another." Bog. Aff. in Opp. to Hdgk. Motion for Order to Surrender Documents P 4, NML Exh. 22.

[\*545] It certainly appears that NML enforced any such General Agent agreement. For example, prominent NML officers sided with Hodgkins in his dispute with Bogan. See e.g., tape of 6/1/90 [\*\*37] conversation between NML Vice President Dennis Tamscin and Robert Bogan, Hdgk. Exh. J., ("You must give Brud [Hodgkins] access to any records in the District Agency . . ."). Tamscin, however, asserts that NML by no means encouraged or even tolerated violations of the exclusive agency agreements, and did not encourage Hodgkins to send Bogan the 30-day notice, but merely "agreed with Hodgkins that Bogan's continued refusal to turn over the agents' records justified his termination for cause and NML tried as best it could to persuade Bogan to release the records to avoid termination for cause." Tamscin Reply Aff. P 19.

In addition, the parties do not dispute that Bogan had actually signed a preliminary Special Agent's contract with another General Agent (Gerald Gilberg) and that it was NML that disapproved the contract after Bogan was terminated for cause. See Hdgk. Exh. N, G. Gilbert Depo. p. 114. There is no evidence that any other General Agents were involved in this particular decision, other than their alleged agreement to the Metropolitan Policy concerning such matters. These facts cut against Bogan's argument that the General Agents were part of an organized conspiracy [\*\*38] to restrict transfer, but cannot defeat the assertion as a matter of law. It certainly appears likely that at least in this instance, without the enforcement arm of NML, any such conspiracy among the General Agents would have failed.

Tamscin also avers that it was NML itself who wanted the policy in the first place. Tamscin Aff. P 37 ("NML has traditionally encouraged its General Agents to try to reach agreement as to the circumstances under which they would approve transfers within their territories. NML not only encouraged such agreements, but typically drafted the agreements and met with the General Agents involved in order to help resolve any differences among them in order to reach an agreement that would be acceptable to them and NML"). A 1989 letter from Kent Beebe to Hodgkins states that:

. . . the Company has developed its policies regarding transfers and recontracting in order to foster orderly development of all general agency territories, especially those in major metropolitan areas. As you know, the Company as a general rule does not allow transfers between metropolitan agencies. Prohibiting transfers protects each general agent's investment of time, energy and [\*\*39] money in the recruitment, financial support and development of agents . . .

G. Gilberg Exh. A.

Tamscin states that the General Agents never agreed to the policy (NML's efforts were "singularly unsuccessful"), and that Mr. Beebe of NML then sent out a copy of the document Bogan calls the Metropolitan Policy as part of a memorandum sent to all General Agents. Tamscin Aff. P 38; G. Gilbert Depo p. 334; see also Hdgk. reply Aff. P 4. The memo reads, in part:

While it is pretty obvious that we will not all agree on each and every subject, the opportunity to constructively share concerns, values and ideas is always valuable.

Since our meeting we have been conferring with the Law Department about the transfer rules we discussed. They have advised us of the state of the law on a number of issues implicit in our efforts to legitimately control transfers in the best interests of the Company and its general agents. We are convinced that the most effective control is a Company policy which addresses your concerns without placing unfair or unreasonable restraints on agents or former agents.

Therefore, the principles which we discussed have been revised with the help of counsel [\*\*40] and are set forth in the attached Company Policy on New York Metropolitan Transfers . . .

I want to stress once again the ultimate objective which is the development of such strong metropolitan relationships that you are able to handle your situations and difficulties without Home Office intervention. We continue to believe that the existence [\*546] of excellent relationships among our General Agents sharing the

New York Territory is the paramount issue, because with good relationships and a desire to "do the right thing" most disputes will disappear.

G. Gilberg Depo. Exh. B, S. Gilbert Depo. Exh. A.

At minimum, these facts suggest strong vertical aspects to the alleged combination or conspiracy.<sup>15</sup> Bogan's decision not to assert an antitrust claim against NML does not change this reality. Thus, Bogan's characterization of the Metropolitan Policy as the type of *per se* illegal boycott quintessentially entered into by horizontal competitors to exclude outsiders is highly dubious.

[\*\*41] Nor does this case involve a horizontal conspiracy affecting prices. The Supreme Court has found franchised auto dealers liable under the *per se* rule for conspiring with their franchisor to restrict price competition. See *United States v. General Motors Corp.*, 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966). In *General Motors*, a number of exclusive dealers, each of whom GM had franchised to sell its cars in a different Los Angeles location, began reselling GM cars to discount houses that then resold to consumers. Other franchise dealers complained to GM, who reacted by obtaining an agreement from each not to resell to discounters. Three associations of franchise dealers jointly policed the agreements by supplying information to GM who met with the dealers to discourage the practice and to request that the cars sold to discount houses be repurchased. *Id. at 129-38.*

In defense of its practices, GM argued that the resales violated the "location clause" in its franchise agreements. The Supreme Court did not question the legality of such agreements, or that GM itself might have taken unilateral action to enforce them. However, it stated:

We have a classic [\*\*42] combination in restraint of trade: joint, collaborative action by dealers, the . . . associations, and General Motors to eliminate a class of competitors by terminating dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. Against this fact of unlawful combination, the "location clause" is of no avail. Whatever General Motors might or might not have done to enforce individual dealer Agreements by action within the borders of those agreements and the relationship which each defines, is beside the point.

*Id. at 140.* The Court was careful to point out, however, that "inherent in the success of the combination in this case was a substantial restraint upon price competition -- a goal unlawful *per se* when sought to be effected by combination or conspiracy. *Id. at 147* (emphasis added).

Bogan argues that the Metropolitan Agreement significantly affects price competition. We disagree. The "price" that Bogan asserts is affected by the Metropolitan Agreement's limitation on transfer is the total compensation provided to NML District, Sales and Soliciting Agents. While [\*\*43] Bogan concedes that an NML Agent's commissions are fixed regardless of who his supervising agents are, he asserts that General Agents have significant discretion in the amount they reimburse their subordinate agents for rent, secretarial services, and supplies and that this discretion would create "wage" competition if the subordinate agents were permitted to transfer between general agencies. Bog. Aff. P 8; see section II(C), *supra*. While this may well be the case, it does not help Bogan here because, as discussed below, his definition of the relevant market as consisting only of the services of NML agents is unacceptable. The market is properly considered the entire industry (or at least the New York Metropolitan area), and thus any restriction on wage competition in NML's small share of the industry does not seriously affect such

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<sup>15</sup> There are countless cases discussing whether to denominate similar agreements as vertical or horizontal conspiracies. Many find such arrangements to be vertical. See, e.g., *Blanton Enter., Inc. v. Burger King Corp.*, 680 F. Supp. 753, 765 (D.S.C. 1988) (refusal by Burger King of franchise to plaintiff was vertical restraint, despite complaints of franchisees). We believe, however, that the best characterization of the Metropolitan Agreement is that it was both vertical and horizontal in nature.

[\*547] competition in the industry as a whole.<sup>16</sup> Thus, the Metropolitan Policy cannot be considered a restriction on price competition that would fall under the *per se* analysis.

[\*\*44] In a situation the Second Circuit found to be "remarkably similar" to that condemned in General Motors, the court found a newspaper publisher guilty of formulating a *§ 1* conspiracy with its exclusive franchised dealers to establish exclusive territories. Bowen v. New York News, 522 F.2d 1242, 1256-58 (2d Cir.), cert. denied, 425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1667 (1976). The obvious effect of the agreement was to prevent competition in the sale of newspapers to independent resale dealers. Id. The territorial restriction was apparently held illegal *per se*, since the Second Circuit did not discuss whether it was performing a *per se* or rule of reason analysis, but simply held the conspiracy illegal, without express consideration of market power or effects on competition. Id. Here, however, the alleged conspiracy (the Metropolitan Policy) does not involve the establishment of exclusive territories -- in fact, Bogan complains about a restriction against his transfer within a territory shared by six General Agents. Bog. 3(g) stmt. P 34.

In light of the fact that the Metropolitan Policy cannot be considered either a classic group boycott, a horizontal [\*\*45] price-fixing scheme or a horizontal territorial allocation that is illegal *per se*, we turn to an analysis of cases involving similar facts -- those involving arrangements that are both horizontal and vertical in nature -- in order to determine whether an agreement among General Agents that is policed by their principal, such as the Metropolitan Policy, constitutes a violation of the antitrust laws.

Many courts have held that sports organizations (outside of baseball) are capable of conspiring with their member clubs in violation of the antitrust laws and have analyzed these conspiracies under the rule of reason. See, e.g., Mackey v. NFL,<sup>17</sup> 543 F.2d 606, 618-19 (8th Cir.), cert. dism'd, 434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977). In Mackey, the Eighth Circuit held that a NFL rule that required a club acquiring a free agent to compensate the agent's previous club constituted a group boycott properly analyzed under the rule of reason because of the special circumstance that the NFL possessed some characteristics of a joint venture and some characteristics of competition. See also Chicago Prof'l Sports Lim. Partnership v. N.B.A., 961 F.2d 667, 673 (7th Cir.), cert. denied, 506 U.S. 954, [\*46] 121 L. Ed. 2d 334, 113 S. Ct. 409 (1992) (Rule of reason properly applied to NBA rule limiting television broadcasts since NBA is a joint venture); Brenner v. World Boxing Council<sup>18</sup>, 675 F.2d 445, 454-55 (2d Cir.), cert. denied, 459 U.S. 835, 74 L. Ed. 2d 76, 103 S. Ct. 79 (1982) (declining to apply *per se* rule to World Boxing Council suspension practices).

The Second Circuit has found that an agreement by independent magazine solicitors to prevent its agents from switching [\*\*47] agencies was an agreement "ostensibly directed at 'housecleaning' within the ranks of the signatory organizations themselves" and that "because a harmful effect upon competition is not clearly apparent from the terms of these agreements," they were "distinguishable from those boycotts held illegal *per se*." Union Circulation Co. v. Fed. Ins. Comm'n, 241 F.2d 652, 657 (2d Cir. 1957).

More recently, in K.M.B. Warehouse v. Walker Mfg., 61 F.3d 123, 127 (2d Cir. 1995), the Second Circuit found a conspiracy between [\*548] an auto parts manufacturer and some of its distributors to exclude an outside auto-parts distributor to be a vertical, non-price restriction governed by the rule of reason. The manufacturer, at the

<sup>16</sup> Bogan argues that even if agent services are not considered a market, the Sherman Act protects the benefits of competition in "vital matters such as claim policy and quality of service." Bog. Br. p. 27 (citations omitted). While he is certainly correct about the law, he is still incorrect in defining the proper market -- it is not simply *NML* claim policies and the quality of service available to *NML* customers that is protected, but policies and level of service in the *entire industry, or at least the New York Metropolitan area*.

<sup>17</sup> Recall from fn.9 that this case has been criticized by the Second Circuit, likely on the issue of labor law preemption of the antitrust laws.

<sup>18</sup> The Court noted that "absent a facial showing of anticompetitive purpose underlying the adopting or enforcement of a rule, the disciplinary activity of a sports organization must be evaluated under the Denver Rockets test or the rule of reason." 675 F.2d 445 at 455 (referring to Denver Rockets v. All-Pro Management Inc., 325 F. Supp. 1049, 1064-65 (C.D. Cal 1971)).

behest of some of its distributors, refused to honor a contract it had made with K.M.B. to allow K.M.B. to distribute its products. *Id. at 126*; see also *Bunch v. Artec Intern. Corp.*, 559 F. Supp. 961, 966 (S.D.N.Y. 1983) ("Merely because a dealer's termination may contain elements of a horizontal restriction, it does not become a *per se* violation of the Sherman Act, thereby obviating the requirements that plaintiff establish that defendants' conduct is manifestly [\*\*48] anticompetitive.").

The Second Circuit has also recently stated that [HN11](#)[] an arrangement that had both horizontal and vertical aspects definitely should be tested under the rule of reason and "possibly under the *per se* rule applied to group boycotts in *Klor's*, if the restraint of trade 'has no purpose except stifling competition.'" *Discon, Inc. v. Nynex*, 93 F.3d 1055, 1060-61 (2d Cir. 1996). There, plaintiff Discon accused NYNEX and MECO, (a corporation that acted as NYNEX's procurement agent), of conspiring to exclude Discon from providing "removal" services. (These removal services included salvaging and disposing of obsolete telephone central office equipment.) The court found that plaintiffs had not established a horizontal restraint because MECO did not itself provide removal services and thus did not compete with Discon or NYNEX. *Id.* However, the Second Circuit stated that an agreement between two firms, even in a vertical relationship may constitute a horizontal restraint if it seeks to "disadvantage a direct competitor." It found that in Discon's case, no pro-competitive justification appeared on the face of the complaint for NYNEX's behavior in excluding Discon [\*\*49] and thus concluded that a cause of action had been stated, leaving the decision as to whether to apply the rule of reason or a *per se* analysis to the district court at trial. *Id.* ("Per se rule to be applied only if evidence shows that the practice had 'no purpose other than to stifle competition.'"; see also *Volvo N. Amer. v. Men's Int'l Prof. Tennis Council*, 857 F.2d 55, 72-73 (2d Cir. 1988) (Whether conduct alleged to be possibly horizontal market division, group boycott or concerted refusal to deal is to be analyzed under rule of reason or *per se* test is "matter for the district court to decide in due course.")).

The transfer restrictions of the Metropolitan Policy at issue here may well have been promulgated with mixed motives, one of which was a desire on the part of the General Agents to preserve the *status quo* at NML, thereby stabilizing the amount of compensation each General Agent expected to receive. However, at the inter-company level, the Policy appears to have the substantial procompetitive justification of encouraging General Agents to better train their subordinate agents.<sup>19</sup> This enables each General Agent to compete more effectively for clients [\*\*50] with other NML General Agents and with the agents of other companies. (see section II(C), *supra*). It also enables them to better compete with other General Agents for the hiring of new subordinate agents, who have an obvious interest in receiving the best training possible. Thus, it is not the type of practice that has "no purpose except stifling competition."<sup>20</sup> *Discon*, 93 F.3d at 1061-61; see also *Northern P.R. Co.*, 356 U.S. at 5 (In order to be illegal *per se*, a practice must be "so pernicious" as to "lack . . . any redeeming value."). Therefore, regardless of the precise label given to the conduct, (boycott, a horizontal price-restraint with vertical aspects, vertical non-price restraint with horizontal aspects and price effects, etc.), we believe a careful comparison of the facts of this case and of the precedents in the Second Circuit shows that it is properly analyzed under the rule of reason. Accordingly, consistent with the sports cases, *K.M.B. Warehouse*, and the Second Circuit's [\*549] prescription that "expansion of the *per se* rule 'should be approached with great caution,'" *Copy-Data Sys., Inc. v. Toshiba Am.*, 663 F.2d 405, 411 (2d Cir. 1982), [\*\*51] we next analyze the effects of the Metropolitan Policy under the rule of reason.

#### E. Rule of Reason Analysis of the Competitive Effects

According to the Second Circuit:

[HN12](#)[] Establishing a violation of the rule of reason involves three 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 "procompetitive

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<sup>19</sup> Bogan himself testifies in detail as to the importance and expense of training agents. See, e.g., R. Bog. Aff. P 16, P 55 ("The recruiting, training and performance of Sales Agents determines 100 percent of management revenue.").

<sup>20</sup> This is a further reason that the Metropolitan policy cannot be considered a "group boycott." *Topps Chewing Gum, supra*, 641 F. Supp. at 1186, suggests that such group boycotts must have a "pernicious effect on competition and lack any redeeming virtue."

'redeeming [\*\*52] virtues" of the action. Should the defendant carry this burden, the plaintiff must then show that the same procompetitive effect could be achieved through alternative means that is less restrictive of competition.

K.M.B. Warehouse, 61 F.3d at 127 (citations omitted); Capital Imaging, 996 F.2d at 543; Int'l Distrib. Centers v. Walsh Trucking, 812 F.2d 786, 793 (2d Cir. 1987), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188, (plaintiff must show anticompetitive effects of the conspiracy outweigh the procompetitive.)<sup>21</sup>

### [\*\*53] 1. The Test for Proving Adverse Effect

"HN13[] 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). Thus, a plaintiff must show more than that he was harmed by defendant's conduct or that there was an adverse effect on competition among different sellers of the same product. K.M.B. Warehouse, 61 F.3d at 127. Such intrabrand restrictions can "actually enhance market-wide competition by fostering vertical efficiency and maintaining the desired quality of a product." Id. The focus of the inquiry must be the relevant market as a whole, and any restriction of intrabrand competition must be balanced against any increases in interbrand competition. Id.; see also Borger v. Yamaha Intern. Corp., 625 F.2d 390, 397 (2d Cir. 1980).

While Bogan has shown considerable personal harm from Hodgkins' and NML's conduct, he has not shown sufficient harm in the relevant market -- labor of insurance agents in the metropolitan area.<sup>22</sup> Bogan would apparently have us believe the relevant market is his services, or that of only NML agents. As [\*\*54] K.M.B. illustrates, this is not the proper market for antitrust purposes.<sup>23</sup> [\*\*56] See also Balaklaw v. Lovell, 14 F.3d 793, 798-99 [<sup>1</sup>\*550] (2d Cir. 1998) (No antitrust injury where anesthesiologist complained about exclusion from hospital holding exclusive contract with another association of doctors -- plaintiff had failed to show injury either to consumers (patients) or sellers (doctors) in the relevant markets. The relevant market for the doctors was the multi-state area in which the hospital recruited doctors.).<sup>24</sup> While Bogan has offered several affidavits of customers and

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<sup>21</sup> Bogan would have us apply the "Quick Look" approach to the rule of reason, arguing that "Because these are restraints by horizontal competitors, as Hodgkins admits, the 'Quick Look' approach requires Hodgkins to justify the restraint by proving that procompetitive effects outweigh anticompetitive effects and are the least restrictive available." Hdgk. Br. p. 34. To justify the application of the "Quick Look" approach, he quotes the Seventh Circuit in Chicago Pro Sports, *infra*, as stating that such an approach applies because "there was a 'naked restraint' of a horizontal nature because it was an agreement among competitors as to certain issues concerning how they would compete with each other." This quotation "cherry picks" a phrase from its context -- the "naked restraint" must be one on "price or output". See, e.g., Chicago Pro Sports, 961 F.2d at 674. As discussed above, the conspiracy alleged here does not constitute a price restriction in the relevant market -- that of the labor of agents industry-wide, or at least metropolitan-area-wide. Nor does it affect output. Bogan does not allege that it affects the number of policies sold or agents hired. The Metropolitan Policy merely prevents transfers of agents between NML General Agencies.

<sup>22</sup> Even though Bogan has since recontracted with Massachusetts Mutual and still apparently uses the same offices, he alleges that he lost a significant client base that did not transfer with him to Massachusetts Mutual as well as generous retirement benefits. See Bog. Aff. PP 12-13. We find these assertions credible, and thus sufficient to establish personal harm from his termination, although his subsequent contract with Massachusetts Mutual provides evidence that interbrand competition was increased by his termination.

<sup>23</sup> Even if NML agents were the proper market (which we do not believe), there is no evidence before this court that anyone other than Robert (and perhaps Scott) Bogan was prohibited from transferring. In fact, Scott Bogan concedes in his deposition that Stephen Gilberg had stated in a June 11th meeting that the Metropolitan Policy "would not be an inhibition . . . [to recontracting]" and that "there have been transfers of agents previously between agencies; and that it wasn't an issue. Nobody would be encumbered." S. Bog. Depo. p. 455 (emphasis added).

agents stating that they prefer not to have either their own or their client's personal information provided to anyone besides Robert Bogan, (see, e.g., James Cantalini Aff., Michael Flora Aff., Lawrence Green Aff., Al Woodall Aff., Eric Wagoner Aff., Donald Zinn Aff.), the Second Circuit has found such "isolated statements of preference are not a sufficient 'empirical demonstration concerning the [adverse] effect of the [defendants'] arrangement on price or quality." [K.M.B., 61 F.3d at 128](#). Thus, since Bogan has not demonstrated the requisite evidence of adverse effect in the relevant market, he has [\[\\*\\*55\]](#) failed the rule of reason test as a matter of law.<sup>25</sup>

#### [\[\\*\\*57\]](#) 2. The Tests for Procompetitive Effect and Plaintiff's Obligation to Prove Less Restrictive Means

Since we have held as a matter of law that Bogan has failed to satisfy the first prong of the rule of reason analysis, we need not reach the other elements. We note in passing, however, that Hodgkins has offered a procompetitive justification -- the encouragement of training -- that was supported by Bogan's own affidavits. See fn.19, *supra*. Moreover, Bogan has not offered a suggested any less restrictive means by which NML and the General Agents could insure that the District and Sales Agents receive adequate training.

### III. THE STATE CLAIMS

As previously mentioned, this case presents a federal antitrust claim together with fifteen pendent state claims which Bogan urges us to retain under the doctrine of supplemental jurisdiction, [28 U.S.C. § 1367. HN15](#)<sup>24</sup> The exercise of pendent (or supplemental) jurisdiction is left to the discretion of the district court. [Purgess v. Sharrock, 33 F.3d 134, 138-139 \(2d Cir. 1994\)](#). In exercising its discretion, the district court is permitted to weigh several factors, including considerations of judicial economy, convenience, and fairness [\[\\*\\*58\]](#) to litigants. *Id.* (state claims retained where federal claim was dismissed at the close of the evidence.)

First, we note that the pendent state claims are the subject of a pending action in Supreme Court, Westchester County. If we retain no part of this case and allow it to proceed in the state court, judicial economy and convenience of the parties would not be substantially disserved. True, this Court has spent considerable time familiarizing itself with the facts of the case, but we have done so mainly with an eye towards the federal claims at issue. We have not probed in depth the factual basis for the state claims [\[\\*551\]](#) such as fraud and tortious interference with contract, and would be required to spend considerable time and effort to do so. Nor have we considered the lengthy submissions regarding Plaintiffs' claims against NML. Moreover, the state court is undoubtedly much more familiar with the state law principles applicable to all of these claims.

<sup>24</sup> [Balaklaw](#) was actually decided on the basis of standing; the Second Circuit found that since plaintiff had not shown injury to competition in the relevant market, he had not demonstrated antitrust injury and had no standing. [Balaklaw, 14 F.3d at 798-800](#). The court noted:

[HN14](#)<sup>25</sup> For standing purposes, however, whether there was or was not a *per se* violation is irrelevant. Regardless of any substantive violation of the Sherman Act, [sections 4](#) and [16](#) of the Clayton Act still require plaintiffs to establish that the defendants engaged in anticompetitive conduct that caused them an antitrust injury . . . Although the *per se* rule relieves plaintiff of the burden of demonstrating an anticompetitive effect, which is assumed, it does not excuse a plaintiff from showing that his injury was caused by the anticompetitive acts.

*Id.* (citations omitted.) Since we decide that for the same reasons, Bogan has failed the rule of reason test, we need not reach the standing issue.

<sup>25</sup> Bogan strenuously urges that this situation is analogous to that of a professional sports player who is not allowed by the league to transfer between teams. While these cases have numerous similarities, the one fatal dissimilarity Bogan fails to perceive is that here, there are other insurance agencies for whom he could work. In fact, Bogan is apparently working for one now. Hdgk. Br. p. 7. When the NFL forbids a player to transfer without compensation of his prior team, see [Mackey, supra](#), he is effectively prevented from playing elsewhere.

This Court, with the generous help of Magistrate Judge Fox, has expended significant resources to oversee the discovery process. This effort will not have been in vain should we dismiss the state claims, but will surely work to save **[\*\*59]** the State Court and the parties considerable time and expense in their continued prosecution of this suit. The extensive discovery already undertaken should not have to be repeated. While Bogan urges us that he would be prejudiced by the 16-month delay in obtaining a trial date in state court, we do not consider this delay a significant factor. Our current trial calendar would not permit trial of the case for approximately ten months, even if the parties were ready for an immediate trial, which they are not. Moreover, there are pending motions by both defendants for summary judgment on all fifteen claims, another factor that could cause further substantial delay of the trial. Thus the time required to reach trial in the state court is not a significant factor in our decision whether to retain jurisdiction.

In light of the above factors, we decline to exercise supplemental jurisdiction over the Bogans' state law claims.

## **CONCLUSION**

Although we conclude that an agreement among an insurance company's General Agents to restrict the transfer of their subordinate agents does not constitute the business of insurance under the McCarran-Ferguson Act and that General Agents can conspire **[\*\*60]** with each other, and thus that the conspiracy alleged by Bogan is not exempt from antitrust scrutiny, we conclude that the activity of Defendant Hodgkins alleged in the complaint does not constitute an antitrust violation. Because the alleged conspiracy appears to have at least some vertical aspects, to have occurred in a setting that requires at least some horizontal cooperation, and not to have involved naked price or output restraints, it is properly analyzed under the rule of reason. Since Bogan has failed to show sufficient adverse effect on the relevant market -- the labor of subordinate insurance agents in the New York Metropolitan area -- he has failed to satisfy the rule of reason test, and his antitrust claim fails as a matter of law. Finally, since neither judicial economy, convenience nor fairness to the litigants would be particularly served by our retaining supplemental jurisdiction over the fifteen state claims, we decline to do so. Thus, we grant defendants' motion for summary judgment on the antitrust claim, and dismiss the remaining fifteen state claims for resolution in the pending state court case.

SO ORDERED.

Date: February 5, 1997

White Plains, New **[\*\*61]** York

William C. Conner

Senior United States District Judge



## Gross v. New Balance Ath. Shoe

United States District Court for the Southern District of New York

February 11, 1997, Decided ; February 13, 1997, FILED

96 Civ. 4921 (RWS) MDL -1154

### **Reporter**

955 F. Supp. 242 \*; 1997 U.S. Dist. LEXIS 1488 \*\*; 1997-1 Trade Cas. (CCH) P71,840

MARK GROSS and ELLEN M. SULLIVAN, individually and on behalf of all others similarly situated, Plaintiffs, - against - NEW BALANCE ATHLETIC SHOE, INC., Defendant.

**Disposition:** [\*\*1] New Balance's motion to dismiss granted. Plaintiffs granted leave to refile within thirty (30) days of issuance of Opinion.

## **Core Terms**

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antitrust, retailers, conspiracy, conspiring, co-conspirators, prices, shoes, consumers, allegations, non-conspiring, athletic shoes, competitor, cases, antitrust violation, manufacturer, causal

## **LexisNexis® Headnotes**

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

### [HN1](#) **Summary Judgment, Entitlement as Matter of Law**

In a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss, the factual allegations of the complaint are presumed to be true and all factual inferences must be drawn in the plaintiff's favor and against the defendants.

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

### [HN2](#) **Summary Judgment, Entitlement as Matter of Law**

[Fed. R. Civ. P. 12\(b\)\(6\)](#) imposes a substantial burden of proof upon the moving party. A court may not dismiss a complaint unless the movant demonstrates beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. In practice a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.

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

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

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

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

### **HN3** Higher Education & Professional Associations, Colleges & Universities

Fed. R. Civ. P. 8(a)(2) mandates that a complaint contain a short and plain statement of the claim that demonstrates that the pleader is entitled to relief. The Federal Rules of Civil Procedure do not permit conclusory statements to substitute for minimally sufficient factual allegations. The burden on a plaintiff alleging federal antitrust violations is no greater than the burden faced by a plaintiff alleging any cause of action not covered by the specific pleading requirements of Fed. R. Civ. P. 8.

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

### **HN4** Pleadings, Rule Application & Interpretation

In a case of magnitude, a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed. The liberal system of notice pleading applies to all causes of action unless otherwise specified in the Federal Rules of Civil Procedure.

Antitrust & Trade Law > Sherman Act > General Overview

### **HN5** Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1](#).

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

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

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

### **HN6** Standing, Clayton Act

Clayton Act § 4 authorizes a private right of action for a person who is injured in his business or property by reason of anything forbidden in the antitrust laws. [15 U.S.C.S. § 15](#). The scope of authority conferred by § 4 is limited by judicially crafted standing rules that purposefully narrow the class of individuals entitled to maintain a private damages claim under § 4.

955 F. Supp. 242, \*242L<sup>A</sup> 1997 U.S. Dist. LEXIS 1488, \*\*1

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

## **HN7** **Private Actions, Standing**

There are five factors that are to be considered in determining whether a particular plaintiff has antitrust standing. These factors are: (1) the causal connection between an antitrust violation and the harm suffered by the plaintiff, and the intent of the defendants to cause that harm; (2) whether the plaintiff suffered antitrust injury; (3) the directness of the asserted injury to the plaintiff; (4) the existence of more direct victims of the antitrust violation; and (5) the potential for duplicative recovery or complex apportionment of damages.

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

## **HN8** **Regulated Practices, Private Actions**

Consumer antitrust plaintiffs have even less ability to determine the identities of a manufacturers' co-conspirators than do most antitrust plaintiffs, who are generally economic competitors. Evidence of the specific identity of exhibitors, attendees, speakers and suppliers who allegedly have acted in concert with defendant, is largely in defendant's hands. Plaintiff should be allowed to conduct full discovery in order possibly to further substantiate such claims.

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

## **HN9** **Regulated Practices, Private Actions**

A plaintiff need not sue all conspirators; he may choose to sue but one. Even in a criminal antitrust case, the government need not name the conspirators not sued, nor state their number, in the indictment.

**Counsel:** APPEARANCES:

For Plaintiffs: BERNSTEIN LITOWITZ BERGER & GROSSMANN, New York, NY, By: JEFFREY A. KLAFTER, ESQ., SETH R. LESSER, ESQ., Of Counsel.

For Defendant: CURTIS, MALLET-PREVOST, COLT & MOSLE, New York, NY, By: TURNER P. SMITH, ESQ., Of Counsel.

**Judges:** ROBERT W. SWEET, U.S.D.J.

**Opinion by:** ROBERT W. SWEET

## **Opinion**

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[\*243] **OPINION**

Sweet, D.J.,

Defendant New Balance Athletic Shoe, Inc. ("New Balance") has moved to dismiss Plaintiffs' antitrust class action lawsuit and certain pendent state law claims.

For the reasons set forth below, New Balance's motion will be granted.

### **Parties**

Defendant New Balance is an athletic shoe manufacturer.

Plaintiffs Ellen M. Sullivan ("Sullivan") and Mark Gross ("Gross") are individuals residing in New York, New York.

### **Background**

For purposes of the instant motion to dismiss, the allegations of the complaint are taken as true. The facts are presented below accordingly, and do not constitute factual findings.

On June 12, 1996, the Federal Trade Commission ("FTC") announced that New Balance **[\*\*2]** had agreed to settle charges that it had engaged in a vertical resale price maintenance scheme to fix the resale prices of its shoes in violation of antitrust laws. The settlement was the result of coordinated investigations by the FTC and the Attorneys General of New York and the other forty-nine states of pricing policies in the athletic shoe industry. Pursuant to the settlement, New Balance, which had a 2% share of the market, signed a Consent Order with the FTC.<sup>1</sup>

On June 27, 1996, Plaintiffs filed the **[\*\*3]** instant action, relying extensively on the allegations used by the FTC in the Consent Order. The Complaint alleges two causes of action: one under Sections 4 and 16 of the Clayton Act ([15 U.S.C. §§ 15, 26](#)) alleging violation of [Section 1](#) of the Sherman Act and the other under [Section 349\(h\)](#) of New York's Consumer Protection from Deceptive Acts and Practices Act (Article 22-A, General Business Law [§ 349\(h\)](#)).

The named Plaintiffs allege that between 1991 and 1996, New Balance, a large athletic footwear manufacturer, engaged in a systemic and nationwide scheme to coerce retail shoe dealers to enter into express or tacit agreements to fix or maintain the prices of New Balance footwear. To obtain agreement from recalcitrant retailers to adhere to its price maintenance scheme, New Balance allegedly engaged in surveillance of retail prices, threats to terminate or suspend shipments to discounting retailers, and demands that retailers raise their prices. The result of New Balance's scheme was that price competition among retailers of New Balance shoes was restricted and the prices of New Balance shoes were inflated to the detriment of consumers, such as the present Plaintiffs.

Plaintiffs **[\*\*4]** allege they "purchased New Balance footwear and suffered economic injury" as a result of New Balance's alleged wrongful conduct. Plaintiffs purportedly have brought the action "on their own behalf and on behalf of all members of a class ... consisting of all persons situated in the United States who purchased New Balance footwear through retail shoe sellers" over a four-year period. As a result of the conspiracy, Plaintiffs allege that they "and the other Class members paid **[\*244]** more for such shoes" than they otherwise would have paid.

The instant motion to dismiss was filed on September 10, 1996. Oral argument was heard on December 4, 1996, at which time the motion was considered fully submitted.

On February 6, 1997, the Judicial Panel on Multidistrict Litigation granted New Balance's motion to transfer to this district all pending actions in this multidistrict litigation, MDL-1154, [In re New Balance Athletic Shoe, Inc., Antitrust Litigation](#), pursuant to [28 U.S.C. section 1407](#).

### **Discussion**

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<sup>1</sup> As a further result of the investigation, two additional athletic shoe manufacturers signed consent orders with the FTC and settled "companion" *parens patrie* suits filed in this Court by the fifty states and the District of Columbia. See [State of New York ex rel Vacco v. Reebok International Ltd.](#), 903 F. Supp. 532 (S.D.N.Y. 1995); [State of New York ex rel Koppell v. The Keds Corporation](#), 1994 U.S. Dist. LEXIS 3362, 1994 WL 97201 (S.D.N.Y. 1994). New Balance was not sued in the *parens patrie* acts.

## **I. Standards for Reviewing a 12(b)(6) Motion**

**HN1** [↑] On a [Rule 12\(b\)\(6\)](#) motion to dismiss, the factual allegations of the complaint are presumed to be true and all factual inferences [\*\*5] must be drawn in the plaintiff's favor and against the defendants. See [Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 \(1974\)](#); [Cosmas v. Hassett, 886 F.2d 8, 11 \(2d Cir. 1989\)](#); [Dwyer v. Regan, 777 F.2d 825, 828-29 \(2d Cir. 1985\)](#). Accordingly, the factual allegations considered here are presumed to be true only for the purpose of deciding the present motions.

**HN2** [↑] [Rule 12\(b\)\(6\)](#) imposes a substantial burden of proof upon the moving party. A court may not dismiss a complaint unless the movant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-102, 2 L. Ed. 2d 80 \(1957\)](#). Accord [Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232-33, 81 L. Ed. 2d 59 \(1984\)](#) (quoted in [H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 250-51, 109 S. Ct. 2893, 2906, 106 L. Ed. 2d 195 \(1989\)](#)).

"In practice 'a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" [Fort Wayne Telsat](#) [\*\*6] [v. Entertainment & Sports Prog. Network, 753 F. Supp. 109, 111 \(S.D.N.Y. 1990\)](#), quoting, [Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 \(7th Cir. 1984\)](#).

**HN3** [↑] [Rule 8\(a\)\(2\) of the Federal Rules of Civil Procedure](#) mandates that a complaint contain a "short and plain statement of the claim" that demonstrates "that the pleader is entitled to relief." The Federal Rules do "not permit conclusory statements to substitute for minimally sufficient factual allegations." [Furlong v. Long Island College Hosp., 710 F.2d 922, 927 \(2d Cir. 1983\)](#).

The burden on a plaintiff alleging federal antitrust violations is no greater than the burden faced by a plaintiff alleging any cause of action not covered by the specific pleading requirements of [Rule 9 of the Federal Rules of Civil Procedure](#). See [George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., Inc., 554 F.2d 551, 554 \(2d Cir. 1977\)](#) ("It...[is] clear in this circuit ... that a short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules," citing [Nagler v. Admiral Corp., 248 F.2d 319](#) [\*\*7] [\(2d Cir. 1957\)](#)); [Nagler, 248 F.2d at 322-23](#) ([it is]"quite clear that the federal rules contain no special exceptions for antitrust cases"); [Barr v. Dramatists Guild, Inc., 573 F. Supp. 555, 558 \(S.D.N.Y. 1983\)](#) (citing George C. Frey for the proposition that there are no special pleading standards for antitrust conspiracy); [Newburger v. Gross, 365 F. Supp. 1364, 1367-68 \(S.D.N.Y. 1973\)](#) (citing Nagler for the proposition that there are no special pleading requirements in antitrust litigation), modified on other grounds, [563 F.2d 1057 \(2d Cir. 1977\)](#); [Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., 711 F.2d 989, 995 \(11th Cir. 1983\)](#) ("It is now well accepted that notice pleading is all that is required for a valid antitrust complaint").

While the Supreme Court has noted in the context of large antitrust action that "**HN4** [↑] certainly in a case of this magnitude, a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed[,]'" [Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 528 n.17, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#), the [\*245] Court recently affirmed that the liberal system of notice pleading applies to all causes of action unless otherwise specified in the Rules. [Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S. Ct. 1160, 1161, 122 L. Ed. 2d 517 \(1993\)](#).

## **II. The Complaint Will Be Dismissed**

Section One of the Sherman Act reads, in relevant part:

**HN5** 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 \(1973\)](#).

#### **A. Plaintiffs Lack Standing to Bring This Action**

Defendants contend that Plaintiffs lack standing to bring the instant antitrust action. **HNC** Section 4 of the Clayton Act authorizes a private right of action for a person who is "injured in his business or property by reason of anything forbidden in the antitrust laws." [15 U.S.C. § 15](#). The scope of authority conferred **[\*\*9]** by § 4 is limited, however, by judicially crafted standing rules that purposefully narrow the class of individuals entitled to maintain a private damages claim under § 4. See, e.g., Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990).

The Supreme Court has **HN7** articulated five factors that are to be considered in determining whether a particular plaintiff has "antitrust standing." See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters ("AGC"), 459 U.S. 519, 537 n.33, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). These factors are:

- (1) the causal connection between an antitrust violation and the harm suffered by the plaintiff, and the intent of the defendants to cause that harm;
- (2) whether the plaintiff suffered antitrust injury;
- (3) the directness of the asserted injury to the plaintiff;
- (4) the existence of more direct victims of the antitrust violation; and
- (5) the potential for duplicative recovery or complex apportionment of damages.

AGC at 537-44; see also Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, **[\*\*10]** 296-297 (2d Cir. 1983); Sullivan v. Tagliabue, 25 F.3d 43, 46 (1st Cir. 1994).

Plaintiffs here allege that "certain, "not all, of New Balance's retailers participated in the conspiracy. Defendants contend that because the Plaintiff class includes all purchasers of New Balance athletic shoes, and is not limited to those who purchased from the conspiring retailers, the complaint fails to allege any injury sufficiently direct to fall within the purview of § 4.

According to Defendants, in order to demonstrate standing, Plaintiffs must be able to allege that they purchased from a conspiring retailer and that New Balance therefore engaged in wrongful conduct with respect to them. Otherwise, the causal link between the putative antitrust violation and any injury sustained by Plaintiffs is too remote to be justiciable under § 4. See Reading Indus., Inc. v. Kennecott Copper Corp., 631 F.2d 10 (2d Cir. 1980) (antitrust standing tests are "ultimately tests of whether there is a legally sufficient causal relationship between the alleged violation and the alleged injury").

Plaintiffs contend that regardless of whether a consumer purchased New Balance shoes from a conspiring retailer **[\*\*11]** or a non-conspiring retailer, that consumer was injured because the conspiracy, if successful, stifled price competition for, and raised the price of, all New Balance shoes.

Mid-West Paper Prod. Co. v. Continental Group, Inc., 596 F.2d 573, 583-87 (3d Cir. 1979), is the only decision of which the Court is aware which directly addresses the question whether those who purchased from non-conspiring retailers have standing, based on the conspiracy's alleged effect on all the company's goods, to bring an antitrust action. **[\*246]** The plaintiff in Mid-West Paper, like Plaintiffs here, purchased from a competitor of the defendants. The Mid-West Paper plaintiff asserted standing based on the alleged conspiracy's effect on the general price level

in the market, and alleged that non-conspirators sold under this "umbrella" at higher prices than they would have absent the price-fixing scheme. The plaintiff claimed that it suffered antitrust injury because it bought from a nonparticipating competitor at the higher price. The Court rejected this contention and held that the plaintiff lacked standing to bring an antitrust action. [Mid-West Paper, 596 F.2d at 587. See also Liang \[\\*\\*12\] v. Hunt, 477 F. Supp. 891, 896-97 \(N.D. Ill. 1979\)](#) (same); [Pollock v. Citrus Assoc. of the New York Cotton Exchange, Inc., 512 F. Supp. 711, 719 n.9 \(S.D.N.Y. 1981\)](#) (distinguishing [Mid-West Paper](#) and holding the "severe difficulties attendant with proving damages in an "umbrella" pricing situation" were not present).

The cases cited by the Plaintiffs do not support the contention that all purchasers, regardless of whether they purchased from a conspiring retailer, have antitrust standing. In [Bogosian v. Gulf Oil Corp., 561 F.2d 434 \(3rd Cir. 1977\)](#), the court simply held that "the fact that a customer has not made purchases from every co-conspirator does not prevent him from suing all for each co-conspirator contributed to the charging of the supracompetitive price paid by the purchaser." [Bogosian, 561 F.2d at 448.](#) In [Bogosian](#), each of the plaintiffs had direct dealings with at least one of the conspiring defendants. Thus, the Court did not address the question presented here -- whether a plaintiff who did not purchase from any conspirator nonetheless has standing to bring an antitrust suit.

[Donahue v. Pendleton Woolen Mills, Inc., 633 F. Supp. 1423, 1429 \[\\*\\*13\] \(S.D.N.Y. 1986\)](#), upon which Plaintiffs also rely, held that resale price maintenance conspiracies like the one alleged here "directly coerce retailers, who must charge the price suggested by the manufacturer if they wish to continue carrying the product line," but ultimately affect consumers, who "pay the economic cost of such conduct in the higher prices set by the manufacturer." The [Donohue](#) Court did not, however, address whether all consumers -- not just consumers who purchased from a conspiring retailer -- could claim antitrust standing arising from an "umbrella" price increase allegedly caused by an RPM.

Plaintiffs' attempt to seek recovery for all consumers of New Balance athletic shoes during the alleged class period places their claim in the category of the type of indirect injury that is incapable of being quantified with any degree of economic certainty. Plaintiffs will be unable to demonstrate that those who purchased New Balance shoes from a non-conspiring retailer suffered damages, i.e., paid more for their shoes, because of the effects of the alleged conspiracy. Non-conspiring retailers may have independently raised or maintained their prices for any number of [\[\\*\\*14\]](#) reasons, or may even have lowered their prices. Accordingly, those who purchased from such retailers could not show an injury caused by a violation of the antitrust laws.

The [Mid-West Paper](#) Court recognized these difficulties in identifying and quantifying damages resulting from indirect injury such as that alleged by Plaintiffs here. The Court held that "the outcome of any attempt to ascertain what price the Defendants' competitors would have charged had there not been a conspiracy would at the very least be highly conjectural." [Mid-West Paper, 596 F.2d at 584.](#) The Court observed that the nonparticipating competitor might very well have charged the same price even absent the conspiracy, and the plaintiff would be "hard pressed to prove otherwise." [Id.; see also Sullivan, 25 F.3d at 52](#) ("highly speculative" nature of plaintiff's damages claim weighed against a grant of standing); [Reading Indus., Inc., 631 F.2d at, 13-14](#) (plaintiff lacked antitrust standing to assert claims based on conjectural theories of injury and attenuated economic causality).

In sum, the factors outlined by the Supreme Court in [AGC](#) weigh against finding that consumers who purchased [\[\\*\\*15\]](#) from non-conspiring retailers have standing to assert an antitrust claim. In particular, Plaintiffs' alleged injury was suffered, if at all, only indirectly as a result of a general [\[\\*247\]](#) price increase which in turn resulted from the direct effects of the conspiracy; the causal connection between the alleged injury and the conspiracy is attenuated by significant intervening causative factors (i.e., independent pricing decisions of non-conspiring retailers); and more direct victims of the alleged conspiracy exist in those who purchased directly from conspiring retailers, such that denying Plaintiffs a remedy on the basis of their allegations in this case is "not likely to leave a significant antitrust violation undetected or unremedied." [AGC, 459 U.S. at 910.](#)

Accordingly, Plaintiffs as currently defined in the complaint lack standing to brings this action. The complaint will be dismissed, and Plaintiffs will be granted leave to replead within thirty (30) days of the issuance of this Opinion.

## **B. Plaintiffs Need Not Identify Alleged Co-Conspirator**<sup>2</sup>

[\*\*16] Defendant claims that the complaint is deficient because it alleges only that "certain" retailers conspired with New Balance in the resale price maintenance scheme but does not identify those co-conspirators. Although New Balance cites several cases that have required the specific naming of co-conspirators in antitrust complaints, the weight of authority does not endorse such a requirement, particularly where, as here, the relevant information regarding the identities of co-conspirators is "largely in the hands of the alleged conspirators." [Poller v. Columbia Broadcasting](#), 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962). Under such circumstances, "dismissal prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." [Hospital Bldg. Co. v. Trustees of Rex Hospital](#), 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976).

**HN8** [↑] Consumer antitrust plaintiffs like those here have even less ability to determine the identities of a manufacturers' co-conspirators than do most antitrust plaintiffs, who are generally economic competitors. This Court has held:

Evidence of the specific identity of exhibitors, attendees, speakers and [\*\*17] suppliers who allegedly have acted in concert with defendant, is largely in defendant's hands. Plaintiff should be allowed to conduct full discovery in order possibly to further substantiate such claims. Thus, the court will not dismiss Count I of the complaint.

[Expoconsul Int'l, Inc. v. A/E Systems, Inc.](#), 711 F. Supp. 730, 735 (S.D.N.Y. 1989).

Only one decision in this district dismissed an antitrust claim based on the plaintiff's failure to name co-conspirators is [North Jersey Secretarial School, Inc. v. McKiernan](#), 713 F. Supp. 577, 584 (S.D.N.Y. 1989), in which the Court was presented with a barebones complaint that alleged that the defendant's employees had conspired with plaintiff's "competitors," and gave no other indication of how the identity of these co-conspirators might be discerned. Here, the Plaintiffs have alleged that New Balance's co-conspirators are "certain" of New Balance's retailers. While New Balance's retailers may number in the hundreds, they nonetheless constitute a finite universe, and one from which a subset of New Balance's co-conspirators might be readily identified. See [Hewlett-Packard Co. v. Arch Associates Corp.](#), 908 F. Supp. 265, 269 [\*\*18] (E.D. Pa. 1995) (motion to dismiss denied where "pleading alleges that HP combined with certain members of its distribution network" which is a "finite group whose members can be determined through discovery").

As the Ninth Circuit has held:

The 'other' distributors are not named, nor are their numbers or locations or other similar facts stated. While some cases seem to require such allegations, we do not think that they are required. **HN9** [↑] A plaintiff need not sue all conspirators; he may choose to sue but one. Even in a criminal antitrust case, the government need not name the conspirators not sued, nor state their number, in the indictment.

[\*248] [Walker Distributing Co. v. Lucky Lager Brewing Co.](#), 323 F.2d 1, 8 (9th Cir. 1963) (citations omitted); accord, e.g., [William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.](#), 668 F.2d 1014, 1053 (9th Cir. 1982); [Christen Inc. v. BNS Indus., Inc.](#), 517 F. Supp. 521, 524 (S.D.N.Y. 1981).

## **C. The Manageability of this Case as a Class Action Is Not Relevant at this Stage**

New Balance contends that this case should be dismissed because management of the case as a class action would be overly [\*\*19] burdensome. This argument, however, pertains to whether class action treatment is

<sup>2</sup> Although the Court, having already determined that alternate grounds warrant dismissal, need not address this portion of Defendant's argument, the Court will nonetheless address this question in order to avoid relitigation of this motion to dismiss in the event Plaintiffs refile the Complaint in accordance with the Court's standing analysis.

appropriate under [Federal Rule of Civil Procedure 23\(b\)](#), and does not shed light on whether dismissal is warranted pursuant to [Rule 12\(b\)\(6\)](#). It is thus inappropriate at this stage of the proceedings, and accordingly will not be addressed.

### **III. The State Law Claims Will Be Dismissed**

Since, as set forth above, Plaintiffs' Sherman Act claims will be dismissed at this early phase of the proceedings, the Court will not exercise jurisdiction over the state law claims. See [Castellano v. Bd. of Trustees, 937 F.2d 752, 758 \(2d Cir. 1991\)](#) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.") quoting [United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 \(1966\)](#).

Plaintiffs' state law claims will be dismissed without prejudice however, and may be refiled along with a refiled complaint that limits the Plaintiff class to those who purchased New Balance shoes from conspiring retailers.

### **Conclusion**

For the reasons set forth above, New [\[\\*\\*20\]](#) Balance's motion to dismiss is hereby granted. Plaintiffs are granted leave to refile within thirty (30) days of issuance of this Opinion.

It is so ordered.

**New York, N. Y.**

**February 11, 1997**

**ROBERT W. SWEET**

**U.S.D.J.**

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End of Document

## **Johnson v. Nyack Hosp.**

United States District Court for the Southern District of New York

February 11, 1997, Decided ; February 11, 1997, FILED

94 Civ. 7464 (LAK)

**Reporter**

954 F. Supp. 717 \*; 1997 U.S. Dist. LEXIS 1416 \*\*

FLETCHER J. JOHNSON, M.D., et ano., Plaintiffs, -against- NYACK HOSPITAL, et al., Defendants.

**Disposition:** [\*\*1] Defendants' motion for partial summary judgment granted in part and denied in part. Plaintiff's motion for leave to file the second amended complaint granted.

### **Core Terms**

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conspiracy, privileges, conspiring, vascular, reinstatement, intraenterprise, emotional, revocation, damages, medical staff, thoracic, thoracic surgery, defendants', distress, accrues

### **LexisNexis® Headnotes**

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Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

#### **HN1** **Statute of Limitations, Time Limitations**

Generally, a cause of action accrues and the limitations period begins to run when a defendant commits an act that injures a plaintiff. Each time a plaintiff is injured by an act of the defendant, a cause of action accrues to him to recover the damages caused by the act and, as to those damages, the statute of limitations runs from the commission of the act. Each cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. Thus, if a plaintiff feels the adverse impact of a conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the cause of action. Only those future damages caused by an action prior to the start of the limitations period that would have been too speculative or unpredictable if sued upon promptly may be recovered in an action brought within the limitations period.

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Remedies

#### **HN2** **Equal Rights Under the Law (sec. 1981), Remedies**

954 F. Supp. 717, \*717L 1997 U.S. Dist. LEXIS 1416, \*\*1

Plaintiffs in [42 U.S.C.S. § 1981](#) cases may recover for emotional distress.

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

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

Business & Corporate Law > ... > Dissolution & Winding Up > Dissolution > General Overview

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > General Overview

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > General Overview

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

### [HN3](#) Management Duties & Liabilities, Causes of Action

A conspiracy is a partnership the object of which is the achievement of an unlawful or improper objective. One who forms or joins it is liable for all of the acts committed in furtherance of the conspiracy by any of the conspirators. Moreover, once having joined a conspiracy, each conspirator is presumed to continue as a member until the conspiracy ends with its abandonment or the accomplishment of its unlawful purpose or until the conspirator withdraws by some affirmative act.

Antitrust & Trade Law > Sherman Act > General Overview

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

### [HN4](#) 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. The evil to which that statute is directed is concerted decisions of two or more business entities to take action that, in a competitive world, each would take separately. In consequence, 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.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > General Overview

### [HN5](#) Antitrust & Trade Law, Sherman Act

Efforts to import the intraenterprise principle of the Sherman Act, [15 U.S.C.S. § 1, to 42](#) U.S.C.S. [§ 1985\(3\)](#) have met with varying results. Some circuits have rejected it outright or confined it to the narrowest of circumstances. Others, however, have restricted [§ 1985\(3\)](#) on the basis of the antitrust analogy. The Second Circuit falls into this group, although the extent of its restriction of [§ 1985\(3\)](#) claims is yet to be fully defined.

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > General Overview

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

## **HN6** Protection of Rights, Conspiracy Against Rights

Personal bias is not the sort of individual interest that takes a defendant out of the intraenterprise conspiracy doctrine where the action complained of arguably served a legitimate interest.

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > General Overview

## **HN7** Protection of Rights, Conspiracy Against Rights

Members of hospital medical staffs are capable of conspiring with one another in view of their separate and possibly competitive private economic interests.

**Counsel:** Appearances:

George R. Clark, Annemarie Scanlon Harthun, REED SMITH SHAW & McCLAY. Harry Frischer, Robert Frenchman, SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP, Attorneys for Plaintiffs.

Ronald S. Rauchberg, Nancy Kilson, Francis D. Landrey, Patricia J. Clarke, Victoria A. Rosen, PROSKAUER ROSE GOETZ & MENDELSOHN LLP, Attorneys for Defendants.

**Judges:** Lewis A. Kaplan, United States District Court

**Opinion by:** Lewis A. Kaplan

## **Opinion**

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### [\*718] MEMORANDUM OPINION

LEWIS A. KAPLAN, *District Judge.*

This action in its present form involves a claim by plaintiff Fletcher J. Johnson, M.D., that his 1994 application for reinstatement of vascular and thoracic surgical privileges at defendant Nyack Hospital was denied on the basis of race. This allegedly violated [42 U.S.C. § 1981](#) and, because it is said to have taken place pursuant to a racially motivated conspiracy, [42 U.S.C. § 1985\(3\)](#) as well. Defendants move for partial summary judgment dismissing (1) the amended complaint as to certain defendants on the ground that there is [\*719] no genuine issue of fact as to their participation in the 1994 decision, and (2) the conspiracy claim under [42 U.S.C. § 1985\(3\)](#) as against all defendants on the ground that the defendants are incapable as a matter of law of conspiring to violate the civil rights laws in connection with the 1994 action. Dr. Johnson moves for leave to file a second amended complaint in an effort to cure any of the alleged deficiencies relied upon by defendants. As the only substantial issue regarding the amendment is the sufficiency of the proposed changes, leave to amend is granted and the Court will treat defendants' motion [\*719] as addressed to the second amended complaint.<sup>1</sup>

This dispute has been the subject of [\*719] three reported decisions of this Court and two of the Second Circuit.<sup>2</sup> The Court assumes familiarity with those opinions and therefore refers to the facts only to the extent necessary to this decision.

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<sup>1</sup> Defendants object also to the fact that the second amended complaint contains claims which previously have been dismissed. The objection is without merit. Plaintiffs are merely preserving their rights with respect to the dismissed claims. The grant of leave to amend does not revive any claim previously dismissed.

I

The defendants in this case, apart from Nyack Hospital, are Kenneth Steinglass, M.D., Daniel Berson, M.D., Lawrence Simon, M.D., James Dawson, Donald Winikoff, M.D., and Greger Anderson.<sup>3</sup> All allegedly were involved in Nyack's 1987 revocation of Dr. Johnson's vascular/thoracic surgical privileges. Defendants, however, maintain that Drs. Berson, Winikoff and Steinglass and Mr. Dawson had no involvement whatever in the 1994 denial of reinstatement. As it already has been established that [\*\*4] plaintiff's claims with respect to the 1987 decision are time-barred, *Johnson II*, defendants maintain that the action should be dismissed as against these defendants.

A.

Dr. Berson was Chief of the Department of Surgery at Nyack from 1982 to 1988. (Cpt<sup>4</sup> P 13) Mr. Dawson was president of the hospital from 1978 to 1991. (*Id. P 14*) Dr. Winikoff has been co-chair of the Peer Review Committee from before 1987 to date. (*Id. P 15*)

Dr. Berson and Mr. Dawson allegedly requested that Dr. Steinglass review all of Dr. Johnson's vascular/thoracic surgery cases, a review which is said to have led to the 1987 revocation of privileges. (*Id. PP 46-76*) Dr. Winikoff allegedly chaired a meeting [\*\*5] of the Peer Review Committee on February 24, 1987 at which the committee allegedly rubber stamped the Steinglass review. (*Id. P 63*) The crux of plaintiff's argument concerning these three defendants is that their 1987 actions were part of a racially motivated conspiracy directed at Dr. Johnson and that the denial of reinstatement in 1994 was a necessary part of the alleged plan to eliminate African-Americans from the vascular/thoracic surgical staff at Nyack. (Pl. Mem. 8) As they put it, defendants "Berson, Dawson, and Winikoff's actions with respect to the 1987 revocation of Dr. Johnson's privileges was, and is, part of the conspiracy to deny Dr. Johnson -- because of his race -- the right to hold thoracic and vascular privileges at Nyack." (*Id. at 13-14*) There is no suggestion and no evidence, however, that any of these three defendants had anything to do with the 1994 action apart from the allegation that the 1994 decision was based in part on 1987 events. On this basis, plaintiff asserts -- without citation of any authority whatsoever -- that he has a timely civil rights claim against these defendants based on the 1994 action. Defendants maintain the contrary, although [\*\*6] they too cite no authority. It is helpful, therefore, to return to first principles.

To begin with, these defendants are sued under both *Sections 1981* and *1985(3)*. The former claim is that each of them, either as a principal or perhaps as an aider and abettor, deprived Dr. Johnson of his federally protected right to equality in making and enforcing contracts, here the contract implicit in the medical staff relationship with Nyack Hospital. The latter asserts that the defendants entered into a conspiracy to deny him that right on the ground of his race. It is important consider these claims separately for purposes of this motion.

As the only allegations against these defendants pertinent to the *Section 1981* claim are of 1987 actions, the Court must determine [\*720] the effect of *Johnson II*, which dismissed claims based on the 1987 events as untimely. This requires consideration of what claims Dr. Johnson had and when they accrued.

**HN1**[] "Generally, a cause of action accrues and [the limitations period] begins to run when a defendant commits an act that injures a plaintiff[...] . . . . Each time a plaintiff is injured by an act of the defendant, a cause of action accrues to him to recover [\*\*7] the damages caused by the act and . . . , as to those damages, the statute of limitations runs from the commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-39, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1990). But *Zenith* articulated another important principle as well. Each "cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of

<sup>2</sup> *Johnson v. Nyack Hospital*, 86 F.3d 8 (2d Cir. 1996), aff'g 891 F. Supp. 155 (S.D.N.Y. 1995) ("Johnson II"); *Johnson v. Nyack Hospital*, 964 F.2d 116 (2d Cir. 1992), aff'g 773 F. Supp. 625 (S.D.N.Y. 1991); *Johnson v. Nyack Hospital*, 169 F.R.D. 550, 1996 U.S. Dist. LEXIS 18660, No. 94 Civ. 7464 (LAK), 1996 WL 724708 (S.D.N.Y. Dec. 17, 1996).

<sup>3</sup> Plaintiff has dropped Rockland Thoracic Associates, P.C. from the second amended complaint.

<sup>4</sup> "Cpt" refers to the second amended complaint.

accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. [citations omitted] Thus, if a plaintiff feels the adverse impact of [a] . . . conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the cause of action." *Id. at 338-39*. Only those future damages caused by an action prior to the start of the limitations period that would have been too speculative or unpredictable if sued upon **[\*\*8]** promptly may be recovered in an action brought within the limitations period. *Id. at 339*.<sup>5</sup>

Dr. Johnson's principal Section 1981 claim is that he was the victim of actions by Drs. Berson and Winikoff and Mr. Dawson which resulted in the revocation of his vascular/thoracic surgical privileges in 1987 and that those same actions influenced the 1994 refusal to reinstate those privileges. The moment those privileges were revoked, however, Dr. Johnson knew that his income stream from the performance of such surgery at Nyack Hospital had been terminated. There is no suggestion that recovery of damages to compensate for the loss of that income would have been precluded as too speculative. **[\*\*9]** Assuming he had sued promptly and prevailed, he would have been entitled to compensation for any income he lost by virtue of the revocation.<sup>6</sup>

The economic loss for which Dr. Johnson now seeks compensation is the loss of any income he would have earned had his privileges been reinstated in 1994. This of course is entirely included in the income stream Dr. Johnson could have recovered following the 1987 revocation of his privileges. These defendants, **[\*\*10]** however, are not alleged to have taken any action after 1987 which brought about the 1994 decision except insofar as their alleged involvement in the 1987 privileges revocation may have affected it. As Dr. Johnson could have recovered for that injury years ago, the dismissal of Count III, the Section 1981 claim, insofar as it was based on the 1987 events, necessarily forecloses any recovery by Dr. Johnson against these defendants for his alleged economic harm resulting from their 1987 actions.

Economic harm, however, is not the only sort of injury for which Dr. Johnson is entitled to seek compensation. **HN2**[  
↑] Section 1981 plaintiffs may recover for emotional distress as well,<sup>7</sup> and Dr. Johnson alleges that he **[\*721]** suffered emotional injury as a result of the 1994 denial. As each adverse action by Nyack Hospital reasonably might be found to have inflicted its own sting and humiliation, one cannot now exclude the possibility that a trier of fact could find that Dr. Johnson suffered emotional distress as a result of the 1994 events quite separate from any emotional injury he sustained in 1987. Given Dr. Johnson's contention that the 1994 denial was based at least in part on the defendants' 1987 **[\*\*11]** actions, the question whether these defendants may be held liable under Section 1981 for emotional distress suffered in and after 1994 presents essentially an issue of causation -- whether the alleged actions of Drs. Berson and Winikoff and Mr. Dawson in 1987 were a substantial factor in producing the alleged incremental emotional injury in 1994. That is quintessentially a jury issue. Accordingly, defendants' motion for partial summary judgment dismissing Count III of the complaint as to Drs. Berson and Winikoff and Mr. Dawson is granted except insofar as Dr. Johnson seeks recovery for emotional distress allegedly sustained as a result of the 1994 denial.

<sup>5</sup> *Zenith* was an antitrust case. There is no reason, however, why the principles referred to in the text should not be applied here. See *Hernandez Jimenez v. Calero Toledo*, 576 F.2d 402, 404 (1st Cir. 1978) (applying *Zenith* in civil rights context); *Kadar v. Milbury*, 549 F.2d 230, 234 (1st Cir. 1977) (same).

<sup>6</sup> See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975) (compensatory damages available under § 1981); *T & S Service Associates, Inc. v. Crenson*, 666 F.2d 722, 727 (1st Cir. 1981) (lost earnings recoverable); *Davis v. Supermarkets General Corp.*, 584 F. Supp. 870, 872 (E.D. Pa. 1984) (future wages recoverable); cf. *United States v. Burke*, 504 U.S. 229, 241, 119 L. Ed. 2d 34, 112 S. Ct. 1867 (1992) (referring to broad remedies available under antidiscrimination statutes other than Title VII).

<sup>7</sup> E.g., *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1498 (9th Cir. 1995); *Thomas v. Resort Health Related Facility*, 539 F. Supp. 630, 633 (E.D.N.Y. 1982); see *Hurley v. Atlantic City Police Dept.*, 933 F. Supp. 396, 423 (D. N.J. 1996).

Count IV, the Section 1985(3) conspiracy claim, presents a rather different issue. The complaint alleges that [\*\*12] Drs. Berson and Winikoff and Mr. Dawson joined a racially motivated conspiracy to remove Dr. Johnson from the vascular/thoracic surgery staff. Plaintiff asserts, moreover, that the 1994 reinstatement denial was in furtherance of that conspiracy.

**HN3** A conspiracy of course is a partnership the object of which is the achievement of an unlawful or improper objective. See, e.g., Pinkerton v. United States, 328 U.S. 640, 644, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946). One who forms or joins it is liable for all of the acts committed in furtherance of the conspiracy by any of the conspirators. Id. at 646-47. Moreover, once having joined a conspiracy, each conspirator is presumed to continue as a member until the conspiracy ends with its abandonment or the accomplishment of its unlawful purpose or until the conspirator withdraws by some affirmative act.<sup>8</sup>

[\*\*13] Here, Drs. Berson and Winikoff and Mr. Dawson allegedly became members of the asserted conspiracy in 1987. They have presented no evidence sufficient to establish withdrawal under the standards governing in this Circuit.<sup>9</sup> The questions whether the alleged conspiracy existed and, if so, whether the 1994 reinstatement denial was in furtherance of such a conspiracy as opposed to an independent, event for which the parties to the alleged 1987 conspiracy may bear no responsibility are not ripe for disposition on this motion. Accordingly, insofar as Drs. Berson and Winikoff and Mr. Dawson seek dismissal of the Section 1985(3) claim on the ground that the complaint alleges no actions by them subsequent to 1987, their motion must be denied.

B.

The fourth defendant as to whom dismissal is sought is Dr. Steinglass, whose situation is not entirely comparable to the other three individuals in that [\*\*14] Dr. Johnson contends that Dr. Steinglass played "an integral role" in the 1994 decision (Pl. Mem. 6), a contention that, in view of what has been said already, affects only the Section 1981 claim. Given that Dr. Steinglass' motion is supported by an affidavit which states unequivocally that he in effect recused himself and took no part in the denial of Dr. Johnson's 1994 application in view of Dr. Johnson's repeated accusations against him (Steinglass Aff. P 70) -- an assertion supported by affidavits of Drs. Simon (Simon Aff. P 23) and Menitove (Menitove Aff. PP 2-5) -- it was Dr. Johnson's burden to come forward with admissible evidence which, if credited, would permit a trier of fact to find that Dr. Steinglass was involved.

[\*722] Plaintiff makes three arguments. These contentions, whether taken individually or together, are insufficient to raise a genuine issue of material fact.

Dr. Johnson first contends that Dr. Steinglass was a member of the Quality Assurance/Risk Management Committee, which voted in 1994 to deny Dr. Johnson's reinstatement application. That is undisputed. It is undisputed also, however, that Dr. Steinglass did not participate in any way the Committee's consideration [\*\*15] of Dr. Johnson's application. The fact that he was present is of no moment because other matters were discussed in other portions of the meeting, and there is no question that he said nothing concerning Dr. Johnson's situation. (Menitove Aff. PP 2-5) Indeed, Dr. Johnson's brief essentially admits as much. (Pl. Mem. 7) ("it appears that Dr. Steinglass chose to remain silent")

Dr. Johnson next relies upon Dr. Steinglass' alleged failure to advise the various Nyack committees and the Board of Trustees who acted upon the 1994 application that proceedings that had taken place before the New York State Office of Professional Medical Conduct ("OPMC") demonstrated that Nyack's 1987 revocation, in which Dr. Steinglass played an important role, was "a sham." (*Id.* 6-7) This is a most peculiar argument. The OPMC decision was rendered on May 6, 1993. *Johnson II*, 891 F. Supp. at 158. Dr. Johnson applied for reinstatement at Nyack in

<sup>8</sup> E.g., United States v. Chalarca, 95 F.3d 239, 243 (2d Cir. 1996) (conspiracy continues until abandoned or objective accomplished); United States v. Greenfield, 44 F.3d 1141, 1149-50 (2d Cir. 1995) (withdrawal); United States v. Rucker, 586 F.2d 899, 906 (conspiracy continues until consummated, abandoned or terminated by affirmative act).

<sup>9</sup> See, e.g., Greenfield, *supra* n. 8, 44 F.3d at 1149-50; United States v. Jones, 27 F.3d 50, 51 (2d Cir. 1994).

January 1994, eight months later. (Johnson Decl., Mar. 28, 1995, P 129) His submission included the OPMC findings. (*Id.* P 132) The notion that Dr. Steinglass violated Dr. Johnson's civil rights by failing to tell Nyack Hospital and its various boards of [\*\*16] the OPMC decision of which they were fully aware simply defies reason.

Finally, Dr. Johnson relies on the fact that Dr. Steinglass was present to testify at a December 1994 hearing concerning the 1994 denial. (*Id.* 6) The hearing in question was conducted by former Judge Conboy of this Court, who acted as a hearing officer pursuant to the Hospital's by-laws. The question whether he would hear evidence concerning the 1987 events had not been determined by the time of the December 1994 hearing. Accordingly, Dr. Steinglass attended in case his testimony was required, although he did not in fact testify. This is insufficient to raise an issue of fact as to Dr. Steinglass' alleged participation in the 1994 denial.

These contentions having been put aside, Dr. Steinglass' situation is analytically identical, for purposes of this aspect of the motion, to that of Drs. Berson and Winikoff and Mr. Dawson. The [Section 1981](#) claim against him must be dismissed except to the extent that Dr. Johnson seeks to recover for emotional harm suffered as a result of the 1994 decision. The issue whether any such harm was a proximate consequence of actions by Dr. Steinglass will be for the jury. There [\*\*17] is no basis for dismissing the [Section 1985\(3\)](#) claim against him for the reasons already discussed unless it be defendants' intraenterprise conspiracy argument, to which the Court now turns.

## II

Defendants contend that the [Section 1985\(3\)](#) claim must be dismissed pursuant to the intraenterprise conspiracy doctrine because all of the conduct complained of was that of employees or members of the medical staff of Nyack Hospital acting in those capacities. In substance, they argue that Nyack Hospital cannot conspire with itself.

**HN4** [↑] 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 business entities to take action "that, in a competitive world, each would take separately." [Stathos v. Bowden](#), 728 F.2d 15, 21 (1st Cir. 1984) (Breyer, J.) In consequence, 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 [\*\*18] their employment. E.g., [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 [I\\*7231](#) (1984); VII PHILLIP E. AREEDA, [ANTITRUST LAW](#) PP 1462-74 (1986) ("AREEDA").

**HN5** [↑] Efforts to import this principle to [Section 1985\(3\)](#) have met with varying results. Some circuits have rejected it outright or confined it to the narrowest of circumstances.<sup>10</sup> Others, however, have restricted [Section 1985\(3\)](#) on the basis of the antitrust analogy.<sup>11</sup> The Second Circuit falls into this group, although the extent of its restriction of [Section 1985\(3\)](#) claims is yet to be fully defined.

[\*\*19] In [Girard v. 94th Street and Fifth Avenue Corp.](#), 530 F.2d 66 (2d Cir.), cert. denied, 425 U.S. 974, 48 L. Ed. 2d 798, 96 S. Ct. 2173 (1976), the plaintiff charged a cooperative apartment corporation and its directors with having declined to approve the assignment of a lease to her on the ground of her gender. A divided panel of the Second Circuit affirmed dismissal of the [Section 1985\(3\)](#) claim, essentially on the view that the corporation and its directors, who it viewed as having been sued only for actions taken in their capacities as such, were incapable as a matter of law of forming a [Section 1985\(3\)](#) conspiracy. *Id.* at 71-72. In doing so, however, it noted that the action

<sup>10</sup> E.g., [Stathos](#), 728 F.2d at 21 (doctrine limited to ministerial acts to carry out a single discretionary decision); [Novotny v. Great Am. Fed. Sav. & Loan Assn.](#), 584 F.2d 1235, 1259 (3d Cir. 1978) (rejecting doctrine), vacated on other grounds, 442 U.S. 366, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979).

<sup>11</sup> E.g., [Hartman v. Board of Trustees of Comm. Coll. Dist. No. 508](#), 4 F.3d 465, 469 (7th Cir. 1992) (managers of corporation pursuing its lawful business not rendered conspirators by discriminatory actions); [Travis v. Gary Community Mental Health Ctr., Inc.](#), 921 F.2d 108, 110 (7th Cir. 1990); [Runs After v. United States](#), 766 F.2d 347, 354 (8th Cir. 1985); [Dombrowski v. Dowling](#), 459 F.2d 190, 196 (7th Cir. 1972) (Stevens, J.).

complained was that of a single policy making body -- the board of directors -- and laid considerable emphasis on the fact that none of the individual defendants was alleged to have been "motivated by any independent personal stake in achieving the corporation's objective." *Id.* See also [Herrmann v. Moore, 576 F.2d 453, 459](#) (2d Cir.), cert. denied, 439 U.S. 1003, 99 S. Ct. 613, 58 L. Ed. 2d 679 (1978) (law school faculty and trustees incapable of conspiring to discharge professor).<sup>12</sup>

[\*\*20] Plaintiff seizes on this latter comment to argue that his claim comes within *Girard* because the requisite independent personal motive is supplied by personal racial bias. (Pl. Mem. 15-16) The argument, however, is without merit. In [Griffin v. Breckenridge, 403 U.S. 88, 29 L. Ed. 2d 338, 91 S. Ct. 1790 \(1971\)](#), the Supreme Court held that "racial, or perhaps otherwise class-based, invidiously discriminatory animus" must motivate the defendants in order to give rise to [Section 1985\(3\)](#) liability. *Id. at 102*. 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.<sup>13</sup> Accordingly, this Court holds that [HN6](#)<sup>14</sup> 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. Accord, [Hartman, 4 F.3d at 470](#); [Robins v. Max Mara U.S.A., Inc., 914 F. Supp. 1006, 1010 \(S.D.N.Y. 1996\)](#).

[\*\*21] Plaintiff next argues that the intraenterprise conspiracy doctrine should be limited in the [Section 1985\(3\)](#) context to circumstances in which the alleged conspiracy [\*724] encompassed no more than a single act of discrimination.<sup>14</sup> There are, to be sure, such suggestions in the cases.<sup>15</sup> [\*\*22] As Judge Easterbrook and others have pointed out, however, "such a line responds neither to the text nor to the objectives of Section [§ 1985](#). [Section 1985](#) depends on multiple actors, not on multiple acts of discrimination or retaliation." [Travis, 921 F.2d at 111](#).<sup>16</sup>

Finally, plaintiff argues that hospitals and their medical staffs are capable of conspiring in violation of [Section 1](#) of the Sherman Act and, in consequence, that his [Section 1985\(3\)](#) claim therefore would be sufficient even if the intraenterprise conspiracy doctrine were imported wholesale from the law of antitrust. (Pl. Mem. 19-20) Although not phrased as such, the argument is a variation on the personal interest exception to the intraenterprise conspiracy doctrine alluded to in *Girard*.

In dealing with alleged antitrust conspiracies involving hospital medical staffs and hospitals, it is important to bear in mind that some physicians are hospital employees while others have independent practices. In the ordinary peer

<sup>12</sup> Dr. Johnson contends that the intraenterprise conspiracy doctrine should not apply here because the policies that produced it cannot properly be translated from antitrust to the civil rights field. See, e.g., [Stathos, 728 F.2d at 21](#); [Novotny, 584 F.2d at 1256-59](#). *Girard* and *Herrmann* foreclose the argument before this Court.

<sup>13</sup> Plaintiff's reliance on [Garza v. City of Omaha, 814 F.2d 553 \(8th Cir. 1987\)](#), is misplaced. While *Garza* did find the intraenterprise conspiracy doctrine inapplicable, it did so principally because there was evidence that the individual defendants acted out of "personal animosity." *Id. at 557*. To be sure, the panel referred also to evidence of personal bias. But it did not address the point here presented. To whatever extent it is fairly read as supporting plaintiff's position, the Court declines to follow it for the reason adduced in the text. Cases such as [Walker v. Woodward Governor Co., 631 F. Supp. 91 \(N.D. Ill. 1986\)](#), also relied upon by plaintiff, which reject the intraenterprise conspiracy doctrine in the [Section 1985\(3\)](#) context are inconsistent with *Girard* and *Herrmann* and therefore inapplicable in this Circuit.

<sup>14</sup> Plaintiff actually contends that it should be confined to cases involving "no more than a single act of discrimination by a single defendant." (Pl. Mem. 16) (emphasis added) As a conspiracy requires at least two actors, however, the suggestion of limitation to situations involving only one defendant makes little sense.

<sup>15</sup> See, e.g., [Volk v. Coler, 845 F.2d 1422, 1435 \(7th Cir. 1988\)](#); [Stathos, 728 F.2d at 21](#); [Wahad v. Federal Bureau of Investigation, 813 F. Supp. 224, 232 \(S.D.N.Y. 1993\)](#); [Rackin v. University of Pennsylvania, 386 F. Supp. 992, 1005 \(E.D. Pa. 1974\)](#).

<sup>16</sup> Accord, Comment, *The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, [90 NW. U. L. REV. 1125, 1159-60 \(1996\)](#); Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c)*, 92 HARV. L. REV. 470, 472-73 (1978).

review or staff privileges dispute, physicians who are hospital employees rarely if ever will have interests separate [\*\*23] from those of the hospitals that employ them and therefore rarely will be capable of conspiring with the hospitals or, for that matter, among themselves when they play their roles in the review or privileging process. Their interests and those of their hospitals and colleagues all will be congruent. Physicians with independent practices, on the other hand, present a more nuanced situation. Rarely will such physicians be in competition with the hospitals at which they practice. Some, however, will be competitors among themselves (e.g., two orthopedists) while others will not (e.g., an obstetrician and a radiologist). The degree to which private practitioners functioning in a peer review or staff privileges context may be capable of conspiring depends upon whether their private interests diverge from those of the hospital or the physician who is the focus of attention. VII AREEDA P 1471e & P 1471'b (1996 Supp.)

This view is borne out by the cases. The Second, Fourth and Eleventh Circuits, for example, have held that [HN7](#) members of hospital medical staffs are capable of conspiring with one another in view of their separate and possibly competitive private economic interests.<sup>17</sup>

[\*\*24] Here, none of the individual defendants save Dr. Steinglass is alleged to have been a competitor of Dr. Johnson. Thus, none had any economic interest in whether his vascular/thoracic surgery privileges were revoked in 1987. Their participation in the process was solely in their capacities as members of the hospital medical staff or hospital officials. They and the hospital therefore are indistinguishable for purposes of conspiracy analysis.

Dr. Steinglass presents a different problem. He headed Rockland Thoracic Associates, P.C., a group practice engaged in vascular and thoracic surgery which competed with Dr. Johnson. Dr. Steinglass and Dr. Johnson allegedly were two of the three vascular/thoracic surgeons with the relevant operating privileges at Nyack Hospital. He [\*725] therefore had a personal interest sufficient to take him out of the intraenterprise conspiracy doctrine. The question therefore becomes whether his personal interest permits the conclusion that he conspired with Nyack Hospital, which for purposes of this analysis includes the other individuals acting on its behalf.

The cases are divided on the question whether a hospital is capable of conspiring with members of its [\*\*25] medical staff.<sup>18</sup> The Second Circuit has not yet ruled on the point. The answer, however, should depend upon straightforward application of the law of conspiracy to the specific facts of each case.

[\*\*26] Dr. Steinglass' alleged personal interest in depriving Dr. Johnson of vascular/thoracic surgery privileges destroys his unity of interest with Nyack Hospital and thus renders him capable of conspiring with it. In order to make out a conspiracy case against these two defendants, however, Dr. Johnson must show that they entered into an agreement to achieve an illicit objective, here the deprivation on the basis of race of rights guaranteed by law. In other words, the plaintiff will have to demonstrate that Dr. Steinglass and one or more agents of the hospital, acting within the scope of their employment, agreed to revoke Dr. Johnson's privileges on the basis of his race.<sup>19</sup> As

<sup>17</sup> [Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.](#), 996 F.2d 537, 544 (2d Cir.), cert. denied, 510 U.S. 947, 114 S. Ct. 388, 126 L. Ed. 2d 337 (1993); [Oksanen v. Page Memorial Hospital](#), 945 F.2d 696, 706 (4th Cir.) (en banc), cert. denied, 502 U.S. 1074, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992); [Bolt v. Halifax Hospital Medical Center](#), 891 F.2d 810, 819 (11th Cir.), cert. denied, 495 U.S. 924, 109 L. Ed. 2d 322, 110 S. Ct. 1960 (1990).

<sup>18</sup> Compare, e.g., [Okusami v. Psychiatric Inst. of Washington](#), 295 U.S. App. D.C. 58, 959 F.2d 1062, 1065 (D.C. Cir. 1992) (hospital and medical staff incapable of conspiracy if they have unity of interest); [Oksanen](#), 945 F.2d at 705 (medical staff members incapable of conspiring with hospital to deny privileges where board of trustees final decision maker); [Nurse Midwifery Assoc. v. Hibbett](#), 918 F.2d 605 (6th Cir. 1990), mod. on rehearing, 927 F.2d 904 (6th Cir. 1991), cert. denied, 502 U.S. 952 (1991) (medical staff members incapable of conspiracy with hospital in denying staff privileges); [Nanavati v. Burdette Tomlin Mem. Hosp.](#), 857 F.2d 96, 118 (3d Cir. 1988), cert. denied, 489 U.S. 1078, 103 L. Ed. 2d 834, 109 S. Ct. 1528 (1989) (same); [Potters Med. Ctr. v. City Hosp. Assn.](#), 800 F.2d 568, 573 (6th Cir. 1986) (same); [Weiss v. York Hosp.](#), 745 F.2d 786, 816-17 (3d Cir. 1984), cert. denied, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985) (same); with [Bolt](#), 891 F.2d 810 (medical staff members with private practices capable of conspiring with hospital); [Oltz v. St. Peter's Comm. Hosp.](#), 861 F.2d 1440 (9th Cir. 1988) (same).

defendants have argued only that Dr. Steinglass and Nyack are incapable of conspiring as a matter of law, a proposition which this Court rejects, the question whether the evidence would permit such a conclusion as a matter of fact has not been addressed. Accordingly, the motion for summary judgment dismissing the [Section 1985\(3\)](#) claim as to Dr. Steinglass and Nyack Hospital must be denied.

**[\*\*27] Conclusion**

For the foregoing reasons, defendants' motion for partial summary judgment is granted to the extent that (1) Count III is dismissed as against Drs. Berson, Steinglass and Winikoff and Mr. Dawson except insofar as plaintiff seeks recovery for emotional distress in connection with the 1994 reinstatement denial, and (2) Count IV is dismissed as against all defendants except Dr. Steinglass and Nyack Hospital. The motion is denied in all other respects. Plaintiff's motion for leave to file the second amended complaint is granted. The pleading is deemed served and filed as of this date.

SO ORDERED.

Dated: February 11, 1997

Lewis A. Kaplan

United States District Court

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<sup>19</sup> [Section 1985\(3\)](#) does not reach "conspiracies motivated by economic or commercial animus." [United Bhd. of Carpenters and Joiners, 463 U.S. 825, 837-39, 77 L. Ed. 2d 1049, 103 S. Ct. 3352 \(1983\)](#). Thus, while the divergence of Dr. Steinglass' economic interests from those of the hospital render them capable of conspiring, plaintiff nevertheless will have to prove that they entered into a racially, as opposed to economically, motivated conspiracy in order to prevail on Count IV.



## S. Megga Telecomms. v. Lucent Techs.

United States District Court for the District of Delaware

February 14, 1997, Decided

C.A. No. 96-357-SLR

**Reporter**

1997 U.S. Dist. LEXIS 2312 \*; 1997 WL 86413

S. MEGGA TELECOMMUNICATIONS LIMITED, a Hong Kong corporation, and S. MEGGATEL SDN. BHD., a Malaysian corporation, Plaintiffs, v. LUCENT TECHNOLOGIES, INC., a Delaware corporation, Defendant.

**Notice:** [\*1] FOR ELECTRONIC PUBLICATION ONLY

**Subsequent History:** Motion for Reconsideration Granted in Part and Denied in Part May 12, 1997, Reported at: [1997 U.S. Dist. LEXIS 22163](#).

**Disposition:** Lucent's motion to dismiss as to counts I through V denied and motion to dismiss as to counts VI and VII granted. Plaintiffs' motion to dismiss Lucent's counterclaims granted. Lucent's motion for temporary restraining order denied as moot.

## Core Terms

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counterclaims, plaintiffs', telephones, allegations, manufacturing, cordless, motion to dismiss, misrepresentation, joint venture, parties, counts, commerce, terminate, argues, import, temporary restraining order, facilities, antitrust, fiduciary duty, selling, business relationship, intellectual property, forum non conveniens, foreign nation, compulsory, public interest factors, integration, fraudulent, Venture, profits

## LexisNexis® Headnotes

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

### [HN1](#) [?] Defenses, Demurrsers & Objections, Motions to Dismiss

In ruling on a motion to dismiss, the court will consider primarily the allegations contained in the complaint. The court, however, may also consider matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint. The court must accept all factual allegations in the complaint as true. The court is also bound to give the plaintiffs the benefit of every reasonable inference to be drawn from the complaint. Additionally, the court must resolve any ambiguities concerning the sufficiency of the claims in favor of the plaintiffs. The 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.

Contracts Law > Contract Interpretation > Intent

Contracts Law > Contract Interpretation > General Overview

## **HN2** **Contract Interpretation, Intent**

The interpretation of an agreement involves determining the intention of the parties as revealed by the language used by them. Under New Jersey law, the intention of the parties is determined by the situation of the parties, the attendant circumstances, and the objects they were striving to attain. Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement.

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

Contracts Law > Contract Modifications > General Overview

## **HN3** **Contract Conditions & Provisions, Integration Clauses**

Some courts, in applying New Jersey law, give conclusive effect to integration clauses in determining whether the parties intended to make a contract integrated.

Contracts Law > Contract Modifications > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

## **HN4** **Contracts Law, Contract Modifications**

The intent of the parties is not to be determined solely by reference to the four corners of the written agreement even when the contract on its face is free from ambiguity.

Contracts Law > Contract Modifications > General Overview

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

## **HN5** **Contracts Law, Contract Modifications**

Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties; but the intent must be judged by an external standard. The writing is not wholly and intrinsically self-determinative of the parties intent to make it the sole memorial of the subject of negotiation; this intent must be sought in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known till the court knows what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, a court must compare the writing and the negotiations before it can determine whether they were in fact covered.

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

Contracts Law > Contract Modifications > General Overview

## **HN6** **Contract Conditions & Provisions, Integration Clauses**

Although a contract with a merger clause is strong evidence that the parties intended the writing to be the complete and exclusive agreement between them, it is not dispositive.

[Contracts Law > Contract Interpretation > Parol Evidence > General Overview](#)

[Evidence > Rule Application & Interpretation](#)

#### **HN7** **Contract Interpretation, Parol Evidence**

The parole evidence rule does not apply in determining the subject matter of the general purchase agreements or whether they were intended to be the master agreements. The parole evidence rule is a rule of substantive law not related to interpretation or the admission of evidence for the purpose of interpretation. The terms of any contract must be given a meaning by interpretation before it can be determined whether an attempt is being made to vary or contradict them.

[Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants](#)

[Contracts Law > Contract Interpretation > Good Faith & Fair Dealing](#)

#### **HN8** **Types of Contracts, Covenants**

Under New Jersey law, a breach of an implied covenant of good faith and fair dealing may be established if a defendant encourages a plaintiff to make substantial investments while actively concealing its decision to terminate a contract.

[Contracts Law > ... > Consideration > Enforcement of Promises > General Overview](#)

[Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Elements](#)

[Contracts Law > Contract Formation > Consideration > General Overview](#)

[Torts > Business Torts > Fraud & Misrepresentation > General Overview](#)

[Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview](#)

#### **HN9** **Consideration, Enforcement of Promises**

Under New Jersey law, the elements for a claim of fraudulent misrepresentation are: (1) a material misrepresentation of presently existing or past fact; (2) knowledge of falsity by the person making the misrepresentation; (3) intent that the misrepresentation be relied upon; (4) actual and reasonable reliance on the misrepresentation; and (5) detriment to plaintiff. The elements of negligent misrepresentation are (1) a material misrepresentation of a presently existing or past fact; (2) negligently made; and (3) justifiably relied upon.

[Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims](#)

[Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview](#)

#### **HN10** **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) provides that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. The United States Courts of Appeals for the Third Circuit holds that focusing exclusively on Rule 9(b)'s particularity language is too narrow an approach and fails to take into account the general simplicity and flexibility contemplated by the rules.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

### **HN11** [blue icon] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) requires plaintiffs to plead with particularity the circumstances of the alleged fraud in order to place the defendants on notice of the precise misconduct charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior. In accordance with these objectives, allegations of date, place, or time are not required and plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

### **HN12** [blue icon] International Aspects, Foreign Trade Antitrust Improvements Act

See [15 U.S.C.S. § 6a](#).

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Sherman Act > General Overview

### **HN13** [blue icon] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act, [15 U.S.C.S. § 6a](#), requires an actual injury to plaintiff within the United States.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > ... > Pleadings > Counterclaims > Permissive Counterclaims

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

#### **HN14** [blue icon] **Supplemental Jurisdiction, Ancillary Jurisdiction**

In order for a federal court to entertain a counterclaim, the counterclaim must be either a compulsory counterclaim and so fall within the court's ancillary jurisdiction, or a permissive counterclaim with an independent basis of jurisdiction. [Fed. R. Civ. P. 13\(a\)](#) provides that a counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Permissive counterclaims are claims not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. [Fed. R. Civ. P. 12\(b\)](#).

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

#### **HN15** [blue icon] **Counterclaims, Compulsory Counterclaims**

The United States Court of Appeals for the Third Circuit embraces a fairly liberal interpretation of the transaction or occurrence standard, establishing as the operative question in determining if a claim is a compulsory counterclaim whether the counterclaim bears a logical relationship to an opposing party's claim.

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

#### **HN16** [blue icon] **Counterclaims, Compulsory Counterclaims**

In determining whether a logical relationship exists between an opposing party's claim and a counterclaim, the court will analyze several factors: (1) are the issues in fact and law raised by the claim and counterclaim largely the same?; (2) would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?; and (3) will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaims?

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Evidence > Burdens of Proof > Initial Burden of Persuasion

#### **HN17** [blue icon] **Venue, Forum Non Conveniens**

The court has the discretion to grant or deny a motion to dismiss a claim under the doctrine of forum non conveniens. Under this doctrine, the party seeking dismissal of a claim has the initial burden of establishing that an adequate alternative forum exists. Once the moving party has established that an alternative forum exists, it must then show that the private and public interest factors weigh heavily in favor of dismissal.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

### **HN18** [L] **Venue, Forum Non Conveniens**

Once an adequate alternative forum is established, the court must balance several private and public interest factors to determine whether dismissal is proper. The private interest factors include: relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; and all other practical problems that make a trial of a case easy, expeditious and inexpensive. The public interest factors include: the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in application of foreign laws.

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**Judges:** Sue L. Robinson, District Judge

**Opinion by:** Sue L. Robinson

## **Opinion**

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### **MEMORANDUM OPINION**

**ROBINSON, District Judge**

#### **I. INTRODUCTION**

On July 1, 1996 plaintiffs S. Megga Telecommunications Limited ("S.Megga") and S. Meggatel SDN. BHD. ("S. Meggatel") (collectively referred to as "plaintiffs") filed this action against defendant Lucent Technologies, Inc. ("Lucent") seeking to recover [\*2] damages as a result of Lucent's alleged breaches of contracts, tortious conduct, and antitrust violations. (D.I. 1) On August 20, 1996, Lucent filed a motion to dismiss counts I through VII of plaintiffs' complaint. (D.I. 8) On January 2, 1997, Lucent filed an answer to count VIII, counterclaims, and a motion for a temporary restraining order. (D.I. 16, 20) Plaintiffs responded by filing an answer and motion to dismiss Lucent's counterclaims. (D.I. 22, 23) On January 6, 1997, the court heard oral argument on Lucent's motion for a temporary restraining order. (D.I. 21) All of the motions have been fully briefed. (D.I. 9, 11, 17, 24, 25, 31, 32, 33, 35, 36)

This case is presently before the court on Lucent's motion to dismiss counts I through VII of plaintiffs' complaint, its motion for a temporary restraining order, and plaintiffs' motion to dismiss Lucent's counterclaims. (D.I. 8, 16, 23) For the reasons that follow, the court shall deny Lucent's motion to dismiss as to counts I through V and grant its motion as to counts VI and VII. The court shall also grant plaintiffs' motion to dismiss Lucent's counterclaims and deny Lucent's motion for a temporary restraining order.

### [\*3] II. BACKGROUND

S. Megga is a Hong Kong corporation with its principal place of business in Hong Kong and with manufacturing facilities in the People's Republic of China ("China"). (D.I. 1 at 3) Plaintiff S. Meggatel is a Malaysian corporation with its principal place of business in Klang, Malaysia.<sup>1</sup> (D.I. 1 at 3)

Defendant Lucent is a Delaware corporation that does business throughout the United States. (D.I. 20 at 1) Lucent is composed of "certain former AT&T Corporation ("AT&T") businesses and operations relating to the design, development, manufacturing and marketing of telecommunications equipment and related software." (D.I. 20 at 1)

Since 1983, S. Megga has manufactured consumer products for Lucent. [\*4] (D.I. 1 at 4) In 1986, S. Megga began manufacturing cordless telephones for Lucent. (D.I. 1 at 5) In 1992, S. Meggatel also began manufacturing cordless telephones for Lucent. (D.I. 1 at 5-6) Plaintiffs assert that, in early 1991, Lucent induced S. Meggatel to build a new facility "dedicated exclusively to the manufacturing of cordless telephones for Lucent." (D.I. 1 at 5) Lucent is alleged to have represented to plaintiffs that it would purchase a minimum of 400,000 telephones annually from S. Meggatel for the "long term" and continue to purchase telephones from S. Megga unless restrictions by China were imposed. (D.I. 11 at 1-2) Plaintiffs also allege that, in 1995, Lucent induced S. Megga to build a new manufacturing facility in China in order to meet Lucent's demands. (D.I. 11 at 1-2) From 1983 to 1995, Lucent allegedly instructed plaintiffs not to manufacture telephones for Lucent's competitors or it would terminate its business relationship with them. (D.I. 1 at 7) Lucent also allegedly directed plaintiffs to defer their profits on sales to Lucent from 1994 to 1995. (D.I. 1 at 8)

In return for all these concessions, plaintiffs allege that Lucent promised S. Megga and S. Meggatel [\*5] a business relationship with Lucent for the "long term." (D.I. 11 at 3) In December 1995, however, Lucent terminated its relationship without notice. (D.I. 1 at 8) As a result, plaintiffs have set forth claims for breach of contract (count I), breach of implied covenant of good faith and fair dealing (count II), promissory estoppel (count III), fraudulent misrepresentation (count IV), negligent misrepresentation (count V), attempted monopolization (count VI), and breach of fiduciary duty (count VII).

In its motion to dismiss counts I through VII of the complaint, Lucent argues that its contractual relationship with plaintiffs is governed by General Purchase Agreements ("GPAs") that S. Megga entered into in 1986 and S. Meggatel entered into in 1992.<sup>2</sup> (D.I. 1 at 4, 6) According to Lucent, both GPAs (1) "constitute the entire agreement between the parties with respect to purchases of cordless telephones;" (2) "disclaim any minimum purchase obligation;" and (3) "state that Lucent can cease making purchase orders at any time." (D.I. 9 at 2) In opposing Lucent's motion, plaintiffs argue that their complaint concerns conduct and agreements with Lucent that are outside the scope of both [\*6] GPAs.

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<sup>1</sup> S. Meggatel is an affiliate of S. Megga. S. Megga is a wholly-owned subsidiary of S. Megga International Holdings, Ltd., a corporation organized under the laws of the British Virgin Islands. (D.I. 1 at 3) S. Megga International Holdings, Ltd. also owns seventy percent of S. Meggatel. (D.I. 1 at 4)

<sup>2</sup> The contract between S. Meggatel and Lucent was amended in March of 1993 to include cordless telephones. Although the agreement between Lucent and S. Meggatel that was attached to plaintiffs' complaint is not specifically identified as a "General Purchase Agreement," both parties appear to refer to it as such. (D.I. 9 at 2; D.I. 11 at 2)

Lucent's motion for a temporary restraining order and its counterclaims relate to cordless telephones that S. Megga made for a joint venture corporation. In 1994, AT&T (now Lucent), S. Megga, and the Central Technology Center,<sup>3</sup> a Chinese government corporation, entered into a contract ("Joint Venture Agreement") to create the joint venture corporation AT&T-CTB ("Joint Venture"). (D.I. 25, Ex. 1 at 4) The Joint Venture Agreement is governed by the laws of China and provides that disputes arising in connection with it shall be submitted to the court of arbitration in Stockholm, Sweden. (D.I. 25, Ex. 1 at 22)

[\*7] After the Joint Venture Agreement was executed, Lucent authorized S. Megga to manufacture cordless telephones for AT&T-CTB. (D.I. 17 at 5) With these instructions, S. Megga manufactured approximately 60,000 to 70,000 cordless telephones for AT&T-CTB. (D.I. 21 at 1) According to S. Megga, these telephones were intended to be sold by the Joint Venture only in China. (D.I. 24 at 1) In December 1995, Lucent allegedly advised S. Megga that it was withdrawing from the Joint Venture.<sup>4</sup> (D.I. 25 at 2 and Ex. 2, P6)

[\*8] The telephones that S. Megga manufactured consisted of three different models: model numbers 5548, 5545, and 4615. (D.I. 25 at 1) According to S. Megga, Models 5548 and 5545 accounted for all but 1,000 of the 60,000 to 70,000 units S. Megga manufactured. (D.I. 25 at 1) Model 4615 accounted for the remaining 1,000 units. (D.I. 25 at 1) S. Megga claims that models "5548 and 5545 were designed entirely by S. Megga" and only S. Megga's tooling and electronics were used. (D.I. 25 at 1) The 5548 and 5545 models carry the AT&T logo and were packaged in boxes with the AT&T logo. The 1000 units of model 4615 were made using AT&T's tooling. (D.I. 25 at 2) The 4615 model does not carry the AT&T logo and was made using only S. Megga's electronics. (D.I. 25 at 2)

Lucent argues that S. Megga has breached its GPA by selling these cordless telephones in China without Lucent's authorization. S. Megga's GPA contains provisions relating to the use of Lucent's tooling equipment,<sup>5</sup> information,<sup>6</sup> [\*10] identification,<sup>7</sup> and insignia.<sup>8</sup> The GPA also contains a clause which provides that S. Megga may not

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<sup>3</sup>The Central Technology Center is a wholly-owned subsidiary of the China National Posts and Telecommunications Industry Corporation, an agency of the Chinese government. (D.I. 17 at 4)

<sup>4</sup>At oral argument, counsel for Lucent denied that Lucent had withdrawn from the Joint Venture. (D.I. 21 at 13) Lucent, however, admits that it advised S. Megga in December 1995 that it was considering selling its interest in AT&T-CTB. (D.I. 20 at 5)

Plaintiffs claim that because Lucent wanted to withdraw from the Joint Venture it entered into a settlement agreement with S. Megga in January 1996 ("January 1996 Agreement"). The January 1996 Agreement involved "an adjustment of costs . . . under which Lucent agreed . . . that it owed and would pay S. Megga U.S. \$ 3 million as part of the reconciliation of costs related to the Joint Venture and S. Megga would, as it did, take over Lucent's position in the Joint Venture at no additional costs to S. Megga." (D.I. 1 at 21) Plaintiffs' count VIII alleges that Lucent breached the January 1996 Agreement. Lucent does not seek to dismiss this claim.

<sup>5</sup>The "Title to Special Tooling" clause, in subparagraph (7), provides, in part, that "if [S. Megga] defaults . . . or if [AT&T] is not obligated to purchase products . . . [AT&T] may withdraw all or any part of the TOOLING and TOOLING drawings." (D.I. 1, Ex. A) The GPA defines "special tooling" as "including, but not limited to molds, dies, punches, printed circuit masters, integrated circuit masks, and the like, including the media in which embodied, and services required to produce the same." (D.I. 1, Ex. A)

<sup>6</sup>The "Use and Information" clause provides that any information furnished or acquired by S. Megga from Lucent shall remain Lucent's property and must be returned at Lucent's request. The term "information" is defined as "any specifications, drawings, sketches, models, samples, tools, computer or other apparatus programs, technical or business information or data, written, oral or otherwise, owned or controlled by [Lucent] . . ." (D.I. 1, Ex. A; D.I. 17 at 10 n. 5)

<sup>7</sup>The identification clause provides in part that "[S. Megga] shall make no use of any identification of . . . [AT&T] . . . in its advertising and promotional efforts in reference to activities undertaken by [S. Megga] under this Agreement." The GPA defines "identification" as "any trade names, trademark, service mark, [or] insignia. . . ." The clause also provides that "[S. Megga] agrees to remove any such identification prior to any sale, use or disposition of material . . . not purchased by Company. . . ." (D.I. 1, Ex. A; D.I. 20 at 9, P38)

<sup>8</sup>The insignia clause in the GPA provides in part that "[cordless phones] rejected or not purchased by Company which utilized such INSIGNIA shall have all such Insignia removed prior to any sale, use or disposition thereof." (D.I. 1, Ex. A; D.I. 20 at 10, P39) The GPA defines "insignia" as "certain Company trademarks, trade names, insignia, symbols, decorative designs, packaging designs or evidences of Company's inspection." (D.I. 1, Ex. A)

knowingly "transmit directly or indirectly . . . any immediate product . . . produced directly by the [\*9] use of technical information . . . or any commodity produced by such immediate product . . . to . . . [the] People's Republic of China . . ." without the prior written consent of the United States Department of Commerce. (D.I. 1, Ex. A at 19)

S. Megga claims that all of the units were made before December 1995. (D.I. 25 at 1) S. [\*11] Megga also claims that Lucent approved these telephones for sale in China. (D.I. 25 at 1) At oral argument, counsel for Lucent disputed S. Megga's claim that the 4615 models were made before December 1995. Counsel for Lucent suggested that a manufacturing date of June 1996 was stamped on the bottom of the 4615 telephones.<sup>9</sup> (D.I. 21 at 14)

In December 1995, S. Megga still possessed 16,000 telephone units from those it had manufactured for the Joint Venture. S. Megga claims that the Joint Venture could not pay for these units because of Lucent's withdrawal. (D.I. 25 at 2 and Ex. 1, P8) S. Megga then attempted to secure payment for these telephones from Lucent but was unsuccessful. Consequently, in August 1996, S. Megga began selling the cordless telephones to third parties in China to mitigate its losses. (D.I. 25 at 2) Between August and December 1996, S. Megga [\*12] sold 12,000 units. Presently, S. Megga claims it has approximately 4,000 telephone units in its possession. (D.I. 25 at 3)

Lucent disputes these facts. In its counterclaim, Lucent alleges that, at or around July 1996, S. Megga began to manufacture, distribute, and sell cordless telephones in China made with Lucent's equipment, technology, and intellectual property. (D.I. 17 at 5-6) Lucent's affiant, Patrick Leung, the General Manager of the Joint Venture, asserts that he believes the number of telephones sold by S. Megga is increasing. (D.I. 19, P13) Leung states that he has "seen no evidence to suggest that S. Megga is reducing its distribution and sale of Lucent/AT&T cordless telephones." (D.I. 19, P13) Leung also states that "the volume of sales by [the Joint Venture] . . . of Lucent/AT&T cordless telephones in China [] has declined by 90% from July to December. (D.I. 19, P14) Lucent also complains that S. Megga has not returned Lucent's capital tooling equipment and technical information as requested by Lucent.<sup>10</sup> (D.I. 17, Ex 1; D.I. 21 at 9)

[\*13] Based on these allegations, Lucent filed its counterclaims and this motion for a temporary restraining order. Lucent's counterclaims fall into two basic categories: breach of contract claims and intellectual property claims. Count I of Lucent's counterclaims alleges that S. Megga breached its GPA by selling cordless phones in China that are marked with the AT&T logo or made with Lucent's tooling. Counts II through IV of Lucent's counterclaims allege that, by selling these phones in China, S. Megga has violated the trademark, unfair competition, and business secret laws of China.

### III. DISCUSSION

The parties' motions will be addressed *seriatim*.

#### A. Lucent's Motion to Dismiss

Lucent has moved to dismiss counts I through VII of plaintiffs' complaint under [Federal Rule of Civil Procedure 12\(b\) \(6\)](#). Counts I through V and VII of plaintiffs' complaint are based on state contract and tort law. Count VI is based on federal [antitrust law](#). Although the parties use different rationales, they do not dispute that New Jersey law governs both the interpretation of the GPAs and plaintiffs' state law claims. (D.I. 9 at 6 n.3; D.I. 11 at 4 n.1) The court finds that New Jersey [\*14] law applies to plaintiffs' state law claims and to all claims arising out of the GPAs. New Jersey law applies to plaintiffs' state law claims because it is the state with the most significant relationship to

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<sup>9</sup> At oral argument, the court noted that the numbers "96" and "6" appeared to be stamped or embossed on the bottom of a sample model 4615 telephone.

<sup>10</sup> At oral argument, counsel for S. Megga and S. Meggatel asserted that Lucent's tooling equipment has been or will be returned. (D.I. 21 at 43) Counsel for S. Megga and S. Meggatel stated that S. Megga and S. Meggatel are not using such equipment and have no interest in it. (D.I. 21 at 43)

these claims. See [\*IBM v. Comdisco, Inc., 1991 Del. Super. LEXIS 453, C.A. No. 91 C-07-199, 1991 WL 269965\*](#), at \*5-7 (Del. Super. Ct., Dec. 4, 1991). The court also finds that New Jersey law applies to the GPAs because there is a material connection that links the chosen jurisdiction to the transaction.<sup>11</sup> [\*Annan v. Wilmington Trust Co., 559 A.2d 1289, 1293 \(Del. 1989\)\*](#).

#### [\*15] 1. Rule 12(b)(6) Standard for Dismissal

[\*\*HN1\*\*](#) In ruling on a motion to dismiss, the court will consider primarily the allegations contained in the complaint. [\*Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 \(3d Cir. 1993\)\*](#). The court, however, may also consider matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint. *Id.* The court must accept all factual allegations in the complaint as true. [\*Cruz v. Beto, 405 U.S. 319, 322, 31 L. Ed. 2d 263, 92 S. Ct. 1079 \(1972\)\*](#) (*per curiam*). The court is also bound to give the plaintiffs the benefit of every reasonable inference to be drawn from the complaint. [\*Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 10 L. Ed. 2d 678, 83 S. Ct. 1461 \(1963\)\*](#). Additionally, the court must resolve any ambiguities concerning the sufficiency of the claims in favor of the plaintiffs. [\*Hughes v. Rowe, 449 U.S. 5, 10, 66 L. Ed. 2d 163, 101 S. Ct. 173 \(1980\)\*](#) (*per curiam*). The "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." [\*16] [\*Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 \(1984\)\*](#).

## 2. Plaintiffs' Contract Claims

In their complaint, plaintiffs set forth claims for breach of contract (count I), breach of implied covenant of good faith and fair dealing (count II), and promissory estoppel (count III).<sup>12</sup> Lucent's argument that these claims should be dismissed is essentially based upon the assertion that both GPAs are the "master agreements" governing its relationship with the plaintiffs.

[\*17] According to Lucent, both GPAs' merger clauses clearly establish that they are the "master agreements" governing Lucent's purchasing relationship with plaintiffs.<sup>13</sup> [\*18] Based on this assertion, Lucent argues that plaintiffs cannot rely on any allegations of prior or contemporaneous oral agreements to alter the terms of both

<sup>11</sup> The GPAs contain choice of law provisions that state "the construction, interpretation and performance of this Agreement and all transactions under it shall be governed by the laws of the State of New Jersey. . . ." (D.I. 1, Ex. A; D.I. 9, Ex. 1) Since Lucent is headquartered in New Jersey, there is a material connection between the chosen jurisdiction and the transaction. [\*Suburban Trust & Sav. Bank v. Univ. of Del., 910 F. Supp. 1009, 1013 \(D. Del. 1995\)\*](#).

<sup>12</sup> Plaintiffs rely upon essentially the same allegations for each of these claims. The conduct plaintiffs base their claims on is Lucent's (1) failure to maintain its volume of purchases with S. Megga once the Malaysian facility was built; (2) failure to purchase annually at least 400,000 units from S. Meggatel for the period necessary to recoup its investment or for the long term; (3) failure to allow plaintiffs to recover profits on sales to Lucent during 1994 to 1995; and (4) failure to allow plaintiffs to continue to sell cordless telephones to Lucent at the price at which plaintiffs could recover their profits. Plaintiffs allege that Lucent promised them this "long-term" business relationship if they would defer profits for two years and build or expand their manufacturing facilities. Plaintiffs also allege that Lucent made these promises even though it had decided to terminate its business relationship with them.

<sup>13</sup> The S. Megga GPA contains an "Entire Agreement" clause which provides:

This Agreement shall incorporate the typed or written provisions on Company's [Lucent's] orders issued pursuant to this Agreement, and this Agreement as supplemented by such provisions shall constitute the entire agreement between the parties with respect to the subject matter of this Agreement and shall not be modified or rescinded, except by a writing signed by Supplier [S. Megga] and Company . . . . Estimates furnished by Company shall not constitute commitments. The provisions of this Agreement supersede all prior oral and written quotations, communications, agreements and understandings of the parties with respect to the subject matter of this Agreement.

(D.I. 1, Ex. A) S. Meggatel's GPA contains a substantially similar clause. (D.I. 9, Ex. 1)

GPAs because the merger clauses and the parole evidence rule bar such allegations. (D.I. 9 at 8) Lucent argues that these claims fail because, under the terms of both GPAs, Lucent had the right to terminate its relationship with plaintiffs for any reason and was not obligated to purchase a minimum number of telephone units.<sup>14</sup>

Plaintiffs argue that their breach of contract claim involves "other agreements" [\*19] that were "separate and independent of the GPAs." In other words, plaintiffs argue that the GPAs do not represent the entire relationship between them and Lucent. For this reason, plaintiffs assert that the court cannot dismiss their claims without first considering evidence relating to these "other agreements."

The court agrees with plaintiffs. [HN2](#)[<sup>15</sup>] The interpretation of an agreement involves determining the intention of the parties as revealed by the language used by them. [Atlantic Northern Airlines v. Schwimmer, 12 N.J. 293, 96 A.2d 652, 656 \(N.J. 1953\)](#). Under New Jersey law, the intention of the parties is determined by the "the situation of the parties, the attendant circumstances, and the objects they were. . . . striving to attain . . . ." *Id.* Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. *Id.*

Lucent argues that *Schwimmer* is inapplicable to the case at bar because that case involved the construction of a contract that did not contain an integration clause.<sup>15</sup> (D.I. 14 at 6 n.9) The court recognizes that [HN3](#)[<sup>16</sup>] some courts, in applying New Jersey law, have given conclusive effect to integration clauses in determining [\*20] whether the parties intended to make a contract integrated. See [Zone Co. v. Service Transp. Co., Inc., 137 N.J.L. 112, 57 A.2d 562, 564-565 \(N.J. 1948\)](#); see also [Dow Chemical Co. v. Schaefer Salt & Chemical Co., 1992 WL 672289 at \\*9](#) (D.N.J. July 21, 1992) (citing [United States v. Clementon Sewerage Authority, 365 F.2d 609, 614 n.1 \(3d Cir. 1966\)](#)). The court, however, finds *Schwimmer* to be the authoritative statement in New Jersey on the manner of proving integration. [United States v. Clementon Sewerage Authority, 365 F.2d 609, 613 \(3d Cir. 1966\)](#) (stating that *Schwimmer* is the authority in New Jersey on integration); [Doyle v. Northrop Corp., 455 F. Supp. 1318, 1333 \(D.N.J. 1978\)](#). The court notes, as the Third Circuit noted in *Clementon Sewerage*, that two older New Jersey Supreme Court cases apparently determine integration by reference only to the written agreement. [365 F.2d at 614 n.1](#) (citing [Brautigam v. Dean & Co., 85 N.J.L. 549, 89 A. 760 \(N.J. 1914\)](#) and [Zone Co., 137 N.J.L. 112, 57 A.2d 562, 564-565 \(N.J. 1948\)](#)). Both these cases, however, do not specifically address the manner in which courts are to determine whether a contract [\*21] is integrated.<sup>16</sup>

<sup>14</sup> S. Megga's GPA contains a "Non-Exclusive Marketing Rights" clause that provides, in part:

Supplier [S. Megga] agrees that the purchases by Company [Lucent] under this Agreement shall not restrict the right of the Company to cease purchasing or require Company to continue any level of such purchases.

(D.I. 1, Ex. A). S. Meggate's GPA contains a substantially similar clause. (D.I. 1, Ex. B) S. Megga's GPA also contains a "Termination of Purchase Order" clause that provides in part:

Company [Lucent] may at any time terminate any or all purchase orders placed by it hereunder. Unless otherwise specified herein, Company's liability to Supplier [S. Megga] with respect to such terminated purchase order or orders shall be limited to (1) Supplier's purchase price of all components [], plus (2) actual costs incurred by Supplier in procuring and manufacturing MATERIAL [], less (2) any salvage value thereof.

(D.I. 1, Ex. A) S. Meggate's GPA has the exact same clause. (D.I. 1, Ex. B)

<sup>15</sup> Lucent notes correctly that, in *Schwimmer*, the court allowed the introduction of parole evidence "only for the purpose of interpreting the writing-- not for the purpose of modifying or enlarging or curtailing its terms." [96 A.2d at 656](#). Lucent, however, is incorrect in characterizing plaintiffs' claims as "seeking to modify, enlarge or curtail the terms of the GPAs." (D.I. 14 at 6-7 n.9) Plaintiffs' argument that the terms of the GPAs do not apply to its other agreements involves interpreting what the parties intended the terms of the GPAs to mean.

<sup>16</sup> In *Brautigam*, the New Jersey Supreme Court considered a contract without an integration clause. The *Brautigam* court simply held that the contract was incomplete upon examining its terms. [89 A. at 763](#). The court recognizes that in *Zone Co.* the New Jersey Supreme Court held that the contract was integrated because "there is a clear implication of fact from the writing itself." [57 A.2d at 564](#). However, the New Jersey Supreme Court in *Zone Co.* also specifically declined to pursue the question of whether extrinsic evidence is admissible in determining whether a contract was integrated. [57 A.2d at 564](#).

[\*22] In *Schwimmer*, the New Jersey Supreme Court held that [HN4](#)<sup>17</sup> the intent of the parties is not to be determined solely by reference to the four corners of the written agreement "even when the contract on its face is free from ambiguity." [96 A.2d at 656](#). The *Schwimmer* court stated:

[HN5](#)<sup>18</sup> Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties; but the intent must be judged by an external standard. The writing is not 'wholly and intrinsically self-determinative of the parties' intent to make it the sole memorial' of the subject of negotiation; this intent 'must be sought . . . in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered.'

*Id. at 657*. (quoting Wigmore on Evidence (3rd ed.), sections 2413, 2430, 2431). Given this directive, [HN6](#)<sup>19</sup> although a contract with a "merger clause is [\*23] strong evidence that the parties" intended the writing to be the complete and exclusive agreement between them, it is not dispositive. [L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc., 9 F.3d 561, 569 \(7th Cir. 1993\)](#) (applying New Jersey law).

[HN7](#)<sup>20</sup> The parole evidence rule does not apply in determining the "subject matter" of the GPAs or whether they were intended to be the "master agreements." [Schwimmer, 96 A.2d at 656](#). As the *Schwimmer* court stated, "the parole evidence rule is a rule of substantive law not related to interpretation or the admission of evidence for the purpose of interpretation." *Id.* "The terms of any contract must be given a meaning by interpretation before it can be determined whether an attempt is being made to 'vary or contradict them.'" *Id.* (quoting Corbin on Contracts, section 579); see also [Garden State Plaza Corp. v. S.S. Kresge Co., 78 N.J. Super. 485, 496, 189 A.2d 448](#), (App. Div. 1963) (stating that "the parole evidence rule does not even come into play until it is first determined what the true agreement of the parties is--i.e., what they meant by what they wrote down").

In accordance with these settled principles of [\*24] contract construction, the court must consider extrinsic evidence in order to determine the scope and meaning of the GPAs as a matter of law. See [L.S. Heath & Son, Inc. 9 F.3d at 569](#). Likewise, the court must consider extrinsic evidence in interpreting plaintiffs' alleged "other agreements."<sup>17</sup>

[\*25] Plaintiffs allege that their contract claims involve agreements relating to new or expanded facilities and deferred profits that are beyond the subject matter of the GPAs. Plaintiffs specifically allege that Lucent promised them a long-term business relationship if they deferred profits and invested in new or expanded facilities. Plaintiffs allege that Lucent terminated its relationship without allowing them to recoup these profits and investments.

<sup>18</sup> [\*26] Plaintiffs also allege that they reasonably relied upon these promises and suffered substantial and definite

<sup>17</sup> In the alternative, Lucent argues that the statute of frauds renders any oral contract regarding the purchase of telephones unenforceable. (D.I. 9 at 8) Plaintiffs cite *California Natural, Inc. v. Nestle Holdings, Inc.*, for the proposition that they can avoid the application of the statute of frauds through the doctrine of promissory estoppel. [631 F. Supp. 465, 472 \(D.N.J. 1986\)](#) (applying New Jersey law). In response, Lucent argues that, as a matter of law, plaintiffs cannot show reasonable reliance on the alleged agreements because the GPAs contain explicit terms to the contrary. However, without first considering extrinsic evidence relating to the GPAs and other agreements, the court cannot determine, as a matter of law, that plaintiffs' reliance was unreasonable. *Id. at 473* (stating that "until all factual issues are resolved . . . the court cannot rule as a matter of law that [plaintiff's] reliance was unreasonable").

<sup>18</sup> [HN8](#)<sup>21</sup> Under New Jersey law, a breach of an implied covenant of good faith and fair dealing may be established if a defendant encourages a plaintiff to make substantial investments while actively concealing its decision to terminate a contract. [Bak-A-Lum Corp. v. Alcoa Building Prod., 69 N.J. 123, 351 A.2d 349 \(N.J. 1976\)](#); see also [Sons of Thunder, Inc. v. Borden, Inc., 285 N.J. Super. 27, 666 A.2d 549, 563 \(App. Div. 1995\)](#) (distinguishing *Bak-A-Lum Corp.*, on the grounds that the defendant did

detriment.<sup>19</sup> Consequently, the court finds plaintiffs' allegations as to counts I through III are sufficient to withstand Lucent's motion to dismiss.

### 3. Fraudulent and Negligent Misrepresentation

Counts IV and V allege fraudulent and negligent misrepresentation respectively. (D.I. 1 at 14-17) Both claims are based on the allegations that Lucent decided to terminate its business dealings with plaintiffs at the same time that it (1) represented to plaintiffs that the level of business in 1996 would at least be equal to 1995 levels; (2) encouraged plaintiffs to expand their facilities at a substantial cost to plaintiffs; and (3) held firm to a requirement that plaintiffs [\*27] not deal with Lucent's competitors. (D.I. 1 at 14-15)

**HN9** Under New Jersey law, the elements for a claim of fraudulent misrepresentation are: (1) a material misrepresentation of presently existing or past fact; (2) knowledge of falsity by the person making the misrepresentation; (3) intent that the misrepresentation be relied upon; (4) actual and reasonable reliance on the misrepresentation; and (5) detriment to plaintiff. *Jewish Ctr. of Sussex County v. Whale*, 86 N.J. 619, 432 A.2d 521, 524 (1981). The elements of negligent misrepresentation are (1) a material misrepresentation of a presently existing or past fact; (2) negligently made; and (3) justifiably relied upon. *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 461 A.2d 138 (1983).

Lucent admits that plaintiffs' first allegation-- that business in 1996 would be at least be equal to 1995 levels-- constitutes an alleged "misrepresentation." (D.I. 9 at 14 at 25 n.34) Lucent argues, however, that plaintiffs could not have reasonably relied upon alleged estimates of 1996 purchase orders because the GPAs explicitly provide that forecasts of future purchase order are not commitments to purchase.<sup>20</sup> As discussed above, the court cannot [\*28] determine whether plaintiffs' reliance on the allegations was reasonable until it considers extrinsic evidence relating to the formation of the GPAs and plaintiffs' alleged other agreements. See *California Natural, Inc. v. Nestle Holdings, Inc.*, 631 F. Supp. 465, 473 (D.N.J. 1986).

Lucent also argues that count IV fails to meet the requirements of *Federal Rule of Civil Procedure 9(b)* because plaintiffs do not allege the identity of the individual agents of Lucent who made the alleged misrepresentations. **HN10** *Rule 9(b)* provides, in relevant part, that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Fed.R.Civ.P. 9(b)*. The Third Circuit has held that "focusing exclusively on [Rule 9(b)]'s 'particularity' language is too narrow an approach and fails [\*29] to take into account the general simplicity and flexibility contemplated by the rules." *Christidis v. First Pa. Mortgage Trust*, 717 F.2d 96, 100 (3d Cir. 1983).

Lucent cites *Saporito v. Combustion Eng'g, Inc.* for the proposition that plaintiffs are required by *Rule 9(b)* to plead the author and recipient of the alleged misrepresentations. *843 F.2d 666, 675 (3d Cir. 1988)*, vacated on other grounds, 489 U.S. 1049 (1989). In *Saporito*, however, the Third Circuit did not explicitly hold that a plaintiff must identify the author and recipient of the misrepresentations in order to satisfy the "particularity" requirement of *Rule 9(b)*. Instead, the Third Circuit held that the pleadings simply did not provide a sufficient level of notice of the

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not actively conceal its decision to terminate the contract). In the present case, plaintiffs allege that Lucent concealed its decision to terminate its relationship, while it encouraged plaintiffs to invest in new or expanded facilities. (D.I. 11 at 20)

<sup>19</sup> Under New Jersey law, in order to state a claim for promissory estoppel a plaintiff must allege the following: (1) a clear and definite promise was made by the promisor; (2) the promise was made with the expectation that the promisee would rely on it; (3) the promisee must in fact reasonably rely on the promise; and (4) the promisee suffered detriment on a definite and substantial nature in reliance on the promise. *R. J. Longo Constr. Co. v. Transit Am.*, 921 F. Supp. 1295, 1305 (D.N.J. 1996). The court finds that plaintiffs have alleged these required elements.

<sup>20</sup> The "Entire Agreement Clause" in the GPAs provides

Estimates or forecasts furnished by Company [Lucent] shall not constitute commitments.

precise misconduct charged. *Id. at 675*. In *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, the Third Circuit stated that [HN11](#) [↑] "Rule 9(b) requires plaintiffs to plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." [742 F.2d 786, 791 \(3d Cir. 1984\)](#). In accordance with these objectives and mindful of the ruling in *Christidis*, the Third Circuit held that allegations of date, place, or time are not required and "plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Id.*

Plaintiffs allege that while Lucent knew it was going to terminate its relationship with plaintiffs, it represented to them that plaintiffs' business for 1996 would at least be equal to 1995 levels. (D.I. 1 at 14) Plaintiffs allege that Lucent made this misrepresentation "less than three months before terminating its relationship" with them. (D.I. 1 at 14) Plaintiffs also allege that Lucent failed to disclose its plan to terminate its relationship with plaintiffs, despite its knowledge that plaintiffs built and expanded their facilities based upon Lucent's promise for a long-term business relationship. (D.I. 1 at 15) In addition to these allegations, a letter signed by one of Lucent's agents, detailing some of the alleged misrepresentations, is attached to the complaint. (D.I. 1, Ex. C) The court finds these allegations to be sufficiently particular under the requirement [\*31] of [Rule 9\(b\)](#). Consequently, the court shall deny Lucent's motion as to counts IV and V.

#### 4. Attempted Monopolization

In count VI, plaintiffs allege that Lucent violated [Section 2](#) of the Sherman Antitrust Act, [15 U.S.C. § 2](#), when it terminated its business relationship with them. Plaintiffs claim that Lucent controls a substantial percentage of the market for cordless telephones because it terminated its relationship with plaintiffs while encouraging them to invest in new facilities. (D.I. 1 at 18) According to plaintiffs, Lucent has exercised its market power to control the supply and price of cordless telephones, eliminate competition, and exclude others from participating or entering the relevant market. (D.I. 1 at 18)

Lucent argues that plaintiffs have failed to state an antitrust claim because, *inter alia*, they fail to allege a basis for subject matter jurisdiction.<sup>21</sup> Lucent asserts that the Foreign Trade Antitrust Improvements Act, [15 U.S.C. § 6a](#) ("FTAIA"), applies to plaintiffs' claim because it involves trade or commerce with foreign nations. [HN12](#) [↑] The FTAIA provides, in part, that sections 1 through 7 of the Sherman Act

Shall not apply to conduct involving [\*32] 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 trade or import commerce with foreign nations; or
- (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; . . . .

[15 U.S.C. § 6a](#) (emphasis added). Lucent contends that plaintiffs' complaint fails to pleads facts from which the court can conclude that Lucent's conduct had a direct, substantial, and reasonably foreseeable effect in the United States.

[\*33] According to plaintiffs, the direct, substantial and reasonably foreseeable standard of the FTAIA does not apply to conduct that affects import trade or import commerce. (D.I. 11 at 31) Plaintiffs argue that the court need only determine whether the challenged conduct has, or is intended to have, any anticompetitive effect upon United States commerce. (D.I. 11 at 31) Plaintiffs argue that the challenged conduct in this case satisfies either standard.

<sup>21</sup> Lucent also argues that plaintiffs' antitrust claim should be dismissed because they fail to allege (1) that Lucent had a dangerous probability of success in attempting to monopolize the relevant market and (2) fail to allege an antitrust injury. The court declines to address these issues since it finds that plaintiffs have failed to establish jurisdiction.

Plaintiffs claim that Lucent's conduct "precluded them from selling their goods in the United States and negatively affected consumers in the United States by forcing higher prices and reduced output." (D.I. 11 at 33) Plaintiffs also argue that Lucent engaged in anticompetitive activities by preventing them from dealing with Lucent's competitors and making profits. (D.I. 11 at 33-34)

The court finds plaintiffs' arguments meritless. The complaint contains no factual allegations that plaintiffs themselves imported or planned to import any product into the United States. The complaint also does not contain any allegations relating to how plaintiffs were prevented from importing products into the United States. The complaint clearly establishes [\*34] that plaintiffs are foreign corporations that only manufactured products for Lucent. (D.I. 1 at 4-6) Since the parties' relationship involved trade and commerce with foreign nations, the court finds that the FTAIA applies.<sup>22</sup> *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 500 (M.D.N.C. 1987) (applying section 6a to antitrust plaintiffs, "other than [] domestic importers"); *Coors Brewing Co. v. Miller Brewing Co.*, 889 F. Supp. 1394, 1398 (D. Colo. 1995) (stating that the FTAIA applies to antitrust plaintiffs "with the exception of claims brought by domestic importers"); *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1995 U.S. Dist. LEXIS 19225, C.A. No. 93-2050, 1995 WL 76164, at \*2 (D.D.C. Dec. 21, 1995) (noting that the FTAIA "makes clear that the concern of the antitrust laws is protection of American consumers and American exporters, not foreign consumers or producers"); *United Phosphorus LTD v. Angus Chemical Co.*, 1994 U.S. Dist. LEXIS 14786, C.A. No. 94-C-2078, 1994 WL 577246 (N.D. Ill. Oct. 18, 1994).

[\*35] [HN13](#)[

The FTAIA requires an "actual injury to plaintiff within the United States." *The 'In' Porters, Inc.*, 663 F. Supp. at 500 (holding that a "foreign company can not demonstrate the domestic injury requirement by 'piggybacking' onto the injury of a United States exporter"); *Optimum, S.A. v. Legent Corp.*, 926 F. Supp. 530, 532-533 (W.D. Pa 1996). Plaintiffs' alleged injuries--lost sales to Lucent-- are not injuries within the United States. Consequently, the court finds that plaintiffs fail to establish subject matter jurisdiction under the FTAIA and shall grant Lucent's motion as to count VI.

## 5. Breach of Fiduciary Duty

Count VII of the complaint alleges that Lucent breached its fiduciary duty to plaintiffs when it terminated their business relationship. (D.I. 1 at 19) Lucent argues that the parties in this case are "corporations dealing at arm's length" and therefore no fiduciary duty could exist between them.

The court agrees. There are no allegations in the complaint that could support a finding that Lucent owed a fiduciary duty to plaintiffs. In count VII, plaintiffs simply allege that they had a "special and unique relationship" with Lucent because of Lucent's involvement [\*36] in establishing manufacturing facilities in Malaysia and China. (D.I. 1 at 19) In their brief, plaintiffs also argue that they had a special and unique relationship with Lucent because they were involved in the Joint Venture. (D.I. 11 at 40) Plaintiffs cite New Jersey law for the proposition that joint venturers owe each other a fiduciary duty.<sup>23</sup> The allegations in count VII, however, do not incorporate any allegations relating to the Joint Venture. (D.I. 1 at 19-20) Furthermore, the record clearly establishes that the Joint Venture Agreement is governed by Chinese law and plaintiffs do not cite any Chinese authority. (D.I. 25, Ex. 1 at 22) Consequently, the

<sup>22</sup> The court declines to follow the ruling in *Eskofot A/S v. E.I. Du Pont de Nemours & Co.*, cited by plaintiffs. 872 F. Supp. 81 (S.D.N.Y. 1995). The majority of cases, cited above, establish that the "import trade or import commerce" exception in the FTAIA applies only to domestic importers. Furthermore, plaintiffs' case is factually different from *Eskofot A/S*. In *Eskofot A/S*, the plaintiff alleged that both it and the defendant planned to market and sell their products in the United States. *Id. at 85*. In the present case, the complaint contains no allegations that plaintiffs imported or planned to import any products into the United States themselves.

<sup>23</sup> The case plaintiffs cite is *LoBosco v. Kure Eng'g Ltd.*, 891 F. Supp. 1020 (D.N.J. 1995).

court finds as a matter of law that Lucent did not owe a fiduciary duty to plaintiffs. The court shall grant Lucent's motion as to count VII of the complaint.

## B. Plaintiffs' Motion to Dismiss

On January 2, 1997, Lucent filed counterclaims against plaintiff [\*37] S. Megga for selling telephones in China. (D.I. 20) Plaintiffs moved to dismiss Lucent's counterclaims. (D.I. 23) Plaintiffs argue that Lucent's counterclaims are permissive counterclaims and should be dismissed based on the doctrine of *forum non conveniens*.

### 1. Compulsory vs. Permissive Counterclaims

**HN14**[] In order for a federal court to entertain a counterclaim, the counterclaim must be either a compulsory counterclaim and so fall within the court's ancillary jurisdiction, or a permissive counterclaim with an independent basis of jurisdiction. [Akzona Inc. v. E.I. du Pont de Nemours & Co., 662 F. Supp. 603, 618 n.29 \(D. Del. 1987\)](#). [Rule 13\(a\) of the Federal Rules of Civil Procedure](#) provides that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Permissive counterclaims are claims "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." [Fed.R.Civ.P. 12\(b\)](#).

As this court has noted before, **HN15**[] "the United States Court [\*38] of Appeals for the Third Circuit has embraced a fairly liberal interpretation of the 'transaction or occurrence' standard, establishing as 'the operative question in determining if a claim is a compulsory counterclaim . . . whether [the counterclaim] bears a logical relationship to an opposing party's claim.'" [Standard Chlorine of Del., Inc. v. Sinibaldi, 1995 U.S. Dist. LEXIS 13913, C.A. No. 91-188- SLR, 1995 WL 562285 at \\*3 \(D. Del. Aug. 24, 1995\) \(citing Xerox Corp. v. SCM Corp., 576 F.2d 1057, 1059 \(3d Cir. 1978\)\)](#).

**HN16**[] In determining whether a 'logical relationship' exists between an opposing party's claim and a counterclaim, the court will analyze several factors: (1) Are the issues in fact and law raised by the claim and counterclaim largely the same?; (2) Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?; and (3) Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaims?

[Sinibaldi, 1995 U.S. Dist. LEXIS 13913, 1995 WL 562285](#) at \*3. In its counterclaims, Lucent alleges that S. Megga breached and continues to breach its GPA, and has violated and continues to violate the trademark, unfair competition, and [\*39] business secret laws of China by selling cordless telephones in China. (D.I. 20 at 15, 17-21) The factual issues raised by these counterclaims concern cordless telephones that were intended for sale to the Joint Venture. (D.I. 17 at 5; D.I. 24 at 4) Lucent also suggests that S. Megga may be making more cordless telephones with Lucent's technology and insignia for sale in China. (D.I. 19) Plaintiffs' complaint concerns Lucent's role in the building and expansion of plaintiffs' manufacturing facilities. The factual issues raised by plaintiffs' complaint concern the contractual relationship between the plaintiffs and Lucent.

Although both Lucent's and plaintiffs' claims involve the interpretation of S. Megga's GPA, there is no significant overlap of factual issues between Lucent's and plaintiffs' claims. The factual issues involved in Lucent's counterclaims concern telephones that S. Megga made for the Joint Venture. These telephones are not at issue in plaintiffs' complaint. The legal issues involved in Lucent's counterclaims are also different from any of plaintiffs'

claims.<sup>24</sup> Given that there is no significant overlap of facts or law between Lucent's and the plaintiffs' claims, [\*40] the court finds no "logical relationship" between Lucent's and plaintiffs' claims. See *Sinibaldi, 1995 U.S. Dist. LEXIS 13913, 1995 WL 562285* at \*3 (D. Del 1995); see also *Alesayi Beverage Corp. v. Canada Dry Corp., 797 F. Supp. 320, 321 (S.D.N.Y. 1992)*. Consequently, the court finds that Lucent's counterclaims are permissive counterclaims. See *Brady v. Schwartz Motor Co., Inc., 723 F. Supp. 1045 (D. Del. 1989)* (finding no logical relationship between a federal claim and a state law claim involving the same loan transaction); see also *Alesayi Beverage Corp., 797 F. Supp. at 322* (dismissing intellectual property counterclaims while maintaining jurisdiction over similar contract counterclaim).

[\*41] In anticipation that this court may determine that some or all of its counterclaims are permissive, Lucent argues that this court has jurisdiction over its counterclaims based on diversity jurisdiction. (D.I. 21 at 24) In response, plaintiffs argue that Lucent's counterclaims should be dismissed on *forum non conveniens* grounds.

## **2. Forum Non Conveniens**

**HN17** [↑] The court has the discretion to grant or deny a motion to dismiss a claim under the doctrine of *forum non conveniens*. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981)*; *Lacey v. Cessna Aircraft Co., 932 F.2d 170, 178 (3d Cir. 1991)*. Under this doctrine, the party seeking dismissal of a claim has the initial burden of establishing that an adequate alternative forum exists. *Id. at 180*. Once the moving party has established that an alternative forum exists, "it must then show that the private and public interest factors weigh heavily in favor of dismissal." *Id.*

Plaintiffs assert that an alternative forum exists in either the courts of China or the arbitration court of the International Chamber of Commerce in Sweden. (D.I. 24 at 8-9) Generally, [\*42] an adequate alternative forum exists if the nonmoving party is amenable to process in the other jurisdiction. *Id.* Lucent does not argue that it is not amenable to process in either China or Sweden. Instead, Lucent argues that its claims are simply more conveniently adjudicated here since the plaintiffs have brought their claims in this court. (D.I. 21 at 24-25) Consequently, the court finds that an alternative forum exists for Lucent's intellectual property claims in either the courts of China or the arbitration court in Sweden.

**HN18** [↑] Once an adequate alternative forum is established, the court must balance several private and public interest factors to determine whether dismissal is proper. *Id.*

The private interest factors include

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make a trial of a case easy, expeditious and inexpensive.

[] The public interest factors include:

. . . the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity [\*43] case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in application of foreign laws. . . .

*Id. at 180* (quoting *Piper, 454 U.S. at 241*).

In reviewing the record, the court finds that, on balance, the private and public interest factors weigh in favor of dismissal. Lucent's claims involve telephones that were made by S. Megga for the Joint Venture, not for Lucent. The Joint Venture has not been joined as a party in this case and is governed by Chinese law. Furthermore,

<sup>24</sup> Lucent's intellectual property counterclaims are based on Chinese law, whereas the GPAs and plaintiffs' claims are governed by New Jersey law. Furthermore, although Lucent's counterclaims are based on the GPAs, the telephones in dispute were intended for sale to the Joint Venture, which is governed by Chinese law.

Lucent's intellectual property claims would involve complex issues of Chinese procedural and substantive law. With respect to these private interest factors, the court finds that Lucent's claims would unnecessarily burden the trial of plaintiffs' claims. See *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1376 (Fed. Cir. 1994) (stating that trial court made findings sufficient to support dismissal of Japanese patent infringement claim on *forum non conveniens* grounds). With respect to the public interest factors, the court finds, as the *Mars* court recognized, that "general concerns respecting [\*44] international comity counsel against exercising jurisdiction over matters involving" Chinese intellectual property law. *Id.* Consequently, the court shall grant plaintiffs' motion to dismiss counts I through IV of Lucent's counterclaims on *forum non conveniens* grounds.

#### **C. Lucent's Motion for a Temporary Restraining Order**

Based on the allegations set forth in its counterclaims, Lucent moved for a temporary restraining order. (D.I. 16) Since the court shall dismiss Lucent's counterclaims, its motion for a temporary restraining order is denied as moot.

#### **IV. CONCLUSION**

For the reasons stated above, the court shall deny Lucent's motion to dismiss as to counts I through V and grant its motion to dismiss as to counts VI and VII. The court shall grant plaintiffs' motion to dismiss Lucent's counterclaims. The court shall also deny Lucent's motion for a temporary restraining order as moot.

An order consistent with this memorandum opinion shall issue.

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## Florida Seed Co. v. Monsanto Co.

United States Court of Appeals for the Eleventh Circuit

February 18, 1997, Decided

No. 96-6080

**Reporter**

105 F.3d 1372 \*; 1997 U.S. App. LEXIS 2777 \*\*; 1997-1 Trade Cas. (CCH) P71,721; 10 Fla. L. Weekly Fed. C 710

FLORIDA SEED COMPANY, INC., a corporation, Frit Industries, Inc., a corporation, Plaintiffs-Counter-Defendants-Appellants, v. MONSANTO COMPANY, a corporation, Defendant-Counter-Claimant-Appellee.

**Subsequent History:** [\[\\*\\*1\]](#) Certiorari Denied October 14, 1997, Reported at: [1997 U.S. LEXIS 6035](#).

**Prior History:** Appeal from the United States District Court for the Middle District of Alabama. (No. CV-94-D-514-N). Ira De Ment, Judge.

**Disposition:** AFFIRMED.

## **Core Terms**

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antitrust, anti trust law, merger, distributors, acquisition, Sherman Act, distributorship, nonselective, terminated, herbicide, products

## **LexisNexis® Headnotes**

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

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

### [HN1](#) [down arrow] **Standards of Review, De Novo Review**

The question of standing is one of law. Accordingly, the court reviews de novo the district court's judgment of dismissal.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

### [HN2](#) [down arrow] **Private Actions, Standing**

The court follows a two-pronged approach in deciding whether a plaintiff has antitrust standing. First, the plaintiff must establish that it has suffered "antitrust injury." Plaintiffs must prove more than injury casually linked to an illegal presence in the market. Plaintiffs must prove injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. Second, the plaintiff must establish that it is an efficient enforcer of the antitrust laws. This determination is predicated on the "target area test." The target area test requires that an antitrust plaintiff both prove that he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry and that he is the target against which anticompetitive activity is directed. Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Mergers & Acquisitions Law > General Overview

### **HN3** [down arrow] **Horizontal Refusals to Deal, Sherman Act**

Economic loss suffered as the result of a merger is not an antitrust injury because the loss does not flow from that which makes a merger unlawful. Courts have consistently denied standing to distributors who were terminated, or whose contracts were not renewed, following a merger. Distributors who are terminated following a merger suffer no antitrust injury.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

### **HN4** [down arrow] **Private Actions, Standing**

Courts uniformly have held that stockholders lack standing to bring an antitrust suit for injury to their corporations.

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**Judges:** Before TJOFLAT and DUBINA, Circuit Judges, and STAGG, \* Senior District Judge.

**Opinion by:** DUBINA

## **Opinion**

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\* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

**[\*1373] DUBINA, Circuit Judge:**

Plaintiffs/Appellants Florida Seed Company, Inc. ("Florida Seed") and Frit Industries ("Frit") appeal the district court's judgment dismissing their Sherman Act claim against Defendant/Appellee Monsanto Company ("Monsanto"). The district court held that Plaintiffs lacked standing to assert their antitrust claims. We affirm.

**I. BACKGROUND**

This case arises out of Monsanto's 1993 acquisition of the Chevron Corporation's Ortho lawn and garden business ("Ortho"). Ortho markets some 200 lawn and garden products. Florida Seed is engaged in wholesale distribution and marketing of lawn and garden products. Prior to Monsanto's acquisition of Ortho, Florida Seed handled the product lines of both Monsanto and Ortho.

The Federal Trade Commission ("FTC") believed that Monsanto's acquisition of Ortho created competitive [\*2] issues as to one of Ortho's products, a nonselective herbicide called "Kleenup." Kleenup is based on glyphosate, a patented ingredient that Ortho purchases from Monsanto. Monsanto also uses glyphosate in its nonselective herbicide called "Roundup." Monsanto entered into a consent decree with the FTC agreeing to divest to a suitable purchaser the trademark "Kleenup." The agreement also provided that Monsanto would sell a significant volume of glyphosate, plus manufacturing know-how and certain regulatory approvals and filings, on a time schedule acceptable to the FTC. The consent decree does not contain any reference to the distribution channels for Kleenup.

After acquiring Ortho, Monsanto notified Florida Seed that its distributorship agreement for Ortho products would not be renewed following its expiration. Monsanto stated that the decision was part of a broader strategic decision to use fewer distributors. Following expiration of the distributorship relationship, Florida Seed refused to pay Monsanto certain amounts owed. Monsanto therefore demanded payment from Frit, which had guaranteed Florida Seed's debt. Florida Seed and Frit then filed this antitrust suit.

Plaintiffs allege [\*3] that Monsanto engaged in monopolization and attempted monopolization of the residential nonselective herbicide market in violation of Section 2 of the Sherman Act by its acquisition of Ortho and its termination of Florida Seed's distributorship.<sup>1</sup> Plaintiffs contend that Monsanto's decision was aimed at damaging the value of Kleenup prior to its divestiture under the FTC consent decree.

**II. ISSUE**

Whether the district court properly dismissed Plaintiffs' Sherman Act claim because they lacked standing to assert such claim.

**[\*1374] III. STANDARD OF REVIEW**

**HN1** [↑] "The question of standing is one of law." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir.1991). Accordingly, we review *de novo* the district court's judgment [\*4] of dismissal. *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1194 (11th Cir.), cert. denied, 510 U.S. 1012, 114 S. Ct. 604, 126 L. Ed. 2d 569 (1993).

**IV. DISCUSSION**

A private plaintiff seeking damages under the antitrust laws must establish standing to sue. Antitrust standing requires more than the "injury in fact" and the "case or controversy" required by Article III of the Constitution. *Todorov*, 921 F.2d at 1448. Rather, the doctrine of antitrust standing reflects prudential concerns and is designed to avoid burdening the courts with speculative or remote claims. *Associated Gen. Contractors of California, Inc. v.*

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<sup>1</sup> Plaintiffs also brought a claim under the Clayton Act, which the district court dismissed. Plaintiffs do not contest this ruling on appeal. Moreover, Plaintiffs asserted various claims under state law that were not ruled on by the district court and have been stayed pending this appeal.

California State Council of Carpenters, 459 U.S. 519, 545, 103 S. Ct. 897, 912, 74 L. Ed. 2d 723 (1983). See also Todorov, 921 F.2d at 1448 ("Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws."); PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW P 334.2 at 409 (1993 Supp.).

**HN2** [↑] We follow a two-pronged approach in deciding whether a plaintiff has antitrust standing. Municipal Utils. Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1499 (11th Cir. 1991). First, the plaintiff must establish that it has suffered "antitrust injury." *Id.* As the Supreme Court has made clear, to have standing antitrust plaintiffs "must prove more than injury casually linked to an illegal presence in the market [i.e., but for causation]. Plaintiffs must prove antitrust injury, which is to say injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977).

Second, the plaintiff must establish that it is an efficient enforcer of the antitrust laws. Municipal Utils. Bd. of Albertville, 934 F.2d at 1499. This determination is predicated on the "target area test." Austin v. Blue Cross & Blue Shield of Ala., 903 F.2d 1385, 1388 (11th Cir. 1990). The target area test requires that an antitrust plaintiff both "prove that he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry" and that he is "the target against which anticompetitive activity is directed." National Indep. Theatre Exhibitors, [\*\*6] Inc. v. Buena Vista Distribution Co., 748 F.2d 602, 608 (11th Cir. 1984), cert. denied sub nom., Patterson v. Buena Vista Distribution Co., 474 U.S. 1013, 106 S. Ct. 544, 88 L. Ed. 2d 473 (1985). Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market. Associated General Contractors, 459 U.S. at 539, 103 S. Ct. at 909.

#### A. Standing of Florida Seed

Plaintiffs' complaint relates to Florida Seed's inability to purchase nonselective herbicides from Monsanto, not to an increase in prices or to a lessening of competition. At one time, Florida Seed was both a customer and a distributor of Kleenup. Now, Florida Seed is neither. In fact, Florida Seed admits that the "termination of [its] distributorship is at the heart of this case." Plaintiffs-Appellants Brief at 5. Nevertheless, Plaintiffs argue that they may maintain an antitrust action based on the terminated distributorship because, in their view, Monsanto violated the Sherman Act "by dealing with its own distributor in furtherance of an anticompetitive purpose." *Id.* at 26. We disagree.

The Supreme Court pointed out in Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977), that "every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects." *Id.* at 487, 97 S. Ct. at 696. "The objective in preventing certain mergers is ... to prevent [the acquiring party] from obtaining sufficient market power to raise [\*1375] prices...." Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1176 (5th Cir. 1976).<sup>2</sup> Obviously, mergers often have an adverse impact on those employees, suppliers, or distributors made redundant by a merger. In many instances, those displaced by a merger suffer an economic loss. However, **HN3** [↑] 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." Todorov, 921 F.2d at 1450; see also Kenneth L. Glazer and Abbot B. Lipky, Jr., Unilateral Refusals to Deal Under Section 2 of the [\*\*8] Sherman Act, 63 ANTIT. L.J. 749, 787-90 (1995) (suggesting "per se legality" for manufacturer's efforts to vertically integrate distribution of its own products).

Relying on *Brunswick*, courts have consistently denied standing to distributors who were terminated, or whose contracts were not renewed, following a merger. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328,

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<sup>2</sup> In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

[345, 110 S. Ct. 1884, 1895, 109 L. Ed. 2d 333 \(1990\)](#); [G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762](#) (2nd Cir.), cert. denied, [\\_\\_ U.S. \\_\\_](#), 116 S. Ct. 381, 133 L. Ed. 2d 304 (1995); [Sierra Wine & Liquor Co. v. Heublein, Inc., 626 F.2d 129](#) (9th Cir. 1980); [John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495](#) (9th Cir. 1977); [Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30](#) (5th Cir. 1977); [Return on Inv. Systems v. TransLogic Corp., 702 F. Supp. 677](#) (N.D.Ill. 1988); [Bryant Heating & Air Conditioning Corp., Inc. v. Carrier Corp., 597 F. Supp. 1045, 1051-53](#) (S.D.Fla. 1984); [A.G.S. Elecs., Ltd. v. B.S.R. \(U.S.A.\), Ltd., 460 F. Supp. 707, 710](#) (S.D.N.Y.), aff'd, [591 F.2d 1329](#) (2nd Cir. 1978). The teaching of these cases is clear: distributors who are terminated following a merger suffer no antitrust injury. Plaintiffs have not shown why we should treat Florida Seed differently. Florida Seed complains not about higher prices or about injury to competition, but about injury to itself. Thus, Florida Seed has suffered no antitrust injury.<sup>3</sup>

[\*\*10] Because we hold that Florida Seed has suffered no antitrust injury, we need not address whether Florida Seed would be an efficient enforcer of the antitrust laws as required by the second prong of our standing analysis. However, it is clear from the record that Florida Seed is not an efficient enforcer. Florida Seed cannot allege any nexus between the injury it has suffered and a lessening of competition in the United States. In this case, if the injury the antitrust laws address--the power to raise prices and reduce output--has occurred, the proper parties to challenge Monsanto's acquisition of Ortho are direct purchasers in the nonselective herbicide market.

#### B. Standing of Frit

Frit is not a customer or competitor in any relevant market, but merely the sole shareholder of Florida Seed and a guarantor of its debt. Plaintiffs allege injury to Florida Seed only, not to Frit. The only injuries allegedly suffered by Frit are as a shareholder and guarantor. Thus, Frit has suffered [\*1376] no antitrust injury. [HN4](#) Courts uniformly have held that stockholders, even sole stockholders such as Frit, lack standing to bring an antitrust suit for injury to their corporations. See, e.g., [Lovett v. General Motors Corp., 975 F.2d 518](#) (8th Cir. 1992), rev'd in part, [998 F.2d 575](#) (1993), cert. denied, 510 U.S. 1113, 114 S. Ct. 1058, 127 L. Ed. 2d 378 (1994); [Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849](#) (2nd Cir.), cert. denied, 479 U.S. 987, 107 S. Ct. 579, 93 L. Ed. 2d 582 (1986); [Bubar v. Ampco Foods, Inc., 752 F.2d 445, 450](#) (9th Cir.), cert. denied, 472 U.S. 1018, 105 S. Ct. 3481, 87 L. Ed. 2d 616 (1985); [Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 710](#) (11th Cir. 1984); [Harris v. Shell Oil Co., 371 F. Supp. 376, 377](#) (M.D.Ala. 1974). We agree with the foregoing cases and hold that Frit has suffered no antitrust injury. Accordingly, the district court properly concluded that Frit did not have standing under the antitrust laws to challenge Monsanto's acquisition of Ortho.

#### V. CONCLUSION

In a recent Seventh Circuit case, Judge Easterbrook wrote that "this is a mundane commercial case, in which a buyer has used the antitrust laws to postpone paying its debts." [Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756, 763](#) (7th Cir. 1996). The same is true here. Simply put, this is not an antitrust case

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<sup>3</sup> Two leading antitrust commentators have addressed whether those displaced by a merger have standing to sue under the antitrust laws.

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 in its potential for supracompetitive pricing, not in its potential for cost savings and other efficiencies*. A merger that actually brings about supracompetitive prices 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.

but rather [\*\*12] a breach of contract case. Plaintiffs' pursuit of this case has forestalled for almost three years Monsanto's efforts to collect the debt owed it by Plaintiffs. In the words of Judge Easterbrook, the "time for payment is at hand." *Id.*

We affirm the district court's judgment of dismissal.

AFFIRMED.

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End of Document



## **Retina Assocs., P.A. v. Southern Baptist Hosp.**

United States Court of Appeals for the Eleventh Circuit

February 19, 1997, Decided

No. 96-3158, Non-Argument Calendar

### **Reporter**

105 F.3d 1376 \*; 1997 U.S. App. LEXIS 2828 \*\*; 1991-1 Trade Cas. (CCH) P71,722; 10 Fla. L. Weekly Fed. C 701

RETINA ASSOCIATES, P.A., Plaintiff-Appellant, v. SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC., d.b.a. Baptist Medical Center; Richard L. Simmons, M.D.; Richard L. Simmons, M.D., P.A.; Gerald A. Coluccelli, M.D.; Gerald A. Coluccelli, M.D., P.A., et al., Defendants-Appellees, Baptist Eye Institute, Inc.; BEI, Inc., Movants.

**Subsequent History:** [\[\\*\\*1\]](#) Suggestion for Rehearing En Banc Denied April 17, 1997, Reported at: [1997 U.S. App. LEXIS 13658](#).

**Prior History:** Appeal from the United States District Court for the Middle District of Florida. (No. 94-255-CIV-J-10). William Terrell Hodges, Judge.

**Disposition:** AFFIRMED.

## **Core Terms**

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retina, anticompetitive, referrals, summary judgment, patients, rule of reason, boycott, network, group boycott, Sherman Act, join, concerted refusal, monopolize, venture, market power, ophthalmologists, contends, percent, ophthalmological, constitutes, effects, per se rule, Defendants', horizontal, antitrust, compete, genuine, markets

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Evidence > Burdens of Proof > Initial Burden of Persuasion

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Methods of Discovery > Interrogatories > Purpose & Use of Interrogatories

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

## **[HN1](#)** Supporting Materials, Affidavits

Summary judgment is appropriate only when the court is satisfied 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\(c\)](#). In making this determination, the court must examine the pleadings, affidavits and other evidence in the record in the light most favorable to the non-moving party. The moving party has the initial burden of establishing the nonexistence of a triable fact issue. If the movant is successful on this score, the burden shifts and the non-moving party must come forward with sufficient evidence of every element that he or she must prove. The non-moving party may not simply rest on the pleadings, but must use affidavits, depositions, answers to interrogatories, or other evidence to demonstrate that a genuine fact issue remains to be tried.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

## **[HN2](#)** Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#), prohibits 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. A [15 U.S.C.S. § 1](#) plaintiff must establish an agreement between two or more persons to restrain trade affecting interstate commerce. Unilateral conduct will not trigger the prohibition of [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

## **[HN3](#)** Antitrust & Trade Law, Sherman Act

A restraint may be violative of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), because it is solely a naked restraint of trade so offensive to competition as to be unreasonable per se, or because it runs afoul of the more detailed rule of

reason inquiry. Conduct is unreasonable per se when it always or almost always tends to restrict competition and decrease output. Claims under the Sherman Act are presumptively evaluated under the rule of reason.

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

#### **HN4** [↓] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The per se rule in antitrust cases requires a historically focused inquiry directed at ascertaining whether the behavior complained of is of the type that regularly poses anticompetitive consequences. Where prior cases have shown that a certain practice is of this type, a deleterious effect on the market will be presumed and no detailed market analysis is required. Where the anticompetitive effect of a practice is not historically clear, the practice may still be per se violative of the antitrust laws if a preliminary examination of market conditions surrounding the alleged restraint at issue reveals such an impact absent any procompetitive justification.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

#### **HN5** [↓] **Sherman Act, Claims**

Under the rule of reason, the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To establish that conduct violates [15 U.S.C.S. § 1](#) under the rule of reason, plaintiff must prove that (1) defendant's conduct had an anticompetitive effect in the relevant market; and (2) that no procompetitive rationale would justify the conduct. In showing that the conduct has an anticompetitive effect, plaintiff may establish either actual anticompetitive effects of the conduct or the potential for genuine anticompetitive effect. To successfully show potential anticompetitive effects, the plaintiff must first define the relevant geographic and product markets and then prove that the defendants possessed power in that market.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

#### **HN6** [↓] **Regulated Practices, Price Fixing & Restraints of Trade**

Where a plaintiff stands to benefit from a price increase, it cannot recover for a combination imposing nonprice restraints, here a group boycott, that has the effect of raising the market price.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

#### **HN7** [↓] **Monopolies & Monopolization, Attempts to Monopolize**

To prove attempted monopolization, a plaintiff must prove that: (1) defendant has engaged in predatory or anticompetitive conduct; (2) a specific intent on defendant's part to monopolize; and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

## **HN8[] Monopolies & Monopolization, Attempts to Monopolize**

Proof of the intent element in an attempt to monopolize requires proof of a specific intent to destroy competition or build a monopoly.

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ATTORNEY(S) FOR APPELLEE(S): Kevin E. Grady, H. Suzanne Smith, Atlanta, Ga. Michael J. Dewberry, Alexandra K. Hedrick, Clinton A. Wright, III, Jacksonville, FL. Earl M. Barker, Jr., Jacksonville, FL. Michael M. Eaton, Washington, DC. William E. Kuntz; Smith, Hulsey & Busey, Jacksonville, FL.

**Judges:** Before TJOFLAT, BIRCH and CARNES, Circuit Judges.

## **Opinion**

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### **[\*1378] PER CURIAM**

We affirm the judgment of the district court for the reasons set out in its dispositive order which is reproduced in the appendix.

AFFIRMED.

### APPENDIX

### *ORDER*

This antitrust case is before the Court on the parties' cross-motions for summary judgment. Because the Court finds that the rule of reason, as opposed to the per se doctrine, governs Count I of Plaintiff's complaint, and because there appears to be no genuine issue of material fact as to the lack of anticompetitive effects of the alleged concerted refusal to deal, Defendants' motions for summary judgment on Count I will be granted. Because Plaintiff has failed to demonstrate the existence of a triable fact issue with regard to Defendant Florida Retina Institute's alleged anticompetitive conduct or specific intent to monopolize, summary judgment will also be granted on Count II of the complaint.

### FACTS

Retina Associates, P.A. ("RA"), the sole plaintiff in this case, is a Florida professional corporation [\*\*2] whose shareholders are Dr. Fred H. Lambräu, Jr., M.D. and Dr. Michael Stewart, M.D. Drs. Lambräu and Stewart are board-certified ophthalmologists who have specialized in the diagnosis and treatment of diseases of the retina and vitreous. As the name would suggest, RA's practice is limited to retina-related ophthalmology.

[\*1379] Defendant Southern Baptist Hospital of Florida, Inc., doing business as Baptist Medical Center ("Baptist"), is a not-for-profit Florida corporation that owns and operates the Baptist Medical Center, the largest acute care hospital in Jacksonville, Florida. Situated on the Baptist Medical Center campus is a four-story building that houses

the Baptist Eye Institute ("BEI"). BEI is an amalgamation of non-specialized ophthalmologists comprised of Defendants Richard L. Simmons, M.D., Gerard A. Coluccelli, M.D., Ernst Nicolitz, M.D., Charles P. Adams, Jr., M.D., Frank W. Bowden, III, M.D., Neil T. Shmunes, M.D., and Jeffrey H. Levenson, M.D. All of the BEI defendants except Dr. Levenson have incorporated their medical practices and are the principal shareholders of these professional corporations. The professional corporations are also named defendants.

Sometime in 1989 [\*\*3] Dr. Simmons, apparently on behalf of Defendants Coluccelli, Nicolitz, Adams and Bowden,<sup>1</sup> approached RA with a proposal for the formation of an ophthalmological services group involving several non-specialized ophthalmologists, one or more retina specialists, other ophthalmological specialists and a major local hospital. The proposal involved marketing the group and cross-referral relationships among the involved parties. Simmons goal for the venture was to offer a full range of ophthalmological services in one location.

General ophthalmologists typically refer patients with specific retina problems to retina specialists.<sup>2</sup> That being the case, a retina specialist was perceived as necessary for the venture to provide a wide array of ophthalmological practitioners under one roof. Prior to the events constituting the gravamen of the complaint, RA alleges that it received the majority of retina referrals from the BEI five.

[\*\*4] RA declined Simmons' offer to participate in the group. Meanwhile, the BEI five searched for a hospital that would support the venture. Baptist ultimately decided to participate and agreed to construct a "state of the art and user friendly" building for the provision of myriad ophthalmological services. The building was to contain office space for the ophthalmologists involved as well as space for a diagnostic center and outpatient surgery.

True to the "one-stop shop" concept, the BEI five continued to look for retina specialists willing to participate. RA again declined an offer to join the group. The BEI five also approached Defendant James A. Staman, M.D., another retina specialist and the principal shareholder of Defendant Florida Retina Institute, James A. Staman, M.D., P.A. ("FRI").<sup>3</sup> In February of 1990, Staman accepted the proposal but withdrew from the venture in May 1990. Staman and FRI rejoined BEI permanently in September of 1991. The complaint alleges that the agreement with FRI included the promise that FRI would receive all of the retina referrals from the BEI physicians.

[\*\*5] The BEI five started, as a group, seeing patients in early 1990, and the BEI building at the Baptist Medical Center campus opened in the fall of 1991. Staman and the other FRI specialists began seeing patients in the BEI building shortly thereafter. Defendant's Levenson and Shmunes joined the BEI five in 1993, and opened offices in the BEI building.

The parties estimate that there are between 45 and 50 practicing general ophthalmologists in the Jacksonville area. Plaintiff's best estimate, assuming the appropriateness of its definition of the relevant product and geographic markets, is that the BEI physicians referrals to retina specialists amount to fifteen percent of the total referrals made. While the record discloses some exceptions, FRI has received almost all of the referrals [\*1380] for retina specialty work from the BEI physicians since Staman and FRI joined the group.

On March 21, 1994, Plaintiff filed a complaint (Doc. 1) alleging that the BEI physicians' referral of almost all of their retina cases to FRI violates federal antitrust laws. Count I, against all Defendants, maintains that the alleged exclusive referral agreement constitutes a horizontal concerted refusal to deal [\*\*6] or group boycott in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. Count II, against Staman and FRI only, alleges that their participation in the alleged exclusionary conduct constitutes an attempt to monopolize in violation of Section 2 of the Sherman Act. 15 U.S.C. § 2. The complaint prays for monetary and injunctive relief. The parties have engaged in voluminous discovery. Plaintiff and all defendants have filed cross-motions for summary judgment on Count I of the complaint.

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<sup>1</sup> For convenience, these defendants will be collectively referred to as the BEI five.

<sup>2</sup> Plaintiff's expert, Dr. McClave, estimates that approximately ninety percent of the patients treated by Jacksonville based retina specialists are referred by other health care providers.

<sup>3</sup> At the time this lawsuit was commenced, there were three retinal specialty practices in Jacksonville: RA, Florida Retina Institute and that of Dr. James Bolling who is affiliated with the Mayo Clinic.

Defendants Staman and Florida Retina Institute have filed a motion for summary judgment on Count II. All of the motions have been thoroughly briefed.

## DISCUSSION

**HN1**[] Summary judgment is appropriate only when the Court is satisfied 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." [F.R.Civ.P. 56\(c\)](#). In making this determination, the Court must examine the pleadings, affidavits and other evidence in the record "in the light most favorable to the non-moving party." [Samples on Behalf of Samples v. Atlanta, 846 F.2d 1328, 1330 \(11th Cir.1988\)](#). The moving party has the initial burden of establishing the nonexistence of a [\*\*7] triable fact issue. [Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 \(1986\)](#). If the movant is successful on this score, the burden shifts and the non-moving party must come forward with "sufficient evidence of every element that he or she must prove." [Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 \(11th Cir.1987\)](#). The non-moving party may not simply rest on the pleadings, but must use affidavits, depositions, answers to interrogatories or other evidence to demonstrate that a genuine fact issue remains to be tried. [Celotex, 477 U.S. at 324, 106 S. Ct. at 2553](#).

### A. The Horizontal Concerted Refusal to Deal Claim

Plaintiff contends that the exclusive referral agreement between the BEI physicians and Staman and the FRI constitutes a horizontal concerted refusal to deal or group boycott violative of [Section 1](#) of the Sherman Act as a combination in restraint of trade. **HN2**[] [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), prohibits "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...." A [Section 1](#) Plaintiff must establish an agreement between [\*\*8] two or more persons to restrain trade affecting interstate commerce. Unilateral conduct will not trigger the prohibition of [Section 1](#). [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 \(1984\)](#), [Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1455 \(11th Cir.1991\)](#).

Assuming, without deciding, that the conduct alleged here constitutes an agreement among several individuals <sup>4</sup> to refer retina cases solely to FRI and to thereby refuse to deal with RA, RA must still establish that the purported agreement *unreasonably restrains competition*. [Standard Oil Co. v. United States, 221 U.S. 1, 58-64, 31 S. Ct. 502, 515-17, 55 L. Ed. 619 \(1911\)](#). **HN3**[] A restraint may be violative of the Sherman Act because it is solely a naked restraint of trade so offensive to competition as to be unreasonable *per se*, or because it runs afoul of the more detailed rule of reason inquiry. [F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 457-58, 106 S. Ct. 2009, 2017, 90 L. Ed. 2d \[\\*1381\] 445 \(1986\)](#). Conduct is unreasonable *per se* when it "always or almost always tends to restrict competition and decrease output." [Broadcast Music, Inc. v. Columbia Broadcasting \[\\*91\] Sys., Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 1562, 60 L. Ed. 2d 1 \(1979\)](#). Claims under the Sherman Act are presumptively evaluated under the rule of reason. [Levine v. Cent. Florida Medical Affiliates, 72 F.3d 1538, 1549 \(11th Cir.1996\)](#) (quoting [Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1567 \(11th Cir.1991\)](#)).

#### 1. Is the Conduct *Per Se* Unreasonable?

Plaintiff contends that it is entitled to summary judgment because the alleged horizontal concerted refusal to deal or group boycott is properly considered [\*\*10] unreasonable *per se*. E.g., [Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 \(1959\)](#). However, the recent jurisprudence of the Supreme Court and of the Court of Appeals of this Circuit cautions against the haphazard expansion of the "group boycott label" and the concomitant imposition of *per se* liability. [Indiana Fed'n, 476 U.S. at 458, 106 S. Ct. at 2018](#), [Levine, 72 F.3d at](#)

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<sup>4</sup> Whether there is an actual combination or conspiracy appears to be an issue among the parties. Defendants seem to argue that BEI is a legitimate joint venture and that the referral of patients exclusively to FRI is reasonably necessary to effectuate its purpose. However, assuming defendants can establish the existence of a joint venture, its practices would not thereby automatically be immune from antitrust scrutiny. See 2 EARL W. KINTNER, FEDERAL **ANTITRUST LAW** § 9.15 (1980).

1550 (citing *Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553, 1561 (11th Cir. 1983)). "The *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor...." *Indiana Fed'n*, 476 U.S. at 458, 106 S. Ct. at 2018. Unless the conspirators imposing the group boycott possess "market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 296, 105 S. Ct. 2613, 2621, 86 L. Ed. 2d 202 (1985). [\*\*11]

In sum, HN4[<sup>14</sup>] the *per se* rule requires a historically focused inquiry directed at ascertaining whether the behavior complained of is of the type that regularly poses anticompetitive consequences. Where prior cases have shown that a certain practice is of this type, a deleterious effect on the market will be presumed and no detailed market analysis is required. Where the anticompetitive effect of a practice is not historically clear, the practice may still be *per se* violative of the antitrust laws if a preliminary examination of market conditions surrounding the alleged restraint at issue reveals such an impact absent any procompetitive justification. *Indiana Fed'n*, 476 U.S. at 458-59, 106 S. Ct. at 2018 ("We have been slow ... to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious...."); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-19, 104 S. Ct. 1551, 1560-61, 80 L. Ed. 2d 2 (1984). This examination of market forces is not as detailed as the one required by the rule of reason, and has been referred to as a "quick look" at market conditions. U.S. [\*\*12] *Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993).

Plaintiff's argument for evaluation of this case under the *per se* rule must fail for two reasons: (1) the boycott alleged here is not of the type that has been historically shown to always or almost always adversely affect competition; and (2) the market power possessed by defendants in terms of patient referrals is insufficient as a matter of law to justify *per se* treatment.

Assuming, for the moment, that Plaintiff is able to establish that the BEI physicians have sufficient market power, analyzing this case under the *per se* rubric would remain inappropriate absent some demonstration that the practice at issue historically leads to anticompetitive effects in the market. *Levine*, 72 F.3d at 1550 (citing *Consultants and Designers*, 720 F.2d at 1562)). *Levine* involved a Section 1 attack by an internist excluded from a PPO panel and a physician provider network.

*Levine* alleged that the exclusion constituted a concerted refusal to deal. The PPO and provider network contended that *Levine* was excluded because no more internists were needed in *Levine*'s area. In affirming a district court's [\*\*13] grant of defendants' motion for summary judgment, the Eleventh Circuit declined [\*1382] to apply the *per se* rule. 72 F.3d 1538 at 1550-51.

The court, relying on a recently issued DOJ Enforcement Policy, held that the courts have had insufficient experience with multiprovider networks to justify condemning their exclusion practices as *per se* violative of the Sherman Act. Id. at 1550. In an effort to contain costs and enhance the competitive ability of the network, multiprovider networks typically contract with some, but not all, health care providers in a given area. Additionally, multiprovider network membership restrictions may yield a procompetitive benefit by giving those excluded the impetus to form competing networks. *Id.* (quoting DOJ Enforcement Policy, available in WESTLAW, 1994 WL 642477, at \*42).

*Levine*'s analysis on this score is equally applicable to this case. Testimony, in the record, apparently uncontested, demonstrates that it is not at all unusual for networks like BEI to affiliate with only a single retina group. BEI's guiding goal is the provision of a "one-stop shop" for eye care and the cost-containment and convenience that it represents. Further, [\*\*14] since BEI's inception, two competing multiprovider eye care

networks formed.<sup>5</sup> The anticompetitive effect of the alleged boycott is far from being "immediately obvious" and, as such, analysis under the *per se* rule is improper. [\*Indiana Fed'n, 476 U.S. at 459, 106 S. Ct. at 2018.\*](#)

Plaintiff contends that the reasoning of *Levine* and the DOJ enforcement policy is inapplicable here because [\*\*15] those authorities dealt with the ability of physicians to combine to jointly meet the needs of managed care organizations. Here, Plaintiff contends, the BEI physicians are illegally colluding to provide joint services to non-managed care patients for whom they would normally compete. However, here the Plaintiff is claiming injury from the alleged refusal to refer patients to RA, not from the underlying arrangement among the BEI physicians to treat non-managed care patients. It is, therefore, the exclusion from patient referrals that must be scrutinized for consistently anticompetitive effect before *per se* analysis may properly be applied. See [\*Northwest Wholesale Stationers, Inc., 472 U.S. at 295-96, 105 S. Ct. at 2620\*](#) (reasoning that where the Plaintiff is not objecting to the underlying arrangement but rather to expulsion from cooperative association, it is the act of exclusion that must be evaluated before the arrangement is condemned as illegal *per se*). The reasoning of *Levine* and the DOJ Enforcement Policy indicates that the anticompetitive effect of the challenged exclusionary conduct is not fully understood and therefore should not be condemned out of hand.

[\*\*16] Plaintiff also argues that the BEI/FRI exclusive dealing arrangement represents control over retina referrals necessary for Plaintiff to compete because those referrals represent "relationships" which RA needs "in the competitive struggle." [\*Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 \(1963\)\*](#). The alleged boycott, plaintiff claims, has caused it to "lose a significant volume of trading" and has "hampered substantially" Plaintiff's ability to compete. [\*Id., 373 U.S. at 348, 83 S. Ct. at 1252\*](#). However, apart from bald assertion, Plaintiff presents no factual or evidentiary justification for such a finding. Plaintiff has not demonstrated that the Defendants' power over the market of referrals is sufficient to hamper Plaintiff in its effort to compete.

Plaintiff's best case scenario is that the BEI physicians control fifteen percent of the referrals made by general ophthalmologists to retina specialists in the Jacksonville area. This leaves plaintiff capable of vigorously competing for the other eighty-five percent of referrals. Courts have refused to impose antitrust liability upon greater showings of market power. *Jefferson Parish Hosp.* [\*\*17] [\*Dist. No. 2 v. Hyde, 466 U.S. at 16-25, 104 S. Ct. at 13831-1560-1565\*](#) (holding that in product-tying claim thirty percent control of relevant market was insufficient to warrant a finding of *per se* invalidity); [\*U.S. Healthcare, 986 F.2d at 596 \(1st Cir. 1993\)\*](#) (holding that power over twenty-five percent of relevant market insufficient to justify, under the rule of reason, Sherman Act liability for vertical exclusivity arrangement).

The determination that *per se* analysis is inapplicable in this case is reinforced by RA's remarkable success during the years of the alleged boycott. In 1990, when FRI participated in the venture for only three months, Plaintiff's gross revenues were slightly in excess of one and one-half million dollars. By contrast, RA's gross revenues, derived from the practice of only two physicians, consistently exceeded two million dollars annually between 1991 and 1994, when the asserted boycott was in full effect. In addition, Plaintiff's records disclose, during the years of the boycott, a referral base of one hundred and fifty physicians; and more, RA has opened satellite offices in St. Augustine, Florida and Waycross, Georgia. Further, Plaintiff has joined [\*\*18] a competing comprehensive eye care network. It clearly appears, therefore, that RA has competed successfully despite the alleged refusal to deal. As such, RA should not be heard to complain that Defendants' use of fifteen percent of the available market is *per se* unreasonable. The antitrust laws were designed to protect competition, not competitors. [\*Brown Shoe Co. v. United States, 370 U.S. 294, 344, 82 S. Ct. 1502, 1534, 8 L. Ed. 2d 510 \(1962\)\*](#). Attempts to win the "Super Bowl of remuneration" by invoking rules of *per se* invalidity cannot be countenanced. [\*Levine, 72 F.3d at 1551.\*](#)

## 2. Is the Conduct Illegal under the Rule of Reason?

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<sup>5</sup>In early 1994, the Florida EyeCare Network was formed. Plaintiffs' principals were among the initial shareholders of the network and are the only retina specialists in the network, although, according to Plaintiff, there is no agreement to refer retina patients solely to RA. Plaintiff also refers to the Florida EyeCare Network as an unsuccessful venture, but does not appear to attribute that lack of success to any allegedly illegal conduct of defendants. A third network, Eye Care Associates of North Florida, has also been formed. Dr. Bolling, of the Mayo Clinic, is the exclusive retina care provider for that network.

Because Plaintiff has failed to establish the applicability of a *per se* analysis in the instant case, the presumption that the rule of reason inquiry governs [Section 1](#) claims remains intact. [HN5](#)<sup>5</sup> Under the rule of reason, the "test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." [Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 \(1918\)](#). To establish that conduct [\[\\*\\*19\]](#) violates [Section 1](#) under the rule of reason, RA must prove that (1) Defendant's conduct had an anticompetitive effect in the relevant market; and (2) that no procompetitive rationale would justify the conduct. [Levine, 72 F.3d at 1551](#). In showing that the conduct has an anticompetitive effect, Plaintiff may establish either actual anticompetitive effects of the conduct or the potential for genuine anticompetitive effect. *Id.* To successfully show potential anticompetitive effects, the Plaintiff must first define the relevant geographic and product markets and then prove that the Defendants possessed power in that market. [Indiana Fed'n, 476 U.S. at 460-61, 106 S. Ct. at 2019](#).

a. is there any actual anticompetitive effect?

Plaintiff asserts three grounds upon which the alleged boycott may be found to have actual anticompetitive effects. First, Plaintiff argues that the alleged exclusive referral agreement between the BEI physicians and the Florida Retina Institute has resulted in higher prices to the consumer for common diagnostic procedures. As evidence of this claim, Plaintiff contends that FRI patients referred by BEI pay a higher price for fluorescein angiograms than [\[\\*\\*20\]](#) other patients because, in addition to FRI's charge for the service, Baptist charges its own fee for the use of its equipment and personnel at the BEI building.

Plaintiff is particularly poorly suited to raise this claim because, should the evidence bear the claim out, Plaintiff stands to benefit. Plaintiff, as a response, can either raise its fees for the same procedures and earn more money, or capitalize on its lower prices in the hope of competing more efficiently. [HN6](#)<sup>6</sup> Where a plaintiff stands to benefit from a price increase, it cannot recover for a combination imposing nonprice restraints, here a group boycott, that has the effect of raising the market price. [Matsushita Elec. Indus. Co. \[\\*1384\] v. Zenith Radio Co., Ltd., 475 U.S. 574, 582-83, 106 S. Ct. 1348, 1354, 89 L. Ed. 2d 538 \(1986\)](#). As a result, the claim by this Plaintiff that the alleged boycott has resulted in higher prices for some procedures is insufficient as a matter of law.

Second, the Plaintiff asserts, when Dr. Levenson joined the BEI physicians in 1993, he cancelled a subcontract with plaintiff to refer patients Levenson had under a contract with PruCare HMO to RA for any applicable retina treatments.<sup>6</sup> When Levenson [\[\\*\\*21\]](#) informed RA of his decision, RA offered to lower its price in order to keep the contract. Levenson subsequently awarded the contract to FRI. Plaintiff contends that this constitutes a detrimental effect on competition because the savings that could have been achieved by leaving the contract with RA could have been passed on to PruCare and its subscribers. Plaintiff, for the same reasons stated above, is particularly ill suited to raise this claim and it is therefore insufficient to raise an issue of actual detrimental effect.

Finally, Plaintiff contends that the six BEI physicians who perform radial keratotomy procedures have engaged in illegal price fixing. Deposition testimony of one of the BEI doctors establishes that the BEI physicians agreed on a price of \$ 1350 as a benchmark for the procedure. This claim can be summarily dismissed as it has absolutely no relationship to the concerted [\[\\*\\*22\]](#) refusal to deal alleged by Plaintiff and has caused the Plaintiff no damages. The record is devoid of any evidence establishing that the alleged price fixing is in any way connected to the concerted refusal to deal of which Plaintiff complains.

b. is there any potential anticompetitive effect?

As noted above, to establish potential anticompetitive effect amounting to a violation of [Section 1](#) under the rule of reason, the evidence must show that the defendants possess market power. This power must be shown to exist in properly defined geographic and product markets. Further inquiry into market definition in this case is, however, unnecessary. Assuming, arguendo, that plaintiff's definition of the relevant geographic and product markets pass

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<sup>6</sup> There is no allegation that Levenson breached any contractual relationship he had with RA when he cancelled the contract.

legal muster, fifteen percent of the retina referral market is insufficient, as a matter of law, to establish market power.

Because plaintiff has failed to establish that the *per se* rule governs the case and because there appears to be no triable fact issue under the rule of reason, defendants' motions for summary judgment on Count I of the complaint should be granted.

#### *B. The Attempted Monopolization Claim*

Plaintiff has also alleged [\*\*23] that Staman and FRI have violated [Section 2](#) of the Sherman Act by attempting to monopolize the market for retina services. Staman and FRI have moved for summary judgment on that claim.

[HN7](#) To prove attempted monopolization, a plaintiff must prove that: (1) Defendant has engaged in predatory or anticompetitive conduct; (2) a specific intent on Defendant's part to monopolize; and (3) a dangerous probability of achieving monopoly power. [Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 \(1993\)](#). There is no evidence to support either the first or second elements of the claim.

Staman and FRI argue that there is no evidence of anticompetitive or predatory conduct sufficient to support a [Section 2](#) claim. They point to the fact that they did not actively seek to affiliate with the BEI physicians and their initial reluctance to join BEI. Plaintiff relies on Staman's and FRI's participation in an unlawful group boycott to establish the necessary predatory conduct. While participating in an unlawful horizontal group boycott may be sufficient to establish a [Section 2](#) claim, here such a finding is precluded by the Court's grant of summary judgment against Plaintiff [\*\*24] on Count I. As such, there is no genuine issue of material fact as to the existence of predatory conduct.

[\*1385] [HN8](#) Proof of the intent element requires proof of "a specific intent to destroy competition or build a monopoly." [Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 73 S. Ct. 872, 890, 97 L. Ed. 1277 \(1953\)](#). Plaintiff, in addition to Defendant's participation in the boycott, points to a letter from FRI seeking a commitment from BEI to make it the exclusive recipient of retina referrals should it join the venture. Plaintiff claims that the letter independently established an intent to exclude RA and therefore to monopolize the market for retina patients. However the record shows that Staman and FRI were reluctant to join BEI, that they left the venture after the first few months and that they desired to split the BEI referrals fifty-fifty with RA should they join the venture. This Court's finding that no illegal group boycott existed in conjunction with these facts permits no inference of a specific intent to monopolize.

Because no triable fact issue exists with respect to two of the three elements of the [Section 2](#) claim, summary judgment should be granted for [\*\*25] Staman and FRI.



## **Delaware Health Care v. MCD Holding Co.**

United States District Court for the District of Delaware

January 6, 1997, Argued ; February 20, 1997, Decided

Civil Action No. 94-406 MMS

### **Reporter**

957 F. Supp. 535 \*; 1997 U.S. Dist. LEXIS 2135 \*\*; 1998-1 Trade Cas. (CCH) P72,079

DELAWARE HEALTH CARE, INC., a corporation of the State of Delaware, Plaintiff, v. MCD HOLDING COMPANY, a corporation of the State of Delaware d/b/a INFUSION SERVICES and d/b/a INFUSION SERVICES OF DELAWARE, and MCD FOUNDATION, a corporation of the State of Delaware and its subsidiaries: THE MEDICAL CENTER OF DELAWARE, INC., a corporation of the State of Delaware, a/k/a (1) CHRISTIANA HOSPITAL, (2) WILMINGTON HOSPITAL d/b/a FIRST STATE HEALTH PLAN, GENESIS HEALTH NETWORK, GENESIS INTEGRATED HEALTH CARE SERVICES, MID-ATLANTIC INTEGRATED HEALTH CARE SERVICES, MID-ATLANTIC HEALTH NET, CHAMPION HEALTH SERVICES, CORNERSTONE HEALTHCARE, EASTERN INTEGRATED HEALTH CARE SERVICE, and VISITING NURSE ASSOCIATION OF DELAWARE, a corporation of the State of Delaware, Defendants.

**Disposition:** **[\*\*1]** Defendants' motion for summary judgment on both of plaintiff's antitrust claims granted and plaintiff's state law claim for tortious interference with contract dismissed

## **Core Terms**

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patients, infusion, geographic, therapy, monopoly power, providers, consumers, market share, referrals, facilities, residents, monopolization, home health care, summary judgment, antitrust, upstream, increased price, relevant market, leveraging, market power, defendants', inpatient, prices, hospital service, state law claim, privileges, customers, summary judgment motion, anti trust law, managed care

## **LexisNexis® Headnotes**

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[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof](#)

[Civil Procedure > 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

## [\*\*HN1\*\*](#) [down] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is governed by [\*Fed. R. Civ. P. 56\*](#), and will be granted when, on the record before the court, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. [\*Fed. R. Civ. P. 56\(c\)\*](#). On the summary judgment motion, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in their favor. The moving party bears the burden of proving that no genuine issue of material fact is in dispute. Once the moving party has carried its burden, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. The non-movant must present concrete evidence supporting each essential element of its claim.

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

## [\*\*HN2\*\*](#) [down] **Sherman Act, Penalties**

[Section 2](#) of the Sherman Act sanctions 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. [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

## [\*\*HN3\*\*](#) [down] **Monopolies & Monopolization, Actual Monopolization**

The elements of a claim of attempted monopolization are (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. The plaintiff must additionally prove antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

## [\*\*HN4\*\*](#) [down] **Monopolies & Monopolization, Actual Monopolization**

Illegal leveraging under antitrust laws involves use of monopoly power in one market (the "upstream" market) to gain or threaten monopoly power in another, related market (the "downstream" market).

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

957 F. Supp. 535, \*535L<sup>1997 U.S. Dist. LEXIS 2135, \*\*1</sup>

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

## **[HN5](#) [down arrow] Summary Judgment, Evidentiary Considerations**

If there is no monopoly power upstream, there can be no illegal leveraging of the downstream market. To prove monopoly power in the hospital market, plaintiff must show defendants had the power to control prices or exclude competition. Such power does not exist in a vacuum, however, and must be evaluated in terms of a "relevant market." Analysis of the relevant market has two components: a product market and a geographic market. Plaintiff bears the burden of defining the relevant market. Although market definition is a question of fact, summary judgment is appropriate if plaintiff fails to present sufficient evidence in support of its proffered market definition. To define a market is to identify producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's product or service. The relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks. The geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product. Once the relevant market is defined, evidence of dominant market share within that market is a primary, but not sole, determinant of monopoly power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

## **[HN6](#) [down arrow] Regulated Practices, Market Definition**

A market drawn too tightly creates the illusion of market power where none may exist. The geographic market must be broad enough that consumers would be unable to switch to alternative sellers in sufficient numbers to defeat an exercise of market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

## **[HN7](#) [down arrow] Market Definition, Relevant Market**

Under the merger guidelines, the relevant market is defined as the area in which a hypothetical monopolist could profitably impose a price increase: In determining whether a hypothetical monopolist would be in a position to exercise market power, it is necessary to evaluate the likely demand responses of consumers to a price increase. A price increase could be made unprofitable by consumers either switching to other products or switching to the same product produced by firms at other locations.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

## [\*\*HN8\*\*](#) [blue download icon] **Monopolies & Monopolization, Actual Monopolization**

The essential facilities doctrine is implicated where a monopolist controls a facility that its competitors need access to if they are to compete effectively. The elements of an essential facilities claim are: (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

## [\*\*HN9\*\*](#) [blue download icon] **Monopolies & Monopolization, Actual Monopolization**

An "essential facility" is one which is not merely helpful but vital to the claimant's competitive viability. The denial of access must inflict a "severe handicap" on the competitor, one that threatens to eliminate competition in the market.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

## [\*\*HN10\*\*](#) [blue download icon] **Jurisdiction, Jurisdictional Sources**

[28 U.S.C.S. § 1367\(c\)](#) allows a federal district court, in its discretion, to decline to exercise supplemental jurisdiction over state law claims when the court has dismissed all claims over which it had original jurisdiction.

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**Judges:** Murray M. Schwartz, Senior District Judge

**Opinion by:** Murray M. Schwartz

## **Opinion**

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### **[\*537] OPINION**

**Schwartz, Senior District Judge**

## **INTRODUCTION**

This lawsuit alleging violations of federal antitrust laws was brought in 1994 by Delaware Health Care, Inc. ("DHC"), a provider of home health care. See Docket Item ("D.I.") 1. Defendants are MCD Foundation ("the Foundation"), its wholly owned subsidiaries, The Medical Center of Delaware ("MCD"), MCD Holding Company ("MCD Holding") **[\*\*2]** and the Visiting Nurse Association of Delaware ("VNA"), and related entities Infusion Services of Delaware ("ISD"), and the Christiana and Wilmington Hospitals. *Id.*; A-81; A-527-611. The two hospitals constitute MCD, which the parties agree is Delaware's largest hospital system. D.I. 121, at 4; D.I. 126, at 2.

Before the Court is the defendants' motion for summary judgment on Counts I, II and III of the plaintiff's complaint, and accompanying motion to dismiss the plaintiff's state claim for lack of supplemental subject matter jurisdiction. In opposition papers, the plaintiff informed the Court it was abandoning its claims under Counts I and III of the complaint; remaining for consideration is Count II, alleging "Attempted Monopolization, Monopolization and Predatory Conduct" under Section 2 of the Sherman Act. See D.I. 1, at 11-13; D.I. 126, at 31 n.15. Jurisdiction is based upon 28 U.S.C. § 1337 and 15 U.S.C. §§ 15, 26. D.I. 1, at 2.

## FACTS

DHC was established by Lawrence and Margaret ("Peggy") Carroll in 1990 as a home health care agency designed to deliver infusion and other health care services to medical patients in their homes. A-1086-88.<sup>1</sup> Home infusion services **[\*\*3]** include delivery of pharmaceutical or nutritional products to patients as well as related nursing care. A-913; B-100. DHC supplied both the pharmaceutical product and the nursing service components of home infusion services. B-99-101.

Home health care services are sought largely by individuals who have been discharged from hospitals yet remain in need of **[\*538]** continuing medical care. A-913. Home health care providers often rely on referrals and contractual positioning (hereafter referred to collectively as "referrals") as sources of business; such referrals come from hospitals, physicians, insurance companies, health maintenance organizations ("HMO's"), nursing homes, state contracts and other patients. A-246; A-1454. Home infusion therapy is considered by some to be the most profitable of home health care services. A-770.

**[\*\*4]** DHC originally operated as a corporate agent of Norrell Healthcare, Inc., a temporary staffing agency. A-1088; A-1428. In November 1993, Norrell's home health care division was sold to Nurse's House Call ("NHC"), and DHC did business under NHC's name. A-1089; A-1428. At the end of 1994, DHC and NHC terminated their relationship and DHC became known as Delaware Home Care, Inc. *Id.*; B-101.

Defendant ISD, an unincorporated division of defendant MCD Holding, was established in 1990, also with the goal of supplying home infusion pharmaceutical products. A-725. Defendant VNA, in turn, was to provide the home nursing services necessary to administer ISD's pharmaceutical product. A-1407. The relationship among ISD, VNA and MCD -- all owned by MCD Foundation -- and the resulting referral of MCD patients to ISD/VNA form the basis of this lawsuit.<sup>2</sup>

Plaintiff asserts prior **[\*\*5]** to ISD's formation, discharge planners recommended home health care providers to patients on an informal rotating basis.<sup>3</sup> See e.g. B-35. This rotation process was dismantled at the same time ISD was formed, plaintiff says, and in its place a directive was issued to refer patients only to ISD/VNA. See e.g. B-180-182; B-612; B-800. In practice, plaintiff says, patients were channeled to ISD even when they specifically requested a different provider. See e.g. B-345-52; B-429.

<sup>1</sup> Citations to documents with the prefix "A" refer to documents found in defendants' appendices. Citations to documents with the prefix "B" refer to documents found in plaintiff's appendices.

<sup>2</sup> Plaintiff maintains no claims against VNA directly; VNA is a defendant only by virtue of its participation in the alleged leveraging scheme.

<sup>3</sup> Discharge planners are hospital staff members who assist patients in obtaining services for post-discharge.

In addition to patient channeling, plaintiff charges defendants permitted ISD -- and ISD alone -- access to patients in their hospital rooms. This practice allowed ISD to offer superior services which in turn led to even more referrals. While all the other home care providers were barred from soliciting patients in their hospital rooms, plaintiff proffered deposition testimony that ISD's administrative director Mary Fitzpatrick [\*\*6] often met with patients in their hospital rooms, both before and after a formal relationship between the patient and ISD had been established. B-44; B-52; B-141; B-185-86. Plaintiff has adduced evidence Mary Fitzpatrick met with patients in need of home care and taught them about home health care services before they left their hospital beds. B-185-86; B-200. Plaintiff contends this access is a selling point for ISD. D.I. 126, at 12-14.

Since its inception, ISD quickly gained market share. According to plaintiff's experts Dr. Solow and Dr. Black, ISD served 44.9% of the New Castle County home infusion therapy market in 1993.<sup>4</sup> [\*\*7] B-505; B-540. In 1994, the figure was 59%, and in 1995 it was 49.4%. B-505; B-540. The rest of the home infusion therapy market was divided among some 14 other providers.<sup>5</sup> B-542. ISD was even more successful among the group of home infusion therapy patients who were discharged from MCD. Of those patients, ISD cared for 60.2% in 1993, 76.4% in 1994, and 77.1% in 1995. B-505; B-535. ISD earned gross revenues of \$ 4,585,066 in 1994 and \$ 5,822,456 in 1995. B-674-75.

DHC on the other hand cared for 28 patients, or 3.6% of the New Castle County home infusion therapy market, in 1993. See B-542. In 1994, it cared for 35 patients, or 3.5% of the market. *Id.* In 1994, it earned gross revenues from its infusion products of \$ 186,511. B-676; B-704. It appears it [\*539] earned no income from infusion products in 1995. *Id.*<sup>6</sup>

## [\*\*8] DISCUSSION

### I. Standard for Motion for Summary Judgment

**HN1** [+] Summary judgment is governed by [Federal Rule of Civil Procedure 56](#), and will be granted when, on the record before the Court, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#). On this summary judgment motion, "the evidence of [the non-movant] is to be believed, and all justifiable inferences are to be drawn in [their] favor." [Eastman Kodak Co. v. Image Technical Servs., Inc.](#), 504 U.S. 451, 456, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (citations omitted).

The moving party "bears the burden of proving that no genuine issue of material fact is in dispute." [Ideal Dairy Farms, Inc. v. John Labatt, Ltd.](#), 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). Once the moving party has carried its burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* "The non-movant must present concrete evidence supporting each essential element of its claim." *Id.*

### II. Plaintiff's Claims Under Count II of the Complaint

<sup>4</sup> Both hospitals comprising MCD, Wilmington and Christiana hospitals, are located in New Castle County, Delaware.

<sup>5</sup> An approximate number will be used in this opinion because the number fluctuated during the relevant time period.

<sup>6</sup> In addition to revenue from infusion pharmaceutical products, DHC also earned revenues from nursing services. In 1993, gross revenue from nursing services was \$ 339,570; in 1994, it was \$ 348,782, and in 1995, DHC earned \$ 355,224 from nursing services. B-704. These figures are not relevant in comparison to ISD's revenues because ISD only provided infusion pharmaceutical products and did not provide nursing services. As noted above, plaintiff no longer asserts any direct claims against VNA, the entity that provides nursing services in conjunction with ISD products. See *supra* n. 2.

In Count II of the [\*\*9] complaint, plaintiff alleges: "Defendants Medical Center and the VNA possess the monopoly power in the hospital and home health industry, respectively, which was wilfully acquired and maintained to effectuate predatory and unreasonable exclusionary acts in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The said Defendants have attempted monopolization and have monopolized home health care . . . ." D.I. 1, at 12. In its brief opposing summary judgment, plaintiff limited its Sherman Act Section 2 claims to attempted monopolization.<sup>7</sup> D.I. 126, at 31.

**HN3**[] The elements of a claim of attempted monopolization are "(1) . . . the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability [\*\*10] of achieving monopoly power." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993). As in all antitrust cases, plaintiff here must additionally prove antitrust injury. Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996) (Sherman Act § 1 conspiracy claim); Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 1996 U.S. Dist. LEXIS 7165, No. 95-4885, 1996 WL 284994, at \*2 (E.D. Pa. May 21, 1996) (Sherman Act § 2 attempted monopolization claim).

Plaintiff has alleged two specific methods by which defendants have worked to achieve their attempted monopoly: "leveraging," and denial of access to an "essential facility."<sup>8</sup> With respect to the former, plaintiff says MCD Foundation "leveraged its monopoly power, in the hospital market, to extend its monopoly in the home health market through Defendant Hospitals." D.I. 1, at 12-13. Plaintiff's essential facilities argument is:

Defendant Hospitals denied the Plaintiff any access to home care patients already discharged, or about to be discharged, from Defendant Hospitals, and access to the patients' records; but allowed its subsidiary, Defendant VNA, and a related for-profit [\*540] entity, [\*\*11] Defendants Holding and ISD, access to these patients and their medical records . . . . Defendant Hospitals are the most important referral sources for the Plaintiff, and are, therefore, an essential facility . . . .

*Id.* at 12.

#### A. Leveraging

**HN4**[] Illegal leveraging under antitrust laws involves use of monopoly power in one market (the "upstream" market) to gain or threaten monopoly power in another, related market (the "downstream" market). See Fineman v. Armstrong World Industries, 980 F.2d 171, 198, 204-06 (3d Cir. 1992), cert denied, 507 U.S. 921, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993).<sup>9</sup>

#### [\*\*12] i. Proof of Monopoly Power: Market Definition

One element of plaintiff's leveraging claim is proof defendant MCD possessed monopoly power in the "upstream" hospital market. See Fineman, 980 F.2d at 198. **HN5**[] If there is no monopoly power upstream, there can be no illegal leveraging of the downstream market. *Id.* at 203. To prove monopoly power in the hospital market, plaintiff must show defendants had the "power to control prices or exclude competition[.]" Eastman Kodak Co., 504 U.S. at 481; Fineman, 980 F.2d at 201. Such power does not exist in a vacuum, however, and must be evaluated in terms

<sup>7</sup> **HN2**[] Section 2 of the Sherman Act sanctions, "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 . . . ." 15 U.S.C. § 2.

<sup>8</sup> In its complaint, plaintiff also included allegations regarding vertical integration. Plaintiff informed the Court at oral argument it does not wish to pursue this claim.

<sup>9</sup> As noted in an earlier opinion in this case, the Court is aware the Third Circuit Court of Appeals, in Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1203 (3d Cir. 1995), indicated leveraging claims were under attack for being "economically groundless." See Delaware Health Care, Inc. v. MCD Holding Co., 893 F. Supp. 1279, 1288 n.2 (D. Del. 1995). Nevertheless, the Court does not read Advo to repudiate all leveraging claims. *Id.*

of a "relevant market." See [\*Spectrum Sports, 506 U.S. at 457\*](#) ("It is beyond a doubt that [a claim of monopolization] requires proof of market power in a relevant market.").

Analysis of the relevant market has two components: a product market and a geographic market. [\*Id. at 459.\*](#) Plaintiff bears the burden of defining the relevant market. [\*Pastore v. Bell Tel. Co., 24 F.3d 508, 512 \(3d Cir. 1994\)\*](#); see also [\*Ideal Dairy Farms, 90 F.3d at 749\*](#). Although market definition is a question of fact, [\*Borough of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307, 311 \(3d Cir. 1982\)\*](#), summary judgment is appropriate if plaintiff fails to present sufficient evidence in support of its proffered market definition. See [\*Ideal Dairy Farms, 90 F.3d at 749\*](#); accord [\*Home Health Specialists, Inc. v. Liberty Health Sys., 1994 U.S. Dist. LEXIS 11947\*](#), No. 92-3413, 1994 WL 463406, at \*2 (E.D.Pa. Aug. 24, 1994), aff'd, 65 F.3d 162 (3d Cir. 1995); [\*Miller v. Indiana Hosp., 814 F. Supp. 1254, 1266\*](#) (W.D. Pa.), aff'd, 975 F.2d 1550 (3d Cir. 1992), cert. denied, 507 U.S. 952, 122 L. Ed. 2d 744, 113 S. Ct. 1366 (1993).

"To define a market is to identify producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's product or service." 2A Phillip E. Areeda et al. [\*Antitrust Law\*](#) P 530a, at 150 (1995); see also [\*Eastman Kodak Co., 504 U.S. at 481-82\*](#) ("The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners."). The relevant geographic market is "the area in which a potential buyer may rationally look for the goods or services he or she seeks[.]" [\*Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 726 \(3d Cir. 1991\)\*](#) (citation omitted), cert. denied, 505 U.S. 1221, 120 [\*\\*\\*141 L. Ed. 2d 903, 112 S. Ct. 3034 \(1992\)\*](#). "The geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product." *Id.*<sup>10</sup> [\*\[\\*541\]\*](#) Once the relevant geographic market is defined, evidence of dominant market share within that market is a primary, but not sole, determinant of monopoly power. [\*Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 112 \(3d Cir. 1992\)\*](#).

[\*\*\[\\*\\*15\]\*\*](#) The parties agree the relevant upstream product market in this lawsuit is inpatient hospital services. The geographic market, on the other hand, is hotly disputed; defendants' motion for summary judgment hinges largely on their assertion that plaintiff has "not come close" to meeting its burden of defining the relevant geographic market. D.I. 121, at 17. According to plaintiff, the relevant upstream geographic market is New Castle County, Delaware. D.I. 126, at 32-34. Defendants urge it is an area within a 15 to 20 mile radius of MCD -- which would include some areas outside New Castle County. D.I. 121, at 18. The implications of such market definition are clear: [\*\*HN6\*\*](#) [\*A market drawn too tightly creates the illusion of market power where none may exist."\*](#) [\*Home Health Specialists, 1994 U.S. Dist. LEXIS 11947, 1994 WL 463406\*](#), at \*2. "The geographic market must be broad enough

<sup>10</sup> This distinction is most vividly described in Herbert Hovenkamp, *Federal Antitrust Policy* § 3.6d, at 113-14 (1994) (footnotes omitted) (quoted in [\*Bathke v. Casey's Gen. Stores, Inc. 64 F.3d 340, 346 \(8th Cir. 1995\)\*](#)):

Fifteen miles outside of City A is a small town, Town B, which contains a single shoe store, Smith's Clothing. The only people who ever shop in Smith's Clothing are residents of Town B. When Smith's is accused of monopolization, the plaintiffs argue that Town B defines the relevant geographic market, since all of the store's customers come from there. In that case, Smith's market share is 100%.

But further inquiry shows the following. Last year 800 residents of Town B purchased shoes. 400 of them purchased from Smith's Clothing, and the other 400 purchased from the numerous shoe stores in City A. Note that this conclusion is absolutely consistent with the proposition that Smith's "trade area" is Town B. The *only* customers Smith's had were from Town B, assuming no one drove from City A to buy shoes at Smith's. In fact, Smith's is probably in close competition with the City A shoe stores. To the extent Town B residents go into City A to work or to shop, they regard the City shoe stores as interchangeable, and would respond to any local price increase by purchasing even more of their shoes in City A.

In sum, "trade area" considers the extent to which customers will travel in order to do business at Smith's. "Relevant market" considers the extent to which customers will travel in order to avoid doing business at Smith's. Unfortunately, this means that using discovery to obtain the addresses of a seller's customers seldom provides us with useful information about geographic market. What we really need to know is the extent to which people from the immediate area can readily turn to *alternative sellers* . . . .

that consumers would be unable to switch to alternative sellers in sufficient numbers to defeat an exercise of market power." *Id.*

In this case, potential MCD customers could turn only to one other option for inpatient hospital services within plaintiff's proposed geographic market: St. Francis Hospital.<sup>11</sup> B-580. On the other hand, between [\*\*16] six and 13 hospitals compete within defendants' proposed market comprising a 15 to 20 mile radius of MCD. A-938-40. Under defendants' proposed market, MCD possessed at most a 43% market share during the relevant time period. *Id.* The Third Circuit Court of Appeals has held a market share of less than 55%, without other evidence tending to show monopoly power, is insufficient as a matter of law to establish that an antitrust defendant had monopoly power. See *Fineman*, 980 F.2d at 201.

[\*\*17] As support for their position plaintiff's market definition is incorrect, defendants argue plaintiff's expert, Dr. Solow, focused on *historical* patient migration data in constructing its geographic market, without also providing data of what patients *would do* if faced with an exercise of monopoly power by MCD. D.I. 121, at 21-23.

Specifically, defendants assert, in defining the relevant market, Dr. Solow relied solely on the Elzinga-Hogarty ("E-H") test instead of the "standard methodology" of the U.S. Department of Justice Merger Guidelines ("Merger Guidelines").<sup>12</sup> *Id.*, at 19-20. The E-H test involves analysis of the flow of consumers in and out of the proposed market. First, a measurement is taken of the percentage of consumers in a proposed geographic [\*542] market who purchased goods or services produced in the market, as opposed to those who left the market (called "LIFO" - Little In From Outside).<sup>13</sup> B-574. Second, the percentage of goods or services produced in the market that are purchased by residents, as opposed to non-residents, of the proposed market, is measured (called "LOFI" - Little Out From Inside).<sup>14</sup> *Id.* Both LIFO and LOFI must be considered. *Id.* [\*\*18]

[\*\*19] In essence, these calculations are used to test a proposed geographic market. The results can be evidence the proposed market is correctly defined when a large percentage of consumers purchase the goods or services at issue from within the market (LIFO), and when, additionally, a large percentage of people who purchase the goods or services produced in the market are residents of that market (LOFI). See *id.* A 90% ratio on the LIFO and the LOFI analysis -- meaning 90% of the consumers in the proposed market stayed in that market to purchase the goods or services, and 90% of the goods or services produced in that market were purchased by residents of that market -- is considered strong evidence that the proposed market is correctly defined. *Id.* A 75% ratio is considered weak, but still credible, evidence that the proposed market is correctly defined. *Id.*

<sup>11</sup> There are eight hospitals in New Castle County. Three are psychiatric hospitals, and thus compete with MCD but only to the limited extent MCD offers psychiatric inpatient hospital care. A fourth, the Veterans Affairs Medical Center, was not considered by plaintiff's expert to compete with MCD because it serves a different population. Of the remaining three, two are affiliated with MCD -- A.I. DuPont Institute, a children's hospital, and Riverside Hospital, which was acquired by MCD in 1995. The remaining hospital is St. Francis. See B-580 (Solow Decl.).

<sup>12</sup> The Guidelines "outline the present enforcement policy of the Department of Justice and the Federal Trade Commission . . . concerning horizontal acquisitions and mergers. . . . They describe the analytical framework and specific standards normally used by the Agency in analyzing mergers." A-482 (Merger Guidelines).

<sup>13</sup> The label "Little In From Outside" may seem somewhat of a misnomer when what is measured is actually the percentage of customers who remain in the market or leave the market to purchase goods or services. However, the aim of "Little In From Outside" is to calculate the proportion of sales of goods or services purchased in the provisional market that were produced by suppliers located outside the provisional market -- which may be accomplished by measuring the percentage of customers who left the market when they purchased the goods or services at issue. See B-574.

<sup>14</sup> Similar to the LIFO label, "Little Out From Inside" seems the wrong designation for this calculation. However, its aim is to calculate the percentage of goods or services produced within the provisional market that are sold to consumers residing in the market versus those consumers who reside outside the provisional market. That calculation may be achieved by measuring the percentage of consumers who entered the market to purchase services. See *id.*

In the present case, plaintiff's experts found in 1992, 90.5% of the residents of New Castle County who used inpatient hospital services, used hospitals in the county. B-576. That corresponds to the LIFO inquiry. Further, the experts found 85% of the patients who used the hospitals in New Castle County in 1992 were residents [\*\*20] of the county. B-575. That corresponds to the LOFI inquiry. Accordingly, Dr. Solow opined the proposed New Castle County inpatient hospital services market "clearly passed both the weak LIFO and the weak LOFI tests, and marginally passes the strong LIFO test as well." *Id.*

Defendants urge the E-H test is insufficient as a tool of market definition. They note critics have opined that the usefulness of the E-H test is limited to determining when a market is *not* correctly defined. See Dennis A. Yao, *The Analysis of Hospital Mergers and Joint Ventures: What May Change?*, 1995 Utah L. Rev. 381, 386 (1995) (A-661); see also *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1271 (N.D. Ill. 1989), aff'd, 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920, 112 L. Ed. 2d 249, 111 S. Ct. 295 (1990). Additionally, defendants point out the **antitrust law** treatise with which Dr. Solow is associated indicates reliance solely on historical tests like the E-H test "can misstate the size of the market." See 2A Areeda, et al., *supra* P550, at 217.

The Merger Guidelines, on the other hand, emphasize what consumers would do if faced with a price increase in [\*\*21] the proposed market. **HN7**[<sup>↑</sup>] Under the Merger Guidelines, the relevant market is defined as the area in which a hypothetical monopolist could profitably impose a price increase:

In determining whether a hypothetical monopolist would be in a position to exercise market power, it is necessary to evaluate the likely demand responses of consumers to a price increase. A price increase could be made unprofitable by consumers either switching to other products or switching to the same product produced by firms at other locations.

[\*543] A-486 (Merger Guidelines). While Dr. Solow indicates his analysis is consistent with the Merger Guidelines, B-571, defendants argue the analysis lacks the crucial forward-looking component that asks what patients would do in the event of a price increase by MCD. D.I. 121, at 18.

As defendants indicate, there is authority for the proposition that plaintiff's reliance on historical patient migration data in the form of the E-H test, without analysis of where consumers could turn in the event of an exercise of monopoly power, is insufficient to avoid summary judgment. See *Home Health Specialists, Inc.*, 1994 U.S. Dist. LEXIS 11947, 1994 WL 463406, at \*3-5; accord *Bathke*, 64 F.3d [\*\*22] at 345. Plaintiff asserts, however, it *has* provided forward-looking evidence of how patients would respond to a price increase by MCD: "the consumer likely would do nothing." D.I. 126, at 50. That is because plaintiff's expert believes consumers of medical care are driven by factors other than cost in deciding which hospital to use. Dr. Solow states:

Patients generally do not have the sort of information necessary to make informed judgments about what medical procedures are appropriate, which hospital is best able to provide them, or what they will cost. It is often difficult and expensive for them to search for this sort of information, and they are unlikely to be in a position to evaluate the information they do receive. Moreover, patients whose services will be covered by third-party payors have little incentive to be responsive to prices. As a result, they rely on their doctors for advice, often allowing their doctors to select a hospital, and their doctors have little incentive to choose among hospitals so as to minimize the cost of treatment.

B-577-78.

Moreover, plaintiff has provided deposition testimony from doctors stating that they refer patients to hospitals [\*\*23] outside New Castle County only infrequently. See B-20; B-158; B-210. This is due to the intersection of state licensure laws for physicians and the necessity for Delaware licensed physicians to have hospital privileges in Delaware. In New Castle County, this means privileges at MCD and/or St. Francis Hospital.

It is this basic fact which ultimately confers market power -- "the power 'to force a purchaser to do something that he would not do in a competitive market[.]" *Eastman Kodak*, 504 U.S. at 464 (quoting *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 14, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)) -- upon MCD. Here, licensure and privileges define the actual market reality long favored in **antitrust law**. *504 U.S. at 464-65*.

Defendants respond that Dr. Solow's opinion is the result of "outdated" assumptions specific to the health care industry. D.I. 121, at 25. Health care is no longer a localized industry, defendants assert, in fact the opposite is true: the rise of managed care is evidence the relevant market is larger than New Castle County. *Id.* Managed care entities have every reason to be price conscious, defendants say, and they are not shy about using the power **[\*\*24]** of the purse to influence consumers' choice of hospitals. *Id.* To buttress their position, defendants point to U.S. Supreme Court and Third Circuit Court of Appeals authority indicating consumer apathy or ignorance is not a source of antitrust market power. See *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984); *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468 (3d Cir.), cert. denied, 506 U.S. 868, 121 L. Ed. 2d 139, 113 S. Ct. 196 (1992).

Defendants miss the point. To be competitive, managed care entities must have MCD as an approved provider in New Castle County. While they might bargain for lower prices, managed care entities would not, as a practical matter, refuse to approve MCD in the event MCD raised its prices; even if all physicians had privileges at St. Francis Hospital, that hospital simply does not have anywhere close to a sufficient number of beds for New Castle County admittees. See B-593 (St. Francis has approximately 300 beds, compared to approximately 700 at MCD).  
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**[\*\*25] [\*\*544]** The market reality, as explained above, is doctors' hospital referrals are limited by hospital privileges and Delaware licensure requirements -- managed care must work within that framework. For this reason, defendants' argument predicated on *Jefferson Parish Hosp.* and *Town Sound and Custom Tops* -- both tying cases -- has no relevance to plaintiff's leveraging theory. A reasonable juror could conclude consumers of health care, unlike consumers of shoes for example, would not chose to leave their local hospital market as a result of a price increase. See 2A Areeda, *supra* § 553, at 242 ("Tribunals often find that a single municipality was a relevant geographic market for the provision of hospital services. . . . Even for hospital services that can be deferred, the hospital is often selected by the patient's doctor, who may be relatively insensitive to hospital prices and who may not have staff privileges in other towns. Hence, most patients would not turn to remote hospitals in response to a local price increase."). Defendants argument that plaintiff failed to correctly define the upstream geographic market cannot serve as the basis for a grant of summary judgment.

#### **[\*\*26] ii. Evidence of Monopoly Power**

Defendants assert even adopting New Castle County as the relevant geographic market, MCD's market share is only 62%, and this is not sufficient to prove monopoly power. D.I. 121, at 28 (citing A-708, A-967). Plaintiff places MCD's market share in 1992 at 71.5%. B-529. Further, plaintiff explains, MCD acquired Riverside Hospital in 1995, increasing its market share to approximately 75%. D.I. 126, at 33 (citing B-581; B-529-31). Using figures from before MCD acquired Riverside Hospital, Dr. Solow found Riverside and St. Francis hospitals combined had insufficient capacity to cover the demand in the event MCD raised its prices. B-581-82. This is further evidence MCD possesses monopoly power, plaintiff says. D.I. 126, at 33 & n. 18.

The Third Circuit Court of Appeals has found as a matter of law that a market share under 55%, in the absence of other factors, does not establish monopoly power. *Fineman*, 980 F.2d at 201. As by all accounts MCD's market share is greater than 55%, and plaintiff has adduced evidence of other factors contributing to monopoly power, this likewise cannot provide a ground for summary judgment.

#### **iii. Proof of "Actual or Threatened" **[\*\*27]** Monopoly Power in Downstream Market: Market Definition**

A second element of plaintiff's leveraging claim is proof that use of the "upstream" monopoly power has resulted in "actual or threatened" monopoly power in the "downstream" home infusion therapy market. *Fineman*, 980 F.2d at 206.<sup>16</sup> **[\*\*28]** Like any other claim of monopolization or attempted monopolization, evaluation of defendant ISD's

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<sup>15</sup> The figure for MCD includes beds at the A.I. DuPont Institute, an MCD affiliate, and Riverside Hospital, which was acquired by MCD in 1995. See *supra* n. 11; B-580.

monopoly power in the downstream market requires a properly defined antitrust relevant product and geographic market, see [Spectrum Sports, 506 U.S. at 457-59](#); once again, defendants urge plaintiff's geographic market definition is flawed.<sup>17</sup> Plaintiff has asserted the relevant geographic market is New Castle County.

In support of plaintiff's position, Dr. Solow pointed out 75.9% of ISD's patients are residents of New Castle County. B-584. That figure, he said, met the weak LOFI part of the E-H test. *Id.* He continued, "Even home infusion therapy providers located inside New Castle County have had difficulty in gaining access to Medical Center of Delaware patients, so it is unlikely that providers located further away would be able to serve those patients." *Id.* As a result, he stated, the LIFO portion of the E-H test also was met. *Id.*

As to forward-looking analysis, Dr. Solow stated:

**[\*545]** In terms of geographic market, we must address whether home infusion patients living in New Castle County would leave that location to receive home infusion therapy, whether patients living outside of New Castle County but being served by New Castle County infusion therapy providers would switch to providers located outside of New Castle County, and whether home infusion providers located outside New Castle **[\*\*29]** County would be able to serve patients located within New Castle County.

B-583-84. Of these possibilities, he opined, "only the second is a reasonable possibility." B-584. Dr. Solow concluded, "It is my opinion that a single seller of home infusion therapy in New Castle County that could restrict access to a large share of the patients referred for home infusion in that area would have market power . . ." *Id.*

Plaintiff's market definition, as set forth here, is flawed. Although Dr. Solow purported to rely on the E-H test, he applied the LOFI prong of the test only to ISD, instead of considering all home infusion therapy services produced in New Castle County -- the proposed geographic market. Information as to the residences of ISD patients does not help define New Castle County as the antitrust relevant geographic market, it is merely evidence of defendant ISD's service area. See [Home Health Specialists, 1994 U.S. Dist. LEXIS 11947, 1994 WL 463406](#), at \*4 (fact that vast majority of defendant's customers live in Delaware County, Pennsylvania, does not establish a geographic market; that fact merely points to Delaware County as defendant's service area); see also Hovenkamp, *supra* n. **[\*\*30]** 10, at 113-14. Dr. Solow completed the LIFO prong of the E-H test with the conclusory statement: "Even home infusion therapy providers located inside New Castle County have had difficulty in gaining access to Medical Center of Delaware patients, so it is unlikely that providers located further away would be able to serve those patients." B-584. This purported application of the E-H test is, to say the least, unconvincing.

Moreover -- although not adequately addressed by either party -- it appears to the Court that home infusion therapy presents an atypical market for analysis under the E-H test. The market is unusual because home infusion therapy consumers are not mobile; by definition, they must receive infusion services in their homes. They cannot physically travel to another market to purchase home infusion therapy services in the event ISD raises its prices.<sup>18</sup> It further appears from deposition testimony in the record that the offices of home infusion therapy providers are merely administrative, while the actual delivery of infusion therapy occurs in the home. B-150-152. The prong of the E-H test that measures the percentage of the goods or services produced outside the market **[\*\*31]** that were purchased by consumers within the market does not aid the analysis, therefore, because the services are always produced in the same location as the consumer's residence.

As noted above, the parties have not weighed in on how this unique aspect of the home infusion therapy market affects the geographic market analysis. Yet there is no dispute that market definition involves identification of

<sup>16</sup> In requiring proof of this element, the Third Circuit Court of Appeals differs from the Second and Sixth Circuits, which require a lesser showing of "competitive advantage" in the "downstream" market, see [Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135 \(6th Cir. 1988\)](#); [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 \(2d Cir. 1979\)](#), cert denied, [444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 \(1980\)](#).

<sup>17</sup> The parties agree the product market is home infusion therapy. D.I. 121, at 31-32; D.I. 126, at 26.

<sup>18</sup> Of course, patients are free to switch from one home infusion therapy provider to another.

"producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's product or service[,]'" 2A Areeda, *supra* P530a, at 150. As a matter of logic, therefore, the geographic market inquiry in this case must focus on which providers are willing to provide services to consumers in the potential market. Any home infusion therapy patient, even one already using ISD, is free to switch; if providers are willing to come from the other two counties of Delaware, as well as nearby Pennsylvania, **[\*\*32]** New Jersey and Maryland, there is no reason to limit the relevant geographic market in this case to New Castle County.<sup>19</sup>

The record is silent on the subject of which providers serve, or are willing to serve, consumers of home infusion therapy located in New Castle County. The only relevant submission **[\*546]** by plaintiff is its argument that the referral process at MCD acted to limit choices available to MCD consumers of home infusion therapy. Similar to plaintiff's position with respect to the upstream inpatient services market, it argues because of information costs, consumers of health care often do not possess the full range of choices that seem logically to be available to them. Plaintiff's point is MCD patients were steered to ISD, and therefore, other providers -- particularly those outside of New Castle County -- could not have gained access to them **[\*\*33]** to provide home infusion services.

While this is not an implausible argument, it also does not support plaintiff's definition of the relevant geographic market as *New Castle County*. At most, the argument entitles plaintiff to an inference that a subgroup of New Castle County residents were steered to ISD and thus did not enjoy full choice of home infusion therapy providers. That inference, coupled with the fact approximately 75% of ISD patients reside in New Castle County, is not sufficient to prove the relevant geographic market is New Castle County. Unlike plaintiff's assertion regarding the "upstream" hospital inpatient services market, plaintiff just has not put enough information in the record to support its geographic market definition.

#### B. Essential Facilities

**HN8[↑]** The essential facilities doctrine "is implicated 'where a monopolist controls a facility that its competitors need access to if they are to compete effectively.'" *Delaware Health Care*, 893 F. Supp. at 1287 (quoting *Monarch Entertainment Bureau, Inc. v. New Jersey Highway Auth.*, 715 F. Supp. 1290, 1300 (D.N.J.), aff'd, 893 F.2d 1331 (3d Cir. 1989)). The elements of an essential facilities claim are: **[\*\*34]**

- (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.

*Id.*; accord *Ideal Dairy Farms*, 90 F.3d 737, 748 (3d Cir. 1996). In this case, the claimed essential facility is "the inpatient discharge and referral process at MCD." D.I. 126, at 44.

Defendants make several arguments that summary judgment must be granted against plaintiff. They argue with respect to the first required element, MCD is not a monopolist. D.I. 121, at 44. Earlier in this opinion, it was held an issue of material fact exists with respect to MCD's monopoly power;<sup>20</sup> accordingly, the Court must reject defendants' same argument directed to essential facilities.

Defendants next urge MCD patients are not, as a matter of law, an essential facility. *Id.* **HN9[↑]** "An 'essential facility' is one which is not **[\*\*35]** merely helpful but vital to the claimant's competitive viability." *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 456, 1996 WL 689103, at \*7 (E.D. Pa. 1996) (citation omitted). The denial of access must inflict a "severe handicap" on the competitor, one "that threaten[s] to eliminate competition in the market . . ." *Advanced Health-Care Servs., Inc. v. Giles Mem'l Hosp.*, 846 F. Supp. 488, 498 (W.D.Va. 1994).

The essential facilities doctrine has been traced to the Supreme Court's opinion in *United States v. Terminal R.R. Assoc.*, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912). See Areeda, et al., *supra* P736.1b, at 620 (1995 Supp.).

<sup>19</sup> The Court takes judicial notice that any geographic point in New Castle County is no more than 30 minutes by car from the Pennsylvania or Maryland borders.

<sup>20</sup> See *supra* pp. 8-19.

In *Terminal Railroad*, the Court ordered an association controlling all three means of crossing the Mississippi River into St. Louis to grant reasonable access to all competing railroads. Although the Court did not use the term "essential facility," it is clear the river passages were considered essential to competition among the railroads because it was impossible to enter or pass through St. Louis without crossing the river. See [224 U.S. at 397](#). The Court stated:

The physical conditions which [\*\*36] compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, [\*547] is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated.

[Id. at 398.](#)

A leading antitrust treatise often quoted in essential facilities opinions urges the essential facilities doctrine should "at most" extend to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately." Areeda et al. *supra* P736.2b, at 645 (1995 Supp.); see [Cyber Promotions, 948 F. Supp. 456, 1996 WL 689103, at \\*4](#); [Monarch Entertainment Bureau, 715 F. Supp. at 1300](#); but see [Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 544 n.10 \(9th Cir. 1991\)](#) (suggesting this strict limitation on the essential facilities doctrine is not supported by Supreme Court case law).

Defendants argue the MCD patient discharge process is not an essential facility because -- as DHC principal Lawrence Carroll conceded -- referrals for patients come from a variety [\*\*37] of sources including physicians, insurers, case managers, and other patients. A-1454.

The Western District of Virginia's *Advanced Health-Care* is factually similar to this one. Plaintiff, in the business of durable medical equipment ("DME") sued Giles Memorial Hospital and Medserv, another DME provider.<sup>21</sup> The two defendants had formed a joint venture to provide DME to residents in the service area of the hospital. Under the agreement Medserv rented office space in the hospital and did business under the name Home Connections. A strict policy was maintained under which patients were advised of all DME suppliers in the community, no particular provider was recommended, and the patient was required to pick the provider. [846 F. Supp. at 495](#).

[\*\*38] The court rejected plaintiff's essential facilities argument. It stated: "Access to patients was not essential to competition in Giles County, nor do Giles Memorial's policies completely deny [plaintiff] patient access, nor is it feasible to permit [the plaintiff] to solicit business directly in patient's hospital rooms." [Id. at 498.](#) As proof access to Giles Memorial patients was not essential, the court relied on market information and found, "throughout Home Connections' existence, rival DME companies continued to do substantial business and . . . were consistently gaining market share." *Id.*

The reasoning of *Advanced Health-Care* is equally applicable here. DHC's essential facilities claim must fail because the patient referral and discharge process at MCD is not an essential facility. First, similar to *Advanced Health-Care*, the market data does not support a finding that MCD was an essential facility during the period ISD was gaining market share. At best, ISD only possessed a 59% market share of home infusion therapy patients in New Castle County -- a figure which dropped below 50% in 1995. B-505; B-540. That leaves open approximately 50% of the New Castle [\*\*39] County home infusion therapy market for ISD's rivals.

Additionally, following the reasoning of *Advanced Health-Care*, plaintiff's statistics demonstrate other home health care providers maintained, or increased, their market share during the relevant time. For example, Brandywine had a market share of 15.4% in 1993, 12.4% in 1994, and 17% in 1995. See B-542. Apria/Homedco maintained a 2.6% market share in New Castle County for 1993 and 1994, and in 1995, its market share jumped to 4.9%. *Id.*

<sup>21</sup> DME refers to durable medical equipment and includes "canes, crutches, oxygen equipment, wheelchairs, walkers, hospital beds and other items used by persons recuperating at home from an illness or accident." [Advanced Health-Care Services, 846 F. Supp. at 492 n.1](#).

More importantly, however, plaintiff has not limited itself to seeking referrals from hospitals in New Castle County.<sup>22</sup> Plaintiff [\*548] defined its service area as the entire state of Delaware. A-1179. Plaintiff also stated it has solicited hospitals in three states surrounding Delaware -- Pennsylvania, New Jersey and Maryland -- for referrals of the business of Delaware residents. A-1178-80. Plaintiff's statistics indicate 24,239 Delaware residents used hospitals in Delaware's other two counties, Sussex and Kent counties. B-533. For comparison, 30,361 Delaware residents used MCD in 1992, and 11,376 Delaware residents used St. Francis Hospital. *Id.* While it is likely only a percentage [\*\*40] of all hospital patients require home infusion therapy, the approximately 25,000 patients in the other two counties of Delaware, plus the 11,376 patients who used St. Francis, represented a sizeable source of business for plaintiff.

Accordingly, accepting plaintiff's alleged inability to gain referrals for MCD patients as true, other sources of business for plaintiff exist in a sufficient amount that the patient discharge and referral process at MCD cannot be considered an "essential facility." Given these other sources of business to plaintiff within plaintiff's [\*41] service area, it can not be said access to MCD's patient discharge process is "vital to [DHC's] competitive viability"; nor can it be said denial of such access inflicts a "severe handicap . . . that threatens to eliminate competition in the market." See *Cyber Promotions*, 948 F. Supp. 456, 1996 WL 689103, at \*7; *Advanced Health-Care*, 846 F. Supp. at 498. Plaintiff has not put forth sufficient evidence here to survive summary judgment on its essential facilities claim.<sup>23</sup> Accordingly, summary judgment will be granted for defendants on plaintiff's federal claims.

#### C. Plaintiff's State Law Claim of Tortious Interference with Contract

Having granted summary judgment for defendants on all plaintiff's federal claims, the Court is left to consider whether, under 28 U.S.C. I\*\*421 § 1367(c)(3), it should decline to decide the state law claim. [HN10](#)  [Section 1367\(c\)](#) allows a federal district court, in its discretion, to decline to exercise supplemental jurisdiction over state law claims when the court has dismissed all claims over which it had original jurisdiction. The Third Circuit Court of Appeals, finding [section 1367\(c\)](#) a codification of "preexisting pendent jurisdiction law," has opined, "Where the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." [Borough of West Mifflin v. Lancaster](#), 45 F.3d 780, 788 (3d Cir. 1995).

The parties have not raised any considerations that would cause the Court to deviate from the general rule and instead exercise supplemental jurisdiction over plaintiff's state law claims. Accordingly, supplemental jurisdiction will not be exercised and plaintiff's state law claims will be dismissed.

#### D. Conclusion

In conclusion, the Court grants defendants' motion for summary judgment on both of plaintiff's [\*\*43] antitrust claims and dismisses plaintiff's state law claim for tortious interference with contract.

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<sup>22</sup> The fact that hospitals outside New Castle County are a potential source of business for plaintiff is not inconsistent with the Court's earlier holding a question of fact exists as to whether New Castle County is the relevant geographic market for inpatient hospital services in this case. The relevant geographic market measures where consumers could look for services; however, DHC does not face similar constraints in where it can market patients.

<sup>23</sup> Because of the Court's holdings in this opinion granting summary judgment for defendants, it is not necessary to address defendants' other arguments that plaintiff has failed to introduce sufficient evidence of anticompetitive conduct and antitrust injury.

## Mandat v. Community Mut. Life Ins. Co.

United States Court of Appeals for the Sixth Circuit

February 25, 1997, FILED

No. 96-3137

**Reporter**

1997 U.S. App. LEXIS 3757 \*; 1997-1 Trade Cas. (CCH) P71,774

THOMAS E. MANDAT, M.D., Plaintiff-Appellant, -v- COMMUNITY MUTUAL LIFE INSURANCE COMPANY, Defendant-Appellee.

**Notice:** [\*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Subsequent History:** Reported in Table Case Format at: 107 F.3d 871, 1997 U.S. App. LEXIS 7832.

**Prior History:** On Appeal from the United States District Court for the Northern District of Ohio. 95-01978. Matia.

**Disposition:** Order of the District Court dismissing the complaint is affirmed.

### **Core Terms**

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laboratory, district court, insureds, Sherman Act, restraint of trade, purchases, patients, buyer

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

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

### **HN1[] Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, provides in 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

declared to be illegal. A tying arrangement is one form of an illegal restraint of trade. It 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.

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

## **HN2** [down arrow] **Performance, Rights of Buyers**

Health insurance companies are purchasers of medical services on behalf of their insurers and as such have the right to dictate the terms of their purchase.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

## **HN3** [down arrow] **Monopolies & Monopolization, Actual Monopolization**

A firm has monopolized in violation of [§ 2](#) of the Sherman Act if it has deliberately followed a course of market conduct through which it has obtained or maintained power to control price or exclude competition in some part of the trade or commerce covered by the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

## **HN4** [down arrow] **Regulated Practices, Trade Practices & Unfair Competition**

The antitrust laws are designed to protect competition, not competitors.

**Counsel:** For FEDERAL PACKAGING CORPORATION, Plaintiff - Appellant: Mark E. Lutz, Robert M. Lamb, Denlinger, Rosenthal & Greenberg, Cincinnati, OH.

For UNITED PAPERWORKERS INTERNATIONAL UNION, Defendant - Appellee: Melvin S. Schwarzwald, Michael E. Jackson, Ann E. Knuth, Schwarzwald & Rock, Cleveland, OH.

**Judges:** BEFORE: KENNEDY, NELSON, and VAN GRAAFEILAND, Circuit Judges. \*

## **Opinion**

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PER CURIAM.

Thomas E. Mandat, M.D. appeals from an Order granting Community Mutual Insurance Company's ("CMIC") Rule 12(b)(6) motion to dismiss his complaint, which alleges violations of the [\[\\*2\]](#) Sherman Act and related state law claims. For the reasons that follow, we affirm.

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\* The Honorable Ellsworth A. Van Graafeiland, United States Circuit Judge for the Second Circuit, sitting by designation.

In 1983, Dr. Mandat entered into a preferred provider agreement with CMIC pursuant to which CMIC agreed to reimburse Mandat for covered services rendered his patients who were insured by CMIC. As originally written, the agreement allowed Mandat to provide necessary laboratory tests for his patients.

In 1994, CMIC unilaterally modified the agreement to require that Mandat and other providers refer all "ancillary services", which include lab work, to third parties who are under contract with CMIC. Because of provider protests, CMIC agreed that certain tests still might be performed by the treating physician. However, CMIC required that approximately seventy percent of laboratory tests be referred to outside laboratories designated by CMIC.

Mandat alleges that (1) CMIC's use of a substantial market power in the Ohio insurance market to restrain competition for laboratory services is an unlawful tying arrangement in violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#); (2) that the same conduct constitutes a group boycott of providers such as Mandat also in violation of [Section 1](#); and (3) that CMIC [\*3] uses its "willfully acquired" economic power to restrain trade in violation of [Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#). Mandat also alleges related state law causes of action. The District Court granted CMIC's motion to dismiss. It held that the complaint fails to state a legally cognizable federal antitrust claim and it declined to exercise jurisdiction over the state claims.

#### THE ALLEGED TYING ARRANGEMENT

[HN1](#)[] [Section 1](#) of the Sherman Act provides in pertinent 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 declared to be illegal . . . .

A tying arrangement is one form of an illegal restraint of trade. It 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." [Northern Pac. Ry. Co. v. United States](#), [356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). The district court held that the complaint failed to state an unlawful tying claim because CMIC is a buyer of laboratory services [\*4] and thus does not sell a tied product. In [Group Life & Health Ins. Co. v. Royal Drug Company](#), [440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067 \(1979\)](#), which involved a preferential prescription arrangement available to insureds, the Court, in holding that the agreement was not "the business of insurance", described it as merely an arrangement "for the purchase of goods and services by the insurer. [Id. at 214](#). Since the decision in *Royal Drug*, courts generally have held that [HN2](#)[] health insurance companies are purchasers of medical services on behalf of their insurers and as such have the right to dictate the terms of their purchase. For example, in [Kartell v. Blue Shield of Massachusetts, Inc.](#), [749 F.2d 922 \(1st Cir. 1984\)](#), cert. denied, [471 U.S. 1029, 85 L. Ed. 2d 322, 105 S. Ct. 2040, 105 S. Ct. 2049 \(1985\)](#), Blue Shield paid doctors for treating patients insured by Blue Shield so long as each doctor promised not to charge the patient an additional fee for the service. Although this practice in combination with Blue Shield's size and buying power resulted in rigidly low set prices, the court held that it did not unreasonably restrain trade because Blue Shield was a purchaser [\*5] of health services for its insureds. The court said, "[antitrust law](#) rarely stops the buyer of a service from trying to determine the price or characteristics or the product that will be sold." [749 F.2d at 925](#).

In [Westchester Radiological Associates P.C. v. Empire Blue Cross & Blue Shield, Inc.](#), [707 F. Supp. 708](#) (S.D.N.Y.), aff'd. on opin. below, [884 F.2d 707 \(2d Cir. 1989\)](#), cert. denied, [493 U.S. 1095 \(1990\)](#), radiologists claimed that agreements between Blue Cross and certain hospitals prevented plaintiffs from directly billing patients who were Blue Cross subscribers and thereby restrained competition in violation of [Section 1](#). The District Court followed *Kartell* and similar cases and granted summary judgment in favor of the defendants. It stated that, "Blue Cross is simply acting as a rational buyer attempting to get the best possible terms for its subscribers. [Id. at 713](#); see also [Brillhart v. Mutual Medical Ins., Inc.](#), [768 F.2d 196, 199 \(7th Cir. 1985\)](#); [Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.](#), [675 F.2d 502, 505 \(2d Cir. 1982\)](#).

Mandat's reliance upon [Eastman Kodak Co. v. Image Technical Services, Inc.](#), [\*6] [504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#), is misplaced. In that case, plaintiffs were service agencies that repaired Kodak equipment whose parts were unique and not compatible with the equipment of other manufacturers. The Supreme

Court held that this uniqueness created a relevant market under the Sherman Act. There is no such limited relevant market in the instant case. CMIC's alleged anticompetitive conduct therefore must be viewed with respect to the general pertinent markets for laboratories and health insurance. Viewed in this manner, no Sherman Act violation has been alleged.

#### GROUP BOYCOTT

The agreement at issue herein was not between competitors so as to ease Mandat's burden of proving conspiracy. See [Royal Drug Co. v. Group Life & Health Ins. Co., 737 F.2d 1433, 1436-37 \(5th Cir. 1984\)](#), cert. denied, 469 U.S. 1160, 83 L. Ed. 2d 925, 105 S. Ct. 912 (1995); [Brillhart, supra, 768 F.2d at 199-200](#). It was a vertical arrangement between buyer and seller. CMIC did not engage in any concerted conduct with others nor did it prevent Mandat from selling his laboratory services to others. There are no allegations in the complaint that CMIC acted other than alone in directing its own purchases [\*7] of laboratory services. Its unilateral refusal to deal is not a group boycott.

#### WILLFUL ACQUISITION OF ECONOMIC POWER AND RESTRAINT OF TRADE

[HN3](#) "A firm has monopolized in violation of [Section 2](#) if it has deliberately followed a course of market conduct through which it has obtained or maintained power to control price or exclude competition in some part of the trade or commerce covered by the act." Lawrence A. Sullivan, *Anitrust* 29 (1977); see also [Beard v. Parkview Hosp., 912 F.2d 138, 144 \(6th Cir. 1990\)](#). The District Court held that the complaint does not adequately allege how the agreements at issue restrain trade. Although Mandat himself claims injury because of the decrease in his lab sales, the District Court correctly noted that [HN4](#) the antitrust laws are designed to protect competition, not competitors. See [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#). The District Court reasoned that the agreements are pro-competitive because they are likely to benefit health care consumers by opening the door to lower costs and higher quality services. We agree.

CMIC did not exclude anybody from competing. CMIC merely transferred [\*8] its purchases or laboratory services from participating doctors to certain designated third parties. There is no allegation that CMIC's insureds could not use Mandat's laboratory services, or anyone else's, so long as they were willing to pay for them. The agreements did not result in an unreasonable restraint of trade.

The Order of the District Court dismissing the complaint is affirmed.



## **Maddock v. Greenville Retirement Community, L.P.**

Court of Chancery of Delaware, New Castle

December 30, 1996, Date Submitted ; February 26, 1997, Date Decided

Civil Action No. 12564

### **Reporter**

1997 Del. Ch. LEXIS 24 \*; 1997 WL 89094

CHARLES S. MADDOCK, Plaintiff, v. GREENVILLE RETIREMENT COMMUNITY, L.P., and FORUM GROUP, INC., Defendant.

**Notice:** [\*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

**Disposition:** Mr. Maddock's motion for summary judgment denied and that of Defendants granted.

## **Core Terms**

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residents, repurchase, retirement community, condominium, injunction, violations, antitrust, purposes, unreasonable restraint on alienation, antitrust claim, alienation, contracts, restraint on alienation, amended complaint, entrance fee, modifications, constitutes, lease, entitled to summary judgment, subject matter jurisdiction, residential unit, cause of action, residential, asserting, formula, invalid, hear, buy

## **LexisNexis® Headnotes**

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Contracts Law > Defenses > Illegal Bargains

### **HN1 [] Defenses, Illegal Bargains**

Individuals have authority in law to enter into all sorts of contracts. But this general power to make contracts does not of course mean that every term in a contract which individuals may choose to adopt, shall in every instance be recognized as valid and binding. No individual may exercise his broad power to enter into contract relations with another so as to offend against what the law deems to be sound public policy.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

## **HN2** **Jurisdiction, Exclusive Jurisdiction**

Federal courts have original and exclusive jurisdiction to enforce [Section 1 of the Sherman Act](#). [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## **HN3** **Antitrust & Trade Law, Sherman Act**

However, the Delaware statute does not permit individuals to enforce their rights by bringing private actions. In contrast, the federal antitrust acts expressly create a private right of action. [15 U.S.C.S. §§ 15](#) and [26](#). Instead of providing for a private right of action, the Delaware statute expressly grants the state attorney general the right to bring remedial actions. [Del. Code Ann. tit. 6, § 2108](#) specifically empowers the state attorney general to initiate parens patriae suits on behalf of state residents whose business or property have been injured by alleged antitrust violations.

Real Property Law > Estates > Future Interests > Invalid Restraints & Rule Against Perpetuities

Real Property Law > Estates > Future Interests > General Overview

## **HN4** **Future Interests, Invalid Restraints & Rule Against Perpetuities**

As a general rule, conditions on the sale of property which prevent its owner from conveying it when it would be economically efficient to do so may constitute an invalid unreasonable restraint on the alienation of property. However, if such a restraint is deemed reasonable under the circumstances, it will be upheld.

Real Property Law > Estates > Future Interests > Invalid Restraints & Rule Against Perpetuities

## **HN5** **Future Interests, Invalid Restraints & Rule Against Perpetuities**

A preemptive right at a fixed price constitutes an unreasonable restraint on alienation unless it is reasonable under the circumstances.

**Counsel:** Bernard A. Van Ogtrop, Esquire, of COOCH AND TAYLOR, Wilmington, Delaware; Attorneys for Plaintiff.

Richard J. Abrams, Esquire, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware; Attorneys for Defendant.

**Judges:** ALLEN, Chancellor

**Opinion by: ALLEN**

## Opinion

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### MEMORANDUM OPINION

ALLEN, Chancellor

Pending are cross-motions for summary judgment. The action is brought by Charles Maddock who since 1987 has been a resident of a retirement community, Stonegates Condominiums, in New Castle County; it asserts a number of claims against Greenville Retirement Community, L.P., ("Greenville"), a Delaware limited partnership that manages the retirement community.<sup>1</sup>

[\*2] Mr. Maddock makes three main contentions in his amended complaint. First, he alleges that Greenville's use of two former residential units to provide additional health care, dining, and sales services to residents, violates his rights because the condominium rules state that such units are to be used solely for residential purposes.<sup>2</sup> [\*3] Second, he attacks the validity of a repurchase option agreement held by Greenville with respect to his residential unit, which, together with a property transfer restriction concerning who may purchase a unit at Stonegates, he says constitutes an invalid restraint on alienation of property.<sup>3</sup> Finally, Mr. Maddock asserts that a mandatory monthly fee paid by residents of the retirement community for health care, food, and other maintenance and housekeeping services provided by Greenville, is a form of illegal tying which violates state and federal antitrust laws.

In addition to denying the substantive validity of Mr. Maddock's claims, Defendants, Greenville and its general partner, Forum Group, Inc., contend that Mr. Maddock is barred from asserting such claims at this time. Although the amended complaint expressly states that each cause of action is based on violations arising since April 3, 1992, Defendants claim that all the claims, in fact, arose prior to that date and are barred by a Bankruptcy Court order issued in connection with a Chapter 11 proceeding involving Forum Group. Further, Defendants claim Mr. Maddock is estopped from challenging contractual agreements that he voluntarily and knowingly entered into when purchasing a unit at Stonegates. Finally, Defendants assert that this Court has no subject matter jurisdiction to hear the antitrust claims, regardless of whether the claims are foreclosed [\*4] by the Bankruptcy Court order or equitable estoppel.

In my opinion, after reviewing the record and legal arguments, the Defendants are entitled to summary judgment dismissing the antitrust claims for want of jurisdiction (federal claims) and failure to state a claim (state claims), and dismissing the remaining claims with prejudice for the reasons stated below. In relevant part, the factual record is as follows.

#### *I. BACKGROUND*

##### *A. Stonegates: Management, Services, and Financial Structure*

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<sup>1</sup> Originally this action was brought solely against Greenville, but it was amended to include Greenville's general partner, Forum Group, Inc., an Indiana corporation, as an additional defendant. Greenville is 50% owned by Forum Group and 50% owned by three individual limited partners. Forum Group manages or owns 44 retirement facilities throughout the United States.

<sup>2</sup> The Stonegates Declaration provides that "each unit, other than the Service Units, and all Common Elements shall be used and occupied exclusively for residential purposes and as a single family dwelling."

<sup>3</sup> Article 11 of the Residence Agreement entered into by all Stonegates' unit owners grants Greenville an "exclusive and irrevocable option" to repurchase their unit in the event of the owner's death or termination of residency for any other reason.

Greenville Retirement Community, L.P., ("Greenville") is a Delaware limited partnership that manages a retirement community, Stonegates Condominiums, in New Castle County. Stonegates was established as a condominium on May 1, 1984, subject to the Delaware Unit Property Act.<sup>4</sup> [25 Del. C. § 2201](#). Pursuant to the Stonegates Declaration, the structure was to have eighty-eight "cottage" units, seventy-six apartment units, and two "service" units which would be used to provide residents with health care and dining services. Residents own their individual living units in fee simple and jointly own the common elements with all other residents, in proportion to their ownership of condominium [\*5] units. Greenville owns the two service units and two former apartments units which have been converted into commercial space.

Pursuant to a Management Agreement, entered into between Greenville and the Condominium Council<sup>5</sup> when the condominium was established, Greenville was granted the right to operate and manage Stonegates for twenty years. Greenville then contracted with Forum Group to manage Greenville's commercial activities and assume its management responsibilities at Stonegates.<sup>6</sup> This contract originally had a ten year term, with an option to renew for an additional ten [\*6] years, which has been exercised.

From the beginning, each residential unit at Stonegates was sold on the condition that Greenville hold an option to repurchase the unit at the time of a resident's death or termination of residency for any reason, including a breach of the Residence Agreement or offer to sell a Stonegates unit to a third party.<sup>7</sup> Pursuant to the Residence Agreement, if the repurchase option is triggered, the option price is the original purchase price less a depreciation allowance. Specifically, the depreciation allowance reduces the option price by 7 percent of the sales price, for the first year of residence, and an additional [\*7] 4 percent for each subsequent year, up to a maximum depreciation allowance of 47 percent of the sales price.<sup>8</sup>

In the past, when residents have died or left Stonegates for other reasons, Greenville has repurchased their units at a price determined by applying this formula. [\*8] See *Greenville Retirement Community, L.P. v. Koke*, Del. Ch., C.A. No. 12487, Allen, C. (Aug. 11, 1993). After exercising this option, Greenville resells the repurchased units at current market prices. The net proceeds from such sales constitute one of Greenville's principal supplemental sources of revenue and, apparently, were intended as a key element of the financial structure of Stonegates from its inception.<sup>9</sup>

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<sup>4</sup> It appears that Greenville chose to use the condominium structure for Stonegates, rather than entering into leasing agreements with tenants, in order to obtain financing and tax benefits for both the residents and Greenville. This structure for a continuing care retirement community is not entirely unique and is recognized as a viable structure for such a facility by the Delaware Life Care Registration Act 18 Del. C. Ch. 46.

<sup>5</sup> Pursuant to the Code of Regulations, the Council has complete governance control over the affairs of the condominium. The Declaration of Stonegates provides that Greenville, as the owner of the two service units, is entitled to designate the majority of its members.

<sup>6</sup> Forum Group receives 8 percent of the gross operating revenue of Stonegates as its management fee.

<sup>7</sup> Greenville is under no obligation to enter into a Residence Agreement with any individual who applies to purchase a condominium unit. Therefore, Greenville has the ability to control who buys units in the retirement community, whether from Greenville itself or from a unit owner, in the event that Greenville did not exercise its repurchase option.

<sup>8</sup> As of March 1995, only two types of improvements made by unit owners were entitled to be calculated into the repurchase sales price formula. Unit owners would be given credit for up to \$ 8,000 spent on constructing a screened in porch and up to \$ 25,000 for adding a glass enclosed room on the patio of a unit. The sales price would not be increased for any other types of improvements.

<sup>9</sup> Net proceeds of unit sales are used by Greenville to pay for operating expenses, improvements, and services provided at Stonegates, as well as providing Greenville with net profit. If Greenville did not receive these proceeds, it contends that it would be operating Stonegates at a net loss unless it increased certain fees.

Apparently, residents of typical similar continuing care retirement communities, who lease units instead of buying them, are required to pay an up front substantial lump sum entrance fee<sup>10</sup>, only partially refundable, if at all, based on a declining formula. See Affidavit [\*9] of William S. Gee. The Delaware Life Care Registration Act states that the purchase price paid for a condominium unit in a continuing care retirement community will be deemed equivalent to an entrance fee charged by other facilities in which the residential unit is not purchased. See [18 Del. C. § 4601\(3\)](#).

In addition, comparable retirement communities tend to require residents to enter into an agreement for both the lease of a unit and a package of services. Stonegates has a similar practice. Section 11 of the Residence Agreement requires all residents to pay a monthly fee which provides them with a package of health care<sup>11</sup> and other services, such as meals, housekeeping, and various basic conveniences. The monthly fee covers common area, sewage, electricity, maintenance and other services as well.

[\*10] As was mentioned above, Greenville has acquired two former residential units at Stonegates, in addition to its service units, to provide additional services to current and potential future residents of the retirement community.<sup>12</sup> In May 1988, Greenville acquired Unit 157 to use both as a dining room for residents and as a marketing office for the condominium. The Condominium Council approved the modifications to be made by Greenville, using its own funds, and residents were informed about the plans. Both the dining room and marketing office have been operational since early 1990.

A second unit, Unit 158, was acquired by Greenville in August 1988, apparently [\*11] to remedy the shortage of beds in the Health Center. Unit 158 was modified to permit six additional beds for nursing care services. As the project was underway, completely funded by Greenville, the Residents Advisory Board and all residents were kept informed regarding the details. In addition, the Condominium Council reviewed the plan.

Several clauses in the Stonegates Declaration are arguably relevant to the issue of whether the above modifications were permissible. Although the Stonegates Declaration states that the units are to be used for residential purposes only, Section 6B(d) provides that Greenville may use a unit owned by it for "sales, leasing, and display purposes." In addition, the Declaration and Declaration Plan may be amended to alter the permitted use of the units, by an 80% vote of all unit owners. No such formal amendment has been made.<sup>13</sup> Section 29 states that the provisions of the Declaration are to be "liberally construed to effectuate its purpose of creating a uniform plan for the development of a retirement living condominium development." In addition, Article 8, [Section 1](#) of the Code of Regulations provides that the Condominium Council may approve the use [\*12] of the units for non-residential, commercial purposes. It appears that the Council gave at least informal approval for the modifications and intended commercial uses of Units 157 and 158.

#### *B. Relationship Between the Parties*

Prior to filing this action, Mr. Maddock had many dealings with Greenville in his capacity as a member of the Residence Board, a committee elected by the residents which makes non-binding recommendations to management, and as the sole representative of the residents on the Condominium Council, from 1990-1992. During his participation in these committees, Mr. Maddock voiced concerns regarding the management of Stonegates on

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<sup>10</sup> Generally, such fees appear to be of the same magnitude, or higher, than the purchase price of a unit at Stonegates.

<sup>11</sup> Each resident is assured the availability of a semi-private room in the Health Care unit, if needed, and has access to a 24 hour on call nursing staff.

<sup>12</sup> Apparently, there has been no change in the number of units or impact on common expenses since Greenville pays the proportionate share of common expenses owed by the two units and covered all costs of the modifications. Greenville's expenses are offset by the additional revenues it receives from the services provided to residents in these units.

<sup>13</sup> Greenville has stated that it could and would seek retroactive 80% approval of its uses of the two units, and reconvert such units to residential use, at its own expense, if such approval was not granted. Mr. Maddock concedes apparently that this would ameliorate any continuing technical violation of the Declaration.

several occasions and attempted to have the [\*13] Council bring a lawsuit against Greenville for alleged failure to comply with the provisions of the Declaration, Declaration Plan, Code of Regulations, and Condominium Management Agreement, but others would not agree.

During his residency at Stonegates, it appears that Mr. Maddock used his legal background, as a formerly practicing attorney, to advise other residents regarding their decision to purchase units at Stonegates. Mr. Maddock advised at least six other residents, both before and after the filing of this action, that he believed the Residence Agreement and repurchase option to be of questionable legality. However, Mr. Maddock himself signed such an agreement in June 1987.

Mr. Maddock filed this action on May 7, 1992. Since then, his complaint and the posture of the litigation has been altered in two ways. Originally, the action was filed on his own behalf and on behalf of all of the Stonegates unit owners. Mr. Maddock, however, subsequently withdrew his representation of the other unit owners, and is currently pursuing the litigation entirely on his own behalf. In addition, Mr. Maddock filed an amended complaint in order to specify that all of his claims arose after April [\*14] 2, 1992, the explanation for which is discussed below, to add Forum Group as an additional defendant, and to assert the claim of antitrust violations. See *Maddock v. Greenville Retirement Community L.P.*, Del. Ch., C.A. No. 12564, Allen, C. (Aug. 9, 1995) Mem. Op.

### C. Bankruptcy Court Proceeding

To understand both why Mr. Maddock filed an amended complaint asserting that all his claims arose after April 2, 1992, and Defendants' argument that all of Mr. Maddock's claims are barred, a brief review of Forum Group's bankruptcy proceeding and related actions is necessary. On February 19, 1991, Forum Group filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of Indiana. Pursuant to [Section 362 of the Bankruptcy Code](#), such filing effected an automatic stay of all proceedings against Forum Group and its subsidiaries and affiliates, all of which would be involved in the consolidated reorganization proceedings.

Significantly, on April 2, 1992, one month before this action was filed, Forum Group obtained final approval of a Plan of Reorganization.<sup>14</sup> Pursuant to [Sections 524](#) and 1041(d) of the Bankruptcy Code, Article 11.2 of the approved plan stated [\*15] that all claims against Forum Group and its affiliates, including Greenville, and any of its or their assets, were discharged and barred if "based upon any document, instrument, act, omission, transaction or other activity of any kind or nature that occurred prior to the Confirmation Date."

When Mr. Maddock filed this action on May 7, subsequent to the effective date of the Confirmation Order, Forum Group responded by bringing an adversary proceeding against him in the Bankruptcy Court. Forum Group claimed that Mr. Maddock's claims had been discharged and barred by the Bankruptcy Court's Confirmation Order. On August 24, 1992, the Bankruptcy Court issued a temporary restraining order to prohibit Mr. Maddock from continuing this Delaware action. An attempt to modify the temporary restraining order to allow him to file an amended complaint with the phrase "since [\*16] April 3, 1992," to limit each claim to the time period after the Confirmation Order, was denied by such court and a permanent injunction granted on September 17, 1993.

Mr. Maddock appealed the permanent injunction to the U.S. District Court for the Southern District of Indiana. The District Court, concerned that the injunction could be interpreted to bar new suits or causes of actions based on future violations, vacated the injunction, remanding the matter to the Bankruptcy Court. The District Court stated that the "Bankruptcy Court cannot enjoin suits premised on Greenville's actions occurring after Greenville has emerged from Forum Group's reorganization. That the post reorganization activity generating the suit is a continuing breach does not change this outcome." U.S. District Court Opinion (Aug. 30, 1994).

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<sup>14</sup> Mr. Maddock apparently was aware of the Bankruptcy Court proceeding when he filed his original complaint which expressly refers to the proceeding.

A final injunction, issued by the Bankruptcy Court on remand on December 19, 1994, only prohibits Mr. Maddock from asserting in this litigation claims that arose prior to the Confirmation Order. Specifically, the injunction order states that Mr. Maddock may not assert any:

claims based upon acts and omissions of Forum Group, Inc. or Greenville Retirement Community, [\*17] L.P., or either of them, occurring prior to April 2, 1992 . . . The actions prohibited by this Order shall not include a claim arising after April 2, 1992 from either a new cause of action or a new breach of any continuing agreement.

U.S. Bankruptcy Court Final Injunction Order, on remand (Dec. 19, 1994).

To comply with this order, Mr. Maddock filed a motion to amend his complaint on March 13, 1995, to modify each claim with the words "since April 3, 1992." In addition, as mentioned above, the amended complaint added Forum Group as an additional defendant, and asserted a new antitrust claim against both defendants. In granting the motion to amend the complaint on August 9, 1995, this Court stated that "to the extent that the discharge of bankruptcy may represent a defense to any of the specific claims alleged it may be pleaded and adjudicated." *Maddock v. Greenville Retirement Community L.P.*, Mem. Op. at 6. Defendants now assert the defense that all of Mr. Maddock's claims are based upon acts or omissions which occurred prior to April 2, 1992 which are barred by the final injunction.

## *II LEGAL PRINCIPLES AND ANALYSIS*

### *A. Defenses*

As a preliminary matter, it [\*18] is useful to discuss the defenses asserted by Greenville in its own motion for summary judgment. Defendants contend that all of the legal claims made by Mr. Maddock are barred by the Bankruptcy Court injunction or, in the alternative, that Mr. Maddock is equitably estopped from bringing claims based on contracts which he knowingly signed.

In response to the first defense, Mr. Maddock argues that each of his three claims are based on acts of the Defendants that occurred after April 2, 1992. First, as to Units 157 and 158, while their conversion to commercial facilities preceded that date, Defendants have continued occupying and using such units for nonresidential purposes, allegedly violating the Declaration and Plan anew every day since April 2, 1992. Second, as to the mandatory requirement that each resident enter into a Residence Agreement, thereby agreeing to grant Greenville the repurchase option, Mr. Maddock contends that its existence constitutes an unreasonable restraint on alienation which has caused injury each day since the original agreement was signed, including the post-bankruptcy period. Third, as to the alleged antitrust violations, Mr. Maddock claims that each new [\*19] payment of the required monthly fee by residents, for goods and services to be supplied by Greenville, constitutes actionable tying due to Greenville's control over the market for units at Stonegates.<sup>15</sup> Despite the fact that each of these claims arises out of contracts and transactions which occurred well before April 2, 1992, I will assume with respect to the first and third of them that the reoccurring nature of each is sufficient for Mr. Maddock to go forward on such claims without contravening the Bankruptcy Court injunction.<sup>16</sup> (I cannot so assume with respect to the claim of unreasonable restraint on alienation).

<sup>15</sup> In a Fifth Circuit case involving tying, *Imperial Point Colonades-Condominium v. Mangurian*, the court found that a collection of payment for the tied product created a new cause of action which was actionable regardless of whether the tying contract was executed prior to the statute of limitations period. See [549 F.2d 1029 \(5th Cir. 1977\)](#), cert. denied, **434 U.S. 859**.

<sup>16</sup> See [Sherrellein Price v. Wilmington Trust Company, Del. Ch., C.A. No. 12476, Allen, C. \(May 19, 1995\), 1995 Del. Ch. LEXIS 65](#) at \*6-8 (finding in breach of contract case that each alleged overcharging gave rise to a separate cause of action, triggering a new statute of limitations period, because the continuing wrong could be segmented into independent wrongful acts).

[\*20] Further, I will assume that Mr. Maddock is not estopped from making claims of unreasonable restraint on alienation and illegal tying, as is argued by Defendants as an alternative defense. Mr. Maddock has alleged that the contracts entered into with Greenville violate rules based on strong public policy concerns. In my opinion, therefore, this Court may still invalidate the contracts if they are found to be illegal on the alleged grounds, despite the fact that Mr. Maddock knowingly signed contracts containing the terms of which he is now complaining.<sup>17</sup>

[\*21] A third defense asserted by Defendants, however, has merit. Defendants contend correctly that this Court lacks subject matter jurisdiction to hear Mr. Maddock's antitrust claims. Mr. Maddock has alleged that Greenville is engaging in illegal tying which violates both [Section 1](#) of the Sherman Antitrust Act, [15 U.S.C. § 1](#), and, in the alternative, the Delaware Antitrust Act, [6 Del. C. § 2103](#), both of which prohibit contracts, combinations, and conspiracies undertaken with the purpose and effect of unreasonably restraining trade. As to the Sherman Act claim, it is settled that [HN2](#)<sup>18</sup> federal courts have original and exclusive jurisdiction to enforce [Section 1](#) of the Sherman Act. [General Investment Co. v. Lake Shore & Mich. S.R. Co.](#), 260 U.S. 261, 67 L. Ed. 244, 43 S. Ct. 106 (1922); [Blumenstock Bros. v. Curtis Pub. Co.](#), 252 U.S. 436, 64 L. Ed. 649, 40 S. Ct. 385 (1920); [Williamson v. Columbia Gas & Electric Corp.](#), 27 F. Supp. 198, 204 (D. Del. 1939). As a state court, the Court of Chancery has no subject matter jurisdiction to hear Mr. Maddock's federal antitrust claim.<sup>19</sup> Therefore, Defendants are entitled to summary judgment as to the federal antitrust claims.

[\*22] As to Mr. Maddock's state antitrust claims, again it appears that this Court lacks subject matter jurisdiction. Theoretically, a cause of action for illegal tying could be stated based on [Section 2103](#) of Delaware's antitrust statute which was substantially modeled after, and expressly intended to be interpreted in harmony with, [Section 1](#) of the Sherman Act. See [6 Del. C. § 2113](#). [HN3](#)<sup>20</sup> However, the Delaware statute does not permit individuals to enforce their rights by bringing private actions. In contrast, the federal antitrust acts expressly create a private right of action. See, e.g., [15 U.S.C. § 15](#); [15 U.S.C. § 26](#). Instead of providing for a private right of action, the Delaware statute expressly grants the state attorney general the right to bring remedial actions. [Section 2108](#) specifically empowers the state attorney general to initiate parens patriae suits on behalf of state residents whose business or property have been injured by alleged antitrust violations.<sup>21</sup> Since Mr. Maddock has failed to bring any case to this Court's attention in which an individual has been permitted to bring an action on his own behalf pursuant to Delaware's antitrust statute, and the act [\*23] itself does not expressly provide such a right, I believe that this Court lacks the necessary subject matter jurisdiction to hear this claim.<sup>22</sup>

<sup>17</sup> In [Greene v. E.H. Rollins & Sons, Inc., Del. Ch.](#), 22 Del. Ch. 394, 2 A.2d 249, 252 (1938), this Court stated that:

[HN1](#)<sup>23</sup> Individuals have authority in law to enter into all sorts of contracts. But this general power to make contracts does not of course mean that every term in a contract which individuals may choose to adopt, shall in every instance be recognized as valid and binding. No individual may exercise his broad power to enter into contract relations with another so as to offend against what the law deems to be sound public policy.

<sup>18</sup> Mr. Maddock has cited several cases to support the proposition that state courts have power to refuse to enforce contracts found to violate the Sherman Act. While this is true, it is not relevant in this case where it is the plaintiff asking for relief pursuant to the federal [antitrust law](#). In [Lyons v. Westinghouse Electric Corp.](#), Judge Hand explained that violations of federal [antitrust law](#) may be raised in a state court as a defense only where the plaintiff's claim is an attempt to enforce "an undertaking itself forbidden." [222 F.2d 184, 190 \(2d. Cir. 1955\)](#); see [Rohm and Haas Co. v. Polycast Technology Corp.](#), 297 A.2d 53, 55 (1972).

<sup>19</sup> Using this power, the state attorney general pursued an illegal tying action involving a trailer park which required purchasers of their lots to purchase their mobile homes from a specific company. See [In the Matter of Attorney General's Investigation of Creekside Homes, Inc.](#), Del. Ch., C.A. No. 6869, Longobardi, V.C. (Sept. 15, 1982).

<sup>20</sup> Recent United States Supreme Court jurisprudence, tending to narrowly construe statutes when asked to recognize an implied private cause of action, suggests that this is the correct result. See [Touche Ross & Co. v. Redington](#), 442 U.S. 560, 578, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979) (Rehnquist opinion discussing a new, stricter standard to be applied where a party is

[\*24] In light of the two assumptions stated above and the ruling regarding subject matter jurisdiction, I will discuss the legal merits of the two remaining claims. As will become clear, the assumptions made in Mr. Maddock's favor in no way altered the outcome of this action because, in my opinion, Defendants are entitled to summary judgment as a matter of law on both claims.

### *B. Substantive Claims*

The first of Mr. Maddock's remaining substantive claims is that by converting Units 157 and 158 to commercial use, Greenville violated Stonegates' Declaration and Plan. Mr. Maddock's second remaining claim is that the combination of the repurchase option and conditions related to who is entitled to purchase a Stonegates unit constitute an unreasonable restraint on alienation. In my opinion, Mr. Maddock is not entitled to relief based on either of these claims for the following reasons.

#### *I. Units 157 and 158*

Mr. Maddock's allegation that Greenville violated Stonegates' Declaration and Plan by modifying two of the units and using them for commercial purposes, does not state a cause of action. First, I note that the Declaration expressly states that it is to be given a liberal interpretation. [\*25] While it is true that the Declaration states that the units are to be used for residential purposes only, and that the Declaration was never amended to permit commercial uses, in my opinion, all of the current uses of the units are collateral residential use (residents use them residentially and do use them when they sleep there while housed there for treatment). Thus, Greenville's use of Unit 158 for health care services and the portion of Unit 157 which is used to provide food services, although not expressly permitted, does not violate the Declaration liberally construed.

Beyond that, the portion of the Unit 157 which is being used as a sales office is authorized by the Declaration without question. Section 6B(d) expressly provides that Greenville may use a unit owned by it for such purposes.

Even if these modifications were found to technically violate the Declaration and Plan, it would be difficult to imagine a course of equity affording Mr. Maddock an equitable remedy. What damages has Mr. Maddock suffered; what injury to others would an injunction do? Apparently, Greenville covered all of the expenses incurred in connection with the modifications and has continued to contribute [\*26] the share of the common expenses which would ordinarily be paid by residents living in the two units. Mr. Maddock has provided no evidence to suggest that economic injury has resulted from the use of the two units for commercial purposes. Without such evidence, even if the claim in the merits were stronger, it would be difficult for a court of equity to order Greenville to discontinue using the units in the current manner, given that the continuation of such services appears to be in the best interest of Stonegates' residents as a group. The fact that Greenville may be profiting from the provision of these services does not entitle Mr. Maddock to any remedy under these circumstances. Defendants are entitled to summary judgment in their favor with regard to this claim.

#### *2. Restraint on Alienation*

Mr. Maddock's second substantive claim is plagued by a similar problem in that he is attempting to invalidate a condition of property ownership at Stonegates which is reasonable given the apparent purpose of the agreements of providing continuing retirement community care. In my opinion, the combination of the repurchase option and transfer restrictions related to who is entitled to purchase [\*27] a Stonegates unit, constitute a *reasonable* restraint on alienation, and should be upheld. Only a very strong showing that a contract term is a gross violation of the

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requesting the recognition of an implied private cause of action). The fact that Section 2109 of the state statute provides that a final judgment in an action initiated by the attorney general "is prima facie evidence against [the defendant] in any other action as to all matters with respect to which the judgment or decree would be an estoppel between the parties thereto," is insufficient to find that a implied private cause of action was intended by the legislature.

policies embodied in this common law rule would permit Mr. Maddock to escape the economic bargain that he entered into when he purchased his condominium.

**HN4** As a general rule, conditions on the sale of property which prevent its owner from conveying it when it would be economically efficient to do so may constitute an invalid unreasonable restraint on the alienation of property. See 61 Am. Jur. 2d, *Restraints on Alienation and Use* § 100, at 108-109 (1981). However, if such a restraint is deemed reasonable under the circumstances, it will be upheld. See *Restatement of the Law, Property (2d), Donative Transfers* § 4.4 (1983).

Although reasonableness is a fact intensive inquiry, the undisputed facts on the record permit the determination of this matter on summary judgment. According to Mr. Maddock, four aspects of the repurchase option are critical. Greenville's repurchase option gives it (1) a preemptive right of first refusal, (2) of unlimited duration, (3) at a fixed price which is, (4) always lower [\*28] than the original price paid for the unit.<sup>21</sup> In addition, Mr. Maddock argues that the fact that Greenville has discretion with regard to who it will permit to buy a unit at Stonegates, constitutes a further impediment to the alienability of Stonegates' units. In my opinion, neither the repurchase option nor the transfer restriction constitutes an unreasonable restraint on alienation under Delaware law. Rather, the terms taken together constitute a reasonable, jointly advantageous means to finance retirement home occupancy.

#### a. repurchase option

First, it is important to recognize that a restraint [\*29] on alienation claim cannot be analyzed without considering the entity of the contractual bargain which created the restraint. The repurchase option reflects an agreement between Greenville and each resident, that Greenville would have the right to buy back the unit on termination of the individual's residency, paying a price determined by the set formula. Given that real estate prices have risen steadily throughout the past century, it is only reasonable to assume that the parties contemplated that the value of the units would likely rise over the term of the residency, assuring that Greenville would elect to buy the unit back at a below market price. Presumably, *the original price paid for the unit reflected all of the economic terms of the contract, including this condition.*

Mr. Maddock is now asking this Court to use the loosely worded common law doctrine prohibiting restraints on alienation to undo a complex, highly rational bargain reached between the parties. In my opinion, it is entirely clear that the contract should be enforced as written. The law of restraints on alienation supports this conclusion.

Delaware has adopted the view held by the *Restatement of the Law, Property*, [\*30] Sections 406 and 413 (1944), that **HN5** a preemptive right at a fixed price constitutes an unreasonable restraint on alienation unless it is reasonable under the circumstances. See *McInerney v. Slights*, Del. Ch., C.A. No. 1096-S, *Allen, C. (April 12, 1988)* *1988 Del. Ch. LEXIS 47* at \*20. The Comments to Section 406 of the Restatement list several factors which tend to show reasonableness and unreasonableness, some of which are applicable to the facts of this case.<sup>22</sup> Significantly, the Comments suggest that a restraint tends to be reasonable if the one imposing the restraint has an interest in land which it is seeking to protect with the restraint, the enforcement of the restraint accomplishes a worthwhile purpose, and the restraint has a limited duration. The repurchase option has all of these characteristics.

Principally, the rule against restraints on alienation is aimed at serving "social policy" goals, rather than [\*31] protecting the "rights of the party on whom the restraint is imposed." *Id.* at \*19. To determine whether a restraint is reasonable, therefore, the countervailing positive and negative effects of a restraint on alienation on society as a whole must be weighed. As to the potential benefits of the repurchase option, Defendants assert that it is an integral

<sup>21</sup> This type of restraint on alienation can have the effect of preventing or discouraging the sale of property, or property improvements, because the owner is unable to realize the full value of the property at the time of sale. See, e.g., American Law of Property, Little Brown & Co., 1952, A. James Casner, Editor-in-Chief, § 26.65; *Restatement of the Law, Property (2d), Donative Transfers*, § 4.4 (1983).

<sup>22</sup> For a complete list of the factors, see *McInerney, 1988 Del. Ch. LEXIS 47* at \*20-21.

element of Stonegates' financing structure and plan to provide continuing care retirement community services. Instead of using the more traditional entrance fee and lease financing structure, Greenville used a condominium ownership structure with the repurchase option to secure tax benefits for both themselves and the residents.

The countervailing negative side effects of the repurchase option appear minimal. Economically, the repurchase option is no greater a restraint on alienation than fees and penalties that are charged by other retirement communities. As discussed above, the fixed price repurchase option can be viewed as comparable to the entrance fee paid by residents who lease units at other types of continuing care facilities. Once a resident has paid an entrance fee, there is a similar disincentive to terminating a lease.

[\*32] In fact, the Stonegates repurchase option may be less of a restraint on alienation than an upfront entrance fee, depending on its magnitude. The repurchase option's fixed price formula is financially akin to a standard rental arrangement. In *Greenville Retirement Community, L.P. v. Koke*, this Court analogized the repurchase price formula to a depreciation allowance, stating that it is the "financial equivalent of a deferred yearly fee made payable in full to Stonegates upon termination of the residency." Del. Ch., C.A. No. 12487 (1993). Such a yearly fee is paid regularly by tenants who rent, instead of own, an apartment or house. Although this scenario is different because Stonegates' residents purchase their condominium units in fee simple, the restraint is not unreasonable given the apparently beneficial purpose discussed above and the minimal economic disincentive in comparison to other retirement community options. I conclude that this type of bargained for reasonable restraint is valid and enforceable.<sup>23</sup>

[\*33] b. transfer restriction

An application of the same type of analysis and the reasonableness test to the transfer restriction leads to the conclusion that it is a valid restraint on alienation as well. Given the presumption discussed above, that Greenville would buy back the unit, and has done so apparently in all cases in order to capture the expected appreciation in property value, the transfer restriction has no practical effect on the ability of residents to freely sell their units. Even if the transfer restriction did restrain the alienability of property somewhat, however, by enabling Greenville to restrict who a unit may be sold to, I would find that it is reasonable under the circumstances.

An essential service provided at Stonegates is guaranteed access to its health care facilities for all residents. In order to fulfill this promise, Greenville contends that it must maintain discretionary control regarding new residents. In this context, such a transfer restriction is reasonable provided that Greenville exercises its discretion in good faith. There is no indication to the contrary based on the record presented. If, as Greenville contends, it reserved such discretion [\*34] in order to maintain reasonable eligibility requirements related to the health and financial ability of Stonegates' residents (a seemingly worthwhile purpose), then it does not constitute an unreasonable restraint on alienation. Again, the benefits to society as a whole, and specifically the other residents at Stonegates, appear to outweigh the restraint on Mr. Maddock's rights as an individual property owner. The transfer restriction is a valid, enforceable element of the contract entered into between the parties.

Finally, independently of the foregoing, it seems clear that the "reasonableness" of these transactions is a subject that is barred against Greenville by reason of the Bankruptcy Court discharge. The alleged invalidity of that repurchase agreement as an unreasonable restraint on alienation arises from documents entered into prior to April 2, 1992 and does not arise thereafter. All of the terms of the contract and the relevant event preceded the discharge

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<sup>23</sup> Mr. Maddock argues that this case is analogous to *McInerney v. Slights*, where a contract providing the plaintiff with a right of first refusal to purchase land at a set price, substantially below the market value of the property at the time of trial, was held to be an unreasonable restraint on alienation. *Id.* at \*2. Although several of the elements of the restraint were similar, this Court found that none of the Restatement factors tending to indicate reasonableness were present in *McInerney v. Slights*. *Id.* at 21. Only the unique set of facts presented in *McInerney v. Slights* merited this Court to take the highly unusual step of invalidating a contract. See *Filasky v. von Schnurbein*, Del. Ch., C.A. 10545, [Jacobs, V.C. \(Jan. 17, 1990\) 1990 Del. Ch. LEXIS 5](#) at \*7-8. The restraint on alienation imposed on Stonegates' residents appears to be reasonable and enforceable when analyzed in the context of Greenville's plan to provide continuing care retirement community services.

in bankruptcy. (See quoted discharge language, *supra, at 10*). Because I conclude as above on the merits, I need not develop that point however.

### *III. CONCLUSION*

As a matter of law, I find that Mr. Maddock [\*35] has failed to state a claim upon which relief can be granted with regard to the unit modifications, repurchase option, and transfer restriction. Having determined, as well, that this Court lacks subject matter jurisdiction to hear Mr. Maddock's antitrust claims, I conclude that Defendants are entitled to summary judgment. Mr. Maddock's motion for summary judgment is denied and that of the Defendants will be granted.

Defendant may submit an order on notice.

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## **ABC Internat. Traders, Inc. v. Matsushita Electric Corp.**

Supreme Court of California

February 27, 1997, Decided

No. S051417.

### **Reporter**

14 Cal. 4th 1247 \*; 931 P.2d 290 \*\*; 61 Cal. Rptr. 2d 112 \*\*\*; 1997 Cal. LEXIS 405 \*\*\*\*; 97 Cal. Daily Op. Service 1430; 97 Daily Journal DAR 2105; 1997-1 Trade Cas. (CCH) P71,736

ABC INTERNATIONAL TRADERS, INC., Plaintiff and Appellant, v. MATSUSHITA ELECTRIC CORPORATION OF AMERICA, Defendant and Respondent.

**Prior History:** [\*\*\*\*1] Superior Court of Los Angeles County, No. BC 098609. Eric E. Younger, Judge.

**Disposition:** The judgment of the Court of Appeal is reversed.

## **Core Terms**

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discounts, sellers, purchasers, retailers, competitors, buyers, chains, unfair practice, restitution, injunction, destroy the competition, price discrimination, wholesalers, allowance, antitrust, horizontal, vertical, distributors, prices, secondary, unearned, secret, unfair competition, purposes, locality discrimination, competitive injury, fair trade, Robinson-Patman Act, discriminatory, monopoly

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review

### **HN1[] Amendment of Pleadings, Leave of Court**

For purposes of an appeal of the dismissal of an action without leave to amend, an appellate court takes the properly pleaded material allegations of plaintiff's complaint as true; the appellate court's only task on review is to determine whether the complaint states a cause of action.

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN2[] Business Torts, Unfair Business Practices**

See [Cal. Bus. & Prof. Code § 17045](#).

Governments > Legislation > Interpretation

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN3** Legislation, Interpretation

On its face, [Cal. Bus. & Prof. Code § 17045](#) is aimed at preventing a distributor from discriminating between customers. The statute is focused patently on discrimination among purchasers; therefore, it is reasonable to assume the legislative purposes include protecting purchasers, such as wholesalers and retailers, against the competitive injury resulting from discrimination by those higher up the marketing chain.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN4** Robinson-Patman Act, Claims

[Cal. Bus. & Prof. Code § 17046](#) makes it unlawful to use any threat, intimidation, or boycott, to effectuate any violation of the Unfair Practices Act (UPA), Cal. Bus. & Prof. Code [§ 17000 et seq.](#) [Cal. Bus. & Prof. Code § 17047](#) makes it illegal to solicit the same. Similarly, [Cal. Bus. & Prof. Code § 17048](#) makes it unlawful to participate or collude in violating the UPA.

Governments > Legislation > Interpretation

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN5** Legislation, Interpretation

In light of the legislative mandate under that a court construe section [Cal. Bus. & Prof. Code § 17045](#) liberally so that its beneficial purposes may be subserved, a court must, in the absence of clear evidence of a contrary legislative intent, interpret the statute to protect against competitive injury in the secondary, as well as primary, lines of commerce. [Cal. Bus. & Prof. Code § 17002](#).

Governments > Legislation > Statutory Remedies & Rights

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN6** Legislation, Statutory Remedies & Rights

An action to enjoin a violation of or recover damages under the Unfair Practices Act, [Cal. Bus. & Prof. Code § 17000 et seq.](#) may be brought by any person or trade association. [Cal. Bus. & Prof. Code § 17070](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Torts > Business Torts > Unfair Business Practices > General Overview

14 Cal. 4th 1247, \*1247L<sup>1</sup> 931 P.2d 290, \*\*290L<sup>1</sup> 61 Cal. Rptr. 2d 112, \*\*\*112L<sup>1</sup> 997 Cal. LEXIS 405, \*\*\*\*1

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Governments > Legislation > Interpretation

### **HN7** [down] Robinson-Patman Act, Claims

Cal. Bus. & Prof. Code § 17045 by its terms requires a plaintiff to prove not only injury to a competitor, but, in addition, a tendency to destroy competition. Thus, whatever may be the federal law or enforcement pattern, § 17045 applies only when the discriminatory rebate, discount or allowance has a tendency to destroy competition generally. For purposes of § 17045, competition is competition, whether among retailers, wholesalers or producers.

Governments > Legislation > Interpretation

### **HN8** [down] Legislation, Interpretation

It is not for a court to determine whether or not the policy of a statute is economically sound or beneficial. That is a matter solely for the legislature.

Governments > Legislation > Statutory Remedies & Rights

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN9** [down] Legislation, Statutory Remedies & Rights

See Cal. Bus. & Prof. Code § 17203.

Governments > Legislation > Statutory Remedies & Rights

Torts > Business Torts > Unfair Business Practices > General Overview

### **HN10** [down] Legislation, Statutory Remedies & Rights

Nothing in the actual language of Cal. Bus. & Prof. Code § 17203 indicates the availability of restitution is contingent on the issuance of an injunction. The statute contains no language of condition linking restitution and injunctive relief. On its face, § 17203 authorizes injunctive relief to prevent unfair competition, and/or restitution (i.e. disgorgement) of money or property wrongfully obtained.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

A wholesale distributor of telephone equipment and other electronic products brought an action against a manufacturer of electronic products and two other competing wholesale distributors for violations of the Unfair Practices Act (UPA) Bus. & Prof. Code, § 17000 et seq., alleging that the manufacturer was providing an unearned, secret 5 percent discount to the two other distributors (a practice prohibited by Bus. & Prof. Code, § 17045), and for violations of the unfair competition law (Bus. & Prof. Code, § 17203). The trial court sustained the manufacturer's demurrer to both causes of action without leave to amend, and dismissed plaintiff's complaint

against the manufacturer. (Superior Court of Los Angeles County, No. BC098609, Eric E. Younger, Judge.) The Court of Appeal, Second Dist., Div. Two, No. B087534, affirmed. As the the UPA cause of action, the Court of Appeal held that the elements of a violation of [Bus. & Prof. Code, § 17045](#), were not met, because the complaint did not allege any injury to the manufacturer's competitors or any tendency to destroy competition among electronics producers. As to the second cause of action, the court held the complaint was deficient because it sought restitution and disgorgement without injunctive relief.

The Supreme Court reversed the judgment of the Court of Appeal. As to the UPA cause of action, the court held that the class of "competitors" and the "competition" protected under [Bus. & Prof. Code, § 17045](#), is not restricted to competitors of the person allowing an unearned discount (the "primary" line of commerce), as opposed to competitors of the person receiving it (the "secondary" line of commerce). The statutory language contains no such restriction. Furthermore, [Bus. & Prof. Code, § 17045](#), is aimed at preventing a distributor from discriminating between customers; hence the legislative purposes include protecting purchasers, such as wholesalers and retailers, against the competitive injury resulting from discrimination by those higher up the marketing chain. Furthermore, the language, context, purposes, and history of [Bus. & Prof. Code, § 17045](#), all point to the conclusion its protection extends to competitors of the purchasers receiving the discount. The court also held the trial court erred when it dismissed the cause of action on demurrer for violations of the unfair competition law ([Bus. & Prof. Code, § 17203](#)). Although plaintiff prayed for restitution, and not for an injunction against future unfair competition, nothing in the actual language of [Bus. & Prof. Code, § 17203](#), indicates the availability of restitution is contingent on the issuance of an injunction. In the absence of such statutory restriction, a court of equity retains the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved. An order for restitution, therefore, was within the court's power. (Opinion by Werdegar, J., with George, C. J., Kennard, Baxter, and Chin, JJ., concurring. Concurring opinion by Mosk, J., and dissenting opinion by Brown, J.)

## **Headnotes**

### **CA(1) [1] (1)**

#### **Appellate Review § 128—Scope of Review—Rulings on Demurrs.**

--For purposes of an appeal of a trial court's dismissal of an action after the court sustains a defendant's demurrer without leave to amend, the reviewing court takes the properly pleaded material allegations of the complaint as true; the only task of the reviewing court is to determine whether the complaint states a cause of action.

### **CA(2) [2] (2)**

#### **Unfair Competition § 3—Unfair Trade Practices Act—Seller Providing Unearned Discounts to Purchaser—Competitive Injury to Wholesale Purchaser.**

--In an action brought by a wholesale distributor of electronic products against a manufacturer of electronic products and two other competitive wholesale distributors for violations of the Unfair Practices Act (UPA) [Bus. & Prof. Code, § 17000 et seq.](#), alleging that the manufacturer was providing an unearned, secret 5 percent discount to the two other distributors (a practice prohibited by [Bus. & Prof. Code, § 17045](#)), the trial court erred when it sustained the manufacturer's demurrer without leave to amend and dismissed the complaint. The class of "competitors" and the "competition" protected under [Bus. & Prof. Code, § 17045](#), is not restricted to competitors of the person allowing an unearned discount--the "primary" line of commerce--as opposed to competitors of the person receiving it--the "secondary" line. The statutory language contains no such restriction. Furthermore, [Bus. & Prof. Code, § 17045](#), is aimed at preventing a distributor from discriminating between customers; hence the legislative purposes include protecting purchasers, such as wholesalers and retailers, against the competitive injury resulting from discrimination by those higher up the marketing chain.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 592]

### CA(3) [ ] (3)

**Unfair Competition § 3—Unfair Trade Practices Act—Seller Providing Unearned Discounts—Legislative Intent—Competitive Injury to Purchaser.**

--The language, context, purposes, and history of [Bus. & Prof. Code, § 17045](#), which prohibits a seller from secretly allowing a purchaser special unearned discounts, all point to the conclusion its protection extends to competitors of the purchasers receiving the discount, i.e., the "secondary" line of commerce. While [Bus. & Prof. Code, § 17045](#), itself does not focus directly on the purchaser's acts in obtaining a discriminatory price or other preference, the immediately following sections of the Unfair Practices Act (UPA) ([Bus. & Prof. Code, § 17000 et seq.](#)) do ([Bus. & Prof. Code, §§ 17046, 17047, 17048](#)). Thus, the Legislature was concerned with the wrongful receipt, as well as the payment, of discriminatory prices, and, inferentially, with the injurious effect such wrongful receipt would have on the recipient's competitors. The UPA is a legislative attempt to regulate business as a whole by prohibiting practices that the Legislature has determined constitute unfair trade practices. Offense against this policy, is no less clear when it produces the evil in respect of the line of commerce in which the purchaser is engaged than when it produces the evil in respect of the line of commerce in which the seller is engaged. Hence, a retailer or wholesaler, or a trade organization representing such a class of merchants, clearly has standing to sue a producer for offering secret rebates or discounts to some members of the group but not to others.

### CA(4a) [ ] (4a) CA(4b) [ ] (4b)

**Unfair Competition § 3—Unfair Trade Practices Act—Seller Providing Unearned Discounts to Purchasers—Legislative History—Competitive Injury to Purchaser.**

--The historical evidence strongly suggests the statute later codified as [Bus. & Prof. Code, § 17045](#) (prohibiting the practice of providing unearned, secret discounts to purchasers), was aimed primarily at protecting against competitive injury among buyers of goods, rather than sellers. The statute's prohibitions on secret discriminatory prices and rebates appear to have been intended mainly to restrain the quickly growing chain stores from certain well-documented abuses of their buying power, abuses that, together with other factors, were thought to have a highly destructive effect on wholesale and retail competition in the food industry and other trades. A primary concern in the enactment of the Unfair Practices Act (UPA) ([Bus. & Prof. Code, § 17000 et seq.](#)), of which [Bus. & Prof. Code, § 17045](#), is a part, was the protection of smaller, independent retailers, especially grocers, against unfair competitive practices of the large chain stores. The competitive injury involved was to the disfavored buyers, and the tendency to destroy competition was in the line of commerce practiced by the favored buyer. Furthermore, the protection of fair and honest competition in the secondary line of commerce does not necessarily impede retail competition, but may well benefit the ultimate consumer.

### CA(5) [ ] (5)

**Statutes § 20—Construction—Judicial Function.**

--It is not for the courts to determine whether or not the policy of a statute is economically sound or beneficial. That is a matter solely for the Legislature.

### CA(6) [ ] (6)

**Unfair Competition § 3—Unfair Trade Practices Act—Locality Discrimination.**

--The locality discrimination prohibition of the Unfair Practices Act (UPA) ([Bus. & Prof. Code, § 17000 et seq.](#)), while somewhat broadened by a 1931 amendment, retained a necessary element of geographic price difference; what was fundamentally prohibited was discrimination between locations, rather than between purchasers as such. Hence, locality discrimination cannot be proven where two locations are owned by competing buyers, but only where they are owned by the same seller ([Bus. & Prof. Code, §§ 17031, 17040](#)).

#### [CA\(7\)](#) [ ] (7)

##### **Unfair Competition § 3—Unfair Trade Practices Act—Seller Providing Unearned Discounts to Purchasers—Applicability to Advertising Allowances.**

--[Bus. & Prof. Code, § 17045](#), which prohibits the practice of providing unearned, secret discounts to purchasers, does not apply to advertising allowances allegedly granted to a competing retailer, where the allowances are neither secret nor discriminatory, being available to all purchasers buying on like terms and conditions.

#### [CA\(8\)](#) [ ] (8)

##### **Unfair Competition § 3—Unfair Trade Practices Act—Comparison Between Provisions Prohibiting Unearned Discounts and Locality Discrimination.**

--Both the section of the Unfair Practices Act (UPA) ([Bus. & Prof. Code, § 17000 et seq.](#)) that prohibits a seller's provision of unearned, secret discounts to select purchasers ([Bus. & Prof. Code, § 17045](#)) and the provisions that prohibit locality discrimination ([Bus. & Prof. Code, §§ 17031, 17040](#)) are designed to foster competition and prevent monopoly conditions, but the particular threats to competition they are principally intended to meet are fundamentally different. The threat to competition caused by locality discrimination is typically to primary line competition: locality discrimination is an anticompetitive abuse engaged in by chain retailers as sellers, to the injury of competing sellers. In contrast, the solicitation and extortion of secret rebates, unearned discounts, and other discriminatory allowances was an anticompetitive abuse historically engaged in by chains as buyers, to the injury of competing buyers, i.e. the independent retailers and wholesalers. The difference in primary application between these provisions is reflected in their language. While neither of the provisions dealing with locality discrimination ([Bus. & Prof. Code, §§ 17031, 17040](#)) refers to individual purchasers, but rather require different prices at different locations, [Bus. & Prof. Code, § 17045](#), is patently concerned with preventing a distributor from discriminating between customers.

#### [CA\(9\)](#) [ ] (9)

##### **Unfair Competition § 8—Actions—Availability of Restitution Absent Request for Injunction.**

--In an action brought by a wholesale distributor of electronic products against a manufacturer of electronic products and two other competitive wholesale distributors for violations of the unfair competition law ([Bus. & Prof. Code, § 17203](#)), the trial court erred when it dismissed the cause of action on demurrer. Although plaintiff prayed for restitution, and not for an injunction against future unfair competition, nothing in the actual language of [Bus. & Prof. Code, § 17203](#), indicates the availability of restitution is contingent on the issuance of an injunction. In the absence of such statutory restriction, a court of equity retains the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved. An order for restitution, therefore, was within the court's power.

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**Judges:** Opinion by Werdegar, J., with George, C. J., Kennard, Baxter, and Chin, JJ., concurring. Concurring opinion by Mosk, J., and dissenting opinion by Brown, J.

**Opinion by:** WERDEGAR

## Opinion

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[\*1252] [\*\*291] [\*\*\*113] WERDEGAR, J.

*Business and Professions Code section 17045*,<sup>1</sup> part of California's Unfair Practices Act (hereafter the UPA; see § 17000), prohibits a seller from secretly allowing a purchaser special "unearned discounts" that injure "a competitor" and tend to destroy [\*\*292] [\*\*\*114] "competition." The question [\*\*\*\*2] before us is whether the competition referred to is limited to competition among sellers of the particular good or service, or includes economic competition among buyers as well. More concretely, does a disfavored buyer adequately plead a cause of action against a seller for violation of *section 17045* by alleging the seller's secret discrimination injured the buyer and tended to destroy competition among buyers, or must the disfavored buyer allege injury to one or more of the seller's competitors and a tendency to destroy competition among sellers? Upon an examination of the statutory language, context, purposes and history, we conclude a cause of action may be pled by alleging competitive injury among buyers.

This case also calls upon us to interpret another section of the *Business and Professions Code, section 17203*, one of several statutes that together are sometimes referred to as the "unfair competition [\*\*\*\*3] law." (§ 17200-17209; see, e.g., *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 209 [197 Cal. Rptr. 783, 673 P.2d 660]*.) The question presented is whether a plaintiff may, under *section 17203*, seek restitution of money lost by the plaintiff or gained by the defendant as a result of the defendant's acts of unfair competition, without also seeking an injunction against future acts of unfair competition. We will hold injunctive relief is not a prerequisite to restitution under *section 17203*.

### FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff ABC International Traders, Inc. (ABC) is a wholesale distributor of telephone equipment and other electronic products. ABC's second [\*1253] amended complaint names as defendants Matsushita Electric Corporation of America (MECA), Procom Supply Corporation (Procom), and Tele-Com Office Products Corporation (Tele-Com). MECA produces electronic products under the brand name Panasonic. Procom and Tele-Com are wholesale distributors of electronics, in competition with ABC.

The case comes to us following ABC's appeal of the trial court's dismissal of the action against MECA after the court sustained MECA's [\*\*\*\*4] demurrer without leave to *HN1* amend. *CA(1)* (1) For purposes of such an appeal, we take the properly pleaded material allegations of ABC's complaint as true; our only task on review is to determine whether the complaint states a cause of action. ( *Garcia v. Superior Court (1990) 50 Cal. 3d 728, 732 [268 Cal. Rptr. 779, 789 P.2d 960]*.)

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<sup>1</sup> Unless otherwise specified, all statutory references are to the Business and Professions Code.

The complaint sets forth two causes of action as to all defendants. The first is for violation of the UPA, "and in particular Sections 17045-17048." ABC alleges that in 1989 it suspected, but had no direct information to confirm, MECA was providing Procom and Tele-Com a 5 percent discount on Panasonic products, a discount not provided to ABC. In October 1991, MECA stopped selling to ABC altogether. In September 1992, ABC learned from employees of Procom that MECA had "for years" been giving Procom and Tele-Com a 5 percent discount from the price charged to other wholesalers.

ABC alleges the 5 percent discount was unearned, in that the recipients' wholesale marketing services were identical to those performed by ABC and others, and was secret, in that neither MECA nor any recipient of the discount confirmed its existence to ABC or to the market generally. ABC [\*\*\*\*5] alleges damages in the amount of the lost discount plus lost profits from reduced sales of Panasonic products. It also charges that the discriminatory discount "tended to destroy competition" among electronics wholesalers, in that the favored wholesalers were in turn able to offer retailers lower prices than those offered by the disfavored wholesalers.

In its second cause of action, ABC alleged the above acts also constituted violations of the unfair competition law. Pursuant to [section 17203](#), ABC sought restitution of all moneys ABC lost and disgorgement of all profits defendants received as a result of their acts of unfair competition.

The trial court granted MECA's demurrer on both causes of action without leave to amend. The Court of Appeal affirmed. As to the first cause of action, the court held the elements of a [section 17045](#) violation were not met, because ABC did not allege any [\*\*293] [\*\*\*115] injury to MECA's competitors or any [\*1254] tendency to destroy competition among electronics *producers*. The court believed our decision in [Harris v. Capitol Records etc. Corp. \(1966\) 64 Cal. 2d 454 \[50 Cal. Rptr. 539, 413 P.2d 139\]](#), which reached a similar result [\*\*\*\*6] in an action brought under other provisions of the UPA, compelled that conclusion. On the second cause of action, the Court of Appeal held the complaint deficient "because it sought restitution and disgorgement without injunctive relief." For reasons explained below, we conclude the Court of Appeal erred in both these respects.

## I. Competitive Injury Under [Section 17045](#)

### A. Statutory Language and Context

**[HN2](#)** [Section 17045](#) provides: "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 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 unlawful."

**[CA\(2\)](#)** (2) MECA contends the class of "competitors" and the "competition" protected under [section 17045](#) is restricted to competitors of the person allowing an unearned discount--sometimes called the "primary" line of commerce--as opposed to competitors of the person receiving it--the "secondary" line. As is immediately apparent, however, the statutory language contains no such [\*\*\*\*7] express restriction. Indeed, to the extent any inference can be drawn from the law's wording, it is to the contrary. **[HN3](#)** On its face, [section 17045](#) is "aimed at preventing a distributor from discriminating between customers." ([Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal. 2d 305, 323 \[70 Cal. Rptr. 849, 444 P.2d 481\]](#)) The statute being focused patently on discrimination among purchasers, one might reasonably assume the legislative purposes included protecting purchasers, such as wholesalers and retailers, against the competitive injury resulting from discrimination by those higher up the marketing chain. Judicial and academic writers concerning themselves specifically with [section 17045](#) have, in fact, so assumed. (See [Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc. \(1993\) 16 Cal. App. 4th 202, 213-214 \[20 Cal. Rptr. 2d 62\]](#); McCarthy, *Whatever Happened to the Small Businessman? The California Unfair Practices Act (1968)* 2 U.S.F. L.Rev. 165, 181-182.)

**[CA\(3\)](#)** (3) MECA contends the intent to protect only against competitive injury in the primary line can be discerned from the Legislature's *omission* of certain language contained in [\*\*\*\*8] federal price discrimination statutes. Section 2 [\*1255] of the federal Clayton Act of 1914 forbids certain types of price discrimination in interstate commerce "where the effect of such discrimination may be substantially to lessen competition or tend to

create a monopoly in any line of commerce." ([15 U.S.C. § 13\(a\)](#); see [Van Camp & Sons v. Am. Can Co. \(1929\) 278 U.S. 245, 252-253 \[49 S. Ct. 112, 113, 73 L. Ed. 311, 60 A.L.R. 1060\]](#)) [section 2 of Clayton Act includes lessened competition in secondary line].) In the Robinson-Patman Act of 1936, Congress amended this section of the Clayton Act, inter alia, by additionally prohibiting discrimination the effect of which is "to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." ([15 U.S.C. § 13\(a\)](#); see [F.T.C. v. Anheuser-Busch, Inc. \(1960\) 363 U.S. 536, 542-545 \[80 S. Ct. 1267, 2170-1272, 4 L. Ed. 2d 1385\]](#)) [added language, like original Clayton Act language, includes injury in either primary or secondary line].) The Robinson-Patman Act also made it unlawful "knowingly to induce or receive a discrimination [\*\*\*\*9] in price which is prohibited by this section." ([15 U.S.C. § 13\(f\)](#)). MECA argues that [section 17045](#), by contrast, focuses on the acts of sellers, rather than buyers, and contains no specific reference to competition in the secondary line.

MECA's argument ignores the statutory context of [section 17045](#). While [section 17045](#) itself does not focus directly on the purchaser's acts in obtaining a discriminatory price or other preference, the immediately following sections of the UPA do. [HN4](#)[] [Section 17046](#) makes it unlawful to "use any threat, [\*\*294] [\*\*\*116] intimidation, or boycott, to effectuate any violation" of the UPA. [Section 17047](#) makes it illegal to "solicit" the same. Similarly, [section 17048](#) makes it unlawful to "participate or collude" in violating the UPA. It thus appears the Legislature, like Congress in enacting section 2(f) of the Robinson-Patman Act ([15 U.S.C. § 13\(f\)](#)), was concerned with the wrongful receipt, as well as the payment, of discriminatory prices, and, inferentially, with the injurious effect such wrongful receipt would have on the recipient's competitors.

[Section 17045](#), to be sure, does not contain an explicit reference to secondary line competitive injury like the [\*\*\*\*10] quoted language of the Clayton and Robinson-Patman Acts. Our interpretive task would be easier if it did. But the absence of a specific reference does not, in this context, constitute an implied restriction. The statute requires injury to a "competitor," and a tendency to destroy "competition," without any further inclusive or restrictive language delineating the scope of those terms. As we have seen, [section 17045](#)'s evident concern with discrimination between competing purchasers suggests its intended protection extends to such competition. That the language used is somewhat less explicit than that of federal price discrimination [\*1256] laws does not persuade us we should read into the statute a restriction contrary to its apparent intent.<sup>2</sup>

#### [\*\*\*\*11] B. *Statutory Purposes and Historical Background*

Our conclusion is strengthened when we consider the purposes and history of the UPA in general and [section 17045](#) in particular.

The declared purposes of the UPA are "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." ([§ 17001](#).) In upholding the law against an early constitutional challenge, this court described it as a legislative attempt "to regulate business as a whole by prohibiting practices which the legislature has determined constitute unfair trade practices." ([Wholesale T. Dealers v. National etc. Co. \(1938\) 11 Cal. 2d 634, 643 \[82 P.2d 3, 118 A.L.R. 486\]](#); see also [Max Factor & Co. v. Kunsman \(1936\) 5 Cal. 2d 446, 478 \[55 P.2d 177\]](#) (dis. opn. of Shenk, J.) [UPA "appears to be a painstaking endeavor by the legislature to combat the abuses which the business interests have deemed unfair practices in the competitive field."].) The Legislature thus, as a Court of Appeal has remarked, [\*\*\*\*12] "set itself no small goal." ([Paramount Gen. Hosp. Co. v. National Medical Enterprises, Inc. \(1974\) 42 Cal. App. 3d 496, 500](#)

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<sup>2</sup> Needless to say, we repudiate the dissent's suggestion we have "perverse[ly]" attempted to "introduce[] into the statute an ambiguity that is not present if the words are taken to mean what they say." (Dis. opn., post, at p. 1272.) In our view, the text of [section 17045](#) is not so much ambiguous as simply silent on the question before us; it neither restricts "competition" to the primary line, nor expressly extends to competition in the secondary line. The dissent, like MECA, relies heavily on a supposed implication arising from [section 17045](#)'s reference to the prohibited acts of sellers, but, as we have seen, any such implication dissolves when the statutory context--especially [sections 17046, 17047](#) and [17048](#)--is considered. In any event, the dissent's inferential method of interpretation hardly justifies its claim of unique fidelity to the plain statutory text.

[117 Cal. Rptr. 42].) That it might have a better chance of success, the Legislature specifically directed that the UPA's provisions "shall be liberally construed that its beneficial purposes may be subserved." ([§ 17002](#).)

[Section 17045](#) seeks to foster "fair and honest competition" ([§ 17001](#)) by prohibiting certain "dishonest, deceptive . . . and discriminatory practices" (*ibid.*), including the secret allowance of an unearned discount where such allowance injures a competitor and tends to destroy competition. We think it clear [section 17045](#) would more fully serve the UPA's purposes if its protections were to extend to the secondary line. Business competition among buyers of a product is competition, no less than that among sellers. A [[\\*1257](#)] deceptive practice that tends to destroy competition is no less repugnant to the policy of the UPA because the competitive injury occurs among wholesalers or retailers, rather [[\\*\\*295](#)] [[\\*\\*\\*117](#)] than among producers. As the United States Supreme Court explained in holding the Clayton Act's anti-price-discrimination [[\\*\\*\\*\\*13](#)] provision applicable to secondary line injury, "[t]he fundamental policy of the legislation is that, in respect of persons engaged in the same line of . . . commerce, competition is desirable and that whatever substantially lessens it or tends to create a monopoly in such line of commerce is an evil. Offense against this policy, by a discrimination in prices exacted by the seller from different purchasers of similar goods, is no less clear when it produces the evil in respect of the line of commerce in which they are engaged than when it produces the evil in respect of the line of commerce in which the seller is engaged." ([Van Camp & Sons v. Am. Can Co., supra, 278 U.S. at p. 254 \[49 S. Ct. at p. 114\]](#).) [HN5](#)↑ In light of the legislative mandate that we construe [section 17045](#) "liberally . . . that its beneficial purposes may be subserved" ([§ 17002](#)), we must, in the absence of clear evidence of a contrary legislative intent, interpret the statute to protect against competitive injury in the secondary, as well as primary, lines of commerce.

[HN6](#)↑ In further aid of the UPA's effective enforcement, moreover, its enactors provided that an action to enjoin a violation or recover damages [[\\*\\*\\*\\*14](#)] may be brought by "[a]ny person or trade association." ([§ 17070](#).) Thus the law "denounces unfair competition and so-called piratical trade transactions, and was designed to afford full relief against such abuses on behalf of anyone aggrieved." ([Max Factor & Co. v. Kunsman, supra, 5 Cal. 2d at p. 478](#) (dis. opn. of Shenk, J.), italics added; see also Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting* (1936) 24 Cal.L.Rev. 640, 647 (hereafter Grether) [broad standing provision later codified as [section 17070](#) was designed to allow trade groups to "police" competition in their various trades].) Hence, a retailer or wholesaler, or a trade organization representing such a class of merchants, clearly has standing to sue a producer for offering secret rebates or discounts to some members of the group but not to others. Yet, under MECA's interpretation of [section 17045](#), such plaintiffs may not rely on their own injury, or on the destruction of competition among themselves, but must instead, or in addition, plead and prove injury at the producer's level.<sup>3</sup> Such a construction would work to frustrate, rather than further, the UPA's goal [[\\*\\*\\*\\*15](#)] of furthering competition at all levels of trade.

[[\\*1258](#)] [CA\(4a\)](#)↑ (4a) Turning to the UPA's historical background, we find additional confirmation for our conclusion.<sup>4</sup> As will be seen below, the historical evidence strongly suggests the statute later codified as [section 17045](#) was aimed primarily at protecting against competitive injury among buyers of goods, rather than sellers. More specifically, the statute's prohibitions on secret discriminatory prices and rebates appear to have been intended mainly to restrain the quickly growing chain stores from certain well-documented abuses of their buying power, abuses that, together with other factors, were thought to have a highly destructive effect on wholesale and retail competition in the food industry and other trades.

[[\\*\\*\\*\\*16](#)] The UPA came into being piecemeal. Although a prohibition on locality discrimination (now [§ 17040](#)) was first enacted in 1913, two other major substantive provisions, the prohibitions on secret rebates and unearned discounts ([§ 17045](#)) and on sales below cost ([§ 17043](#)), were not added until 1933. (Stats. 1913, ch. 276, § 1, p.

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<sup>3</sup> MECA concedes ABC had standing to bring this action, but maintains ABC is nonetheless required to plead and prove injury to one of MECA's competitors.

<sup>4</sup> The parties have not provided, and our own research has not discovered, any direct legislative history relating to the enactment of [section 17045](#)'s predecessor. Of necessity we rely on broader evidence of the legal and economic concerns motivating the law.

508; Stats. 1933, ch. 261, § 1, p. 793; Stats. 1933, ch. 504, § 1, p. 1280.) In 1935, the entire law was repealed and reenacted as a whole, supplemented and given its present name. (Stats. 1935, ch. 477, § 1, pp. 1546-1551.) In 1941 it was codified in the Business and Professions Code with the basic structure it has today. (Stats. 1941, ch. 526, § 1, pp. 1839-1846.) The pertinent historical background, then, is that of the early to middle 1930's.

[\*\*296] [\*\*\*118] The chain store problem "became important in the 1920's [and] resulted in political action that culminated in the 1930's." (Edwards, *The Price Discrimination Law* (1959) p. 10 (hereafter Edwards).) Between 1919 and 1927, retail sales by grocery chains almost quadrupled; those by drug, candy and variety chains more than doubled. (*Id. at p. 9.*) While lawmakers had earlier been concerned primarily [\*\*\*\*17] with geographic discrimination used to obtain a local monopoly, new problems came to the fore during the 1920's as the chains grew in size, integrated wholesale and retail functions, and gained extraordinary purchasing power. (*Id. at pp. 8-9.*) The perceived importance of the chain store problem grew with the coming of the Depression, which "added to the economic distress of independents and intensified their fear and hatred of the chains, whose price appeal was sharpened by the slash in consumer income." (Palamountain, *The Politics of Distribution* (1955) p. 160 (hereafter Palamountain).)

In 1926, the Federal Trade Commission (FTC) began an investigation of the chain stores; the investigation produced numerous interim reports and a [\*1259] final report issued in December 1934. (Edwards, *supra*, at p. 10.) The FTC found a pattern of "special discounts and allowances" granted to chains in preference to independent wholesalers and retailers. (FTC, Final Rep. on Chain-Store Investigation, Sen. Doc. No. 4, 74th Cong., 1st Sess., p. 60 (1935).) Grocery manufacturers reported selling to chain stores at a discount from the price charged other customers. In many cases the discount [\*\*\*18] was purportedly for volume buying, but "the quantity purchased ha[d] no relation to the difference in price," the discount actually being only the result of hard bargaining by the chain purchaser. (*Id. at p. 61.*) Some manufacturers, in grocery and other industries, regularly granted chains a discount of up to 10 percent, with other distributors allowed only a much lower discount. For example, one manufacturer gave buyers a "confidential rebate" at year's end, "the rate to wholesalers being 2 percent, to chains generally it was 5 percent, but to two particular chains, it amounted to 10 percent." (*Id. at p. 62.*) In addition, a large number of manufacturers in the grocery, drug, tobacco and candy industries reported that the chain purchasers, through bargaining, had obtained preferential "promotional allowances," which in some cases were "not used for that purpose [advertising] at all" and bore "no direct relation to the volume of sales." (*Id. at p. 61.*) Similarly, the chains demanded and were granted special allowances for brokerage. (*Id. at p. 62.*)

As in the case just noted, of a manufacturer whose year-end rebates to buyers were kept "confidential," preferential [\*\*\*19] rebates and unearned discounts were typically not disclosed publicly or to the trade generally. To the contrary, these discounts--or their unearned character--were frequently kept secret so that the buyer's competitors would not demand the same treatment. (See Fulda, *Food Distribution in the United States: The Struggle Between Independents and Chains* (1951) 99 U.Pa. L.Rev. 1051, 1086 (hereafter Fulda) [unearned advertising allowance constitutes "an indirect secret rebate"]; *id. at pp. 1130-1131* [New York Great Atlantic & Pacific Tea Company's (A & P's) use of illusory quantity discounts as disguised preference]; *id. at pp. 1132-1133* [examples of A & P's efforts to keep its unique price concessions secret].)

Depression conditions, moreover, gave chains greater relative buying power; "[c]onsequently, the difference between the prices charged chains and those charged smaller distributors apparently widened, and the attention of independents was increasingly focused on discounts." (Palamountain, *supra*, p. 192.) The resulting "secret rebates" and other discriminatory allowances were not insignificant in size; in the best known case, that of the A & P chain, they [\*\*\*20] totaled more than \$ 8 million in the single year 1934. ( *New York Great Atl. & Pac. Tea Co. v. Grosjean* (1937) 301 U.S. 412, 421 [57 S. Ct. 772, 775, 81 L. Ed. 1193, 112 A.L.R. 293].) "The leverage which [\*1260] accomplished this was the enormous purchasing power of the company." (*Ibid.*)

The perceived impact of such deceptive and discriminatory practices on the chains' competitors--the independent retailers and wholesalers--was the primary evil targeted in the Robinson-Patman Act. "It is . . . too [\*\*297] [\*\*\*119] well known to require extensive exposition . . . that the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congressional concern over the impact upon secondary-line competition

of the burgeoning of mammoth purchasers, notably chain stores." (*F.T.C. v. Anheuser-Busch, Inc., supra, 363 U.S. at pp. 543-544 [80 S. Ct. at p. 1271]*, fn. omitted.) The problem was perceived to have both economic and, more broadly, social aspects. Economically, price discrimination in favor of chains added to their cost advantage over competing retailers, helping them to undersell the independents and ultimately drive them from the field, thereby [\*\*\*\*21] tending to create monopoly conditions. (FTC, Final Rep. on the Chain-Store Investigation, *supra*, Sen. Doc. No. 4, 74th Cong., 1st Sess., at p. 64; see also Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective* (1957) 57 Colum. L.Rev. 1059, 1062 [while chain stores grew in the 1920's and 1930's, independent retailers went out of business at an average rate of 10 percent per year].) Socially, it was feared the result of chain store domination would be the loss of an endangered middle class, the "prosperous bourgeois class [that] has been considered one of the mainstays of our civilization." (Comment (1933) 22 Cal.L.Rev. 86, 101.)<sup>5</sup>

[\*\*\*\*22] The pressure for remedial legislation was not confined to Washington. In California, a fair trade law, authorizing retail price maintenance agreements [\*1261] with respect to trademarked products, had been passed in 1931 and strengthened in 1933. (Stats. 1931, ch. 278, p. 583; Stats. 1933, ch. 260, § 1, p. 793, repealed Stats. 1975, ch. 402, § 1, p. 878.) In part because much of the grocery trade dealt in unbranded goods, however, the law was of limited usefulness in that industry. (Fulda, *supra*, 99 U.Pa. L.Rev. at p. 1117.) The independent grocers therefore led the political fight for the UPA, which was opposed by the grocery chains. (Grether, *supra*, 24 Cal.L.Rev. at pp. 647-648; see also Fulda, *supra*, 99 U.Pa. L.Rev. at pp. 1117-1118, fn. 288 [quoting an officer of the California Retail Grocers and Merchants Association as saying the UPA "is the finest law ever enacted on the Statute books of any state, as far as our industry is concerned"].)

This history teaches that a primary concern in the enactment of the UPA was the protection of smaller, independent retailers, especially grocers, against unfair competitive practices of the large chain stores. As a contemporary [\*\*\*\*23] commentator explained, the prohibitions added in 1933 on secret rebates and unearned discounts (now [section 17045](#)) and below-cost sales (now [section 17043](#)) "are designed to protect the retailer whose more powerful neighbor is attempting to drive him out of business." (Comment, *supra*, 22 Cal.L.Rev. at p. 102; see also *G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 271 [195 Cal. Rptr. 211, 41 A.L.R.4th 653]* [UPA closely parallels, and is based upon same policies as, Robinson-Patman Act]; *Uneedus v. California Shoppers, Inc. (1978) 86 Cal. App. 3d 932, 937 [150 Cal. Rptr. 596]* [same].) More specifically, the provision that became [section 17045](#) was almost certainly designed to prohibit and protect against the practice of granting to chains [\*\*298] [\*\*\*120] and other large distributors, as a result of their much greater bargaining power, secret rebates, unearned discounts and other unearned allowances not granted to smaller, independent merchants. These practices had been thoroughly investigated and were widely known, and were believed to have highly destructive effects on competition at the wholesale and retail levels in a variety of industries. The competitive injury [\*\*\*\*24] involved was to the disfavored buyers, and the tendency to destroy competition was in the line of commerce practiced by the favored buyer.<sup>6</sup>

<sup>5</sup> Representative Wright Patman, introducing his 1935 bill in the House of Representatives, described both aspects of the chain store problem in characteristically vivid language: "In the field of merchandise distribution a Goliath stands against divided forces plying a powerful weapon with a skillful hand against the vulnerable weaknesses of his opponents. [P] The Goliath is the huge chain stores sapping the civic life of local communities with an absentee overlordship, draining off their earnings to his coffers, and reducing their independent business men to employees or to idleness. [P] His weapon is huge buying power, by the manipulation of which he threatens manufacturers and others with financial stringency or even bankruptcy if they refuse him the prices and terms he demands. His opponents are not only these manufacturers, not only the independent competitors whom he seeks to eliminate, but the consuming public, whom he hopes then to have at his mercy." (Remarks of Rep. Wright Patman introducing H.R. No. 8442, 74th Cong., 1st Sess., 79 Cong. Rec. 9077 (June 11, 1935) reprinted in 4 Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* (1980) p. 2927 (hereafter Kintner).) Elsewhere Representative Patman emphasized that the chains were enriching themselves at the expense of independent merchants not through fair and open competition but through "secret rebates" and "special discounts" not available to the independents. (House Debate on H.R. No. 8442, 74th Cong., 2d Sess., 80 Cong. Rec. 8102 (May 27, 1936) reprinted in 4 Kintner, *supra*, at p. 3268.)

<sup>6</sup> By 1938, there were a large number of state unfair practices acts, commonly prohibiting unjustified price discrimination as well as sales below cost. A commentator at that time identified an important purpose of the anti-discrimination provisions as "the

[\*\*\*\*25] Thus, the background of the UPA's prohibition on unearned discounts, codified as [section 17045](#), confirms our view the statute was intended [\*1262] primarily to protect against competitive injury in the secondary line of commerce, i.e. at the level of the discount's recipient. In the present case, ABC alleged just such injury and tendency to destroy competition.

MECA accuses ABC of construing [section 17045](#) "as though it were designed to protect individual dealers from price competition at the expense of consumers." Such an interpretation would assertedly be inconsistent with the statutory purpose, as MECA characterizes it, of "insuring the continued existence of vigorously competitive markets." While some commentators, MECA notes, have criticized aspects of the Robinson-Patman Act or its enforcement as anticompetitive and therefore in conflict with other antitrust laws, the California Legislature, MECA argues, avoided such conflicts in policy by "limiting the [UPA's] scope entirely to pro-competitive regulation of primary-line competition."

For three reasons, we find MECA's policy arguments unpersuasive. First, the interpretive question in this case does not concern protection [\*\*\*\*26] of individual competitors versus competition generally. [HN7](#) [↑] By its terms, [section 17045](#) requires the plaintiff to prove not only injury to a competitor, but, *in addition*, a tendency "to destroy competition." (Cf. Fulda, *supra*, 99 U.Pa. L.Rev. at p. 1109 [*disjunctive* language of Robinson-Patman Act section 2(a), [15 United States Code section 13\(a\)](#), has been interpreted as including discrimination that causes injury only to a particular competitor].) Thus, whatever may be the federal law or enforcement pattern, [section 17045](#) applies only when the discriminatory rebate, discount or allowance has a tendency to destroy competition *generally*. The only question here is whether "competition" includes business competition at the level of the favored purchaser, as well as at the level of the seller. For reasons already discussed, we conclude that, for purposes of [section 17045](#), competition is competition, whether among retailers, wholesalers or producers.

Second, MECA's view of the statutory purposes is unjustifiably narrow. [Section 17045](#), and the UPA as a whole, reflect a Legislative concern not only with the maintenance of competition, but with the maintenance of "fair [\*\*\*\*27] and honest competition." ([§ 17001](#), *italics added*; see also [State v. Langley, supra, 84 P.2d at p. 772](#) [The aim of the Wyoming unfair practices act "is to maintain fair competition, but to prevent unfair and ruinous competition."].) [\*1263] Our law attempts to foster such competition through the prohibition of certain "unfair, dishonest, deceptive, destructive, fraudulent and discriminatory [\*\*299] [\*\*\*121] practices" ([§ 17001](#)), including the solicitation and allowance of secret discriminatory discounts and rebates ([§ 17045](#), [17047](#)). As long ago as 1903, a leading commercial court observed that "[w]hile public policy demands a healthy competition, it abhors favoritism, secret rebates, and unfair dealing . . ." ( [John D. Park & Sons Co. v. National W. Druggists' Ass'n \(1903\) 175 N.Y. 1 \[67 N.E. 136, 139\]](#)). [Section 17045](#) reflects the same policy viewpoint.

Finally, to the extent MECA's arguments go to the *wisdom* of protecting secondary line competition, rather than to the legislative intent, they are irrelevant to our interpretive task. [CA\(5\)](#) [↑] (5) As this court said 59 years ago, in rejecting a constitutional challenge to the UPA, [HN8](#) [↑] "[i]t is not for the courts, except [\*\*\*\*28] within the limits herein set forth, to determine whether or not the policy of a statute is economically sound or beneficial. That is a matter solely for the legislature." ( [Wholesale T. Dealers v. National etc. Co., supra, 11 Cal. 2d at pp. 646-647](#).) [CA\(4b\)](#) [↑] (4b) MECA has not shown, to the degree of certainty required to exclude the possibility of a contrary legislative view, that the protection of fair and honest competition in the secondary line necessarily impedes retail competition and inures to the detriment of the ultimate consumer. It has been argued, with at least equal

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prevention of discriminatory sales by manufacturers to customers with unusually strong bargaining power who can force large price concessions." (Comment, *Prohibiting Price Discrimination and Sales Below Cost: The State Unfair Practices Acts* (1938) 32 Ill. L.Rev. 816, 819-820, fn. omitted; see also Dewell & Gittenger, *The Washington Antitrust Laws* (1961) 36 Wash. L.Rev. 239, 277 [Washington's "secret rebate" statute, worded similarly to [section 17045](#), was designed to prohibit similar types of business conduct as the federal Robinson-Patman Act]; [Ideal Plumbing Co. v. Benco \(8th Cir. 1976\) 529 F.2d 972, 978, fn. 7 \[42 A.L.R.Fed. 266\]](#) [same as to Arkansas statute, enacted in 1937, whose prohibitory language is identical to that of [section 17045](#)]; [Jaquet Lumber v. Kolbe & Kolbe Millwork \(1991\) 164 Wis.2d 689 \[476 N.W.2d 305, 309\]](#) [Wisconsin statute worded almost identically to [section 17045](#) "was designed to accomplish the same goals" as Robinson-Patman Act]; [State v. Langley \(1938\) 53 Wyo. 332 \[84 P.2d 767, 774\]](#) [Wyoming unfair practices act "probably intended mainly for their [independent merchants'] benefit."].)

persuasiveness, that the chain stores' solicitation and receipt of secret favoritism from producers hurt consumers in two ways: In the short term, it was believed, the producers recouped the losses in sales to chains by charging higher prices to the independent wholesalers and retailers, who passed them on to consumers; in the long term, the secret rebates helped chains move toward monopoly or dominance in some markets, allowing them ultimately to raise consumer prices. (FTC, Final Rep. on the Chain-Store Investigation, *supra*, Sen. Doc. No. 4, 74th Cong., 1st Sess., at p. 64; Fulda, *supra*, 99 U.Pa. L.Rev. [\*\*\*\*29] at pp. 1105-1106.) Some have thought these concerns exaggerated (see, e.g., Edwards, *supra*, p. 10, fn. 19 [reporting dispute over FTC's conclusion that price discrimination in favor of chains contributed substantially to chains' ability to undersell independent retailers]), but where the truth lies in such economic debates is not for us to say.

#### C. Prior Judicial Interpretation: *Harris v. Capitol Records etc. Corp.*

MECA, like the Court of Appeal, relies principally on certain language in our decision in *Harris v. Capitol Records etc. Corp.*, *supra*, 64 Cal. 2d 454 (hereafter *Harris*). Read in context of the issues actually presented in that case, however, *Harris* neither binds us precedentially to MECA's position nor persuades us to adopt it. [\*1264]

In *Harris*, a phonograph record retailer sued three record distributors, alleging they had given a competing retailer, a former "rack-jobber" who had opened his own retail store across the street from plaintiff's, larger dealer discounts than those allowed the plaintiff. The plaintiff contended the differential discounts constituted "locality discrimination" as defined in [section 17031](#) and prohibited [\*\*\*\*30] in [section 17040](#). (*Harris, supra*, 64 Cal. 2d at pp. 456-457).<sup>7</sup> This court affirmed summary judgment for the defendants.

[\*\*\*\*31] **CA(6)[↑] (6)** We held, first, that the UPA's locality discrimination prohibition, while somewhat broadened by a 1931 amendment, retained a necessary element of *geographic* price difference; what was fundamentally prohibited was discrimination between locations, rather [\*\*300] [\*\*\*122] than between purchasers as such. (*Harris, supra*, 64 Cal. 2d at pp. 458-460.) In particular, the defining language of [section 17031](#) ("selling . . . at a lower price . . . in one location . . . than in another") implied that a seller, to violate [section 17040](#), "must have at least two different places of business and must sell at a lower price *in* one than *in* the other." (64 Cal. 2d at p. 460.) Locality discrimination could therefore not be proven in *Harris*, as the two locations involved were owned by the competing buyers, not by any of the sellers. (*Ibid.*) Apparently as an alternative ground of decision, we went on to agree with the defendants' argument that "[section 17040](#) is intended to apply only to competition on the same 'level' as the person allegedly creating the locality discrimination." (*Ibid.*)

**CA(7)[↑] (7)** The above summarized discussion in *Harris* was addressed solely to the claim the defendants [\*\*\*\*32] had committed locality discrimination, as defined in [section 17031](#) and prohibited in [section 17040](#). Although the plaintiff apparently did not claim the defendants had also violated [section 17045](#), we briefly addressed that possibility later in the decision. We held [section 17045](#) did not apply to advertising allowances allegedly granted to the competing retailer, because the allowances were neither secret nor discriminatory, being available to all purchasers buying on like terms and conditions. (*Harris, supra*, 64 Cal. 2d at p. 463.)

[\*1265] MECA does not rely on this portion of *Harris*, in which we directly addressed [section 17045](#), but on an earlier parenthetical mention of the statute in our discussion of locality discrimination. The cited passage is as follows: "Throughout the Act the Legislature has manifested its intent to discourage practices which injure the

<sup>7</sup> [Section 17040](#) provides: "It is unlawful for any person engaged in the production, manufacture, distribution or sale of any article or product of general use or consumption, with intent to destroy the competition of any regular established dealer in such article or product, or to prevent the competition of any person who in good faith, intends and attempts to become such dealer, to create locality discriminations. [P] Nothing in this section prohibits the meeting in good faith of a competitive price."

[Section 17031](#) provides: "Locality discrimination means a discrimination between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing an article or product, at a lower price in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another."

seller's competitors ([§ 17040](#), [17043](#), [17045](#), [17071](#)) and thereby tend to create the monopolies condemned by [section 17001](#) [citation]. Equally apparent is the Legislature's concern to allow the seller to meet in good faith the prices of his competitors ([§ 17040](#), [17050](#)), thereby fostering the competition [\*\*\*\*33] promoted by [section 17001](#). Together these constitute the 'horizontal' concept of price regulation, one of the fundamental characteristics of this legislation." (*Harris, supra*, [64 Cal. 2d at p. 461](#).)

The issue under discussion in this part of *Harris* was whether the differential discount offered by a record company to one of two retailers--record stores located across the street from one another--constituted locality discrimination within the meaning of [sections 17031](#) and [17040](#). Not surprisingly, we held it did not. Neither our discussion of locality discrimination as a whole, nor the above quoted inclusion of [section 17045](#) in a parenthetical dictum, can reasonably be read as *holding* that a disfavored buyer alleging a violation of [section 17045](#) must plead and prove competitive injury in the primary line of commerce. This is especially so in light of the later passage, already discussed, in which we specifically focused on [section 17045](#) and held it inapplicable for reasons unrelated to the fact the injuries alleged by the *Harris* plaintiff were to the buyer's competitors, rather than the seller's. ([64 Cal. 2d at p. 463](#).) Thus, the *Harris* decision has no *binding* [\*\*\*\*34] precedential effect on the current case.<sup>8</sup>

**CA(8)[↑]** (8) Nor does the *Harris* court's analysis of [section 17040](#) persuade us to MECA's interpretation of [section 17045](#). In our view, both sections of the UPA are designed to foster competition and prevent monopoly conditions, but the particular threats to competition they are principally intended [\*\*\*\*35] to meet are fundamentally different. As we observed in *Harris*, the threat to competition caused by locality discrimination was typically to primary [\*\*301] [\*\*\*123] line competition. A "large retail chain," we explained, could "lower its prices at a [\*1266] store in one area, constituting a severable market, until the competition from smaller, local businesses in that community had been eliminated, concurrently offsetting the losses it thus suffered by charging higher prices in its other areas of operation. After the demise of competitors, the chain outlet would then realize monopoly profits, and the process of attrition would be repeated elsewhere." (*Harris, supra*, [64 Cal. 2d at p. 458](#).) Locality discrimination was an anticompetitive abuse engaged in by chain retailers as *sellers*, to the injury of competing *sellers*. As we have seen earlier, however (see *ante*, pt. I.B.), the solicitation and extortion of secret rebates, unearned discounts and other discriminatory allowances was an anticompetitive abuse historically engaged in by the chains as *buyers*, to the injury of competing *buyers*, i.e. the independent retailers and wholesalers. That the Legislature [\*\*\*\*36] may have intended [section 17040](#) to protect mainly against injury in the primary line, therefore, does not detract from our earlier conclusion that the protections of [section 17045](#) extend to injury in the secondary line.<sup>9</sup>

<sup>8</sup> In support of its interpretation, MECA also cites *Plotkin v. Tanner's Vacuums* (1975) 53 Cal. App. 3d 454 [125 Cal. Rptr. 697], and *Carlock v. Pillsbury Co.* (D.Minn. 1989) 719 F. Supp. 791. *Plotkin* did not involve unearned discounts or any form of discriminatory pricing, and discussed only [sections 17040](#) and [17043](#). The discussion in *Carlock* concerned only [section 17040](#). Similarly, the dissenting opinion's reliance on *Beam v. Monsanto Co., Inc.* (1976) 259 Ark. 253 [532 S.W.2d 175, 181-182] (dis. opn., post, at p. 1279, fn. 2) is misplaced, as that decision concerned only a locality discrimination prohibition modeled on [sections 17031](#) and [17040](#).

<sup>9</sup> For the proposition that the UPA operates "horizontally" rather than "vertically," we cited, in *Harris*, three law review articles, two of which MECA cites for the same proposition. None specifically addresses the question before us. The principal authority relied upon, Professor Ewald Grether, appears to have meant, in distinguishing between the "horizontal" UPA and the "vertical" Fair Trade Law, merely that under the UPA "action . . . need not wait upon the initiative of manufacturers or distributors at the apex of the distributive pyramid, but may arise at any level." (Grether, *supra*, 24 Cal.L.Rev. at p. 686.) One should also note that Professor Grether, in the cited article, focused on the historical background and prospects for enforcement of the UPA and Fair Trade Law, and disavowed any intent to engage in "[i]nterpretation of the law, technically speaking." ( *Id. at p. 641*.) The reference to "the horizontal concept of trade regulation" in Cupp, *The Unfair Practices Act* (1936) 10 So.Cal.L.Rev. 18, is brief and nonspecific. The final academic passage quoted in *Harris, supra*, [64 Cal. 2d at pages 461-462](#), deals specifically with primary versus secondary line injury, but was concerned only with the locality discrimination provisions, which, of course, were also the only provisions at issue in this part of *Harris*. (Birmingham, *Legal Aspects of Petroleum Marketing Under Federal and California Laws* (1960) [7 UCLA L.Rev. 161, 246-247](#).) None of the cited passages persuades us to MECA's view of [section 17045](#).

[\*\*\*\*37] The difference in principal application between [section 17045](#) and the locality discrimination prohibition in [sections 17040](#) and [17031](#) is reflected in their language. Neither [section 17040](#) nor [section 17031](#) refers to individual purchasers. Locality discrimination, as defined in [section 17031](#), requires different prices at different "locations." Thus "the smallest geographic unit [[section 17031](#)] envisages is the individual store or outlet, not the individual purchaser regardless of location." (*Harris, supra*, 64 Cal. 2d at p. 460.) [Sections 17031](#) and [17040](#) are tailored to address the problem of a distributor, typically a retailer, selling out of many locations, who might use geographical price discrimination as a predatory practice against its own competitors.

[Section 17045](#), in contrast, forbids discrimination in favor of "certain purchasers" at the expense of other "purchasers." As discussed earlier (pt. [\*1267] I.A., ante), the section is patently concerned with "preventing a distributor from discriminating between customers." (*Chicago Title Ins. Co. v. Great Western Financial Corp., supra*, 69 Cal. 2d at p. 323.) Moreover, [section 17045](#), unlike the locality [\*\*\*\*38] discrimination provisions, applies only to "secret" rebates and discounts. A retail seller, needing to attract buyers in large number, typically advertises any available discounts and rebates widely, rather than keeping them secret. In contrast, a producer from whom a large retailer has extracted special concessions might well prefer to keep such concessions secret. [Section 17045](#) is thus tailored to address the problem of a manufacturer or other producer who is forced or induced to give preferential prices to one or more individual purchasers, typically retailers. This practice, of course, is likely to be injurious to the disfavored *buyers'* business position and may tend to destroy competition among such *buyers*.

The dissent imagines that our reading of [section 17045](#) originates in a "desire to do [\*\*302] [\*\*\*124] good, be universally fair, and make everybody happy." (Dis. opn., *post*, at p. 1272.) While we need not go so far as to disclaim all interest in fairness and human happiness, our goal in this case has been narrower and simpler: we have attempted to discover the legislative intent by examining the statutory language, the stated purposes of the law and the historical [\*\*\*\*39] background of its enactment. If we have mistaken that intent, or if the Legislature determines today's economic conditions require a different regulatory scheme, the remedy lies with that body "on the other side of Tenth Street." (*Osborn v. Hertz Corp.* (1988) 205 Cal. App. 3d 703, 711 [252 Cal. Rptr. 613].)

Reading beyond the dissenting opinion's hyperbolic rhetoric, its main argument seems to be that "interbrand competition" is the sole proper end of antitrust legislation, that "vertical restrictions" on trade are *per se* unobjectionable, and that fair and open competition among wholesalers and retailers could not, therefore, possibly be considered worthy of legislative protection. In response, it is perhaps sufficient to observe that *none* of these precepts are reflected in the language, stated purposes, or history of the UPA. [Section 17045](#) requires proof of injury to, and a tendency to destroy, "competition," not "interbrand competition." Whether economists, professors of law or our dissenting colleague believe today that the use of secret, discriminatory rebates and discounts is an efficient "vertical restriction," is immaterial, because it is clear that in 1933 the [\*\*\*\*40] California Legislature considered such hidden discrimination to be a "dishonest, deceptive, . . . and discriminatory practice" destructive of "fair and honest competition." ([§ 17001](#)) Finally, whatever the current economic orthodoxy may be, the historical background we have rehearsed above belies the dissent's assumptions. During the period [\*1268] of [section 17045](#)'s enactment, the chain stores' receipt of secret rebates, unearned discounts and allowances was widely understood as a threat to vigorous and fair competition at the retail and wholesale levels, and the potential loss of independent merchants engaged in such competition was regarded as an economic and social problem requiring legislative redress.

In summary, the language, context, purposes and history of [section 17045](#) all point to the conclusion its protection extends to competition in the secondary line. The Court of Appeal therefore erred in affirming the order sustaining MECA's demurrer to ABC's first cause of action and the subsequent dismissal.<sup>10</sup>

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<sup>10</sup> In its brief, MECA also contends certain allegations in ABC's current and superseded complaints contradict and "negate" ABC's necessary allegations of competitive injury (at any level) and secrecy. The issues thus raised were not among those specified in the petition for review or the answer, and are not fairly included in them. (See Cal. Rules of Court, rule 29.3(c).) We decline to expand the scope of review.

[\*\*\*\*41] II. Restitution Under [Section 17203](#)

**CA(9)[<sup>↑</sup>] (9) HN9[<sup>↑</sup>] [Section 17203](#)** provides, in pertinent part: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." <sup>11</sup> MECA contends restitution is available as relief under [section 17203](#) only when ancillary to an injunction. The Court of Appeal agreed, holding ABC's cause of action under [section 17203](#) was properly dismissed on demurrer because no prayer was made for an injunction against future unfair competition.

[\*\*\*\*42] Nothing in the actual language of [section 17203](#) indicates the availability of restitution is contingent on the issuance of an injunction. The statute contains, as ABC notes, no language of condition linking injunctive and restitutionary relief. On its face, [section 17203](#) appears to authorize "injunctive relief to prevent [unfair competition], and/or restitution" [\[\\*\\*303\]](#) [\[\\*\\*\\*125\]](#) (i.e. disgorgement) of money or property wrongfully obtained." ([State Farm Fire & Casualty Co. v. Superior Court \(1996\) 45 Cal. App. 4th 1093, 1102 \[53 Cal. Rptr. 2d 229\]](#), italics added.)

The appellate court below did not discuss the statutory language, relying instead on three prior cases: [People v. Superior Court \(Jayhill\) \(1973\) 9 Cal. 3d 283 \[107 Cal. Rptr. 192, 507 P.2d 1400, 55 A.L.R.3d 191\]](#) (hereafter *Jayhill*), [Fletcher v. Security Pacific National Bank \(1979\) 23 Cal. 3d 442 \[153 Cal. Rptr. 28, 591 P.2d 51\]](#) (hereafter *Fletcher*), and [People v. Thomas Shelton Powers, M.D., Inc. \(1992\) 2 Cal. App. 4th 330 \[3 Cal. Rptr. 2d 34\]](#) (hereafter *Powers*). MECA relies on the same cases.<sup>12</sup> None of those decisions, however, holds--or even states in dictum--that [\*\*\*\*43] restitution or disgorgement under [section 17203](#) is contingent on injunctive relief.

[\*\*\*\*44] In *Jayhill*, this court considered the availability of restitution under section 17535, which, in language similar to that of 17203, sets out remedies for fraudulent advertising. At the time the complaint was filed, section 17535 provided only that violations could be enjoined, making no reference to restitution. ([9 Cal. 3d at p. 286](#).) We observed, however, that the statute did not purport to *restrict* a court's equitable powers, and concluded that, in the absence of such restriction, a court of equity retained the "full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved." (*Ibid.*) An order for restitution, therefore, was within the court's power. Although in *Jayhill* an injunction had been sought and allowed, and we therefore described restitution as "a form of ancillary relief" (*ibid.*), we did not hold or state that a court would lack the power to issue a restitutionary order under section 17535 if no injunction were also sought.

<sup>11</sup> [Section 17200](#) defines "unfair competition," for purposes of the code chapter that includes [section 17203](#), to include any unlawful business act or practice. In its second cause of action, ABC alleged MECA's violation of [section 17045](#) constituted unfair competition within this definition.

**HN10[<sup>↑</sup>]**

<sup>12</sup> MECA also cites and provides the court with selected staff analyses, reports and letters accompanying the 1976 amendment of [section 17203](#) by which the explicit authorization for restitutionary relief was added. None of them discuss the question before us, although the language of some reveals the authors' *assumptions* that restitution would be ancillary to an injunction. Whatever value these materials might have provided in resolving the present question evaporates upon examination of other reports, analyses and letters cited and provided by an amicus curiae supporting ABC's position--materials that, in some cases, reflect the opposite assumption as to the independence of restitution from injunctive relief, and in other cases neutrally describe the proposed amendments without making any such assumption. Neither set of legislative materials indicates the Legislature actually considered and resolved the question before us. (See [California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. \(1997\) 14 Cal. 4th 627, 648 \[59 Cal. Rptr. 2d 671, 927 P.2d 1175\]](#) ["we hesitate to accord much weight to an anonymous staff report that was merely summarizing the effect of a proposed bill"].)

In *Fletcher*, this court again construed section 17535. Although we again described restitution as "a form of ancillary [\*\*\*\*45] relief in such an injunctive action" ([23 Cal. 3d at p. 454](#)), we did not hold or assert that restitution was permitted *only* as ancillary relief. The question under discussion, moreover, was not whether restitution is available as an independent remedy, but whether it is available in a class action without proof that each individual plaintiff lacked knowledge of the fraudulent nature of the practice when he [\*1270] or she did business with the defendant. ([Id. at pp. 449-454](#).) We held the lack of such proof was not fatal to certification of the class; section 17535, we explained, "authorizes a trial court to order restitution in the absence of proof of lack of knowledge in order to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains." ([Fletcher, supra, 23 Cal. 3d at p. 449](#).)

Finally, in *Powers*, the Court of Appeal held an order for disgorgement or restitution of illegal profits was permitted under [section 17203](#), despite the lack of specifically identifiable victims who lost money as a result of the defendant's unfair business practice (sale of designated moderate-income housing units [\*\*\*\*46] at illegally high prices). ([2 Cal. App. 4th at pp. 339-344](#).) As an injunction had also been sought and granted in that case, the appellate court described the order for disgorgement or restitution as "a form of relief ancillary to an injunction" ([id. at p. 341](#)), but nothing in the opinion [\[\\*\\*304\] \[\\*\\*\\*126\]](#) states or suggests restitution under [section 17203](#) is restricted to such a circumstance. Rather, the *Powers* court, like this court in *Fletcher*, stressed the independent deterrent value of restitutionary orders: "[T]he laws against unfair business practices were drafted in large part to prevent a wrongdoer from retaining the benefits of its illegal acts. That purpose would be frustrated if a party were entitled to retain its profits simply because it is difficult to specify the victim." ([Powers, supra, 2 Cal. App. 4th at pp. 341-342](#).) Simply stated, "the necessity for deterring future acts require[s] that the wrongdoer be prevented from retaining the illegal profits." ([Id. at p. 343](#).)

*Fletcher*, *Jayhill* and *Powers* provide insufficient reason to read a restriction on relief into the statute. Indeed, ABC and the Attorney General, appearing as an [\*\*\*\*47] amicus curiae, argue that the deterrent policy expressed in *Fletcher* and *Powers* supports their interpretation of [section 17203](#). We agree; it is unlikely the Legislature, in providing courts with broad equitable powers to remedy violations under [section 17203](#), intended those powers be limited in an illogical, unfair and counterproductive manner. As the Attorney General explains, "[o]ften, no logical connection exists between an order of restitution or disgorgement of past illicit gains and an injunction addressing future conduct. Sometimes, a court may find that an injunction is moot as a practical matter, for example because of the age, illness, disability or even death of the defendant. In other circumstances, a court may find that an injunction is unwise or impractical because of the difficulty of enforcement, for example when the defendant is located out of state. Occasionally, a court is disinclined to issue an injunction because of the technical expertise needed for proper enforcement . . . . In other situations, a court may find that an injunction may not be the most appropriate remedy to redress unfair practices committed only during a brief and unique [\*\*\*\*48] circumstance involving a [\*1271] change in business circumstance, such as the acquisition or spin off of another company. In all of these cases, however, the offender is not entitled to keep the fruits of its unfair, deceptive, or unlawful conduct. The defendant's victims may be entitled to restitution, and the court may also conclude that deterrence is more effectively accomplished through restitution than through an injunction of little practical significance." MECA's interpretation of [section 17203](#) would frustrate the deterrent purposes of restitution by allowing a defendant who successfully opposed an injunction to retain its illicit profit.

For the above reasons, we conclude [section 17203](#) authorizes a trial court to order restitution of money lost through acts of unfair competition, as defined in [section 17200](#), whether or not the court also enjoins future violations.<sup>13</sup> The Court of Appeal erred in concluding otherwise.

#### [\*\*\*\*49] DISPOSITION

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<sup>13</sup> In light of our conclusion, we need not address the question whether ABC should have been permitted to amend its complaint to seek an injunction. Nor do we address MECA's contention ABC has "disguised" a claim for damages as one for restitution. To the extent MECA's unelaborated assertion can be understood, it appears to dispute ABC's ability to prove MECA illegally enriched itself at ABC's expense, rather than the sufficiency of the complaint to state a cause of action.

The judgment of the Court of Appeal is reversed.

George, C. J., Kennard, J., Baxter, J., and Chin, J., concurred.

**Concur by:** MOSK

## Concur

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**MOSK, J.**

I concur in the opinion of the court prepared by Justice Werdegar. It addresses all the questions presented in this cause, and answers them correctly. Of course, issues remain for resolution in the future. On its face, or only slightly underneath, [Business and Professions Code section 17045](#) requires unfair competition, injury to a competitor, and a tendency to destroy competition. It implicitly defines "unfair competition" as secret discrimination by a seller between or among its buyers. It similarly defines "injury to a competitor" as harm to a competitor of either the seller or a favored buyer. By contrast, it does not define a "tendency to [\*\*305] [\*\*\*127] destroy competition." Whether the phrase should be understood so as to further "[c]onsumer welfare," which is "a principal, if not the sole, goal of antitrust laws" ( [Cianci v. Superior Court \(1985\) 40 Cal. 3d 903, 918 \[221 Cal. Rptr. 575, 710 P.2d 375\]](#)), and to prevent "output restriction," which is "one of their principal targets" ([State of California ex rel. \[\\*\\*\\*\\*50\] Van de Kamp v. Texaco, Inc. \(1988\) 46 Cal. 3d 1147, 1183 \[252 Cal. Rptr. 221, 762 P.2d 385\]](#) (conc. and dis. opn. of Mosk, J.))--as it apparently should be--is a question for another day. [\*1272]

**Dissent by:** BROWN

## Dissent

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**BROWN, J.,**

Dissenting.--The declared purpose of the Unfair Practices Act is to "safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition." ([Bus. & Prof. Code, § 17001](#).) In pursuit of that goal, the act prohibits the "secret payment or allowance of rebates, refunds, commissions, or unearned discounts . . . to the injury of a competitor and where such payment or allowance tends to destroy competition . . ." ([Bus. & Prof. Code, § 17045](#); hereafter all undesignated statutory references are to the Business and Professions Code.) Given the ordinary rules of English usage, this prohibition is implicated only by competitive injury to a competitor of the one prohibited. Such a result is abhorrent to the majority. It suggests that some victims of commercial discrimination might have no remedy under the act. The quixotic desire to do good, be universally fair, and make everybody happy is understandable. Indeed, [\*\*\*51] the majority's zeal is more than a little endearing. There is only one problem with this approach. We are a court.

As a court, we are constrained to work with the tools available and to play by the rules. When the task is statutory construction, our inquiry begins with the words of the statute. It ends there if the words are sufficient. The majority's insistence on "interpreting" the unambiguous language of [section 17045](#) prompts me to repeat Justice Frankfurter's tongue-in-cheek advice for a court with an overactive lawmaking gland: "[W]hen the legislative history is doubtful," he wrote, "go to the statute." ( [Greenwood v. United States \(1956\) 350 U.S. 366, 374 \[76 S. Ct. 410, 414-415, 100 L. Ed. 412\]](#).)

Here, of course, lacking even the guidance a legislative history of [section 17045](#) would furnish, there is all the more reason for a cautious fidelity to the text of the statute. Undaunted, the majority creates doubt where none exists and, marshaling a patchwork of secondary comments that provide no clear evidence of what the Legislature had in mind in 1933, jettisons the settled understanding of the statute more than half a century after it was passed. By reading the [\*\*\*52] language of [section 17045](#) as referring to competitors of those who receive prohibited price

discounts, the majority introduces into the statute an ambiguity that is not present if the words are taken to mean what they say. To use rules of statutory construction to *create* ambiguity is perverse. The sole justification of the canonical apparatus is to remove doubt, ambiguity, or uncertainty where they exist.

Apart from a couple of exceptions that only serve to prove the rule, in the more than 60 years that the price discrimination provision of the Unfair Practices Act has been on the books, neither the Legislature, this court, the antitrust bar nor the business community has regarded it as applying to [\*1273] so-called "vertical" price discrimination. Indeed, the decision which until today had been regarded as the definitive opinion on the scope of the act reached the opposite conclusion. ( [Harris v. Capitol Records etc. Corp. \(1966\) 64 Cal. 2d 454 /50 Cal. Rptr. 539, 413 P.2d 139](#) (hereafter *Harris*).) In a striking reversal of settled law--notable as much for its retrospective reinterpretation as for its result--the majority abandons that orthodox view [\*\*\*\*53] and strikes out along a path that is not only contrary to the language of the statute itself, but one whose underlying view of economics has been repeatedly repudiated by national authorities on antitrust policy as "giv[ing] artificial protection to the individual competitor" (Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy* (1952) 50 Mich. L.Rev. 1139, 1201 (hereafter Oppenheim)); "unleavened by economic understanding" and "safeguard[ing] not competition, but competitors" (Adelman, *Effective* [\*\*306] [\*\*\*128] *Competition and the Antitrust Laws* (1948) 61 Harv. L.Rev. 1289, 1328, 1335); and as "antithetical to antitrust policy and unnecessary for antitrust enforcement" (Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman* (1951) 60 Yale L.J. 929, 974, fn. omitted); indeed, the United States Supreme Court has described the interpretation espoused by the majority as promoting "a price uniformity and rigidity in open conflict with the purposes" of the antitrust laws. ( [Automatic Canteen Co. v. F.T.C. \(1953\) 346 U.S. 61, 63 /73 S. Ct. 1017, 1019, 97 L. Ed. 1454](#)).

The majority reaches its [\*\*\*\*54] conclusion by ignoring a bedrock rule of statutory interpretation: Where there is no ambiguity, there is nothing to "interpret"--the statute means what it says. Once free of the inconvenient impediments presented by a straightforward text, the majority indulges in an extravagant bout of post hoc judicial lawmaking. Long after the events that provoked [section 17045](#) have passed from memory, the majority imbues the statute with a sweeping scope that is not only unwarranted by its language, but protectionist and anticompetitive in effect.

This case involves competition among distributors of the same product, competition that cannot conceivably have any significant effect on the touchstones of antitrust policy--interbrand competition, the structure of competitive markets, and the ultimate economic welfare of the California consumer. With the utmost respect for the views of my colleagues, I fear today's decision will not only eliminate price discounts as a means of enhancing competition; it will encourage precisely the kind of vexatious and costly litigation which serves only to burden the economy.

#### [\*1274] I. THE TEXT OF [SECTION 17045](#)

On its face, the language of [section 17045](#) [\*\*\*\*55] indicates a legislative concern with the business practices of sellers, rather than purchasers. The operative language condemns the "allowance of . . . discounts . . . to certain purchasers . . . not extended to all purchasers purchasing upon like terms and conditions . . ." (Italics added.) These words evince a concern on the part of the drafters of [section 17045](#) with the conduct of the party *allowing* or *extending* a discount or rebate, that is, with sellers. For the prohibition applies only to them and not, at least by the statute's express terms, to those who *receive* the price discount--purchasers. That conclusion, read in light of the act's overriding purpose of enhancing competition, suggests it is anticompetitive conduct with respect to other sellers that triggers a violation of the statute, a reading that tends to confirm its horizontal focus. Moreover, the statute condemns only those price discounts resulting in an "injury . . . to . . . competition." Although it may be possible to read this language as directed at injury to competitors of the buyer, such a reading is a stretch. The more natural sense of the text, given the several references [\*\*\*\*56] to the conduct of sellers and the absence of a buyer referent, is that [section 17045](#) is directed at injuries to competitors of the party "extending" or "allowing" the discount or allowance; again, other sellers.

Thus, a seller who grants a price discount to less than all of its customers commits an unlawful act, provided the discount injures a competitor and tends to destroy competition. Neither of these two qualifying phrases suggests to

me (or, I imagine, to the ordinary reader) that the use of these words was meant to refer to "competitors" of the *purchaser* to whom the discount was given, or to "destroying competition" among *purchasers* from the seller. A more natural sense of the words is that they refer to competitors of the party granting the price discount--the one referred to earlier in the sentence --sellers who "pay," "allow," or "extend" the prohibited discount.

The majority reasons that because [section 17045](#) is "focused patently on discrimination among purchasers," it is reasonable to assume that the Legislature had their interests in mind in enacting the prohibition on price discrimination. (Maj. opn., *ante*, at p. 1254.) Yes and no. Purchasers are mentioned, [\*\*\*\*57] as they would have to be in any statute whose subject [\*\*\*129] is a bilateral transaction, but only because [\*\*307] purchasers are essential to *any* sale, discriminatory or not. Beyond that, however, there is no basis in the statutory language itself to warrant the conclusion that a prohibition on *granting* [\*1275] a price discount was intended for the protection of those purchasers not receiving it.

The majority also reasons that [section 17045](#) contains no "express restriction" to horizontal injury. (Maj. opn., *ante*, at p. 1254.) Granted, the statute does not affirmatively state that competitive injury to buyers is *insufficient* to plead a cause of action, but it would be both odd and unnecessary if it went out of its way to do so. Conceding that the language of [section 17045](#) "does not contain an explicit reference to secondary line competitive injury like the . . . language of the Clayton and Robinson-Patman Acts," the majority declares that "the absence of a specific reference does not . . . constitute an implied restriction." (Maj. opn., *ante*, at p. 1255.) This is said to be so because the statute "requires injury to a 'competitor,' and a tendency to destroy 'competition,' [\*\*\*\*58] without any further inclusive or restrictive language delineating the scope of those terms." (*Ibid.*, italics in original.)

In the context of another statute, one not focused so "patently" on the conduct of those who "pay," "allow," or "extend" discounts, such reasoning might persuade. But here, the language of the statute *does* contain a "specific reference" which, in context, *does* "constitute an implied restriction." That reference is to those who make the payments, allow the rebates, or extend the privileges made unlawful; in a word, sellers. The statute's "evident concern with discrimination between competing purchasers," the majority concludes, "suggests its intended protection extends to such competition." (Maj. opn., *ante*, at p. 1255.) But what "evident concern," apparent on the surface of the statute, does the majority have in mind? A disinterested reader of the text, I suggest, would come away with a clear impression, not of an "evident concern" with purchasers, but with those who "grant," "pay," or "allow" discounts and *their* competitors. It strikes this reader as improbable to conclude that the words "competition" and "competitor" refer, not to [\*\*\*\*59] competitors of the price-cutting seller, which may suffer commercial injury as a result of such a practice, but to competitors of the *purchaser*. Sellers, of course, do not compete with buyers but with other sellers, *their* "competitors," and it is to them that the statute evidently refers.

Had the Legislature intended the statute to apply to competitors of purchasers receiving prohibited discounts, it would have been easy enough to insert language in [section 17045](#) making that point clear. Indeed, three years after [section 17045](#) was passed, Congress passed the Robinson-Patman Act, outlawing price discounts on goods in interstate commerce. That legislation, however, left no doubt whatever that *its* prohibition applied to those who received, as well as those who granted, discounts. How did Congress express [\*1276] such a "bilateral" prohibition? Quite simply. By making unlawful price differences which injure competition "with any person who grants or . . . receives" their benefit. ([15 U.S.C. § 13\(a\)](#), italics added.)

## II

### *Harris v. Capitol Records*

Some 30 years ago, Justice Mosk, writing for a unanimous court in [Harris, supra, 64 Cal. 2d 454](#), described [\*\*\*\*60] the Unfair Practices Act--including [section 17045](#)--as intended to proscribe only *horizontal* price discrimination, that is, differences in the price a seller charges buyers, the effect of which is to impair competition with other *sellers*. He wrote that "[t]hroughout the Act the Legislature has manifested its intent to discourage practices which injure the *seller's* competitors ([§ 17040, 17043, 17045, 17071](#)) and thereby tend to create the monopolies condemned by [section 17001](#) . . . Together these constitute the 'horizontal' concept of price regulation, one of the fundamental characteristics of this legislation. In his exhaustive study entitled *Experience in California*

*With Fair Trade Legislation Restricting Price Cutting* (1936) 24 Cal.L.Rev. 640, 686, Professor Ewald T. Grether explained: 'Whereas the Fair Trade [\*\*308] [\*\*\*130] Law has to do with *vertical* price relations, the Unfair Practices Act operates *horizontally*.' (Italics in original.) And in Cupp, *The Unfair Practices Act* (1936) . . . 10 So.Cal.L.Rev. 18, the author said that 'The act may be said to be the consummation of years of effort by businessmen to carry out the horizontal concept of trade [\*\*\*\*61] regulation.' More recently, it has been pointed out that . . . the Unfair Practices Act 'protects only first-line competition against predatory price cutting on an area basis and does not make illegal price discriminations which only injure second or third-line competition at the buyer level or lower. . . . [A] seller can lawfully discriminate in favor of one of his purchasers for the purpose of enabling that purchaser to meet his competition, so long as there is no intent on the part of the seller to prevent or destroy the competition of other sellers at his level.' (Birmingham, *Legal Aspects of Petroleum Marketing Under Federal and California Law[s]* (1960) [7 U.C.L.A. L.Rev. 161, 246-247.](#))" (*Harris, supra, 64 Cal. 2d at pp. 461-462*, first italics added.)

From the context in which these statements appear, it is clear that Justice Mosk was speaking of the Unfair Practices Act as a whole ("Throughout the Act"), characterizing it as fundamentally "horizontal" in effect. (*Harris, supra, 64 Cal. 2d at p. 461.*) I cannot subscribe to the majority's dismissal of those statements in *Harris, supra, 64 Cal. 2d 454*, as standing for something other than what [\*\*\*\*62] their ordinary meaning conveys. Not only Justice Mosk's [\*1277] statement, but also the authorities he relied on in support of it, make an unqualified case for a horizontal interpretation of the Unfair Practices Act as a whole, including [section 17045](#). The article by Professor Ewald T. Grether, for example, discusses the near concurrent rise of state fair trade statutes, companion legislation to the national outbreak of unfair competition laws in the 1930's. "The Unfair Practices Act," Grether concluded, "represented the culmination of legislation begun in 1913. . . . The core of this act was a provision"--now [section 17040](#)--"declaring it unlawful to discriminate between different sections, communities, cities or between different locations in the state by selling at a lower rate . . . 'with the intent to destroy the competition of any regular established dealer.' " (Grether, *Experience in California With Fair Trade Legislation Restricting Price Cutting* (1936) 24 Cal.L.Rev. 640, 645, italics omitted (hereafter Grether).)

As Grether's comments indicate, a consistent theme--restraints on *horizontal* price discrimination--runs through the act from its origin in 1913 to 1935, [\*\*\*\*63] the year in which its major provisions were consolidated. As the Sherman and Clayton Acts were aimed at structural reforms of the economy by promoting horizontal competition, so state antitrust legislation--including California's act of 1913--was aimed at thwarting the growth of monopolies and business combinations that had a restraining effect on competition among sellers. Like the federal antitrust acts of the same era, these state antitrust statutes were aimed at prohibiting so-called locality or area price discrimination, the paradigmatic condition for the rise of cartels. (See, e.g., 3 Kintner, *Federal Antitrust Law* (1984) § 19.1, pp. 42-50 & accompanying fns. (hereafter Kintner).) As the majority points out, the act of 1931, popularly named the "Anti-Discrimination Act" (Stats. 1931, ch. 617, pp. 1333-1335), was aimed primarily at these "large scale distributors, especially chain store systems." (Grether, *supra*, 24 Cal.L.Rev. at p. 645.) It carried forward the proscription on geographic price discrimination of the original 1913 act and coupled to it, in amendments adopted in 1933, two significant additions--the prohibition on "secret rebates" (now [§ 17045](#)), and a provision [\*\*\*\*64] prohibiting sales below cost (now [§ 17043](#)). (Stats. 1933, chs. 261, 504, pp. 793, 1280-1281; see Wilson, *California Unfair Practices Act and Fair Trade Act* (1941) 27 ABA J. 249.) Throughout this series of amendments, however, there is nothing to indicate that the legislation lost its original horizontal focus. In particular, there is no convincing basis in the text of [section 17045](#) to indicate that the Legislature had adopted the vertical prohibitions on price discrimination that were soon to appear in section 2(a) of the federal Robinson-Patman Act. Parallel events suggest the contrary.

[\*\*309] [\*\*\*131] Almost concurrently with the consolidation of what is now the Unfair Practices Act, the Legislature enacted the "Fair Trade Act" (Stats. 1931, ch. [\*1278] 278, p. 583; Stats. 1933, ch. 260, p. 793), legislation that was expressly vertical in orientation. <sup>1</sup> The product of pressure by the same retailers and

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<sup>1</sup> Prior to its repeal in 1975 (Stats. 1975, ch. 402, p. 878), section 1 of the Fair Trade Act declared legal contract terms for the sale of "commodit[ies]" by which the buyer agreed not to resell "except at the price stipulated by the vendor," and authorized

distributors threatened by the chains who pushed for the Unfair Practices Act, the fair trade movement had been popularized by the National Industrial Recovery Act (Act of June 16, 1933, ch. 90, 48 Stat. 195), Depression-era legislation authorizing the establishment and self-policing [\*\*\*\*65] of "codes of competition" designed to prohibit "unfair competitive practices." Fair trade legislation, which swept the states in the 1930's, was not antitrust legislation in the classic mold of the Sherman, Clayton and Federal Trade Commission Acts of the monopoly era. It was directed at providing relief to distributors and small retailers, squeezed more than ever by a weak economy and the highly competitive chains. Rather than seeking to promote a structurally competitive *market*, fair trade and similar legislation was aimed at relieving the pressure on the individual competitor--permitting floors to be set on prices, for example, and authorizing resale price maintenance--thus in a sense *restraining* competition. (See, e.g., Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman, supra*, 60 Yale L.J. at p. 1067; Oppenheim, *supra*, 50 Mich. L.Rev. at pp. 1198-1202.)

[\*\*\*\*66] As Grether summarized the situation in 1936, "[I]t is . . . essential to note that these statutes [i.e., the Unfair Competition and Fair Trade Acts] were promulgated during depression years. Both the vigor of the demands and the weakness of opposition were decidedly tempered by the condition of the glutted market. The impact upon the legislature showed itself not only in the fair trade acts, but in a great number of measures aimed at economic control. Apparently, legislators had accepted the proposition that price cutting in the distributive trades engenders a series of repercussions that react harmfully upon primary producers." (Grether, *supra*, 24 Cal.L.Rev. at p. 648, fn. omitted.) Contrasting the California fair trade and unfair practices legislation, Grether pointed to the differing orientation and scope of the two trade regulation acts: Although it applied vertically, the Fair Trade Act reached only a select group of commodities--those that were tradeor brand-marked. The "horizontal procedure under the Unfair Practices Act," Grether wrote, "may develop possibilities for wider, perhaps, even general application, in [\*1279] contrast to the relatively limited possibilities [\*\*\*\*67] of the Fair Trade Act. The strength of the Unfair Practices Act is that action under it need not wait upon the initiative of manufacturers or distributors at the apex of the distributive pyramid but may arise at any level, and that it is not limited merely to trade-marked, identified goods." (Grether, *supra*, 24 Cal.L.Rev. at p. 686.)

The majority dismisses these comments as of marginal value in reaching an understanding of the scope of the act. (Maj. opn., *ante*, at pp. 1265-1266.) I disagree. It was not until 1936 that congressional passage of the Robinson-Patman Act, validating vertical restraints by extending prohibitions on discriminatory pricing to those granting or receiving discounts, or customers of either, set the stage for a rush of similar state statutes. (See Kintner, *supra*, § 19.1, pp. 47-50.) Although some of these state acts were modeled on the "vertical" Robinson-Patman Act, others, enacted earlier in the decade, including our own act, carried forward the original horizontal antidiscrimination model. (See Comment, *Prohibiting Price Discrimination and Sales Below Cost: The State Unfair Practice Acts* (1938) 32 Ill. L.Rev. 816; 819-820, [\*\*\*132] fn. 5; see [\*\*\*\*68] also *Harris, supra*, 64 Cal. 2d at p. 459, fn. 5 [\*\*310] ["By contrast [to the Unfair Practices Act], as of 1938 seven states specifically prohibited discrimination between purchasers as well as between localities."]; McAllister, *Price Control by Law in the United States: A Survey* (1937) 4 Law & Contemp. Probs. 273, 298 (hereafter McAllister) ["The [California] Unfair Practices Act is directed at the horizontal level of prices and, unlike the Fair Trade Act, it applies to all goods. . . . Another provision outlaws price discrimination 'with the intent to destroy . . . or to prevent the competition of any person' but this precursor of the Clayton and Robinson-Patman Acts has long been familiar in state anti-trust laws."].)<sup>2</sup>

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buyers to require their buyers "to agree that [they] will not, in turn, resell except at the price stipulated by such vendor or by such vendee." (Stats. 1931, ch. 278, § 1, p. 583.) As Grether pointed out, "The vertical nature of the rights under the [Fair Trade] Act are clearly indicated by Section 2: 'This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.' " (Grether, *supra*, 24 Cal.L.Rev. at p. 641.)

<sup>2</sup> Opinions from other jurisdictions with unfair competition statutes of the same provenance as the California act follow the horizontal interpretation we adopted in *Harris, supra*, 64 Cal. 2d 454, often relying on our opinion. In *Beam v. Monsanto Co., Inc. (1976) 259 Ark. 253 [532 S.W.2d 175, 181-182]*, for example, the Arkansas Supreme Court wrote that "It is apparent that the [Unfair Practices Act] is intended to foster competition for the primary benefit of the general public by protecting dealers . . . from unfair competition by large dealers. . . . Appellants' argument for 'vertical competition' would broaden the Act to not only protect dealers . . . from unfair competition by other dealers, but would also protect buyers from competition by [other] business buyers who use and purchase the same . . . product for use in their . . . businesses." (See also *Carlcock v. Pillsbury (D.Minn. 1989) 719*

[\*\*\*\*69] It is possible that the available extrastatutory materials Justice Mosk relied on in [\*Harris, supra, 64 Cal. 2d 454\*](#), are simply too equivocal to establish [**\*1280**] satisfactorily the Legislature's intent, one way or the other. If so, our response ought to be a refusal to extend the act beyond the horizontal view, one that is supported by the words of [\*section 17045\*](#), is consistent with the act's purpose of enhancing competition, and is congruent with the ruling horizontal orthodoxy of the day--precisely the view reflected in *Harris* itself. If that cautious view turns out to be mistaken, Justice Mosk prescribed the appropriate remedy in *Harris*: "Plaintiff complains that this [horizontal] construction of the Act will allow a predatory company 'to vertically feed on those beneath it.' Such arguments should be addressed to the Legislature, which alone is equipped to determine the gravity of the economic evil here alleged, and to take such steps as it deems appropriate." ([\*Harris, supra, 64 Cal. 2d at p. 462\*](#), fn. omitted.)

### III. VERTICAL RESTRAINTS ON PRICE COMPETITION

It is worth pointing out just how far from the contemporary antitrust mainstream the [**\*\*311**] [**\*\*\*\*70**] [**\*\*\*133**] majority's construction of California's Unfair Practices Act strays. (See, e.g., [\*Continental T.V., Inc. v. GTE Sylvania Inc. \(1977\) 433 U.S. 36, 54 \[97 S. Ct. 2549, 2559-2560, 53 L. Ed. 2d 568\]\*](#) ["Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers. . . . [P] [Such] restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."]; Bork, *Vertical Restraints: Schwinn Overruled* (1977) Sup. Ct. Rev. 171; [**\*1281**] Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality* (1981) 48 U.Chi. L.Rev. 6; 8 Areeda, [\*Antitrust Law\*](#) (1989) § 1609e, pp. 139-143.) Whatever its business motivation, the alleged price differential at issue in this case reflects an implicit preference for two distributors of the same brand of telephone over a third. I find it difficult to comprehend how a discount offered to some but fewer than all distributors of the same product can even affect, much less "tend to destroy" the only kind of competition that matters to the consumer--competition [**\*\*\*\*71**] among brands.

If the net economic effect on the retail buyer of telephones of a price differential between intrabrand competitors is nil, how can competition in any sense that justifies "trundling out the great machinery of antitrust enforcement" ([\*Valley Liquors, Inc. v. Renfield Importers, Ltd. \(7th Cir. 1982\) 678 F.2d 742, 745\*](#)) have been affected by the allegedly discriminatory price involved here? It seems evident that competition among manufacturers of telephones and related consumer electronic goods is robust, and that nothing respondent does in its dealings with distributors of its own products is likely to affect significantly that hard economic fact. The lesson in all of this is one that belies the majority's tautology that "competition is competition." (Maj. opn., *ante*, at p. 1262.) For antitrust purposes at least, it is not necessarily so. (See, e.g., [\*Valley Liquors, Inc. v. Renfield Importers, Ltd., supra, 678 F.2d at p. 745\*](#) ["We reject the casual equation of intrabrand price competition with interbrand competition. . . . The plaintiff in a

[\*F. Supp. 791, 849\*](#) [applying *Harris* to state-based unfair practices claim]; [\*USA Petroleum Co. v. Atlantic Richfield Co. \(C.D.Cal. 1983\) 577 F. Supp. 1296, 1307\*](#) [distinguishing *Harris* in a "true" horizontal case]; [\*Chapiewsky v. G. Heilemann Brewing Co. \(D.Wis. 1968\) 297 F. Supp. 33, 41\*](#) [following *Harris*]; [\*William Ingliss, etc. v. I.T.T. Continental Baking Co. \(9th Cir. 1982\) 668 F.2d 1014\*](#) & [\*William Inglis & Sons v. Continental Baking \(9th Cir. 1991\) 942 F.2d 1332\*](#) [relying on *Harris* as to state law claims]; [\*Burge v. Pulaski County Special Sch. Dist. \(1981\) 272 Ark. 67 \[612 S.W.2d 108\]\*](#) [Arkansas Unfair Practices Act applies only horizontally]; [\*Rose v. Vulcan Materials Co. \(1973\) 282 N.C. 643 \[194 S.E.2d 521, 67 A.L.R.3d 1\]\*](#) [same].)

This account of the scope of unfair practice provisions of other states differs, it is apparent, from the majority's evaluation. (Maj. opn., *ante*, at p. 1261, fn. 6.) The Eighth Circuit Court of Appeals' gloss on the Arkansas act, cited by the majority, merely declares, without analysis or discussion, that it was passed in 1937 shortly after the Robinson-Patman Act, "and was obviously designed to prohibit similar types of business conduct." ([\*Ideal Plumbing Co. v. Benco, Inc. \(8th Cir. 1976\) 529 F.2d 972, 978, fn. 7 \[42 A.L.R.Fed. 266\]\*](#).) I am persuaded by the contrary reasoning and result of the Arkansas cases cited above interpreting that state's statute as "horizontal." The opinion of the Wyoming Supreme Court in [\*State v. Langley \(1938\) 53 Wyo. 332 \[84 P.2d 767\]\*](#), also cited by the majority, involved a criminal prosecution under a statute prohibiting sales below cost; although a provision of the statute contains language similar to [\*section 17001\*](#), the opinion is too obscure to stand for much, other than the statement that the provision prohibiting such sales "was probably intended mainly for" the independent merchant. ([\*84 P.2d at p. 774\*](#).) The price discrimination provision of the Wisconsin act, also cited by the majority, is almost identical to [\*section 17045\*](#), and at least one Wisconsin appellate court has construed it as applying vertically. ([\*Jauquet Lumber v. Kolbe & Kolbe Millwork \(1991\) 164 Wis.2d 689 \[476 N.W.2d 305, 309\]\*](#).) As noted, however, the Arkansas statute, also modeled on the California provision (see McAllister, *supra*, 4 Law & Contemp. Probs. at p. 298, fn. 141), has received a contrary construction.

restricted distribution case must show that the restriction he is complaining of was unreasonable because, weighing [\*\*\*\*72] effects on both intrabrand and interbrand competition, it made consumers worse off."); Bork, *Vertical Restraints: Schwinn Overruled*, *supra*, Sup. Ct. Rev. at p. 172 ("The Court's *Sylvania* opinion not only counted efficiencies in favor of a challenged business practice but did so in a sophisticated way, perceiving that the elimination or mitigation of competition among a manufacturer's dealers was essential to the achievement of certain distributional efficiencies.").) In this very case, the majority imposes a ban on vertical, intrabrand price differences as a legitimate business method, an interpretation that may not only hobble structural competition, but may also fuel claims of California's "unfriendly" regulatory and legal climate. On the basis of what appears to be some misplaced principle of distributive equality, the majority today virtually rules out vertical price differences as a method of enhancing competition.

The conclusion that there is no sound basis in the text of the statute or relevant materials for the idea that in enacting the Unfair Practices Act the Legislature anticipated the vertical, secondary line innovations introduced [\*1282] three [\*\*\*\*73] years later in the Robinson-Patman Act, is reinforced by these views of national authorities on antitrust and trade regulation policies. If vertical restrictions on price discrimination are both anticompetitive in effect and protectionist in intent, then the Legislature's explicit declaration in [section 17001](#) of an intention to "foster competition" is thwarted by the majority's innovative gloss on [section 17045](#). We ought to be especially reluctant to engraft onto the statute so dramatic and counterproductive a policy innovation, doubly so in the absence of a clear legislative directive.

## Conclusion

There is a lesson in the half-century-plus of legislative inactivity since [section 17045](#) was enacted; unfortunately, it is one lost on the majority. Today's result is not only bad law, it is demonstrably bad policy and even worse economics. Why? Because the fundamental aim of antitrust legislation is to protect the [\*312] [\*\*\*134] competitive process. Protecting the individual business from the benefits of competition will cost the California consumer in the form of higher prices; it will cost the state as a whole in a flood of wasteful price discrimination litigation unrelated to the [\*\*\*\*74] only goal [section 17045](#) was meant to protect--a competitive market.

For that constituency whose interests alone justify legislative intervention in market-pricing forces--the California consumer--price competition, including discounts, is an unmixed good. It lowers prices and maximizes buying power. Yet the majority condemns it, rewriting the act in the process, to import a construction that is not only bad economics but questionable policy as well. For object lessons we need look no further than the national experience with the heavily criticized Robinson-Patman Act. Confronted with a text that fails to support the majority's construction, and the likelihood of anticompetitive consequences, we ought to pause to consider whether we do more harm than good.

I dissent.



## Morrison v. Viacom

Court of Appeal of California, First Appellate District, Division Two

February 27, 1997, Decided

No. A071263.

**Reporter**

52 Cal. App. 4th 1514 \*; 61 Cal. Rptr. 2d 544 \*\*; 1997 Cal. App. LEXIS 147 \*\*\*; 97 Cal. Daily Op. Service 1491; 97 Daily Journal DAR 2163; 1997-2 Trade Cas. (CCH) P71,886

CHRISTOPHER MORRISON et al., Plaintiffs and Appellants, v. VIACOM, INC., et al., Defendants and Respondents.

**Subsequent History:** [\*\*\*1] As Modified on Denial of Rehearing of March 21, 1997, Reported at: [1997 Cal. App. LEXIS 207](#).

**Prior History:** Marin County Super. Ct. No. 161687. Honorable Beverly B. Savitt.

**Disposition:** The judgment is reversed. Costs on appeal are awarded to appellants.

## **Core Terms**

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cable, preempted, regulation, rates, provisions, tier, cable service, Cartwright Act, channels, state law, appellants', rate regulation, franchising, preemption, customers, trial court, programming, cable operator, charging, cable company, present case, anti-tying, television, broadcast, effective, legislative history, state **antitrust law**, basic service, indirectly, Consumer

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Demurrsers

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

### **[HN1](#) [blue icon] Defenses, Demurrsers & Objections, Demurrsers**

When reviewing a judgment based on an order sustaining a demurrer without leave to amend, the court accepts as accurate the factual allegations of an appellant's complaint. If a complaint states a cause of action, a judgment must be reversed.

Constitutional Law > Supremacy Clause > Federal Preemption

52 Cal. App. 4th 1514, \*1514L<sup>61</sup> Cal. Rptr. 2d 544, \*\*544L<sup>997</sup> Cal. App. LEXIS 147, \*\*\*1

Governments > State & Territorial Governments > Relations With Governments

Constitutional Law > Supremacy Clause > General Overview

Constitutional Law > Supremacy Clause > Supreme Law of the Land

## **HN2** **Supremacy Clause, Federal Preemption**

See U.S. [Const. art. VI, § 2.](#)

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial Governments > Relations With Governments

Governments > Federal Government > US Congress

## **HN3** **Constitutional Law, Supremacy Clause**

Whether federal law preempts state law fundamentally is a question of congressional intent. When addressing a preemption question, the court starts with the assumption that the historic police powers of the states are not to be superseded by federal act unless that is the clear and manifest purpose of Congress. Courts should proceed on the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial Governments > Relations With Governments

## **HN4** **Constitutional Law, Supremacy Clause**

Preemption may arise in three ways. First, Congress can define explicitly the extent to which its enactments preempt state law. Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intends the federal government to occupy exclusively. Finally, state law is pre-empted to the extent that it actually conflicts with federal law.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

## **HN5** **Federal Acts, Cable Television Consumer Protection & Competition Act**

See [47 U.S.C.S. § 543\(b\)\(7\).](#)

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

## **HN6** **Federal Acts, Cable Television Consumer Protection & Competition Act**

Only regulated companies must comply with [47 U.S.C.S. § 543\(b\)\(7\).](#)

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

#### **HN7** **Federal Acts, Cable Television Consumer Protection & Competition Act**

See [47 U.S.C.S. § 543\(a\)\(2\)](#).

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Communications Policy Act

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

#### **HN8** **Federal Acts, Cable Communications Policy Act**

[47 U.S.C.S. § 543\(b\)\(8\)](#) expressly prohibits a cable operator from requiring the subscription to any tier other than the basic service tier as a condition of access to video programming that is offered on a per channel or per program basis.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

Communications Law > ... > Regulated Entities > Cable Systems > Rate Regulation

#### **HN9** **Federal Acts, Cable Television Consumer Protection & Competition Act**

See [47 U.S.C.S. § 543\(a\)\(1\)](#).

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Communications Policy Act

Communications Law > ... > Regulated Practices > Franchises > Authorities

Communications Law > Overview & Legal Concepts > General Overview

Communications Law > ... > Regulated Practices > Franchises > General Overview

Communications Law > ... > Regulated Entities > Cable Systems > Rate Regulation

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

#### **HN10** **Federal Acts, Cable Communications Policy Act**

[47 U.S.C.S. § 543\(a\)\(2\)](#) provides that a cable system which is subject to effective competition is not subject to rate regulation by the commission or by a state or franchising authority. [§ 543\(a\)\(2\)](#) further provides that if a cable

system is not subject to effective competition that system's rates for the provision of basic cable service shall be subject to limited regulation by the franchising authority and by the commission.

Communications Law > ... > Regulated Entities > Cable Systems > Rate Regulation

Communications Law > Overview & Legal Concepts > General Overview

Communications Law > ... > Regulated Entities > Cable Systems > General Overview

#### **HN11**[ **Cable Systems, Rate Regulation**

A cable operator's "rate" is the amount of money charged to subscribers to receive cable services. To "regulate" means to fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws. A rate regulation is a law which fixes, establishes or controls the amount of money a cable operator may charge subscribers for the provision of cable services.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

#### **HN12**[ **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Cal. Bus. & Prof. Code § 16720 of the Cartwright Act defines a "trust" as a combination of capital, skill or acts by two or more persons for numerous specified purposes including to create or carry out restrictions in trade or commerce and to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity. Except as otherwise stated in the Cartwright Act, every trust is unlawful, against public policy and void. Cal. Bus. & Prof. Code §16726.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

#### **HN13**[ **Price Fixing & Restraints of Trade, Tying Arrangements**

See Cal. Bus. & Prof. Code § 16727.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

#### **HN14**[ **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is an agreement by a party to sell one product but only on the condition that a buyer also purchases a different (or tied) product, or at least agrees not to purchase that product from any other supplier. Tying arrangements are illegal per se if a party has sufficient economic power and substantially forecloses competition in a relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

52 Cal. App. 4th 1514, \*1514L<sup>61</sup> Cal. Rptr. 2d 544, \*\*544L<sup>997</sup> Cal. App. LEXIS 147, \*\*\*1

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial Governments > Relations With Governments

### **HN15** [blue icon] **Federal Acts, Cable Television Consumer Protection & Competition Act**

In determining the scope of an acts preemptive effect, the court begins with the language of the federal statute; if that language is ambiguous the court considers the statute's legislative history.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

Communications Law > ... > Regulated Entities > Cable Systems > Rate Regulation

### **HN16** [blue icon] **Federal Acts, Cable Television Consumer Protection & Competition Act**

The statutory language employed in the Cable Television Consumer Protection and Competition Act of 1992 and the Cable Communications Policy Act of 1984, [47 U.S.C.S. § 521 et seq.](#), indicates that Congress intended the preemptive scope of section [47 U.S.C.S. § 543\(a\)](#) to be narrow.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

### **HN17** [blue icon] **Federal Acts, Cable Television Consumer Protection & Competition Act**

[47 U.S.C.S. § 544\(f\)](#) of the Cable Television Consumer Protection and Competition Act of 1992 and the Cable Communications Policy Act of 1984, [47 U.S.C.S. § 521 et seq.](#), provides that a state may not impose requirements regarding the provision or content of cable services, except as expressly provided in the subchapter.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Communications Law > Overview & Legal Concepts > General Overview

### **HN18** [blue icon] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

The anti-tying provisions of the Cartwright Act do not regulate the manner in which cable services are packaged. Rather, the provisions preclude a cable operator from depriving its customer, in a manner which unreasonably restrains trade, of a choice as to what package the customer wishes to purchase.

## **Headnotes/Summary**

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### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

In an action against a cable television company, plaintiffs alleged that defendant unlawfully restrained trade in violation of [Bus. & Prof. Code, §§ 16720, 16727](#) (Cartwright Act), by illegally tying the sale of satellite channels to the sale of broadcast channels and the sale of premium channels to the sale of both broadcast and satellite

channels. The trial court sustained defendant's demurrer without leave to amend on the ground the antitrust claims were preempted by provisions of the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C.A. § 540 et seq.) (the 1992 Cable Act), and the Cable Communications Policy Act of 1984 ([47 U.S.C.A. § 521 et seq.](#)), and entered a judgment of dismissal. (Superior Court of Marin County, No. 161687, Beverly B. Savitt, Judge.)

The Court of Appeal reversed. The court held that plaintiffs' claim that defendant violated the Cartwright Act by requiring customers to subscribe to defendant's basic service tier in order to access other tiers of service was preempted, as such conduct is expressly required by [47 U.S.C.A. § 543\(b\)\(7\)](#). However, that provision only applies to cable companies that are regulated under the 1992 Cable Act, that is, those not subject to effective competition. Accordingly, to the extent defendant's conduct occurred when it was not so regulated, the claims were not preempted. Moreover, by its own terms, [47 U.S.C.A. § 543\(b\)\(7\)](#) applies only to the provision of the "basic service tier," which in the present case would be defendant's tier of broadcast channels, but plaintiffs' claims were not limited to the allegation that it is illegal to require customers to buy the basic service tier in order to obtain access to other tiers. They also complained that defendant's practice of requiring a subscription to the basic and satellite cable tier in order to obtain access to the premium channels constituted illegal tying, and [47 U.S.C.A. § 543\(b\)\(7\)](#) neither requires nor authorizes this latter practice. The court also held that the trial court erred in finding that [47 U.S.C.A. § 543\(a\)](#), prohibiting states from regulating rates, preempted the Cartwright Act provisions on which plaintiffs relied. A rate regulation is a law that fixes, establishes, or controls the amount of money a cable operator may charge subscribers for the provision of cable services. The anti-tying law does not preclude a cable operator from charging whatever rate it desires, but only prohibits the operator from entering into an agreement which forces a customer to accept one service in order to obtain another. And, to the extent the anti-tying provisions had some indirect effect on cable company rates, there was insufficient evidence that Congress intended to preempt those provisions. The court further held that the trial court properly found that [47 U.S.C.A. § 544\(f\)](#), providing that a state "may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter," did not preempt plaintiffs' claims. [47 U.S.C.A. § 544\(f\)](#) targets regulation of the content of cable services and did not, therefore, preempt the Cartwright Act provisions at issue. (Opinion by Haerle, J., with Kline, P. J., and Lambden, J., concurring.)

## Headnotes

### [CA\(1\)](#) [ ] (1)

#### Constitutional Law § 34—Distribution of Governmental Powers—Between Federal and State Governments—Federal Preemption.

--The preemption doctrine derives from the supremacy clause (U.S. [Const., art. VI, § 2](#)), and whether federal law preempts state law fundamentally is a question of congressional intent. When addressing a preemption question, courts start with the assumption that the historic police powers of the states are not to be superseded by federal law unless that is the clear and manifest purpose of Congress. Therefore, courts should proceed on the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted. Preemption may arise in three ways. First, Congress can define explicitly the extent to which its enactments preempt state law. Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively. Finally, state law is preempted to the extent that it actually conflicts with federal law.

### [CA\(2\)](#) [ ] (2)

#### Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements—Cable Television—Federal Preemption.

--A claim that a cable television company violated the Cartwright Act ([Bus. & Prof. Code, §§ 16720, 16727](#)) by requiring customers to subscribe to its basic service tier in order to access other tiers of service was preempted, as such conduct is expressly required by [47 U.S.C.A. § 543\(b\)\(7\)](#), which is part of the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C.A. § 540 et seq.). However, that provision only applies to cable companies that are regulated under the Act, that is, those not subject to effective competition. Accordingly, to the extent defendant's conduct occurred when it was not regulated, the claims were not preempted. Moreover, by its own terms, [47 U.S.C.A. § 543\(b\)\(7\)](#) applies only to the provision of the "basic service tier," which in the present case would be defendant's tier of broadcast channels, but plaintiffs' claims were not limited to the allegation that it is illegal to require customers to buy the basic service tier in order to obtain access to other tiers. They also complained that defendant's practice of requiring a subscription to the basic and satellite cable tier in order to obtain access to the premium channels constituted illegal tying, and [47 U.S.C.A. § 543\(b\)\(7\)](#) neither requires nor authorizes this latter practice.

#### [CA\(3a\)](#) [ ] (3a) [CA\(3b\)](#) [ ] (3b)

##### **Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements—Cable Television—Federal Preemption.**

--In an action against a cable television company alleging that defendant unlawfully restrained trade in violation of [Bus. & Prof. Code, §§ 16720, 16727](#) (Cartwright Act), by illegally tying the sale of satellite channels to the sale of broadcast channels and the sale of premium channels to the sale of both broadcast and satellite channels, the trial court erred in finding that [47 U.S.C.A. § 543\(a\)](#) (part of the Cable Television Consumer Protection and Competition Act of 1992; 47 U.S.C.A. § 540 et seq.), prohibiting states from regulating rates, preempted the Cartwright Act provisions on which plaintiffs relied. A rate regulation is a law that fixes, establishes or controls the amount of money a cable operator may charge subscribers for the provision of cable services. The anti-tying law does not preclude a cable operator from charging whatever rate it desires, but only prohibits the operator from entering into an agreement which forces a customer to accept one service in order to obtain another. And, to the extent the anti-tying provisions had some indirect effect on cable company rates, there was insufficient evidence that Congress intended to preempt those provisions. The cable act prohibits states from directly regulating cable rates; it does not prohibit states from enforcing any law which may indirectly affect the rates any company may charge.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 589.]

#### [CA\(4\)](#) [ ] (4)

##### **Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements—General Principles.**

--A tying arrangement under [Bus. & Prof. Code, §§ 16720, 16727](#) (Cartwright Act), is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he or she will not purchase that product from any other supplier. Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade.

#### [CA\(5\)](#) [ ] (5)

##### **Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Tying Arrangements—Cable Television—Federal Preemption.**

--In an action against a cable television company alleging that defendant unlawfully restrained trade in violation of [Bus. & Prof. Code, §§ 16720, 16727](#) (Cartwright Act), by illegally tying the sale of satellite channels to the sale of broadcast channels and the sale of premium channels to the sale of both broadcast and satellite channels, the trial

court properly found that [47 U.S.C.A. § 544\(f\)](#), providing that a state "may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter," did not preempt plaintiffs' claims. [47 U.S.C.A. § 544\(f\)](#) targets regulation of the content of cable services and did not, therefore, preempt the Cartwright Act provisions at issue.

**Counsel:** Joseph M. Alioto, John H. Boone, Michael Dietrick and Jon P. Rankin for Plaintiffs and Appellants.

George Shapiro, David M. Balabanian, Terry J. Houlihan, Christopher B. Hockett and Stephanie S. Lamarre for Defendants and Respondents.

**Judges:** Opinion by Haerle, J., with Kline, P. J., and Lambden, J., concurring.

**Opinion by:** HAERLE

## Opinion

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[\*1517] [\*\*547] HAERLE, J.

### I. INTRODUCTION

The question presented by this appeal is whether provisions of California's [antitrust law](#) prohibiting anticompetitive "tying" practices are preempted by federal law regulating the cable television industry. The trial court found that appellants' state law antitrust claims against a cable operator were preempted and sustained a demurrer to their complaint, without leave to amend. We disagree and reverse the judgment.

[\*1518] II. STATEMENT OF FACTS

On September 22, 1994, appellants filed an antitrust action against respondent, Viacom, Inc., seeking damages [\*\*\*2] and injunctive relief. Appellants are alleged representatives of a class consisting of all persons who have purchased cable television services in San Francisco or Marin County from respondent during the four years prior to the filing of their complaint. The complaint charges respondent with violating California's Cartwright Act by restraining trade in the San Francisco and Marin county markets for cable television services.

According to the complaint, respondent offers customers three distinct categories of services: (1) broadcast channels, consisting of local television channels concurrently available over the noncable airwaves without charge, such as KGO, KPIX and KRON; (2) satellite cable channels, consisting of geographically remote broadcast television channels and nonbroadcast channels such as CNN and ESPN; and (3) premium channels, consisting of nonbroadcast channels such as HBO and Showtime.

Appellants allege that respondent has unlawfully restrained trade in violation of [Business and Professions Code sections 16720](#) and [16727](#) (the Cartwright Act) by illegally tying the sale of satellite channels to the sale of broadcast channels and the sale of premium channels to the [\*\*\*3] sale of both broadcast and satellite channels. In other words, appellants complain that respondent has illegally restrained trade by making the purchase of broadcast channels a prerequisite for the purchase of satellite cable channels and by making the purchase of both broadcast channels and satellite cable channels a prerequisite for the purchase of premium channels.

Respondent demurred to the complaint, arguing that appellants failed to state a cause of action because the antitrust claims alleged in the complaint are preempted by provisions of the Cable Television Consumer Protection and Competition Act of 1992 (Pub.L. No. 102-385 (Oct. 5, 1992) 106 Stat. 1460, 1992 U.S. Code Cong. & Admin. News, No. 1) (the 1992 Cable Act), and the Cable Communications Policy Act of 1984 (Pub.L. No. 98-549 (Oct. 30, 1984) 98 Stat. 2779, codified in part at [47 U.S.C.A. § 521 et seq.](#)) (the 1984 Cable Act). Respondent argued that its

practice of offering customers several "tiers of service" is required by federal law and that, in any event, states are expressly prohibited by the cable acts from regulating rates charged by cable operators.

On July 12, 1995, the trial court sustained respondent's [\*\*\*4] demurrer without leave to amend. Judgment was entered on August 21, 1995. Appellants timely appealed.

### [\*1519] III. DISCUSSION

Appellants contend the trial court erred by sustaining the demurrer to their complaint; they argue the complaint states valid causes of action because the 1984 and 1992 Cable Acts do not preempt their state Cartwright Act claims. [HN1](#) When reviewing a judgment based on an order sustaining a demurrer without leave to amend, we accept as accurate the factual allegations of appellants' complaint. ([Endler v. Schutzbanks \(1968\) 68 Cal. 2d 162, 165 \[65 Cal. Rptr. 297, 436 P.2d 297\]](#).) If the complaint states a cause of action, the judgment must be reversed. ([Black v. Browne \(1940\) 39 Cal. App. 2d 606, 607-608 \[103 P.2d 1012\]](#))

#### A. The Preemption Doctrine

[CA\(1\)](#) (1) The preemption doctrine derives from the supremacy clause, which declares that the [HN2](#) "laws of the United States . . . shall be the supreme Law of the Land; and the Judges in [\*\*548] every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. [Const., art. VI, § 2.](#))

[HN3](#) "Whether federal law preempts state law 'fundamentally is a question of [\*\*\*5] congressional intent . . . .' [Citations.]" ([Smiley v. Citibank \(1995\) 11 Cal. 4th 138, 147 \[44 Cal. Rptr. 2d 441, 900 P.2d 690\]](#), affd. [U.S. \[116 S. Ct. 1730, 135 L. Ed. 2d 25\]](#).) When addressing a preemption question, we "start[] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." ("[Cipollone v. Liggett Group, Inc. \(1992\) 505 U.S. 504, 516 \[112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407\]](#); see also [Smiley v. Citibank, supra, 11 Cal. 4th at p. 148](#).) "Therefore, courts should proceed on 'the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.' ("[Storer Cable Com. v. City of Montgomery, Ala. \(M.D.Ala. 1992\) 806 F. Supp. 1518, 1531](#), quoting [Merrill Lynch, Pierce Fenner & Smith v. Ware \(1973\) 414 U.S. 117, 127 \[94 S. Ct. 383, 389-390, 38 L. Ed. 2d 348\]](#).)

[HN4](#) Preemption may arise in three ways. " 'First, Congress can define explicitly the extent to which its enactments pre-empt state law.' [Citations.] 'Second, [\*\*\*6] in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.' [Citations.] 'Finally, state law is pre-empted to the extent that it actually conflicts with federal law.' [Citations.]" ([Smiley v. Citibank, supra, 11 Cal. 4th at p. 147](#).)

In the present case, the trial court found two types of preemption. First, it concluded that the anti-tying provisions of the Cartwright Act conflict with [\*1520] federal law which compels cable operators to require customers to subscribe to a basic service tier as a prerequisite to providing access to other tiers of service (conflict preemption). Second, the court found that statutory provisions in the 1984 and 1992 Cable Acts prohibiting states from regulating cable company rates explicitly preempt the Cartwright Act claims at issue in this case (express preemption). In addition, respondent contends that the lower court's preemption ruling can be sustained under another provision of the cable acts which allegedly expressly precludes states from regulating cable operators' "tiering" decisions.

For the reasons that [\*\*\*7] follow, we hold that the 1992 Cable Act preempts only a portion of appellants' claims and that neither act precludes appellants from stating a valid cause of action under the Cartwright Act. Therefore, the judgment must be reversed.

#### B. The 1992 Cable Act Provision Requiring Subscription to a Basic Tier of Service for Access to Other Tiers of Service Conflicts With Only a Portion of the Cartwright Act Claims

The trial court found that appellants' claims are preempted to the extent that they are based on conduct occurring after the enactment of [47 United States Code Annotated section 543\(b\)\(7\)](#), of the 1992 Cable Act ([section 543\(b\)\(7\)](#)). [Section 543\(b\)\(7\)](#) states in relevant part: [HN5](#) "Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service." ([§ 543\(b\)\(7\)\(A\)](#).)

[CA\(2\)](#) (2) Appellants have alleged that respondent violated the Cartwright Act by requiring customers to subscribe to its basic service tier in order to access other tiers of service. This part of the allegedly illegal conduct is expressly required by [section 543\(b\)\(7\)](#). Thus, it appears appellants' claims are \*\*\*8 partially preempted. Appellants contend, however, that [section 543\(b\)\(7\)](#) does not preempt any of their claims because this provision applies only to those cable companies that are regulated under the cable act and there is no evidence in the record that respondent is regulated.

Respondent half-heartedly disputes appellants' contention that only cable companies whose rates are regulated are subject to [\\*\\*549](#) [section 543\(b\)\(7\)](#). Respondent cites no authority for its contention that all cable operators, whether regulated or not, are subject to [section 543\(b\)\(7\)](#). The only authority on the subject which has been brought to our attention states that [section 543\(b\)\(7\)](#) applies only to regulated companies. (See [Time Warner Entertainment Co., L.P. v. F.C.C. \(D.C. Cir. 1995\) 56 F.3d 151, 192 \[312 App.D.C. L\\*1521\] 187](#).) We are persuaded by the *Time Warner* court's interpretation of the relevant statute and agree with its conclusion that [HN6](#) only regulated companies must comply with [section 543\(b\)\(7\)](#). ([56 F.3d at p. 192](#).)

Respondent next claims that its San Francisco and Marin cable systems are regulated. Indeed, the trial court took judicial notice of documentation which establishes that \*\*\*9 respondent's San Francisco and Marin county operations are currently being regulated.<sup>1</sup> Nevertheless, the court's conclusion that appellants' claims are preempted by [section 543\(b\)\(7\)](#) to the extent they are based on conduct occurring after the enactment of that statute is erroneous in two important respects.

First, the trial court erred by using the date [section 543\(b\)](#) was enacted as the cutoff date for appellants' claims rather than determining when respondent actually became subject to \*\*\*10 regulation.<sup>2</sup> The documents of which the trial court took judicial notice do not establish when respondent became subject to rate regulation. [Section 543\(a\)\(2\)](#) of the 1992 Cable Act provides that [HN7](#) "[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by any State or franchising authority under this section." ([47 U.S.C.A. § 543\(a\)\(2\)](#).)<sup>3</sup> Thus, respondent was subject to rate regulation at all times that it was not subject to effective competition.

\*\*\*11 In its brief, respondent contends it was subject to "effective competition" "[f]rom September 22, 1990 (the starting date for the Complaint's allegations) through June 21, 1993 (when the Commission changed its effective competition regulations). . . ." We have not been directed to any factual evidence in the record to support this contention. But if it is correct, [section 543\(b\)\(7\)](#), the preemption provision relied on by both the trial court and respondent, could not have applied to respondent before June 21, 1993. In a petition for rehearing, however, respondent submits a new and different contention and asks us to rule as a matter of law that it was subject to

<sup>1</sup> At oral argument, appellant's counsel argued that while Viacom's San Francisco and Marin systems are subject to regulation, they are not currently being regulated. However, the documents of which the trial court took judicial notice indicate that both the San Francisco and Marin systems are currently being regulated. The documents include two Federal Communications Commission (FCC) opinions and orders resolving complaints about the prices respondent charged for cable programming service in Marin and in San Francisco.

<sup>2</sup> Even if [section 543\(b\)\(7\)](#) applies to nonregulated companies, as respondent contends, it would be error to focus on the enactment date of the statute as the trial court did in this case. [Section 543\(b\)](#) did not become effective until 180 days after its enactment. (See [47 U.S.C.A. § 543](#), Historical and Statutory Notes.)

<sup>3</sup> The substance of this provision was also contained in the 1984 Cable Act. (See [47 U.S.C.A. § 543\(b\)\(1\)](#).)

effective competition (and hence not subject to rate regulation by anyone) [\*1522] only until the effective date of the 1992 Cable Act, April 3, 1992. We decline the invitation to so rule for at least two reasons: (a) the statute seems to suggest that a Commission finding is determinative of whether a cable system is or is not subject to "effective competition" (see [§ 543\(a\)\(2\)](#)) and (b) bearing in mind the procedural posture of this case, we think the issue of the effective date of rate regulation is one best left to [\*\*\*12] the trial court for consideration in the course of future proceedings.<sup>4</sup>

The trial court's second error was in concluding that all of appellants' claims are partially preempted by [section 543\(b\)\(7\)](#). By its own terms, [section 543\(b\)\(7\)](#) applies only to the provision of the "basic service tier," which in the present case would be respondent's tier of broadcast channels. But appellants' claims are not limited to the allegation that it is illegal to require customers to buy the basic service tier in order [\*\*\*13] to obtain access to other tiers. Appellants also complain [\*\*550] that respondent's practice of requiring a subscription to the basic *and* satellite cable tier in order to obtain access to the premium channels constitutes illegal tying. [Section 543\(b\)\(7\)](#) neither requires nor authorizes this latter practice. Indeed, [HN8](#) [↑] [section 543\(b\)\(8\)](#) expressly prohibits a cable operator from requiring "the subscription to any tier other than the basic service tier . . . as a condition of access to video programming offered on a per channel or per program basis." ([47 U.S.C.A. § 543\(b\)\(8\)](#).)

In summary, although [section 543\(b\)\(7\)](#) may temporally and substantively limit the scope of appellants' claims, it does not preclude appellants from stating a cause of action for violation of California's Cartwright Act. Thus, [section 543\(b\)\(7\)](#) does not justify sustaining respondent's demurrer to the complaint.

#### C. The Provision in the Cable Acts Prohibiting States From Regulating Rates Does Not Preempt the Cartwright Act Provisions Upon Which Appellants Rely

[CA\(3a\)](#) [↑] (3a) The second ground for the court's ruling is that [47 United States Code Annotated section 543\(a\)](#) of the 1984 and 1992 Cable Acts ([section 543\(a\)](#)), which precludes [\*\*\*14] states from regulating cable company rates, preempts appellants' antitrust claims. The court reasoned that appellants' prayers for relief establish that they seek to regulate respondent's rates because appellants seek damages for allegedly *illegal rates* and also seek to enjoin respondent from charging *illegal rates* in the future.

[\*1523] [Section 543\(a\)\(1\)](#) of the 1992 Cable Act states that [HN9](#) [↑] "[n]o Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title." ([§ 543\(a\)\(1\)](#).) [HN10](#) [↑] [Section 543\(a\)\(2\)](#) provides that a cable system which is subject to "effective competition" is not subject to rate regulation by "the Commission or by a State or franchising authority under this section." ([§ 543\(a\)\(2\)](#).) This section further provides that if a cable system is not subject to "effective competition" that system's rates for the provision of basic cable service shall be subject to limited regulation by the franchising authority and by the commission. (*Ibid.*) Prior to the enactment of the 1992 Cable Act, the 1984 Cable Act contained comparable statutory provisions severely limiting states' [\*\*\*15] authority to regulate rates for the provision of cable services. (See [47 U.S.C.A. § 543\(a\)-\(b\)](#).)

Appellants do not dispute that both cable acts preclude states from regulating cable rates. Rather, they contend that the anti-tying provisions of the Cartwright Act do not regulate rates. According to appellants, the antitrust laws are the antithesis of regulation in that their design and purpose is to promote competition and not regulation. Respondent, on the other hand, contends that using the Cartwright Act to regulate its "tiering" practices would directly affect how much it could charge customers, since rates are determined according to the tiering structure it has adopted. According to respondent, the cable acts preempt any state law, including antitrust laws, which necessarily affect cable rates.

<sup>4</sup> As noted above, during oral argument, appellants' counsel attempted for the first time to distinguish between companies that are regulated and companies that are subject to regulation. Whether this distinction is valid and relevant to the determination as to when respondent became subject to [section 543\(b\)\(7\)](#) (i.e., when it became subject to regulation or when it was actually regulated) is an issue the parties may address to the trial court, which has not yet had the opportunity to consider this matter.

Although both parties cite authority useful to our analysis, we have found no case which addresses the specific issue we face, i.e., whether the anti-tying provisions of the California Cartwright Act constitute rate regulation and are therefore preempted by the cable acts. We conclude that these provisions do not constitute direct rate regulation and that Congress has not expressed [\*\*\*16] an intent to preempt all state regulation which indirectly affects rates charged by cable operators. Therefore, appellants' claims are not preempted by [section 543\(a\)](#).

### *1. The Anti-tying Provisions Do Not Constitute Rate Regulation*

We employ respondent's proffered definition of rate regulation: [HN11](#)[<sup>1</sup>] a cable operator's "rate" is "the amount of money charged to subscribers to receive cable services." ([Storer Cable Com. v. City of Montgomery, Ala., supra, 806 F. Supp. at p. 1543](#).) To "regulate" means "[t]o fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." (Black's Law Dict. (6th ed. 1990) p. [\*\*551] 1286, col. 1.) Thus, in the present context, a rate regulation is a law which fixes, establishes or controls the amount of money a cable operator [\*1524] may charge subscribers for the provision of cable services. The Cartwright Act provisions upon which appellants rely, [sections 16720](#) and [16727 of the Business and Professions Code](#), do not fall within this definition.

The purpose of the Cartwright Act is to protect and foster competition by preventing combinations and conspiracies [\*\*\*17] which unreasonably restrain trade. (See [State of California ex rel. Van de Kamp v. Texaco, Inc. \(1988\) 46 Cal. 3d 1147, 1153 \[252 Cal. Rptr. 221, 762 P.2d 385\]](#); [People v. Santa Clara Valley Bowling etc. Assn. \(1965\) 238 Cal. App. 2d 225, 238 \[47 Cal. Rptr. 570\]](#).) [HN12](#)[<sup>1</sup>] Section 16720 of the Cartwright Act defines a "trust" as a "combination of capital, skill or acts by two or more persons" for numerous specified purposes including "(a) [t]o create or carry out restrictions in trade or commerce" and "(c) [t]o prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity." ([Bus. & Prof. Code, § 16720](#).) Except as otherwise stated in the Cartwright Act, "every trust is unlawful, against public policy and void." ([Bus. & Prof. Code, § 16726](#).)

[Section 16727](#) of the Cartwright Act, which expressly prohibits illegal tying arrangements, states: [HN13](#)[<sup>1</sup>] "It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or [\*\*\*18] understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State." ([Bus. & Prof. Code, § 16727](#).)

[CA\(4\)](#)[<sup>1</sup>] (4) Case law construing [Business and Professions Code section 16727](#) defines [HN14](#)[<sup>1</sup>] a tying arrangement as " '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.' " ([Corwin v. Los Angeles Newspaper Service Bureau, Inc. \(1971\) 4 Cal. 3d 842, 856 \[94 Cal. Rptr. 785, 484 P.2d 953\]](#); [Kim v. Servosnax, Inc. \(1992\) 10 Cal. App. 4th 1346, 1360 \[13 Cal. Rptr. 2d 422\]](#).) Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. (*Ibid.*) Even when not per se illegal, a tying arrangement [\*\*\*19] violates the Cartwright Act if it unreasonably restrains trade. ([Kim v. Servosnax, Inc., supra, 10 Cal. App. 4th at p. 1361](#).)

Neither the language of the Cartwright Act provisions at issue nor authority construing them indicates that the purpose or effect of those provisions is [\*1525] to dictate or otherwise control what price a company, such as a cable operator, may charge for its services or goods. Instead, these provisions preclude agreements which restrain trade by conditioning the consumer's access to a product or service on his or her relinquishment of the freedom to choose whether to purchase another product or service. [CA\(3b\)](#)[<sup>1</sup>] (3b) To the extent cable rates are affected at all by enforcement of these provisions, the effect is indirect at best.

That the state laws at issue are not designed to and do not directly regulate cable rates distinguishes the present case from most of the preemption cases upon which respondent relies. (See [Storer Cable Com. v. City of Montgomery, Ala., supra, 806 F. Supp. at pp. 1542-1544](#) [preempting portion of local ordinance prohibiting cable companies from charging anticompetitive rates]; [Town of Norwood v. Adams-Russell Co. \(1990\) 406 Mass. 604 \[549 N.E.2d 1115\]](#) [preempting rate-freeze provision in contract between cable operator and franchising authority]; [Westmarc Com. v. Conn. Dept. of Public Utility \(D.Conn. 1990\) 807 F. Supp. 876, 884-889](#) [state agency ruling providing that fine imposed on cable operator could not be passed on to cable subscribers constituted impermissible rate regulation]; [\[\\*\\*552\] Cablevision Systems Corp. v. Town of East Hampton \(E.D.N.Y. 1994\) 862 F. Supp. 875, 883-885](#) [recognizing that 1992 Cable Act limited franchising authority's power to regulate rates to regulation of basic service tier]; [Time Warner Entertainment Co. v. Briggs \(D.Mass. 1993\) 1993 WL 23710, 3-4](#) [preempting local ordinance to the extent it regulated cable company rates]; [City of Dubuque v. Group W Cable, Inc. \(N.D.Iowa 1987\) 1987 WL 11826, 4-7](#) [preempting cable franchise regulation of cable equipment rates]; [City of Gillette v. TCI Cablevision of Wyoming, Inc. \(D.Wyo. 1991\) 1991 WL 329587](#) [preempting portions of city ordinances which overstepped franchising authority's power to regulate rates for cable services].)

Nevertheless, respondent contends the Cartwright Act provisions [\[\\*\\*\\*21\]](#) constitute rate regulation because applying these state law provisions to respondent's activities necessarily affects the rates it can charge. We reject this argument for two reasons. First, the anti-tying law does not preclude a cable operator from charging whatever rate it desires but only prohibits the operator from entering into an agreement which forces a customer to accept one service in order to obtain another. Thus, so long as access to services is not restricted in a way prohibited by the law, cable rates are not affected at all. Second, to the extent the anti-tying provisions have some indirect effect on cable company rates, we find insufficient evidence Congress intended to preempt those provisions.

## 2. An Indirect Effect on Cable Rates Does Not Warrant Preemption

[HN15](#) In determining the scope of the cable acts' preemptive effect, we begin with the language of the federal statute; if that language is ambiguous we [\[\\*1526\]](#) consider the statute's legislative history. (See [Storer Cable Com. v. City of Montgomery, Ala., supra, 806 F. Supp. at p. 1542](#); [Westmarc Com. v. Conn. Dept. of Public Utility, supra, 807 F. Supp. at p. 885](#).) Here, [section 543\(a\)](#) of the [\[\\*\\*\\*22\]](#) 1992 Cable Act provides that no state "may regulate the rates for the provision of cable service" except as provided under the act, and that the "rates" for the "provision of basic cable service" and "for cable programming services" "shall not be subject to regulation" except under limited circumstances not relevant in this case. ([§ 543\(a\)\(1\)-\(2\)](#).) The 1984 Cable Act similarly restricted the states' power to "regulate the rates for the provision of cable services." ([§ 543\(a\)](#).)

The language used in both the 1992 and the 1984 versions of [section 543\(a\)](#) is not indicative of a congressional intent to extend the statute's preemptive effect so as to include all state regulation which might indirectly affect cable rates. ( [Cable Television Ass'n v. Finneran \(2d Cir. 1992\) 954 F.2d 91](#) (*Finneran*).) The *Finneran* court held that the provision of the 1984 cable act prohibiting states from regulating cable rates does not preempt state authority to regulate charges by cable operators to customers wishing to downgrade to a less expensive level of cable service. The court found that downgrade charges are not rates for the provision of cable services and, therefore, are not expressly [\[\\*\\*\\*23\]](#) preempted by the cable act. ( [Id. at p. 100](#).) The court also rejected the argument that regulation of downgrade charges was preempted because it would necessarily affect rates for the provision of cable services. The court was unable to discern a congressional intent to preempt regulations only indirectly affecting rates. ( [Id. at pp. 100-102](#).) The court based its ruling on, among other things, the language employed in [section 543\(a\)](#) which "fails to evince an intention to carve out a wide area free of state regulation." ([954 F.2d at p. 101](#).)

As the *Finneran* court recognized, "[w]here Congress has intended to pre-empt all state laws affecting a particular subject, it has employed language well suited to the task." ([Finneran, supra, 954 F.2d at p. 101](#).) Thus, for example, statutes which expressly preempt state regulations which "relate to" a given subject matter or field are indicative of an expansive preemptive intent. (*Ibid.*; see, e.g., [Morales v. Trans World Airlines, Inc. \(1992\) 504 U.S. 374, 383-387 \[112 S. Ct. 2031, 2036-2039, 119 L. Ed. 2d 157\]](#) [finding that the term "relating to" indicates that a preemption clause is intended to have a broad reach].) [\[\\*\\*\\*24\]](#) The cable acts do not employ such [\[\\*\\*553\]](#) broad language;

they do not preempt state laws that "relate to" rate regulation. Rather the language employed suggests that ". . . Congress meant to pre-empt only those state rules that regulate rates charged by cable companies for providing services to customers." (*Finneran, supra, 954 F.2d at p. 102.*)

We conclude, as have courts construing both the 1984 and the 1992 Cable Acts, that [HN16](#)<sup>5</sup> the statutory language employed in the cable acts indicates that [\*1527] Congress intended the preemptive scope of [section 543\(a\)](#) to be narrow. (See, e.g., *Finneran, supra, 954 F.2d at p. 102; Total TV v. Palmer Communications, Inc. (9th Cir. 1995) 69 F.3d 298, 302*, cert. dism. *U.S. [116 S. Ct. 1459, 134 L. Ed. 2d 576].*) Thus, the cable acts prohibit states from directly regulating cable rates; they do not prohibit states from enforcing any law which may indirectly affect the rates any company may charge.

Our conclusion is supported by the acts' legislative history, history which is relevant to the extent the acts are arguably ambiguous as to the scope of their intended preemptive effect. An important purpose of the [\*\*\*25] cable acts is to foster competition in the cable industry. ([47 U.S.C.A. § 521\(6\).](#)) This purpose is consistent with and promoted by enforcing the Cartwright Act's prohibition against tying arrangements which unreasonably restrain competition.<sup>5</sup> [\*\*\*26] Further, section 27 of the 1992 Cable Act, an uncodified provision recorded in the act's legislative history, indicates it was not designed or intended to preclude enforcement of federal and state antitrust laws. (Pub.L. No. 102-385 (Oct. 5, 1992) § 27, 106 Stat. 1503, 1992 U.S. Code Cong. & Admin. News, No. 1, § 27, p. 1503 ["Nothing in this Act or the amendments made by this Act shall be construed to alter or restrict in any manner the applicability of any Federal or state [antitrust law](#)."].)<sup>6</sup>

[\*1528] Our conclusion is also consistent with the Ninth Circuit's recent decision in *Total TV v. Palmer Communications, Inc., supra, 69 F.3d 298* (*Total TV*), a case decided after the lower court issued its decision in the present case. Total TV was a nonfranchised "cable television dealer" which sued a franchised cable operator and the company that owned it, alleging defendants were attempting to drive it out of the relevant market by engaging in below-cost [\*\*\*27] predatory pricing with the intent to destroy competition in violation of the California Unfair Practices Act, [Business and Professions Code section 17043 \(UPA\)](#). ([69 F.3d at p. 300.](#)) Total TV sought damages and injunctive relief. After removing the case to federal court, defendants filed a motion to dismiss, arguing Total

<sup>5</sup> Respondent contends it is irrelevant that enforcing the Cartwright Act in this context may actually further the purpose of the cable acts because the United States Supreme Court has held that "an express preemption clause displaces all state laws that fall within its sphere, including consistent ones." (Citing *Morales v. Trans World Airlines, Inc., supra, 504 U.S. at pp. 386-387 [112 S. Ct. at pp. 2038-2039]* (*Morales*).) But the preemption clause at issue in *Morales*, a provision of the Airline Deregulation Act of 1978 (ADA), is not comparable to [section 543\(a\)](#) of the cable acts. In contrast to [section 543\(a\)](#), the ADA preemption provision prohibited "States from enforcing any law 'relating to rates, routes, or services.'" ([504 U.S. at pp. 378-379 \[112 S. Ct. at p. 2034\].](#)) The *Morales* court held that the scope of this preemption clause was so wide that it preempted even consistent state laws which had a connection with or reference to airline rates, routes, or services. ([Id. at pp. 386-387 \[112 S. Ct. at pp. 2038-2039\].](#)) However, the court did not announce a general rule that all preemption clauses automatically preempt consistent state laws.

The additional cases cited by counsel during oral argument are similarly unavailing because, among other things, they involve federal statutes which Congress clearly intended to have broad preemptive effects. (See *San Diego Unions v. Garmon (1959) 359 U.S. 236, 239 [79 S. Ct. 773, 776, 3 L. Ed. 2d 775]* [National Labor Relations Act]; *Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 739 [105 S. Ct. 2380, 2388-2389, 85 L. Ed. 2d 728]* [Employee Retirement Income Security Act].).

<sup>6</sup> Respondent's contention that section 27 cannot negate statutory provisions which expressly preempt appellants' claims begs the question. Our review of the relevant statutes and authority leads us to the conclusion that no statutory provision expressly preempts appellants' claims.

Respondent's reliance on [section 556\(c\)](#) of the cable acts is also misplaced. [Section 556\(c\)](#) provides that state laws inconsistent with the acts are "deemed to be preempted and superseded." ([47 U.S.C.A. § 556\(c\).](#)) As our analysis illustrates, the Cartwright Act provisions at issue in the present case are not inconsistent with the cable acts.

TV's claims were preempted because the relief sought would prohibit defendants from charging their current rates and thereby effectively [\*\*554] regulate them in contravention of the cable acts. (*Ibid.*)

The *Total TV* court held that the cable acts did not preempt the UPA provision upon which Total TV relied because the provision does not regulate rates but "merely fixes a level below which the producer or distributor may not sell with intent to injure a competitor." (*Total TV, supra, 69 F.3d at p. 301*.) The court rejected the precise argument embraced by the trial court in the present case, i.e., that a state law could be characterized as rate regulation because it authorized relief which would indirectly affect rates. The court reasoned that "[e]ven assuming that Total TV receives the relief it requests, Colony's and Palmer's prices will not be regulated [\*\*\*28] directly and, as long as they do not act with discriminatory purpose, they will be free to 'sell [their] merchandise at any price [they] please in the ordinary course of business.' [Citation.]" (*Ibid.*)

The *Total TV* court's preemption analysis properly focused on discerning and effectuating congressional intent. The court found that (1) the statutory language used in the acts signified a limited preemptive intent; (2) the cable acts' purpose of fostering competition in the cable industry was complimented rather than undermined by declining to preempt the UPA provisions; and (3) the legislative history of the cable acts indicates Congress did not intend to preempt state antitrust laws of general applicability. (*Total TV, supra, 69 F.3d at pp. 302-304*.) In this third regard, the court specifically relied on section 27 of the 1992 Cable Act, which expresses Congress's intent not to preempt federal and state antitrust laws. The *Total TV* court held that " [i]n light of the clear mandate of Section 27 that state antitrust laws not be preempted, § 543(a)(1) applies only to those situations involving a statute (or local ordinance) directly aimed at the cable [\*\*\*29] industry and affecting or regulating rates." (*69 F.3d at p. 303*.)

Respondent contends *Total TV* is inapposite because it involved the UPA rather than the Cartwright Act. However, this distinction is not material to [\*1529] our analysis. Indeed, we think it undeniable that the predatory pricing law at issue in *Total TV* has a more direct effect on cable rates than the anti-tying prohibition of the Cartwright Act. In any event, *Total TV* squarely supports our conclusion that neither the language nor the legislative history of the cable acts warrant preemption of state antitrust laws which may have an indirect effect on cable rates.

Respondent also argues that *Total TV* should not be followed because it is inconsistent with *Time Warner Cable v. Doyle* (7th Cir. 1995) 66 F.3d 867, certiorari denied — U.S. — [116 S. Ct. 974, 133 L. Ed. 2d 894] (*Doyle*). *Doyle* addressed the legality of a cable operator's restructuring of its tiered services. Time Warner deleted certain channels from its basic tier and its standard tier and offered the deleted channels to new customers as a separate "a la carte" service. Time Warner continued to provide [\*\*\*30] the "a la carte" channels to existing customers but began charging them an additional fee. (*Id. at pp. 870-871*.) The State of Wisconsin (State) argued that Time Warner's policy of charging customers for an unordered service and requiring those who did not want the service affirmatively to reject the charge constituted "negative option billing" in violation of the State's unfair trade practice law. (*Id. at p. 871*.) Both the 1992 Cable Act and an FCC regulation proscribed negative option billing. (See 47 U.S.C.A. § 543(f); 47 C.F.R. § 76.981 (1996).) However, the regulation carved out an exception in cases involving "the addition or deletion of specific channels from an existing tier of service." Time Warner argued that the State's unfair trade practice law was preempted by the federal regulation. (*Doyle, supra, 66 F.3d at p. 872*.)

Recognizing that preemption may occur through the promulgation of federal regulations, the *Doyle* court focused on the question whether the federal regulation authorizing Time Warner's conduct was consistent with the 1992 Cable Act. (*Doyle, supra, 66 F.3d at p. 875*.) The *Doyle* court found that (1) the 1992 Cable Act's statutory [\*\*\*31] language prohibiting negative option billing was sufficiently ambiguous to require some agency interpretation (*id. at pp. 876-877*) and (2) the federal regulation at issue was a permissible interpretation of the congressional authority given to the FCC by the 1992 Cable Act. (*Id. at pp. 877-881*.) Though recognizing the act was not intended to preempt state consumer protection laws, the court found that *section 543(a)* of the act, which prohibits states from [\*\*555] regulating rates, supported the FCC interpretation of its authority under the act as including the power to preempt state consumer protection laws which jeopardized the rate structure of cable company operators. (*66 F.3d at pp. 877-881*.) Thus, the court concluded that the FCC regulation which authorized Time Warner's challenged activities preempted the State's consumer protection law.

[\*1530] Respondent characterizes *Doyle* as "directly on point." In fact, *Doyle* addressed a much different question, i.e., whether the FCC had authority under the 1992 Cable Act to promulgate a regulation which expressly preempts state law. The *Doyle* court did not hold that the 1992 Cable Act preempts any state law which indirectly [\*\*\*32] affects rates. It held, rather, that the FCC had authority under the act to promulgate a regulation which preempted a state law that only indirectly affected rates. Since we are faced with no comparable federal regulation in the present case, *Doyle* is inapposite.<sup>7</sup>

[\*\*\*33] We conclude that the trial court erred by characterizing the Cartwright Act provisions as rate regulation. Further, state law provisions are not preempted because they may have some indirect effect on cable rates. In the present case, enforcing the Cartwright Act provisions would not have a sufficiently direct effect on rates to justify finding those provisions preempted by [section 543\(a\)](#) of the Cable Acts.

*D. The Provision in the Cable Acts Precluding States From Imposing Requirements Regarding the Provision or Content of Cable Services does not Preempt the Provisions of the Cartwright Act Upon Which Appellants Rely*

[CA\(5\) \[↑\]](#) (5) [HN17 \[↑\]](#) [47 United States Code Annotated section 544\(f\)](#) of the 1984 and 1992 Cable Acts ([section 544\(f\)](#)) provides that a state "may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter." ([§ 544\(f\)\(1\)](#).) According to respondent, [section 544\(f\)](#) prohibits states from regulating cable operators' tiering decisions. Respondent contends that [section 544\(f\)](#) is an alternative ground upon which to sustain the judgment.

The lower court found that [section 544\(f\)](#) does not preempt appellants' claims because [\*\*\*34] that section prohibits state regulation of the content of cable [\*1531] programming and the Cartwright Act claims at issue in this case do not seek to regulate content. The court cited [Storer Cable Com. v. City of Montgomery, Ala., supra, 806 F. Supp. 1518](#) (*Storer*) as support for its conclusion.

In *Storer*, several cable operators argued that a local ordinance regulating competition among cable operators was preempted by [section 544\(f\)](#). (*Storer, supra, 806 F. Supp. at pp. 1544-1546*.) Rejecting this contention, the *Storer* court adopted the analysis of the only federal appellate court to interpret [section 544\(f\)](#) and found that the language of that section sheds little light on the provision's proper application but that its legislative history indicates that "[§ 544\(f\)](#)'s concern is with 'content-based rules' which require or forbid cable providers from carrying particular programming." ([806 F.Supp at p. 1545](#).) The court concluded that the ordinance at issue was content-neutral and thus not preempted by [section 544\(f\)](#). (*Id. at p. 1546*.)

The appellate decision upon which the *Storer* court relied was [United Video, Inc. v. F.C.C. \(D.C. Cir. \[\\*\\*\\*35\] 1989\) 890 F.2d 1173 \[281 App.D.C. 368\]](#) (*United* [\*\*556] *Video*). In that case, the Court of Appeals for the District of Columbia rejected several cable operators' challenge to FCC "syndicated exclusivity" rules which enabled a supplier of syndicated programs to agree with a broadcast television station that the station would be the exclusive presenter of the program in its area. (*Id. at p. 1176*.) The court held, among other things, that [section 544\(f\)](#) of the Cable Act did not forbid the FCC from adopting the challenged rules. (890 F.3d at pp. 1187-1190.) Finding the language of [section 544\(f\)](#) to be ambiguous, the *United Video* court concluded that the legislative history of this provision revealed that it was intended to prohibit content-based regulation of cable services: "[T]he key is whether a regulation is content-based or content-neutral. [Section 544\(f\)](#), one must note, does not simply forbid

<sup>7</sup> The *Doyle* court did embrace the view that "[t]he rate structure is a federal matter and state consumer laws that impact upon it conflict with the operation of the rate structure." (*Doyle, supra, 66 F.3d at p. 882*.) However, we decline to take this statement out of the context in which it occurs. Indeed, the *Doyle* court expressly acknowledged the limitation of its holding by declining to disagree with [Time Warner Entertainment Co., L.P. v. F.C.C., supra, 56 F.3d 151](#). In that case, the Court of Appeals for the District of Columbia held that the cable act *did not* preempt state and local negative option billing laws. (*Id. at p. 194*.) Instead of disagreeing with the *Time Warner* court's analysis (an analysis consistent with our conclusion in the present case), the *Doyle* court simply found that it faced a different issue, i.e., "whether the FCC regulation specifically preempts the enforcement of state negative option billing laws in the narrow situation of relatively minor adjustments in programming." (*Doyle, supra, 66 F.3d at p. 880, fn. 17*.)

'requirements'; it forbids 'requirements regarding the provision or content of cable services.' (emphasis added). The House report suggests that Congress thought a cable company's owners, not government officials, should decide what sorts of programming the company would provide. But [\*\*\*36] it does not suggest a concern with regulations of cable that are not based on the content of cable programming, and do not require that particular programs or types of programs be provided. Such regulations are not requirements 'regarding the provision or content' of cable services." ([890 F.2d at p. 1189](#).)

*Storer* and *United Video* support the conclusion that [section 544\(f\)](#) targets regulation of the content of cable services and does not, therefore, preempt the Cartwright Act provisions at issue in this case. Respondent does not argue that the anti-tying provisions regulate content. Instead it contends that [\*1532] [section 544\(f\)](#) should be construed more broadly to preempt any suit "challenging a cable company's tiering decision." Respondent's contention is not supported by the only authority it cites, [Cablevision Systems Corp. v. Town of East Hampton, supra, 862 F. Supp. 875](#) (*Town of East Hampton*). The discussion in that case upon which respondent relies addressed whether a franchising authority could revoke a cable operator's franchise for violating a franchise agreement by eliminating a previously available "tier" of service without obtaining prior City [\*\*\*37] approval. The *Town of East Hampton* court held that such a revocation was precluded by the cable act which limited a franchising authority's power to regulate cable services to enforcing valid requirements "for broad categories of video programming or other services." ([47 U.S.C.A. § 544\(a\)-\(b\)](#).) The court noted that the cable operator's re-structuring of its tiers did not affect a broad category of programming or services but merely restructured the manner in which its programming was packaged. According to the court, the cable act precludes franchising authorities from enforcing franchise requirements "that usurp the cable operator's power to determine the details and particulars of the provision of cable service." (*Town of East Hampton, supra, 862 F. Supp. at p. 886*.) Thus, the court held that the franchising authority had "no authority to regulate such a particular as the manner in which Cable service is packaged for the Consumer." (*Ibid.*)

*Town of East Hampton* does not advance respondent's argument that this case is preempted by [section 544\(f\)](#) for several reasons. First and foremost, *Town of East Hampton* did not discuss or even refer to [section 544\(f\)](#). [\*\*\*38] Second, *Town of East Hampton* is distinguishable from the present case because it involved a regulation which expressly and directly regulated cable services. Here, any effect on the cable operator's tiering decisions is only incidental to the enforcement of state [antitrust law](#). Finally, to the extent *Town of East Hampton* stands for the general proposition that the Cable Acts preclude regulation of the "manner in which Cable service is packaged for the Consumer," that proposition is not offended by our holding in the present case. [HN18](#)↑ The anti-tying provisions of the Cartwright Act do not regulate the manner in which cable services are packaged. Rather, they preclude a cable operator from depriving its customer, in a manner which unreasonably restrains trade, of a choice as to what package the customer wishes to purchase.

In any event, respondent has failed to provide authority to support its broad interpretation of [section 544\(f\)](#). Since the Cartwright Act provisions relied on by appellants do not seek to regulate the content of cable services, [\*557] they are not preempted by [section 544\(f\)](#). Thus, none of the grounds asserted [\*1533] by respondent support the trial court's [\*\*\*39] ruling that appellants' state law claims are preempted by the 1984 and 1992 Cable Acts.

#### IV. DISPOSITION

The judgment is reversed. Costs on appeal are awarded to appellants.

Kline, P. J., and Lambden, J., concurred.

A petition for a rehearing was denied March 21, 1997, and the opinion was modified to read as printed above.



## Doe v. Norwest Bank Minn., N.A.

United States Court of Appeals for the Eighth Circuit

December 11, 1996, Submitted ; February 28, 1997, Filed

No. 96-1763

**Reporter**

107 F.3d 1297 \*; 1997 U.S. App. LEXIS 3571 \*\*

John Doe; John Roe, on behalf of themselves and all others similarly situated, Appellants, v. Norwest Bank Minnesota, N.A., a national banking association; Voyager Guaranty Insurance Company, Appellees.

**Subsequent History:** [\[\\*\\*1\]](#) Rehearing and Suggestion for Rehearing En Banc Denied May 12, 1997, Reported at: [1997 U.S. App. LEXIS 11337](#).

**Prior History:** Appeal from the United States District Court for the District of Minnesota. CIV 3-94-1434. Honorable Michael Davis.

**Disposition:** Affirmed.

## Core Terms

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charges, coverage, borrower, premiums, district court, collateral, unauthorized, impair, national bank, extend credit, allegations, state statute, anti-competitive, endorsements, regulation, argues, tie, insurance business, insurance premium, interest rate, late fee, provisions, repayment, insured, federal statute, McCarran-Ferguson Act, policyholders, compensating, anti-tying, repossess

## LexisNexis® Headnotes

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Banking Law > ... > Banking & Finance > Federal Acts > National Bank Act

Banking Law > Types of Banks & Financial Institutions > National Banks > General Overview

Banking Law > ... > National Banks > Interest & Usury > General Overview

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

### [\*\*HN1\*\*](#) **Federal Acts, National Bank Act**

The National Bank Act permits a national bank to charge interest at the rate allowed by the laws of the State where the bank is located and no more. [12 U.S.C.S. § 85. Section 86](#) provides a federal cause of action for usury against a national bank that "takes, receives, reserves, or charges a rate of interest greater than is allowed by [12 U.S.C.S. § 85. 12 U.S.C.S. § 86](#).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

## **HN2** Standards of Review, De Novo Review

The appellate court reviews a grant of summary judgment de novo, affirming only if the record, viewed in the light most favorable to the nonmoving party, shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Banking Law > ... > Banking & Finance > Federal Acts > National Bank Act

Insurance Law > Claim, Contract & Practice Issues > Appraisals

Banking Law > ... > National Banks > Interest & Usury > General Overview

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

## **HN3** Federal Acts, National Bank Act

The term "interest" as used in [12 U.S.C.S. § 85](#) includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Appeals > Motions on Appeal

## **HN4** Motions to Dismiss, Failure to State Claim

In considering a motion to dismiss, the appellate court assumes all facts alleged in the complaint are true, construes the complaint liberally in the light most favorable to the plaintiff, and affirms the dismissal only if it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief.

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

## **HN5** Federal Acts, Bank Holding Company Act

See [12 U.S.C.S. § 1972\(1\)](#).

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

#### [\*\*HN6\*\*](#) **Financial Institutions, Bank Holding Company Act**

The plaintiff in an action under [12 U.S.C.S. § 1972\(1\)](#) must show that the bank imposed a tie, that the practice was unusual in the banking industry, that it resulted in an anti-competitive arrangement, and that it benefitted the bank.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

#### [\*\*HN7\*\*](#) **Financial Institutions, Bank Holding Company Act**

A plaintiff in a [12 U.S.C.S. § 1972](#) action need not show that a tie has anti-competitive effects. But a [§ 1972](#) plaintiff is required to show an anti-competitive practice, that is, that the practice results in unfair competition or could lessen competition.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

Insurance Law > Industry Practices > General Overview

#### [\*\*HN8\*\*](#) **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The McCarran-Ferguson Act, [15 U.S.C.S. § 1012\(b\)](#), provides that no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance unless such Act specifically relates to the business of insurance. The McCarran-Ferguson Act bars the application of a federal statute if (1) the statute does not specifically relate to the business of insurance; (2) a state statute has been enacted for the purpose of regulating the business of insurance; and (3) the federal statute would invalidate, impair, or supersede the state statute.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Securities Law > RICO Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

## **HNG** Shareholder Actions, Actions Against Corporations

The Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1964\(c\)](#), expressly grants treble damages, costs, and attorney fees to a victorious plaintiff.

**Counsel:** Counsel who presented argument on behalf of the appellant was Ronald Goldser of Minneapolis, Minnesota. Appearing on the brief were Barry G. Reed, J. Gordon Rudd, Jr., Howard Specter, Michael P. Malakoff, and Tom Lyons.

Counsel who presented argument on behalf of the appellee was Bradley Clary of Minneapolis, Minnesota. Appearing on the brief for Voyager Guaranty Insurance was ronald H. Groth. Appearing on the brief for Norwest Bank was James L. Volling, Randall E. Kahnke, and Timothy E. Rank.

**Judges:** Before BOWMAN and HEANEY, Circuit Judges, and SMITH,<sup>1</sup> District Judge.

**Opinion by:** BOWMAN

## Opinion

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[\*1299] BOWMAN, Circuit Judge.

John Doe and John Roe brought a class action against Norwest Bank Minnesota, N.A. (Norwest) and Voyager Guaranty Insurance Company (Voyager), alleging violations of the usury provisions of the National Bank Act, 12 U.S.C. § 85-86 (1994), the anti-tying provisions of the Bank Holding Company Act Amendments of 1970, [12 U.S.C. § 1972 \(1994\)](#), and the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C. § 1962\(c\) \(1994\)](#). Doe settled his claims and was dismissed from the case. The District Court<sup>2</sup> granted judgment in favor of the defendants on the federal claims and declined to exercise supplemental jurisdiction over the plaintiffs' state-law claims. Roe appeals, and we affirm.

[\*\*2] I.

Before summarizing the facts, we consider the relevance of Doe's claim to this case. Although Doe settled his claim and was dismissed from the case, Roe argues that "Doe's suitability as a class representative remains in issue." Roe's Br. at 1 n.2. We disagree. This action was filed on November 3, 1994, and Doe agreed to settle on February 28, 1995. When Doe apparently had misgivings, the defendants moved the court to enforce the settlement agreement and dismiss Doe from the case. The District Court did so, dismissing Doe on September 11, 1995, and Doe has not appealed that order. Accordingly, Doe is no longer a party to this action, individually or in his capacity as a class representative.

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<sup>1</sup> The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri, sitting by designation.

<sup>2</sup> The Honorable Michael J. Davis, United States District Judge for the District of Minnesota, adopting two reports and recommendations of The Honorable John M. Mason, United States Magistrate Judge for the District of Minnesota.

Of course, the dismissal of Doe did not affect the claim of Roe or the claims of the unnamed class members in any way. This case remains a putative class action with Roe as representative. We will therefore summarize the facts of Roe's claim. In 1989, Roe purchased a pickup truck from a dealer and entered into an installment contract, granting the dealer a security interest in the pickup truck. The dealer assigned the contract to Norwest. Several provisions of the installment contract [\*\*3] addressed insurance on the pickup truck:

Insurance on property I [Roe] give as security is required. If insurance is required, I may buy it through any insurance agent or company of my choice. . . .

. . .  
If you [Norwest] require property insurance, it must cover all risks of physical damage to the property and the risk that the vehicle may be lost. . . . I promise to keep the property insured throughout the term of my loan and to deliver a certificate of insurance to you that shows I have purchased insurance of this kind.

. . .  
I also agree that, if I fail to keep any required insurance on the property, you may purchase such insurance for me. I will immediately repay you for any amounts you spend in purchasing that insurance, plus interest at the "annual percentage rate" disclosed on the other side of this contract.

Roe's App. at 135-36. At the same time, Roe signed a document entitled "Agreement to Provide Accidental Physical Damage Insurance," which read:

I understand that to provide protection from serious financial loss, should an accident or loss occur, Norwest . . . requires the collateral securing [\*\*4] my loan to be continuously covered with insurance against the risks of fire, theft, and collision, and that failure to provide such insurance [\*1300] gives Bank the right to declare the entire unpaid balance immediately due and payable or alternatively to purchase coverage for its interest and add the premium plus interest to the balance. . . .

I further understand and agree to maintain insurance, as described above, in force during the term of the loan and will furnish Norwest . . . with a loss payable endorsement upon each renewal of said insurance.

Norwest's App. at 69.

In February 1993, Norwest notified Roe that it had not received proof of insurance and warned him that if he failed to provide proof of insurance, Norwest could exercise its right to purchase insurance. Norwest's letter notified Roe that if the bank purchased insurance, the premium of \$ 902 (for a year of coverage) would be added to his loan balance. When Roe did not provide proof of insurance, Norwest purchased insurance from Voyager and added \$ 902 to Roe's balance. Voyager then sent Roe a certificate of coverage, which indicated that only Norwest's interest in the vehicle was insured.

When that [\*\*5] coverage expired in January 1994, Norwest again warned Roe that it had not received proof of insurance. The same process was repeated, and Norwest purchased insurance and added the premium of \$ 549 to Roe's loan balance. In June 1994, Roe apparently proved to Norwest that he had procured his own insurance, and Norwest credited his loan with \$ 233, the unearned portion of the \$ 549 premium. At about the same time, Norwest added to Roe's loan a charge of \$ 11.60 for interest on the insurance charge.

As part of its collateral protection insurance program, Norwest has an umbrella insurance policy with Voyager, pursuant to which Norwest purchases insurance when borrowers fail to provide their own insurance. When Norwest purchases insurance from Voyager with respect to a particular piece of collateral, the insurance covers only Norwest's interest in the collateral. The coverage, which is otherwise similar to ordinary comprehensive and collision coverage, is limited to either the damage to the collateral or the balance of the customer's loan, whichever is smaller in amount. The umbrella policy also contains two endorsements that are significant in this case. The first endorsement, entitled [\*\*6] "Waiver of Repossession Requirement," waives the requirement that Norwest repossess the borrower's vehicle before making a claim. The second, the "Waiver of Salvage Deduction on Non-Repossession Claims," modifies the policy so that the amount payable to Norwest on a claim is not reduced by the

salvage value of the borrower's vehicle.<sup>3</sup> Roe's arguments that insurance charges attributable to these endorsements were unauthorized form the basis of this action.

The plaintiffs brought this action in federal district court, asserting [\*\*7] claims under the National Bank Act and the Bank Holding Company Act against Norwest only and a RICO claim against Voyager only. After permitting discovery and dismissing Doe from the case, the District Court granted summary judgment to the defendants on the National Bank Act claim and dismissed the anti-tying and RICO allegations for failure to state a claim on which relief could be granted. See *Doe v. Norwest Bank Minn., N.A.*, 909 F. Supp. 668 (D. Minn. 1995) (order dismissing RICO count). The court dismissed these federal claims with prejudice and declined to exercise supplemental jurisdiction over the state-law claims, dismissing them without prejudice. Roe's appeal challenges the dismissal of the federal claims.

## II.

We address the National Bank Act claim first. Insofar as it is relevant here, [HN1](#)<sup>↑</sup> the National Bank Act permits a national bank to charge "interest at the rate allowed by the laws of the State . . . where the bank is [\*1301] located . . . and no more." [12 U.S.C. § 85 \(1994\)](#). [Section 86](#) provides a federal cause of action for usury against a national bank that "takes, receives, reserves, or charges a rate of interest greater than is allowed by [section 85](#) of this title."  
[\[\\*\\*8\]](#) [12 U.S.C. § 86 \(1994\)](#); see also [M. Nahas & Co. v. First Nat'l Bank](#), 930 F.2d 608, 612 (8th Cir. 1991) (remedy of [§ 86](#) completely preempts state-law usury actions against national banks); [Fisher v. First Nat'l Bank](#), 548 F.2d 255, 257 (8th Cir. 1977) (interest rate a national bank may charge is ultimately a question of federal law).

Roe argues that the "unauthorized" charges attributable to the repossession and salvage waivers, and perhaps the full amount of insurance charges, should be considered interest with respect to his installment loan. Norwest argues that charges for insurance are not interest at all, but even if they were considered interest, the total interest rate on Roe's loan would be below the allowable cap under Minnesota law. The parties' experts assumed that all the charges were interest but used different interpretations of the Federal Reserve's Regulation Z (12 C.F.R. pt. 226 (1996)) to support their conclusions: Roe's expert calculated the interest rate by amortizing the insurance charges over the period of time from when they were imposed to the end of the loan term, while Norwest's expert amortized the insurance charges, like the ordinary interest charges, [\*\*9] over the entire length of the loan. The District Court assumed that all the insurance charges were interest and approved the calculation method of Norwest's expert. Because that method resulted in an interest rate below the maximum allowed by Minnesota law, the court granted summary judgment to Norwest.

[HN2](#)<sup>↑</sup> We review a grant of summary judgment de novo, affirming only if the record, viewed in the light most favorable to the nonmoving party, shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See [Smith v. City of Des Moines](#), 99 F.3d 1466, 1468-69 (8th Cir. 1996). We may affirm on any ground supported by the record. See [Phillips v. Marist Soc'y](#), 80 F.3d 274, 275 (8th Cir. 1996).

We need not resolve the parties' thorny dispute about the correct interpretation of Regulation Z, nor need we decide the less-complicated question of the applicable interest-rate cap under Minnesota law. Instead, we conclude that collateral protection insurance premiums charged to a borrower's account do not, as a matter of federal law, constitute "interest" within the meaning of [§ 85](#).<sup>4</sup>

<sup>3</sup> Prior to January 1991, Norwest had a different policy with Voyager that contained additional endorsements. This policy is not relevant here. Roe also claims that Norwest imposed an additional charge for calculating his premium based on the outstanding principal balance rather than the sum of principal and interest. However, Norwest introduced undisputed evidence that no such charge was made to Roe's account because the charge applies only to simple-interest accounts, which Roe's was not.

<sup>4</sup> Roe argues that Norwest has raised this issue for the first time on appeal. This assertion is patently untrue. See Report and Recommendation of Dec. 21, 1995, at 4 ("Defendant makes a compelling argument that [the charges] are not interest for any purpose.").

[\*\*10] The Office of the Comptroller of the Currency recently issued an interpretive ruling regarding the meaning of the term "interest" in [§ 85](#). That ruling reads:

**HN3** [↑] The term "interest" as used in [12 U.S.C. 85](#) includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

Interpretive Rulings, 61 Fed. Reg. 4849, 4869 (1996) (to be codified at [12 C.F.R § 7.4001\(a\)](#)) (emphasis added). Although this ruling is a recent one, it has already received the imprimatur of the Supreme Court. In [Smiley v. Citibank \(S.D.\), N.A., 135 L. Ed. 2d 25, 116 S. Ct. 1730](#) [\*\*11] (1996), the Court unanimously held that the word "interest" in [§ 85](#) was ambiguous and that the Comptroller's judgment as to its meaning was entitled to deference under [Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 \(1984\)](#). See [Smiley, 116 S. Ct. at 1732-33](#). The Court then concluded that the Comptroller's inclusion of late fees within the meaning of "interest" was a reasonable interpretation of the statute. See [id. at 1735](#). Because the law of South Dakota, Citibank's home state, permitted banks to charge late fees, the determination that late fees are interest for National Bank Act purposes put an end to the state-law claims of Smiley, a California resident. See [id. at 1732](#); [Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 313, 58 L. Ed. 2d 534, 99 S. Ct. 540 \(1978\)](#) (national bank may charge interest allowed by its home state even if such interest would not be allowed to bank in borrower's home state).

In the instant case, we are faced with a slightly different issue. If we accept the Comptroller's judgment that "premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit" are not "interest," and we conclude [\*\*12] that the charges involved here are premiums within that definition, Roe's claim must fail because he cannot show that Norwest charged "a rate of *interest* greater than is allowed by [section 85](#)." [12 U.S.C. § 86 \(1994\)](#) (emphasis added).

We have little difficulty concluding that the Comptroller's interpretation of "interest" as excluding insurance premiums is reasonable. The Supreme Court has already determined that "interest," as it is used in [§ 85](#), is not an unambiguous term. See [Smiley, 116 S. Ct. at 1732-33](#). Our inquiry, therefore, is whether "the agency's answer is based on a permissible construction of the statute." [Chevron, 467 U.S. at 843](#). Certainly the ordinary definition of "interest" does not include insurance premiums passed along from creditor to debtor. See Black's Law Dictionary 812 (6th ed. 1990) ("Interest is the compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money."); [Smiley, 116 S. Ct. at 1735](#) (interest is "compensation which is paid by the borrower to the lender or by the debtor to the creditor for . . . use [of money]") (quoting 1 J. Bouvier, *A Law Dictionary* 652 (6th ed. 1856)) (alterations [\*\*13] in [Smiley](#)). Indeed, we believe it is quite sensible to conclude that such premiums are not interest but rather additions to the principal of the loan, or perhaps separate extensions of credit entirely. See [Kenty v. Bank One, Columbus, N.A., 92 F.3d 384, 393 \(6th Cir. 1996\)](#). And, as the Court stated in [Smiley](#), it is "quite possible and rational to distinguish, as the regulation does," between charges that are specifically assigned to the expenses of the bank in undertaking such activities as processing an application, insuring a loan, or appraising collateral and, on the other hand, charges "that are assessed for simply making the loan, or for the borrower's default." [Smiley, 116 S. Ct. at 1734](#). We conclude that the Comptroller's ruling excluding "premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit" from the definition of "interest" is reasonable.

The question remains whether the charges involved here fit within the Comptroller's definition. Although collateral protection insurance has produced a substantial body of case law in recent years, we have been unable to locate any cases addressing the precise issue presented [\*\*14] here in light of [Smiley](#). Cf. [Giddens v. Hometown Fin.](#)

Servs., 938 F. Supp. 801, 806-07 (M.D. Ala. 1996) (suggesting that insurance premiums are not interest; holding that case was improperly removed); Kenney v. Farmers Nat'l Bank, 938 F. Supp. 789, 793-94 (M.D. Ala. 1996) (same). But cf. *Moss v. Southtrust Mobile Servs., Inc.*, No. CV-95-P-1647-W (N.D. Ala. Sept. 22, 1995) (holding, without discussion of Comptroller's ruling, that unauthorized premiums are interest and finding state-law claims completely preempted).<sup>5</sup> [\*1303] Roe argues that the charges added to his account are in fact not premiums attributable to insurance, but rather charges "compensating a creditor or prospective creditor for . . . a default or breach by a borrower," which would fit them within the Comptroller's definition of "interest." See 61 Fed. Reg. at 4869. It is true that Norwest charges a borrower for insurance only after the borrower breaches the covenant to maintain insurance. But there is a notable difference between a late fee, which compensates the creditor solely for the effects of the debtor's default, and an insurance charge, which compensates the creditor for the cost of protecting [\*\*15] its security, a cost the debtor is supposed to bear anyway. In addition, the limitation of the coverage in this case to the lesser of the damage to the collateral or the loan balance indicates that the insurance is designed to guarantee the repayment of the loan. Accordingly, we believe that these collateral protection insurance premiums are excluded by the Comptroller's interpretive ruling from the general category of charges compensating a creditor for a default or breach and placed in the category of premiums attributable to insurance guaranteeing the repayment of credit extended.

[\*\*16] Roe also argues that even if the basic insurance coverage is not interest, the allegedly unauthorized aspects of the insurance must be considered interest. We disagree. The charges related to the waiver of repossession and waiver of salvage endorsements are not trivial; Roe's expert calculated that these endorsements accounted for more than thirty percent of the total premium charged to Roe. But Norwest introduced undisputed evidence that these endorsements placed Norwest in exactly the same position in which it would have been if Roe had purchased a standard Minnesota automobile insurance policy and named Norwest as loss payee, as the loan agreement required him to do. In other words, under an ordinary policy in Minnesota, a lender named as loss payee would not have to repossess a wrecked car in order to make a claim, and the amount received by the lender would not be reduced by the salvage value of the car. We therefore see no reason to treat the charges related to the waiver endorsements any differently from the basic insurance charge. Although they may be differentiated for insurance purposes, they are in essence a single package designed to replicate the coverage Roe should have [\*\*17] provided himself.<sup>6</sup>

In sum, unlike late fees, NSF fees, and the like, the insurance charges in this case benefitted both creditor and borrower by making it easier for Roe to repay the loan in case his truck were physically damaged or stolen. (Roe, after all, would remain liable on the note even if the collateral were valueless.) Norwest merely passed along to Roe the exact cost Norwest incurred in procuring insurance that restored it to the same situation in which it would have been had Roe kept his end of the bargain. The charges therefore are "premiums . . . attributable to insurance guaranteeing repayment of [an] [\*\*18] extension of credit," and under the Comptroller's reasonable interpretation of the statute, they are not "interest." We conclude that the events that form the basis of this cause of action do not amount to a violation of the National Bank Act.

<sup>5</sup> The opinions in the *Kenty* case express different views of the collateral protection insurance in that case. On a motion to dismiss, the district court held that insurance charges that were "unauthorized and unnecessary to protect the collateral" could be considered interest on the loan. See *Kenty v. Bank One, Columbus, N.A.*, 1992 WL 170605, at \*4 (S.D. Ohio Apr. 23, 1992). At the summary judgment stage, however, the court concluded that state law imposed no maximum on the allowable interest rate, so that it did not matter whether any portion of the insurance charges was considered interest. See *Kenty v. Bank One, Columbus, N.A.*, 1993 WL 592532, at \*5 (S.D. Ohio Oct. 25, 1993). The Sixth Circuit saw Kenty's argument slightly differently, believing Kenty was complaining about the bank's charging interest on the insurance charges. That court concluded that the insurance premiums were themselves loans, and so state law permitted the bank to charge any amount of interest on the premiums. See *92 F.3d at 393*. None of these opinions addresses the Comptroller's interpretation of § 85.

<sup>6</sup> At times in his brief and at oral argument, counsel for Roe seemed to be challenging a third endorsement, entitled "Automatic Coverage," which covers collateral retroactively to the date on which the borrower's own insurance lapsed. We see no reason to treat this endorsement any differently from the others, as it also merely replicates the coverage Roe was contractually obligated to provide.

### III.

The District Court dismissed Roe's anti-tying allegations for failure to state a claim on which relief could be granted. See [Fed. R. Civ. P. 12\(b\)\(6\)](#). [HN4](#)<sup>↑</sup> In considering a motion to [\[\\*1304\]](#) dismiss, we assume all facts alleged in the complaint are true, construe the complaint liberally in the light most favorable to the plaintiff, and affirm the dismissal only if "it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief." [Coleman v. Watt, 40 F.3d 255, 258 \(8th Cir. 1994\)](#). Our review is de novo. See *id.*

The relevant provisions of [HN5](#)<sup>↑</sup> the Bank Holding Company Act Amendments of 1970 state as follows:

- (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service . . . on the condition or requirement--

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, [\[\\*\\*19\]](#) discount, deposit, or trust service;

...

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service.

[12 U.S.C. § 1972\(1\) \(1994\)](#). [HN6](#)<sup>↑</sup> The plaintiff in an action under this section must show that the bank imposed a tie, that the practice was unusual in the banking industry, that it resulted in an anti-competitive arrangement, and that it benefitted the bank. See [Alpine Elec. Co. v. Union Bank, 979 F.2d 133, 135 \(8th Cir. 1992\)](#).

Roe alleged two potential ties in his complaint: when he purchased insurance through the bank, he was required to accept an automatic extension of credit to pay for the insurance; and when he purchased property damage insurance through the bank, he was also required to purchase additional insurance that was unauthorized and undisclosed. On appeal, Roe emphasizes that he does not suggest that the purchase of insurance through the bank was a condition of the extension of credit for the original loan. See [Kenty, 92 F.3d at 395](#) (where borrower is free to purchase insurance on open market, [\[\\*\\*20\]](#) insurance is not tied to original loan).

Roe first complains that when he elected to purchase insurance through the bank rather than from an independent agent--a highly debatable characterization of the facts, but one we will entertain for purposes of this motion to dismiss--he found that the only way he was permitted to pay for the insurance was to have it added to his loan balance, where it bore interest at the loan rate. But this contention is belied by the language of the installment agreement itself, which was attached to Roe's complaint and forms a part of the pleadings: "I MAY PREPAY MY OBLIGATIONS UNDER THIS AGREEMENT, IN WHOLE OR IN PART, AT ANY TIME WITHOUT PENALTY." Roe's App. at 135. It is therefore clear that Roe was not required to accept an automatic extension of credit to pay for the insurance; he could have tendered payment to Norwest in the amount of the insurance premium (or in any other amount) at any time. Because Roe's complaint itself demonstrates that this supposed tie did not exist, this allegation does not state a claim on which relief could be granted.

The second alleged tie presents a more substantial question. Roe here argues that when he elected to purchase [\[\\*\\*21\]](#) property damage coverage through Norwest, he was also required to purchase other unauthorized and undisclosed coverages. Norwest suggests that we adopt the reasoning of the Sixth Circuit, which held on nearly identical allegations in *Kenty* that because the borrower never agreed to purchase the unauthorized insurance, that purchase could not have been a "condition or requirement" of the purchase of the authorized insurance, as [§ 1972\(1\)](#) requires. See [Kenty, 92 F.3d at 395](#). In effect, that court held that "a valid breach of contract claim cannot be converted into an anti-tying claim." *Id.* We are not sure that we agree with the reasoning of

the Sixth Circuit, particularly in the context of a motion to dismiss. Fairly read, Roe's complaint alleges that Norwest provides property damage insurance only if borrowers also pay for other, unauthorized insurance coverage. It therefore appears that the purchase of the unauthorized coverage is a "requirement" of the purchase of property damage coverage, for the latter is not available without [\*1305] the former. We do not believe that the fact that the unauthorized coverage is undisclosed should affect this portion of the analysis. Roe's complaint [\*\*22] thus alleges a tie and satisfies the first requirement of an anti-tying claim.

We reach the same result as the Sixth Circuit by another route, however, for we believe Roe's complaint does not allege an anti-competitive tie. Unlike a Sherman Act plaintiff, [HN7](#)<sup>↑</sup> a plaintiff in a [§ 1972](#) action need not show that a tie has anti-competitive effects. See, e.g., [Palermo v. First Nat'l Bank & Trust Co.](#), 894 F.2d 363, 368 (10th Cir. 1990); [Davis v. First Nat'l Bank](#), 868 F.2d 206, 208 (7th Cir.), cert. denied, 493 U.S. 816, 107 L. Ed. 2d 35, 110 S. Ct. 68 (1989); [Parsons Steel, Inc. v. First Ala. Bank](#), 679 F.2d 242, 245 (11th Cir. 1982); cf. [Jefferson Parish Hosp. Dist. No. 2 v. Hyde](#), 466 U.S. 2, 13-16, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984) (Sherman Act tying plaintiff must show that defendant has market power in tying market and that tie forecloses substantial volume of commerce). But a [§ 1972](#) plaintiff is required to show an anti-competitive *practice*, that is, "that the practice results in unfair competition or *could lessen competition*." [Palermo](#), 894 F.2d at 368 (emphasis added); see also [Davis](#), 868 F.2d at 208; [Parsons Steel](#), 679 F.2d at 246.<sup>7</sup>

[\*\*23] In this case, Roe has not alleged an anti-competitive practice. In the market for property damage insurance (the tying market), it is undisputed that Roe was permitted to purchase from any vendor of his choice. Roe has alleged nothing from which a factfinder could conclude that the tie would have any anti-competitive disruption in the tying market. Nor can there be any anti-competitive result in the tied market, the market for the unauthorized insurance coverage, for the simple reason that Roe did not want to purchase such coverage from any vendor. See [Jefferson Parish](#), 466 U.S. at 16 ("When a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed."). When these circumstances are considered together--that is, Roe can buy basic property damage insurance anywhere and does not want to buy other coverage at all--it is clear that Norwest's practice cannot possibly lessen competition. It therefore cannot be considered an anti-competitive practice. See [Palermo](#), [\*\*24] 894 F.2d at 368. The District Court properly dismissed this allegation for failure to state a claim.

#### IV.

Finally, we consider Roe's RICO allegations. The District Court concluded that Roe failed to state a claim on which relief could be granted because the application of RICO to the alleged actions of Voyager was barred by the McCarran-Ferguson Act, [15 U.S.C. § 1012\(b\) \(1994\)](#). We agree.

The relevant portion of [HN8](#)<sup>↑</sup> the McCarran-Ferguson Act provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." [15 U.S.C. § 1012\(b\) \(1994\)](#). The McCarran-Ferguson Act bars the application of a federal statute if (1) the statute does not specifically relate to the business of insurance; (2) a state statute has been enacted for the purpose of regulating the business of insurance; and (3) the federal statute would invalidate, impair, or supersede the state statute. See [Murff v. Professional Med.](#)

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<sup>7</sup> We disagree with trial court decisions from within our Circuit opining that a tie is a per se violation of [§ 1972](#). See [JST Properties v. First Nat'l Bank](#), 701 F. Supp. 1443, 1449 (D. Minn. 1988); [Sharkey v. Security Bank & Trust Co.](#), 651 F. Supp. 1231, 1232 (D. Minn. 1987).

Ins. Co., 97 F.3d 289, 291 (8th Cir. 1996) (citing United States Dep't of Treasury v. Fabe, 508 U.S. 491, 501, 124 L. Ed. 2d 449, 113 S. Ct. 2202 [\*\*25] (1993)).<sup>8</sup>

[\*1306] The parties agree that RICO does not specifically relate to the business of insurance. Nor does Roe seriously dispute Voyager's contention that Minnesota has enacted a comprehensive statutory scheme to regulate the business of insurance. See Minn. Stat. ch. 59A-72C (1996). The only substantial question for our review, therefore, is whether [\*26] the application of RICO to the activities of Voyager would invalidate, impair, or supersede Minnesota's insurance laws.

Fairly summarized, Roe's complaint contains two substantive allegations. First, Roe alleges that Voyager contracted to function as Norwest's automobile insurance department, sending notices to borrowers which appeared to be from Norwest and causing borrowers to be charged for unauthorized insurance coverage.<sup>9</sup> [\*27] Second, Roe claims that Voyager paid or caused to be paid to Norwest "illegal and unauthorized kickbacks, rebates, and/or commissions" with respect to the borrowers' collateral insurance premiums.<sup>10</sup> Compl. P 57. All of this alleged activity, Roe claims, constitutes a massive pattern of racketeering activity, particularly mail fraud and wire fraud, in violation of 18 U.S.C. § 1962(c) (1994).

Voyager argues that the allegedly fraudulent activities with which it is charged fall squarely within several sections of Minnesota's insurance laws. See Minn. Stat. §§ 72A.08(2) (1996) (prohibiting payment of rebate to insured), 72A.20(1) (1996) (prohibiting misrepresentation of terms of policy issued or to [\*28] be issued), 72A.20(12)(1) (1996) (prohibiting misrepresentation of pertinent facts or policy provisions relating to coverages). Minnesota law does not provide a private cause of action for violations of these prohibitions. See Morris v. American Family Mut. Ins. Co., 386 N.W.2d 233, 238 (Minn. 1986). Instead, the Commissioner of Commerce is empowered to investigate violations, file charges, issue orders, and impose fines. See Minn. Stat. §§ 72A.201(1), 72A.21, 72A.08(3) (1996). In certain circumstances, the Commissioner may also obtain injunctive relief against an insurer. See Minn. Stat. § 72A.25(2)-(3) (1996).

**HN9** RICO, by contrast, expressly grants treble damages, costs, and attorney fees to a victorious plaintiff. See 18 U.S.C. § 1964(c) (1994). Voyager argues that the application of RICO in this case would impair the operation of Minnesota's administrative remedial system by providing private plaintiffs with a remedy Minnesota does not provide and affording plaintiffs a recovery significantly greater than that which the state has authorized. In particular,

<sup>8</sup> Despite the apparent agreement of the parties to the contrary, the application of the McCarran-Ferguson Act in this case does not require a specific conclusion that the allegedly improper activities of Voyager constituted the "business of insurance." *Fabe* recognizes that the three-part test of Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 73 L. Ed. 2d 647, 102 S. Ct. 3002 (1982), for determining whether a particular practice constitutes the business of insurance is relevant only in cases involving a conflict between state law and federal antitrust law, a conflict which is the subject of a separate provision of the McCarran-Ferguson Act. See Fabe, 508 U.S. at 504-05.

<sup>9</sup> Roe argues that our opinion in First Nat'l Bank v. Taylor, 907 F.2d 775 (8th Cir.), cert. denied, 498 U.S. 972, 112 L. Ed. 2d 425, 111 S. Ct. 442 (1990), holds that the McCarran-Ferguson Act is inapplicable to a national bank, and that because he alleges that Voyager was acting as the agent of a national bank, the Act cannot apply here. We believe Roe misreads that case, which relies on the conclusion that the bank was specifically authorized by the National Bank Act to undertake the insurance-like activity that was the subject of the case. See Taylor, 907 F.2d at 778-79. In any event, Voyager is an insurance company and is subject to Minnesota's laws regulating insurance companies; that it may have been working on behalf of a bank adds nothing to this analysis.

<sup>10</sup> Evidence in the record on appeal suggests that the actual goings-on were quite different. Norwest contracts with G.D. Van Wagenen Company, which is not a party here, to administer the collateral protection program by verifying whether borrowers have provided proof of insurance and sending notices to borrowers about Norwest's right to purchase insurance to protect its collateral. Van Wagenen is also a Voyager agent and is authorized to place insurance with Voyager when Norwest purchases it. An affiliate of Norwest, Norwest Insurance, Inc., which is also not a party to this suit, serves as the broker for the purchase of the insurance and receives commissions from Voyager on the premiums. Nevertheless, for purposes of this motion to dismiss, we must accept Roe's allegations as true.

Voyager suggests that the possibility of treble damages and attorney fees would eviscerate the administrative [\*\*29] system by diverting any rational aggrieved policyholder from the Commissioner's office to federal court. Consequently, Voyager claims, an insurer that found itself the subject [\*1307] of an inquiry by the Commissioner would be unlikely to cooperate in the administrative process for fear of prejudicing its litigation position if a RICO suit should arise later.

The precise degree of impairment of a state statute that is required to trigger the operation of the McCarran-Ferguson Act is not settled. In its only opinion to address the question directly, the Supreme Court concluded that application of the federal securities laws to a merger of insurance companies would not impair the state's laws protecting policyholders. See [SEC v. National Securities, Inc., 393 U.S. 453, 463, 21 L. Ed. 2d 668, 89 S. Ct. 564 \(1969\)](#). The Court noted that "Arizona has not commanded something which the Federal Government seeks to prohibit" but also recognized that the federal interest was directed toward protecting shareholders, while the state statute was directed toward protecting policyholders. See *id.* The Court concluded, "in these circumstances, we simply cannot see the conflict." *Id.* In the case at bar, Minnesota has not commanded [\*\*30] anything which RICO would prohibit; in other words, there is no direct conflict between federal and state law. But, in contrast to *National Securities*, the federal and state statutes at issue here are directed toward the same end: the protection of policyholders and prospective policyholders from fraudulent insurance practices. The issue presented here, therefore, is whether a federal statute that is essentially parallel in substance to a state statute may impair the state statute because of a difference in the availability and the magnitude of the remedies they provide.

Several courts addressing this question have concluded that the McCarran-Ferguson Act is not implicated by federal law that is substantively parallel to state law. See [Villafane-Neriz v. FDIC, 75 F.3d 727, 736 \(1st Cir. 1996\)](#) (Federal Deposit Insurance Act); [Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1363 \(6th Cir. 1995\)](#) (Fair Housing Act), cert. denied, 133 L. Ed. 2d 893, 116 S. Ct. 973 (1996); [Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1492](#) (9th Cir.) (RICO), cert. denied, 116 S. Ct. 418, 133 L. Ed. 2d 335 (1995); [NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 295-97 \(7th Cir. 1992\)](#) (Fair Housing Act), cert. denied, 508 U.S. 907, 124 L. Ed. 2d 247, 113 S. Ct. 2335 (1993); [Thacker v. New York Life Ins. Co., 796 F. Supp. 1338, 1342-43 \(E.D. Cal. 1992\)](#) (RICO). Other courts have disagreed, concluding that the intrusion of RICO's substantial damage provisions into a state's insurance regulatory program may so impair the state law as to bar application of RICO. See [Kenty, 92 F.3d at 392](#) (collateral protection insurance case; distinguishing *Nationwide*); [Ambrose v. Blue Cross & Blue Shield, 891 F. Supp. 1153, 1165-68 \(E.D. Va. 1995\)](#), aff'd, 95 F.3d 41 (4th Cir. 1996) (unpublished per curiam); [Everson v. Blue Cross & Blue Shield, 898 F. Supp. 532, 544 \(N.D. Ohio 1994\)](#); [Wexco Inc. v. IMC, Inc., 820 F. Supp. 194, 203-04 \(M.D. Pa. 1993\)](#); [LeDuc v. Kentucky Cent. Life Ins. Co., 814 F. Supp. 820, 829 \(N.D. Cal. 1992\)](#); [Senich v. Transamerica Premier Ins. Co., 766 F. Supp. 339, 341-42 \(W.D. Pa. 1990\)](#) (collateral protection insurance case).

We find the latter line of cases more persuasive in the RICO context. As one court has noted, "the remedies available under RICO are among the most severe ever enacted in a federal civil statute." [Ambrose, 891 F. Supp. at 1166](#). [\*32] The state of Minnesota has determined that its insurance market can best be regulated by the Commissioner's pursuit of fines and injunctive relief. Congress has expressed its intention to leave the regulation of the business of insurance to the states unless a federal statute expressly addresses that subject or the application of a general federal statute would not invalidate, supersede, or impair a state statute. Were the question presented here, we might agree with the Sixth and Seventh Circuits that the federal civil rights statutes do not impair state insurance regulation. Cf. [Murff, 97 F.3d at 292](#) (application of Age Discrimination in Employment Act to insolvent insurance company does not impair state insurance insolvency procedures).<sup>11</sup> But Voyager [\*1308] makes a compelling case that the extraordinary remedies of RICO would frustrate, and perhaps even supplant, Minnesota's

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<sup>11</sup> Although *Murff* contains language suggesting that impairment will exist only in the case of a direct conflict between state and federal law, that language is certainly dictum in light of the Court's conclusion that application of the ADEA would have a de minimis effect, at most, on the insolvency proceedings. See [Murff, 97 F.3d at 292](#) (citing Missouri statute giving policyholders priority over claims of employees). In addition, the ADEA, like the federal securities laws, is designed to protect parties other than policyholders. *Murff* therefore fits well within the framework of *National Securities*, see [393 U.S. at 463](#), and does not control here.

carefully developed scheme of regulation. We do not read the term "impair" so narrowly as to permit the conclusion that the McCarran-Ferguson Act does not apply in the circumstances presented here. See Webster's Third New International Dictionary 1131 (1981) (defining "impair" as "diminish in quantity, value, [\*\*33] excellence, or strength; do harm to"). The District Court correctly held that Roe's RICO allegations failed to state a claim.

## V.

The judgment of the District Court is affirmed.

**Concur by:** HEANEY

**Dissent by:** HEANEY

## **Dissent**

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HEANEY, Circuit Judge, concurring and dissenting.

I concur in Sections III and IV of the court's opinion. I disagree, however, with the [\*\*34] conclusions reached in Section II. I believe the district court erred in granting summary judgment on the question of whether the payments that were made were premiums rather than interest payments. I think this question can only be decided after an evidentiary hearing by the district court and that we should remand to the district court to hold such a hearing. If the district court decides after an evidentiary hearing that the payments are interest payments in whole or in part, then it must determine whether the payments were usurious. In reaching this decision, I believe it is clear that the rate of interest should be computed over the life of the loan rather than over the life of the agreement.

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## Allergan Sales v. Pharmacia & Upjohn

United States District Court for the Southern District of California

March 5, 1997, Decided ; March 5, 1997, FILED

CASE NO. 96-CV-1430 H(JFS)

### **Reporter**

1997 U.S. Dist. LEXIS 7648 \*

ALLERGAN SALES, INC., Formerly Known As Allergan Medical Optics, a California corporation, and STAAR SURGICAL CO., a Delaware corporation, Plaintiff, vs. PHARMACIA & UPJOHN, INC., a Delaware corporation, Formerly Known As Pharmacia & Upjohn Company, Defendant.

**Disposition:** [\*1] Plaintiffs' motion to dismiss Defendant's first, second, and third counterclaims denied, the motion to strike the related affirmative defenses denied, and Plaintiffs' motion to stay the counterclaims and related affirmative defenses denied. Defendant's ex parte application denied in part and granted in part by extending the discovery cut-off date to April 14, 1997.

## **Core Terms**

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counterclaims, patent, antitrust, alleges, affirmative defense, infringement, motion to dismiss, denies, baseless, scheduling order, leverage

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

### **HN1 [blue icon] Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) dismissal is proper only in extraordinary cases. Courts should grant Rule 12(b)(6) relief only where a plaintiff's complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. Courts should not dismiss a complaint unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Courts must construe the complaint in the light most favorable to the plaintiff. Accordingly, courts must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Conclusory allegations of law and unwarranted inferences, however, are insufficient to defeat a Rule 12(b)(6) motion.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

## **HN2** Sherman Act, Claims

A Handgards claim alleges a violation of § 2 of the Sherman Act for infringement actions initiated and conducted in bad faith.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

## **HN3** Bad Faith, Fraud & Nonuse, Fraud

A Walker Process claim alleges the obtainment of a patent by knowing and willful misrepresentation or fraud and the enforcement of such patent in violation of the antitrust laws.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Patent Law > ... > Defenses > Patent Invalidity > Grounds

## **HN4** Regulated Practices, Intellectual Property

Where an antitrust plaintiff alleges that the defendant's patent infringement suit is attempting to enforce a patent obtained by intentional fraud, the plaintiff sufficiently alleges that the infringement suit is objectively baseless.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

## **HN5** Inequitable Conduct, Anticompetitive Conduct

A patentee may not use a patent's leverage to extend the monopoly of the patent to derive a benefit not attributable to use of the patent's teachings.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Strike > General Overview

## **HN6** [+] **Defenses, Demurrsers & Objections, Motions to Strike**

Under [Fed. R. Civ. P. 12\(f\)](#), the court may strike any insufficient defense.

**Counsel:** JEFFREY T THOMAS, GIBSON DUNN & CRUTCHER, SAN FRANCISCO, CA, For defendant. HALL MARSTON, MARK REIDEL, DICKSON CARLSON & CAMPILLO, SANTA MONICA, CA, For defendant.

DOUGLAS E OLSON, JOHN M BENASSI, LYON & LYON LLP, LA JOLLA, CA, For plaintiff. FRANK FRISENDA, MARK ESTES, FRISENDA QUINTON & NICHOLSON, LOS ANGELES, CA., For plaintiff.

**Judges:** MARILYN L. HUFF, JUDGE, UNITED STATES DISTRICT COURT

**Opinion by:** MARILYN L. HUFF

## **Opinion**

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### **Order Denying Plaintiffs' Motion to Dismiss; Denying Plaintiffs' Motion to Stay (Doc. 121); Granting in Part and Denying in Part Defendant's Ex Parte Application for Modification of Scheduling Order (Doc. 129)**

Plaintiffs/Counterdefendants Allergan Sales, Inc. and Staar Surgical Co. move to dismiss Defendant/Counterclaimant's counterclaims and to strike affirmative defenses nos. 7 and 9, or in [\*2] the alternative, to stay the counterclaims and related affirmative defenses. Defendant opposes the motion. Having fully considered the papers submitted in the matter, the court denies Plaintiffs' motion to dismiss and denies Plaintiffs' motion to stay.

## **BACKGROUND**

On January 6, 1997, Plaintiffs filed a second amended complaint for patent infringement. Defendant's answer to the first amended complaint and counterclaims filed November 13, 1996 are deemed responsive to the second amended complaint per stipulation and order filed January 6, 1997. Defendant's counterclaim alleges violations of federal antitrust laws, California antitrust laws, [CAL.BUS. & PROF. CODE § 16700 et seq.](#), and California unfair competition laws, [CAL. BUS. & PROF. CODE § 17200 et seq.](#). Defendant has also asserted affirmative defenses of patent misuse and enforcement of an invalid patent in the seventh and ninth affirmative defenses. Plaintiffs now move to dismiss Defendant's first, second, and third claims, to dismiss or strike Defendant's seventh and ninth affirmative defenses, or in the alternative, to stay the counterclaims and affirmative defenses.

## **DISCUSSION**

**HN1** [+] [Federal Rule of Civil Procedure](#) [\*3] [12\(b\)\(6\)](#) dismissal is proper only in "extraordinary" cases. [United States v. Redwood City](#), 640 F.2d 963, 966 (9th Cir. 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. [Balistreri v. Pacifica Police Dept.](#), 901 F.2d 696, 699 (9th Cir. 1990). Courts should not dismiss a complaint "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [Moore v. City of Costa Mesa](#), 886 F.2d 260, 262 (9th Cir. 1989) (quoting [Conley v. Gibson](#), 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)), cert. denied, 496 U.S. 906 (1990). Finally, courts must construe the complaint in the light most favorable to the plaintiff. [Concha v. London](#), 62 F.3d 1493, 1500 (9th Cir. 1995), cert.

dismissed, 116 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). Conclusory allegations of law and unwarranted inferences, however, are insufficient to defeat a Rule 12(b)(6) [\*4] motion. In Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

Plaintiffs contend that Defendant's first counterclaim under federal antitrust laws attempts to allege (1) a Handgards <sup>1</sup> claim, (2) a Walker Process claim, <sup>2</sup> and (3) a "tying" claim. They argue that Defendant fails to state a Handgards claim because Plaintiffs are entitled to antitrust immunity under the Noerr-Pennington doctrine and Defendant has failed to establish an exception to such immunity. Defendant argues in response that the claim is not even based on Handgards. (See Opposition, at 14). HN2[<sup>3</sup>] A Handgards claim alleges a violation of section 2 of the Sherman Act for infringement actions initiated and conducted in bad faith. 601 F.2d at 993. Paragraph 32 of the counterclaim alleges that Plaintiffs Staar and Allergan initiated the litigation in bad faith. (Counterclaim, P 32.b(2), c). Although such allegations appear to attempt to state a Handgards claim, Defendant disavows attempting to make such a claim. Therefore, the court denies Plaintiffs' motion to dismiss the Handgards claim on the basis that Defendant has stated that such a claim is not being asserted. [\*5]

As to Defendant's Walker Process claim, <sup>3</sup> Plaintiffs contend that the Noerr-Pennington doctrine also applies and that Defendants must satisfy the "objectively baseless" standard as set forth in Professional Real Estate Investors, Inc. v. Columbia Pictures Indust., Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993), before being permitted to proceed on such a claim. Defendants argue, citing Hydranautics v. Filmtec Corp., 70 F.3d 533 (9th Cir. 1995), that the Ninth Circuit has held that Columbia Pictures does not apply to Walker Process claims.

[\*6] In Hydranautics, the court discussed on a Rule 12(b)(6) motion to dismiss whether an infringement action based on a fraudulently obtained patent is "objectively baseless" under Columbia Pictures. Contrary to Defendant's reading, the court did not hold that Walker Process claims are an exception to the Noerr-Pennington doctrine or that the "sham" test set forth in Columbia Pictures does not apply to Walker Process claims. Rather, the court noted that the holdings in Columbia Pictures and Liberty Lake <sup>4</sup> left open "the question of whether an infringement action based on a fraudulently obtained patent is 'objectively baseless.'" Hydranautics, 70 F.3d at 538. The court appears to have answered that question in the affirmative. In distinguishing the case from a parallel case in the Federal Circuit, the court noted that the "[defendant's] alleged fraud would render [the defendant's] patent infringement claim objectively baseless." Id. 70 F.3d at 538 n.1. The rationale for holding that such infringement claims are objectively baseless is that the basis for the antitrust immunity, the patent itself, is invalid and a nullity. 70 F.3d at 538. Therefore, HN4[<sup>5</sup>] [\*7] where an antitrust plaintiff alleges that the defendant's patent infringement suit is attempting to enforce a patent obtained by intentional fraud, the plaintiff sufficiently alleges that the infringement suit is objectively baseless.

In the present case, Defendant alleges that plaintiffs seek to enforce an invalid patent which it procured through fraud. Taking these allegations as true, as the court must on a Rule 12(b)(6) motion, the court finds that such allegations are sufficient to allege that Plaintiffs' infringement suit is objectively baseless. The court therefore denies Plaintiffs' motion to dismiss Defendant's Walker Process claim.

Finally, as to Defendant's tying/leverage claim, Plaintiffs argue that Defendant's theory fails to state a "tying" claim, primarily because manufacturers pay a royalty on the very product they intend to manufacture pursuant to the

<sup>1</sup> Handgards, inc. v. Ethicon, Inc., 601 F.2d 986, 995 (9th Cir. 1979), cert. denied, 444 U.S. 1025, 62 L. Ed. 2d 659, 100 S. Ct. 688, 100 S. Ct. 689 (1980).

<sup>2</sup> Walker Process Equip., Inc. v. Food Mach. and Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965).

<sup>3</sup> HN3[<sup>6</sup>] A Walker Process claim alleges the obtainment of a patent by knowing and willful misrepresentation or fraud and the enforcement of such patent in violation of the antitrust laws. Walker Process, 382 U.S. at 177-78, 86 S. Ct. at 350-51.

<sup>4</sup> 12 F.3d 155 (9th Cir. 1993).

patent, and thus, there is no tie to a separate product. Defendant responds that the alleged claim is a leveraging [\*8] claim, not a tying claim. Having examined Defendant's claim, the court finds that Defendant has sufficiently alleged a leveraging claim under Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969). Under Zenith Radio, HN5<sup>1</sup>] a patentee may not use a patent's leverage to extend the monopoly of the patent to derive a benefit not attributable to use of the patent's teachings. *Id.* at 136, 89 S. Ct. 1583.

In the instant case, Defendant's counterclaim alleges that non-rigid IOLs are staple items which have substantial non-infringing uses, and that Plaintiff is attempting to extend the monopoly to sales of IOLs which will be used for non-infringing purposes. Further, Defendant alleges that Plaintiffs have market and economic power and that a significant amount of commerce has been adversely affected. Whether labeled a "tying" claim or a "leverage" claim, the court finds that Defendant has sufficiently alleged an antitrust claim under Zenith Radio.

Plaintiff also argues that Defendant's state law claims in the second and third counterclaims should be dismissed under Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587 (1990). In Pacific [\*9] Gas, the court noted that the only common law tort claim for instigating or bringing a lawsuit is an action for malicious prosecution, and that such an action requires a legal termination of the underlying action in plaintiff's favor. *Id. at 1131*. Relying upon, *inter alia*, the Noerr-Pennington doctrine, the court extended such a requirement to a claim for intentional interference with contract or prospective economic advantage. *Id. at 1137*.

Pacific Gas, however, did not address whether statutory claims under California's antitrust Cartwright Act and the Unfair Competition Act may only be brought after resolution in the claimant's favor in the underlying action. Moreover, Defendant alleges that the state law claims arise from the same conduct underlying the federal antitrust claim. As noted above, Defendant's Walker Process claim is not defeated by the Noerr-Pennington doctrine and the Columbia Pictures "objectively baseless" requirement. This indicates that Pacific Gas, and its reliance on Noerr-Pennington, is distinguishable from the facts and claims of the instant action. Therefore, having considered the arguments presented, the court denies [\*10] the motion to dismiss Defendant's state law counterclaims.

Having fully considered the parties' arguments, the court denies Plaintiffs' motion to dismiss Defendant's first, second, and third counterclaims. Plaintiffs also seek to strike Defendant's related seventh and ninth affirmative defenses. HN6<sup>1</sup>] Under Federal Rule of Civil Procedure 12(f), the court may strike any insufficient defense. Plaintiffs contend the related defenses should be stricken for the same reasons that the federal antitrust claims should be dismissed. The court has denied Plaintiff's motion to dismiss, and therefore also denies the motion to strike the affirmative defenses.

In the alternative, Plaintiffs have argued that in the interests of fairness and judicial economy, that if not dismissed, the counterclaims and related defenses should be stayed pending resolution of the infringement action. Having duly considered the arguments raised, the court denies Plaintiffs' request to stay the counterclaims and related defenses without prejudice. The court notes, however, that the antitrust claims involve significant questions separate and apart from those raised in the infringement action, and the court explicitly reserves [\*11] the right at the final pretrial conference to sever, stay, bifurcate, or otherwise set the order of proof of the antitrust counterclaims and related affirmative defenses.

Finally, the court is in receipt of Defendant's ex parte application for modification of the scheduling order. Defendant seeks to continue all remaining pretrial dates and the trial date by six months. Plaintiffs oppose the motion. Defendants state that it anticipates conducting approximately 50 depositions, filing various motions, and preparing and deposing approximately 20 experts. The complaint, however, was filed in August 1996 and the original scheduling order set forth in October 1996. Plaintiffs note that Defendant did not take any depositions until February 15, 1997, and as of the date this request for continuance was made, was the only deposition taken. The court finds that good cause for modification of the scheduling order has not been shown, and therefore, the court generally denies Defendant's request without prejudice. At a time closer to the current trial date, Defendant may renew its request for continuance of the scheduling order upon a showing of good cause. However, the court will grant in [\*12] part Defendant's request by extending the discovery cut-off date from April 7, 1997 to April 14, 1997. All other dates shall remain the same.

## CONCLUSION

Having fully considered the papers submitted in the matter and the relevant authorities, the court denies Plaintiffs' motion to dismiss Defendant's first, second, and third counterclaims, denies the motion to strike the related affirmative defenses, and denies Plaintiffs' motion to stay the counterclaims and related affirmative defenses. The court also denies in part Defendant's ex parte application and grants in part by extending the discovery cut-off date to April 14, 1997.

IT IS SO ORDERED.

DATED: 3/5/97

MARILYN L. HUFF, JUDGE

UNITED STATES DISTRICT COURT

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End of Document



## **Rebel Oil Co. v. Atlantic Richfield Co.**

United States District Court for the District of Nevada

March 5, 1997, Decided ; March 5, 1997, RECEIVED AND FILED

CV-S-90-76-PMP (RLH)

### **Reporter**

957 F. Supp. 1184 \*; 1997 U.S. Dist. LEXIS 2749 \*\*; 1998-1 Trade Cas. (CCH) P72,162

REBEL OIL COMPANY, INC., a Nevada corporation, and AUTO FLITE OIL COMPANY, INC., a Nevada corporation, Plaintiffs, v. ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation, Defendant.

**Disposition:** **[\*\*1]** Defendant's Motion for Summary Judgment ( # 617) GRANTED and Judgment entered in favor of Defendant ARCO and against Plaintiff Rebel. Pretrial Conference currently scheduled for March 14, 1997 and trial date previously scheduled for March 24, 1997 vacated.

## **Core Terms**

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prices, predatory, gasoline, costs, summary judgment, measurement, market power, price discrimination, damages, retail, recoupment, marginal cost, antitrust, competitors, sales, margins, losses, oil, market price, wholesale, markets, anticompetitive conduct, summary judgment motion, opportunity cost, crude oil, stations, variable, Appeals, anti trust law, Clayton Act

## **LexisNexis® Headnotes**

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[Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages](#)

[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 > Robinson-Patman Act > Claims](#)

[Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview](#)

[Antitrust & Trade Law > Sherman Act > Remedies > General Overview](#)

[Antitrust & Trade Law > Sherman Act > Remedies > Damages](#)

**HN1** [ ] [Remedies, Damages](#)

957 F. Supp. 1184, \*1184L 1997 U.S. Dist. LEXIS 2749, \*\*1

Section 4 of the Clayton Act, allows private parties to sue for damages for violations of antitrust laws.

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

## **HN2** Discovery, Methods of Discovery

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, 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](#).

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

## **HN3** Judgment as Matter of Law, Directed Verdicts

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. 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. 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 then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

957 F. Supp. 1184, \*1184L 1997 U.S. Dist. LEXIS 2749, \*\*1

[Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations](#)

[Civil Procedure > ... > Summary Judgment > Hearings > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Hearings > Oral Arguments](#)

[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 > Appropriateness](#)

#### **HN4** **Supporting Materials, Affidavits**

If the party seeking summary judgment meets its burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. 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. Likewise, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment.

[Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview](#)

[Civil Procedure > Judgments > Summary Judgment > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview](#)

[Civil Procedure > ... > Summary Judgment > 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](#)

#### **HN5** **Summary Judgment, Opposing Materials**

In opposing a motion for summary judgment in an antitrust case, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. While summary judgment has historically been disfavored in antitrust cases, this may no longer be so. 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. After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims.

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

#### **HN6** **Entitlement as Matter of Law, Appropriateness**

957 F. Supp. 1184, \*1184L 1997 U.S. Dist. LEXIS 2749, \*\*1

Summary judgment is appropriate if a party fails to make a sufficient showing on an essential element of the case on which it would bear the burden of proof at trial. Failure of proof as to such an element renders all other facts immaterial. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules of Civil Procedure as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

#### **HN7** Standards of Review, Clearly Erroneous Review

The law of the case doctrine provides that an appellate court's decision of legal issues must be followed in all subsequent proceedings either in the same case in the trial court or on a later appeal. The only exception to the law of the case doctrine is when evidence in a subsequent trial is substantially different, controlling authority has made a contrary decision of law that applies to the issues previously decided, or the decision was clearly erroneous and would work a manifest injustice.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

#### **HN8** Preclusion of Judgments, Law of the Case

The law of the case doctrine addresses legal issues decided by a court, not observations, commentary, or mere dicta touching upon issues not formally before the court. Any issue not expressly or impliedly dealt with on appeal is open for the trial court's consideration on remand. It is critical to determine what issues were actually decided in order to define what is the "law" of the case.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

#### **HN9** Robinson-Patman Act, Claims

To hold a defendant liable for charging below-cost prices, a primary-line plaintiff must show that the predator stands some chance of recouping his losses. [*Brook Group, 509 U.S. at 224*. Under the Clayton Act, as amended by the Robinson-Patman Act, the standard is a "reasonable prospect" of recoupment. Id. This requires the plaintiff to show that the predator has market power, or that he has some reasonable prospect of obtaining it.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

957 F. Supp. 1184, \*1184L 1997 U.S. Dist. LEXIS 2749, \*\*1

Antitrust & Trade Law > Clayton Act > General Overview

**HN10** [  ] **Antitrust & Trade Law, Robinson-Patman Act**

A plaintiff in a price discrimination case must show a causal connection between the price discrimination and the injury suffered. A plaintiff need not rule out all possible alternative sources of injury, but must show that the anticompetitive conduct was a material cause of its injury. The evidence linking the anticompetitive conduct must be more precise than the evidence establishing the extent to which a party is damaged. Once this is established, antitrust plaintiffs are excused from an unduly rigorous standard of proving antitrust injury.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

**HN11** [  ] **Antitrust & Trade Law, Sherman Act**

A plaintiff alleging primary-line discrimination must prove antitrust injury in the same manner that a Sherman Act plaintiff does, by showing that his injury flows from those aspects or effects of the conduct that are harmful to consumer welfare.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

**HN12** [  ] **Antitrust & Trade Law, Sherman Act**

A primary line price discrimination claim exists when the price differential is between geographical markets, as opposed to price discrimination between two purchasers.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

**HN13** [  ] **Actual Monopolization, Anticompetitive & Predatory Practices**

When calculating lost profits, a plaintiff must provide a sufficient evidentiary base from which damages can be calculated. In antitrust cases, as long as the fact of damage is certain, uncertainty as to the extent of that damage is not fatal to a plaintiff's case.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

**HN14** [  ] **Robinson-Patman Act, Claims**

In order to state a cause of action under [section 2](#) of the Clayton Act as amended by the Robinson-Patman Act, a plaintiff bears essentially the same substantive burden as a plaintiff under the Sherman Act.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

#### [\*\*HN15\*\*](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

A failure to show price is below average variable or marginal cost is usually fatal to a predatory pricing claim. Cost based methods involve determining numerous costs of the seller who is accused of predatory pricing. Whether prices are predatory depends not on their effectiveness in minimizing losses, but on their tendency to eliminate rivals and create a market structure enabling the seller to recoup his losses.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

#### [\*\*HN16\*\*](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a *prima facie* case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

#### [\*\*HN17\*\*](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

Marginal cost is the cost a firm incurs in the production of one additional unit of output. Average variable cost measures costs which vary with output, and is a generally accepted substitute for marginal cost in antitrust cases. Average total cost (ATC) is an average of variable costs and fixed costs.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

#### [\*\*HN18\*\*](#) **Actual Monopolization, Anticompetitive & Predatory Practices**

Predatory pricing schemes are rarely tried, and even more rarely successful, since the predator must make a substantial investment with no assurance that it will pay off. A significant purpose of antitrust laws is to foster competition, and cutting prices to increase market share is the very essence of competition. Mistaken inferences in predatory pricing cases are therefore especially costly, since they chill the very conduct the laws are intended to protect. Competitors are not protected from a loss in profits due to a decision by another firm to cut prices in order to increase market share. It is in the interest of competition to permit dominant firms to engage in price competition. Accordingly, an objective cost analysis is the crucial component in a *prima facie* case of predatory pricing. This requirement may make it extremely difficult for plaintiffs to prove predatory pricing in antitrust cases, but that difficulty, however, reflects the economic reality that predatory pricing schemes are rarely tried, more rarely successful.

957 F. Supp. 1184, \*1184L 1997 U.S. Dist. LEXIS 2749, \*\*1

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

#### [\*\*HN19\*\*](#) [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

Opportunity costs are the benefits a firm foregoes by choosing one course of action over another. The opportunity costs of a decision are not one of the costs of implementing a particular business decision. It is improper as a matter of law to use opportunity costs to show below cost pricing. Opportunity costs are not reflected in a profit and loss statement, and allowing opportunity costs as a method of cost measure in predatory pricing cases would impermissibly restrict the decision making power of businesses.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

#### [\*\*HN20\*\*](#) [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

To show below costs sales by a parent corporation and a subsidiary, the costs of both parent and subsidiary must be proved.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

#### [\*\*HN21\*\*](#) [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

Operating at a substantially reduced profit margin is not pricing in a predatory matter, rather it was simply pricing in a competitive manner. In order to meet the requirements of predatory pricing, the plaintiff must present some evidence that the defendant priced below its costs.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Evidence > Burdens of Proof > Clear & Convincing Proof

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

#### [\*\*HN22\*\*](#) [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

Under Ninth Circuit authority, a plaintiff in a price discrimination case can also state a claim by showing clear and convincing evidence of predatory intent.

**Counsel:** For plaintiffs: William H. Bode, John M. Mason, Robert A. Jaffee, James M. Ludwig, Laura D. Seidman, William H. Bode & Associates, Washington, D.C. Donald J. Campbell, John D. O'Brien, Las Vegas, NV.

For defendant: Donald C. Smaltz, Leighton M. Anderson, Theodore Spanos, Smaltz & Anderson, Los Angeles, CA. Thomas F. Kummer, Kummer, Kaempfer, Bonner & Renshaw, Las Vegas, NV.

**Judges:** PHILIP M. PRO, United States District Judge

**Opinion by:** PHILIP M. PRO

## Opinion

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### **[\*1192] ORDER**

Presently before the Court is Defendant Atlantic Richfield Company's ("ARCO") Motion for Summary Judgment (# 617) filed on November 18, 1996.<sup>1</sup> Plaintiffs Rebel Oil Company, Inc., and Auto Flite Oil Company, Inc., (collectively "Rebel") filed an Opposition Brief (# 631) on December 13, 1996. ARCO filed a Reply Brief (# 636) on December 30, 1996.

### **[\*\*2] I. Factual Background<sup>2</sup>**

The basic structure of the gasoline market in Las Vegas flows from the fact that gasoline is first produced from crude oil in Los Angeles refineries. Wholesale marketers then transport gasoline to Las Vegas storage terminals over the Cal-Nev Pipeline. Wholesale marketers sell the gasoline to retailers, who then sell the gasoline to consumers.

Rebel is a retail marketer of gasoline in Las Vegas that sells gasoline on a self-serve, cash-only basis. Rebel operates retail stations under various gasoline brand names. Rebel is also a wholesaler, shipping gasoline over the Cal-Nev pipeline for sale in the retail markets in Las Vegas. ARCO is a major driller and refiner of crude oil in Los Angeles, as well as a retail and <sup>3</sup> wholesale marketer of gasoline in Las Vegas. ARCO supplies gasoline to retail stations in Las Vegas bearing the ARCO brand name.

Rebel asserts that between 1985 and 1989, ARCO executed a pricing policy in Las Vegas of charging predatory prices in an attempt to increase its market share and eventually monopolize the Las Vegas gasoline market. Rebel contends that ARCO's pricing scheme drove competitors out of the Las Vegas market, and that its own share of self-serve, cash-only gasoline sales dropped as a result.

**[\*1193]** According to Rebel, once ARCO drove competitors from the market, it engaged in price gouging in order to recoup the losses from its predatory practices. It supports this allegation by alleging that ARCO's Las Vegas prices were higher than its Los Angeles prices. Rebel alleges that Las Vegas marketers had been disciplined by ARCO's behavior, and that they refused to challenge ARCO's supra competitive prices. Rebel contends that today the Las Vegas market is a disciplined oligopoly in which each oligopolist shares supra competitive profits.

### **II. Procedural History**

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<sup>1</sup> The Court has also ruled on several motions in limine to exclude expert testimony. The expert testimony at issue in those motions is only relied upon by this Court in deciding ARCO's Summary Judgment Motion to the extent that testimony was deemed admissible in this Court's previous rulings.

<sup>2</sup> This factual background is a condensed version of the extensive background given in Rebel Oil Co. Inc. v. Atlantic Richfield Co., ("Rebel I") [51 F.3d 1421 \(9th Cir.\)](#), cert. denied, [U.S. , 116 S. Ct. 515, 133 L. Ed. 2d 424 \(1995\)](#).

In January of 1990, Rebel filed an antitrust suit against ARCO under [HN1](#) [↑] Section 4 of the Clayton Act, which [\*\*4] allows private parties to sue for damages for violations of antitrust laws. Rebel sought relief under [sections 1](#) and [2](#) of the Sherman Act, and under [section 2](#) of the Clayton Act (as amended by the Robinson-Patman Act). This Court limited discovery to the issues of antitrust injury and whether ARCO had sufficient market power to charge prices above competitive levels. [Rebel Oil Co. Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1432 \(9th Cir. 1995\)](#), cert. denied, U.S. \_\_\_, 116 S. Ct. 515, 133 L. Ed. 2d 424 (1995). ("Rebel I"). This Court held that Rebel failed to put forth sufficient evidence of market power to support a jury verdict, and therefore failed to sufficiently prove antitrust injury, which is a necessary element of an antitrust claim.

Rebel appealed, and the Ninth Circuit Court of Appeals analyzed the issue of market power separately as to each of Rebel's three antitrust claims. *Id.* The Ninth Circuit Court of Appeals upheld this Court's grant of summary judgment in favor of ARCO on the Sherman Act attempted monopolization claims. [Id. at 1443](#). The court reversed as to the Clayton Act claim for predatory pricing. The Ninth Circuit held [\*\*5] that a lesser showing of market power was required for a claim of price discrimination, and that Rebel's showing of market power was enough to create a material issue of fact as to this claim. [Id. at 1448](#). The court therefore reversed and remanded as to the price discrimination claim only.

### III. Standard for Summary Judgment

[HN2](#) [↑] 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, 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](#).

[HN3](#) [↑] The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. See [Adickes v. S.H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 \(1970\)](#); [Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 883 \(9th Cir. 1982\)](#), cert. denied, 460 U.S. 1085, 76 L. Ed. 2d 349, 103 S. Ct. 1777 (1983). 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. [\*\*6] See [Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1305-06 \(9th Cir. 1982\)](#). 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 then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#).

[HN4](#) [↑] If the party seeking summary judgment meets its burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. [First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 290, 20 L. Ed. 2d 569, 88 S. Ct. 1575, \(1968\)](#), reh'g denied, 393 U.S. 901, 21 L. Ed. 2d 188, 89 S. Ct. 63 (1968); [Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270 \(9th Cir. 1979\)](#). 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. [British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 \(9th Cir. 1978\)](#), cert. [\*\*7] denied, 440 U.S. 981, 60 L. Ed. 2d 241, 99 S. Ct. 1790 (1979), reh'g denied, 441 U.S. 968, 60 L. Ed. 2d 1074, 99 S. Ct. 2420 (1979). Likewise, "legal memoranda and oral [\*1194] argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment." *Id.*

[HN5](#) [↑] In opposing a motion for summary judgment in an antitrust case, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#). In [Sicor Ltd. V. Cetus Corp., 51 F.3d 848, 853 \(9th Cir. 1995\)](#), cert. denied, \_\_\_ U.S. \_\_\_, 116 S. Ct. 170, 133 L. Ed. 2d 111 (1995), the Ninth Circuit noted that while summary judgment has historically been disfavored in antitrust cases, this may no longer be so given the

Matsushita case.<sup>3</sup> *Id.* 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. Poller v. CBS, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. [\*\*8] 486 (1962). After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims. Admiralty Fund v. Tabor, 677 F.2d 1297, 1298 (9th Cir. 1982).

**HN6**[<sup>↑</sup>] Summary judgment is appropriate if a party fails to make a sufficient showing on an essential element of the case on which it would bear the burden of proof at trial. Celotex, 477 U.S. at 322. Failure of proof as to such an element renders all other facts immaterial. *Id. at 323*. The [\*9] Matsushita, Liberty Lobby, and Celotex cases cited above establish that "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, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

#### IV. Law of the Case

Rebel cites the Ninth Circuit Court of Appeal's decision in Rebel I as law of the case, arguing that it prohibits this Court from granting ARCO's current motion for summary judgment. **HNT**[<sup>↑</sup>] The law of the case doctrine provides that an appellate court's decision of legal issues must be followed in all subsequent proceedings either in the same case in the trial court or on a later appeal. Vucinich v. Paine, Webber, Jackson & Curtis, Inc., 803 F.2d 454, 459 (9th Cir. 1986). The only exception to the law of the case doctrine is when evidence in a subsequent trial is substantially different, controlling authority has made a contrary decision of law that applies to the issues previously decided, or the decision was clearly erroneous and would work a manifest injustice. [\*10] *Id.* The law of the case encompasses both a court's explicit decisions, and those issues decided by necessary implication. Eichman v. Fotomat Corp., 880 F.2d 149, 157 (9th Cir. 1989).

Rebel argues that ARCO's entire motion for summary judgment must be denied based on the Rebel I decision. In its Opposition Brief (# 631), Rebel states that the Ninth Circuit Court of Appeal's decision held that Rebel had adduced sufficient evidence to preclude summary judgment on Rebel's price discrimination claim. (Rebel Oppo. at 15). Therefore, Rebel argues that ARCO's motion for summary judgment is "unsupportable" under controlling law of the case doctrine.

Rebel's interpretation of Rebel I is an overstatement of both the Ninth Circuit Court of Appeals' holding and the law of the case doctrine.<sup>4</sup> **HN8**[<sup>↑</sup>] The law of the case doctrine [\*1195] addresses *legal issues* decided by a court, not "observations, commentary, or mere dicta touching upon issues not formally before the Court." Gertz v. Robert Welch, Inc., 680 F.2d 527, 533 (7th Cir. 1982), cert. denied, 459 U.S. 1226, 75 L. Ed. 2d 467, 103 S. Ct. 1233 (1983). Any issue not expressly or impliedly dealt with on appeal is open for the [\*11] trial court's consideration on remand. Beltran v. Myers, 701 F.2d 91, 93, cert. denied, 462 U.S. 1134 (1983). As the Seventh Circuit Court of Appeals found in Gertz, "It is critical to determine what issues were actually decided in order to define what is the 'law' of the case." 680 F.2d at 533. Thus, the only law of the case in the present case is the issues that were decided by the Ninth Circuit Court of Appeals in Rebel I.

<sup>3</sup> ARCO alleges that Matsushita creates a new summary judgment standard for antitrust plaintiffs, one in which if circumstantial evidence is as consistent with competition as with conspiracy, plaintiffs must come forth with additional evidence. However, Matsushita addressed a Sherman Act § 1 conspiracy, not a Robinson-Patman Act case. Therefore, this Court analyzes Rebel's claim under the traditional summary judgment standard in light of the principles of the Matsushita decision.

<sup>4</sup> Rebel's misinterpretation of the Ninth Circuit's holding in Rebel I is illustrated by Rebel's argument that the Ninth Circuit found that "Rebel's evidence is sufficient . . . to raise a disputed question of material fact" precluding summary judgment. What the Ninth Circuit in *fact* found was that "Rebel's evidence is sufficient . . . to raise a disputed question of material fact as to whether ARCO achieved sufficient market power to enforce supra competitive oligopoly pricing." (emphasis added).

In Rebel I, the court of appeals reviewed this Court's [\*\*12] determination that Rebel failed to put forth sufficient evidence of market power to support a jury verdict on its claims under the Sherman Act sections 1 and 2, and Clayton Act section 2 (as amended by the Robinson-Patman Act). Addressing the Sherman Act claims, the Ninth Circuit held that since Rebel failed to sufficiently prove ARCO's ability to increase prices above competitive levels and sustain them for an extended period, there was no proof ARCO's alleged actions threatened consumer welfare, and therefore Rebel failed to sufficiently prove antitrust injury. Rebel I, 51 F.3d at 1434. The issues of market power and antitrust injury were the only issues decided by this Court in ARCO's summary judgment motion, and they were the only issues before the Ninth Circuit on appeal.<sup>5</sup>

[\*\*13] Certain other findings were necessary implications to the Ninth Circuit's holding that market power did not exist for Rebel's Sherman Act claims. The Ninth Circuit held that since Rebel attempted to prove its case through circumstantial evidence, a showing of market power would be met by proving three separate elements. First, Rebel must define the relevant market. In Rebel I, the Ninth Circuit found that the relevant market was all retail sales of gasoline in Las Vegas. 51 F.3d at 1437.<sup>6</sup> Secondly, a plaintiff must show that the defendant owns a dominant share of that market. The Ninth Circuit found that Rebel's evidence that ARCO owned 44 percent of the market was sufficient to meet this burden. Id. at 1438.

[\*\*14] Finally, the court held that a plaintiff must show significant barriers to entry and that existing competitors lack capacity to increase output in the short run. The Ninth Circuit found that Rebel's evidence on barriers to entry was sufficient to create a genuine issue of material fact, but that there was no genuine issue as to ARCO's competitors ability to increase output if ARCO increased prices. Because ARCO's competitors had the excess capacity to increase output if ARCO raised its prices, ARCO did not have the requisite market power to sustain its Sherman Act claims. However, since the Clayton Act required a lesser showing of market power, Rebel's evidence was sufficient to create a genuine issue of material fact on this claim, and the court remanded as to this issue.

## V. ARCO's Motion for Summary Judgment

Three different elements of a price discrimination claim are at issue in ARCO's Motion for Summary Judgment: recoupment, damages, and below cost pricing. Rebel must provide evidence, which when analyzed in the light most favorable to Rebel, [\*1196] creates a material issue of fact on each issue. The first two elements, recoupment and damages, are determined by the Rebel [\*\*15] I decision and the law of the case doctrine. The third element, below cost pricing, is not.<sup>7</sup> As Rebel has failed to adequately allege below cost pricing or provide evidence of such pricing, summary judgment in favor of ARCO is appropriate.

### A. Recoupment

In Rebel I, the Ninth Circuit held:

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<sup>5</sup> In fact, in Rebel I, this Court limited discovery solely to the issue of whether ARCO had sufficient market power to charge prices above competitive levels. Rebel I, 51 F.3d at 1232. No discovery was conducted on predatory pricing, intent and collusion. Id.

<sup>6</sup> In Rebel I, the court noted the relationship between the wholesale and retail markets in Rebel's claim. The court found that where sufficient retail outlets exist, a defendant must control output at the wholesale level to pose any real threat of monopolizing the retail market. The court stated, "In essence, Rebel must show that ARCO had monopoly power, or was dangerously close to achieving it, at the wholesale supply level." 51 F.3d at 1442. The court then went on to find that Rebel had sufficient market power to sustain its price discrimination claim. Id. at 1448.

<sup>7</sup> Below cost pricing was not an issue before the Ninth Circuit Court of Appeals in Rebel I, and no substantial discovery on ARCO's costs had taken place at the time of the Ninth Circuit's ruling. Upon remand, extensive discovery has occurred, and substantial new evidence concerning costs is before this Court. Therefore, even if Rebel I was law of the case as to below cost pricing, an exception to law of the case doctrine applies.

**HN9** To hold a defendant liable for charging below-cost prices, a primary-line plaintiff must show that the predator stands some chance of recouping his losses. [Brook Group, 509 U.S. at 224](#). Under the Clayton Act, as amended by the Robinson-Patman Act, the standard is [\\*\\*16](#) a "reasonable prospect" of recoupment. *Id.* This requires the plaintiff to show that the predator has market power, or that he has some reasonable prospect of obtaining it.

[Id. at 1445](#). The Ninth Circuit, after finding that a lesser showing of market power was necessary for Rebel's price discrimination claim, found that Rebel established a disputed issue of material fact as to ARCO's market power or reasonable prospect of obtaining market power. [Id. at 1447](#). The court noted that Rebel had produced data showing that during the recoupment period, ARCO's retail gas prices were higher in Las Vegas than in Los Angeles, when adjusted for transportation costs. Rebel further produced evidence showing that ARCO's market share increased at the time it was charging allegedly supracompetitive prices. The court found that Rebel had produced evidence of significant barriers to entry in the Las Vegas retail gasoline market. The court stated that this showing was crucial, since if entry into the market easy, high profit levels in the market would bring new competitors into the market, undercutting ARCO's ability to recoup its predatory losses. [Id. at 1447](#).

The Ninth Circuit [\\*\\*17](#) Court of Appeals concluded that Rebel had produced sufficient evidence to create a disputed issue of fact as to whether ARCO had sufficient market power to maintain oligopoly pricing. Since a claim for price discrimination under the Clayton Act requires a showing of a chance of recoupment, Rebel's showing of market power was sufficient to meet this burden. Therefore, the court upheld Rebel's cause of action for price discrimination. [Id. at 1447](#). The court went on to note that it was expressing no opinion on the ultimate merits of Rebel's claim. [Id. at 1448](#). While Rebel might not be able to prove at trial that ARCO had a reasonable chance of recoupment, summary judgment requires only a genuine issue of material fact, and Rebel met this burden. In evaluating ARCO's current motion for summary judgment, this Court is bound by the Ninth Circuit's determination that a genuine issue of material fact as to ARCO's ability to recoup any such losses.

## B. Rebel's Damages

ARCO contends that it should be awarded summary judgment on the issue of Rebel's damages for two primary reasons: 1) Rebel has failed to prove a causal connection between ARCO's alleged wrongful acts and a loss [\\*\\*18](#) of anticipated revenue, and 2) Rebel either cannot show damages at all, or it has improperly measured damages.

### 1. Causal Connection

**HN10** A plaintiff in a price discrimination case must show a causal connection between the price discrimination and the injury suffered. [Texaco Inc. v. Hasbrouck, 496 U.S. 543, 573, 110 L. Ed. 2d 492, 110 S. Ct. 2535 \(1990\)](#). Rebel need not rule out all possible alternative sources of injury, but must show that the anticompetitive conduct was a material cause of its injury. [Dolphin Tours Inc. v. Pacifico Creative Service Inc., 773 F.2d 1506, 1509 \(1985\)](#). The evidence linking the anticompetitive conduct [\\*1197](#) must be more precise than the evidence establishing the extent to which a party is damaged. *Id.* Once this is established, antitrust plaintiffs are excused from an unduly rigorous standard of proving antitrust injury. [Texaco Inc. v. Hasbrouck, 496 U.S. at 573](#).

In [Rebel I](#), the Ninth Circuit Court of Appeals held that "**HN11**" a plaintiff alleging primary-line discrimination<sup>8</sup> must prove antitrust injury in the same manner that a Sherman Act plaintiff does -- by showing that his injury flows from those aspects or effects of the conduct that are [\\*\\*19](#) harmful to consumer welfare." [51 F.3d at 1445](#). In

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<sup>8</sup> **HN12** A primary line price discrimination claim exists when the price differential is between geographical markets, as opposed to price discrimination between two purchasers. [Rebel I, 51 F.3d at 1445](#).

Rebel I, the court found explicitly that "Rebel may be able to demonstrate antitrust injury on this claim." *Id. at 1448*. Therefore, since the court found that antitrust injury was sufficiently shown to withstand summary judgment, the court by implication found that Rebel's injury had a sufficient nexus to the alleged anticompetitive conduct. This Court is therefore bound by law of the case to sustain Rebel's claim as to the causal connection between its injury and ARCO's alleged anticompetitive conduct.

## 2. Measurement of Damages

**[HN13]** When calculating lost profits, a plaintiff must provide a sufficient evidentiary base from which damages can be calculated. See William Inglis & Sons v. Continental Baking, ("Inglis II") *942 F.2d 1332, 1340 (9th Cir. 1991)*. In antitrust cases, as long as the fact of damage is certain, uncertainty as to the extent of that damage is not fatal to a plaintiff's case. See Story Parchment Co. v. Paterson Parchment Paper Co., *282 U.S. 555, 75 L. Ed. 544, 51 S. Ct. 248 (1931)*. In light of this rule, it is not fatal to Rebel's claim for damages that Rebel's expert Clifford Beadle ("Beadle") uses hypothetical markets, and assumes retail margins calculated from prior sales would continue. Hypothetical markets are often the only way to prove damages in antitrust cases. In Dolphin Tours, the court approved establishing lost profits by projecting the market share the plaintiff would have had in the absence of anticompetitive conduct. *773 F.2d at 1511*. There is no evidence that Rebel's estimates are so far from prior margins or that the time period from which they are derived is so different that the estimates are unduly speculative.<sup>9</sup> A question of fact as to these issues remains.

**[\*\*21]** ARCO also argues that Rebel has had a steady growth in profit margins throughout the alleged predation period. Assuming this is true, it is not enough to warrant summary judgment. Even assuming Rebel had high profits during the predation period, if Rebel would have had astronomical profits in the absence of anticompetitive conduct, Rebel could recover the difference.

ARCO further contends that Rebel has improperly excluded all wholesale gas sales from its damages study. It may be that at trial Rebel will be obligated to offset any damages in its retail market sales with gains in its wholesale market sales. The Ninth Circuit Court of Appeals stated in Rebel I that Rebel may have received some gains during the predatory period, but if it was ultimately able to prove losses resulting from anti-competitive conduct, it should not be precluded from recovery. *Rebel I* *51 F.3d at 1448 n.19*. Beadle's study is therefore sufficient to create a material issue as to whether retail losses were sustained.

ARCO's next contention is that Beadle's use of a 6-9 cent profit margin is inappropriate. Beadle based his estimates of retail margins on a review of Rebel's actual margins prior to 1986, **[\*\*22]** upon consultation with **[\*1198]** Rebel's experts, and upon a review of various Lundberg Price Surveys for the Los Angeles gasoline market. (Beadle Report p.2). ARCO has not shown that these are invalid methods of determining retail margins. At trial ARCO might be able to prove that this measurement is inappropriate, or that another measurement of damages is more accurate. However, based on Beadle's database, a material issue exists as to whether the 6-9 profit margin is an appropriate measure of damages.

Finally, ARCO contends that Beadle's calculations in scenarios B and C of his report are inappropriate as a matter of law. In his projections of Rebel's lost sales in scenarios B and C, Beadle includes stations that were sold by Rebel prior to the predatory period. Rebel alleges that these sales were necessitated by ARCO's threats of predatory pricing, and therefore they should be included as damages from ARCO's anticompetitive conduct.

<sup>9</sup> At trial, Rebel would bear the burden of showing that the time period from which damages are calculated is similar to the predatory pricing period but for the impact of the anticompetitive conduct. *Inglis II*, *942 F.2d at 1340-41*. ARCO has merely alleged that Rebel has failed to show the periods were similar, but ARCO has offered no evidence that the two time periods or that the Los Angeles/Las Vegas markets are dissimilar. Since all inferences must be taken in Rebel's favor, summary judgment is inappropriate on this issue.

The inclusion of these sales in Rebel's projections is inappropriate. Rebel cannot end-run the statute of limitations on ARCO's alleged anticompetitive conduct by including these stations in its damage calculations. The statute of limitations has expired, so [\[\\*\\*23\]](#) there is no way to prove that ARCO acted anticompetitively, forcing Rebel to sell the stations. [See 15 U.S.C. § 16](#). Since Rebel cannot prove ARCO's 1984 conduct was anticompetitive, it cannot include these sold stations in its damages calculations. Additionally, Rebel merely alleges threats, and offers no evidence that anticompetitive conduct actually occurred. Therefore, as a matter of law, the estimates based on the stations Rebel sold prior to 1984 have no valid factual basis, are unduly speculative and Rebel could not rely on them at trial.

### C. Below Cost Pricing

[HN14](#) [↑] In order to state a cause of action under [section 2](#) of the Clayton Act as amended by the Robinson-Patman Act, a plaintiff bears essentially the same substantive burden as a plaintiff under the Sherman Act. [Rebel I, 51 F.3d at 1445](#).<sup>10</sup> Rebel must show that ARCO discriminated in price between purchasers of gasoline and that this price difference tended to lessen competition or create a monopoly. [15 U.S.C. § 13\(a\)](#); see [Inglis II, 942 F.2d at 1337](#). Rebel may prove this by showing ARCO's anticompetitive intent. *Id.* Rebel may utilize a price/cost comparison to allege this intent, but that comparison [\[\\*\\*24\]](#) must meet the same standard required to establish intent for an attempted monopolization claim under the Sherman Act. *Id.*

In [Brooke Group v. Brown & Williamson, 509 U.S. 209, 125 L. Ed. 2d 168, 113 S. Ct. 2578 \(1993\)](#), a case decided after this Court's original grant of summary judgment in favor of ARCO, the Supreme Court held that in order to establish a primary-line price discrimination claim under the Robinson-Patman Act, a plaintiff has two prerequisites to recovery. First, the plaintiff must prove that the prices complained of are below an appropriate measure of its rival's costs. [Id. at 222](#). Second, the plaintiff must demonstrate that the competitor had a reasonable prospect or a dangerous probability of recouping [\[\\*\\*25\]](#) its investment in below-cost prices. [Id. at 224](#).

In [Brooke Group](#), the Supreme Court declined to resolve the conflict among courts regarding the appropriate measure of cost in predatory pricing and price discrimination claims. [509 U.S. at 223 n. 1](#). However, noting its decisions in [Cargill Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#) and [Matsushita, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#), the Court stated that the reasoning in both of those opinions "suggests that only below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws." [Brooke Group, 509 U.S. at 223](#). The Court found that the [\[\\*1199\]](#) exclusionary effect of prices above a relevant measure of cost reflect either the lower cost structure of the alleged predator and competition on the merits, or is "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." [Id. at 223](#) (citing 3 P. Areeda & H. Hovenkamp, [\[\\*\\*26\] Antitrust Law](#) PP 714.2, 714.3 (Supp 1992)).

[HN15](#) [↑] Under Ninth Circuit authority, a failure to show price is below average variable or marginal cost<sup>11</sup> is usually fatal to a predatory pricing claim. [Universal Analytics v. MacNeal-Schwendler Corp., 707 F. Supp. 1170, 1178 \(C.D. Cal. 1989\)](#).<sup>12</sup> [\[\\*\\*28\]](#) Cost based methods involve determining numerous costs of the seller who is

<sup>10</sup> In [Rebel I](#), the court addressed only antitrust injury under the Robinson-Patman Act. The court found that Rebel must prove that ARCO had a degree of market power to threaten oligopolization, not monopolization, which is the requirement under the [Sherman Act](#). [51 F.3d at 1447](#).

<sup>11</sup> [HN17](#) [↑] Marginal cost is the cost a firm incurs in the production of one additional unit of output. [Rebel I, 51 F.3d at 1431](#). Average variable cost measures costs which vary with output, and is a generally accepted substitute for marginal cost in antitrust cases. Average total cost ("ATC") is an average of variable costs and fixed costs.

<sup>12</sup> In [Universal Analytics](#), the court found that the plaintiff's predatory pricing claims failed as a matter of law because there was no indication that the defendant set prices below its marginal or average variable cost. [707 F. Supp. at 1179](#).

accused of predatory pricing. *Taggart v. Rutledge*, 657 F. Supp. 1420, 1437 (D. Mont. 1987). The Ninth Circuit articulated the relevant cost measurements for predatory and discriminatory pricing in *Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir. 1983), cert. denied, 464 U.S. 955, 78 L. Ed. 2d 329, 104 S. Ct. 370 (1983). The court noted that whether prices are predatory depends "not on their effectiveness in minimizing losses, but on their tendency to eliminate rivals and create a market structure enabling the seller to recoup his losses." *Id. at 1386*. The court found that *Inglis* set forth a cost-based test for allocating the burden of proof in predation cases. The court articulated the test as follows:

**HN16[]** If the defendant's prices were below average total cost but above average variable [\*\*27] cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

*Id.*<sup>13</sup> In *Transamerica*, the court held that prices above average total cost are not legal per se, and found that *Inglis* left open the question of how to evaluate prices that exceed average total costs ("ATC"). *Id.*<sup>14</sup>

The court went on to find that if the challenged [\*\*29] prices exceed average total cost, the plaintiff must prove by clear and convincing evidence that the defendant's pricing policy was predatory. *Id.*<sup>15</sup> The court held that Transamerica had not met this standard. The only price increases were modest increases during the mid-1970's, which was a general inflationary period, thus the court found no evidence that IBM's prices rose once competition had left the market. Transamerica also failed to prove limit pricing, as there was merely evidence of an initial price cut, "hardly an unusual act in the [\*1200] computer industry or unusual in the fact of competition." *Id. at 1389*.

In *Taggart*, the court found that the plaintiffs did not even mention the defendant's costs, but only alleged that on several occasions the defendant's wholesale prices exceeded retail prices. *657 F. Supp. I\*\*301 at 1437*. The court noted that on at least one occasion, the Ninth Circuit has departed from its strict rule of comparing retail price and average variable cost, and remanded the case to allow the plaintiff to show by means other than a cost-price comparison that the defendant's price was predatory. *Id.* (citing *Marsann Co. v. Brammall, Inc.*, 788 F.2d 611, 615 (9th Cir. 1986)). The *Taggart* court noted that the ruling in *Marsann* hinged on the difficulty of fixing the identity of the product for which to establish average variable costs. *Id.* The court went on to find that in a situation involving retail and wholesale gasoline competitors, that the threshold showing for predatory pricing had not been met. *Id.*

The Supreme Court has noted that **HN18[]** predatory pricing schemes are rarely tried, and even more rarely successful, since the predator must make a substantial investment with no assurance that it will pay off. *Matsushita*, 475 U.S. at 589. Furthermore, a significant purpose of antitrust laws is to foster competition, and cutting prices to increase market share is the very essence of competition. Mistaken inferences in predatory pricing cases are therefore especially [\*\*31] costly, since they chill the very conduct the laws are intended to protect. *Id. at 594*.

<sup>13</sup> All of the presumptions are rebuttable by a showing of predatory or nonpredatory purpose. *In re Air Passenger Comp. Res. Sys. Antitrust Litigation*, 694 F. Supp. 1443, 1464 (C.D. Cal. 1988).

<sup>14</sup> In *Transamerica*, the court noted situations in which prices above ATC would be illegal. First, a monopolist cannot set prices above ATC but below the short-term profit-maximizing level so as to discourage new entrants and maximize profits over the long run ("limit pricing"). *698 F.2d at 1387*. While it may be difficult in many instances to assess the long-run consequences of these policies, where these difficulties can be overcome, plaintiffs should be allowed to prove these violations exist. *Id.* The court was hesitant to create a "free zone" in which monopolists can exploit their power without fear of legal scrutiny. "A rule based exclusively on cost forecloses consideration of other important factors, such as intent, market power, market structure, and long-run behavior in evaluating the predatory impact of a pricing decision." *Id.*

<sup>15</sup> The Supreme court in *Cargill*, 479 U.S. at 117 n. 12, declined to determine whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation.

Competitors are not protected from a loss in profits due to a decision by another firm to cut prices in order to increase market share. [Cargill, 479 U.S. at 116](#). This would be a perverse result indeed, as it is in the interest of competition to permit dominant firms to engage in price competition. *Id.* Accordingly, an objective cost analysis is the crucial component in a *prima facie* case of predatory pricing. [International Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1394 \(8th Cir. 1993\)](#). This requirement may "make it extremely difficult for plaintiffs to prove predatory pricing in antitrust cases[; but t]hat difficulty, however, reflects the economic reality 'that predatory pricing schemes are rarely tried, and even more rarely successful.'" [International Travel, 991 F.2d at 1396](#), (quoting [Matsushita, 475 U.S. at 589](#)).

While the Ninth Circuit held that cost-based inquiries serve merely as an aid in determining if predatory pricing occurred in [Inglis I](#), this decision must be viewed in light of [Brooke Group](#), which was decided after the [Transamerica](#) and [Inglis](#) [\[\\*\\*32\]](#) [I](#) cases. The Ninth Circuit has stated that when an alleged predator's prices are above ATC, predatory intent may be proved by clear and convincing evidence. However, [Brooke Group](#) makes it clear that prices above a relevant measure of cost will not suffice to infer the predatory motive necessary to support a price discrimination claim. Therefore, Rebel must either prove that ARCO's prices were below a relevant measure of ARCO's costs, (which will also allocate the burden of proof under [Transamerica](#)) or show by clear and convincing evidence other than price-cost comparisons that ARCO possessed predatory intent.

## **1. The Tosco Agreement**

Preliminarily, this Court notes that its inquiry is limited to whether Rebel's measures of ARCO's cost are *legally* adequate, not whether the specific amount of costs is accurate. The precise amount of ARCO's costs are a factual determination properly decided at trial. Additionally, the weight or credibility of Rebel's economic and other experts are not proper subjects for review at this stage of the proceedings. See [D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245, 1248 \(9th Cir. 1982\)](#). It is true that cost [\[\\*\\*33\]](#) based inquiries are difficult, since economics is an inexact science, and that such inexactitude is not synonymous with legal insufficiency of the evidence. *Id.* Given Rebel's measurements of ARCO's costs, the Court must determine whether a jury could reasonably return a verdict for Rebel in light of the standards governing a price discrimination claim.

The first measure of ARCO's costs on which Rebel relies is the Tosco exchange agreement. Under the agreement, ARCO [\[\\*1201\]](#) exchanged 50,000 barrels per day of crude oil for 30,000 to 35,000 barrels per day of gasoline refined by the Tosco Corporation.<sup>16</sup> Rebel alleges that the market value of each barrel of oil exchanged is the marginal cost to ARCO of producing a barrel of gasoline. Rebel basis its analysis on the fact that ARCO had more crude oil than refining capability, so the Tosco agreement measured the cost of producing an additional barrel of gas.

[\[\\*\\*34\]](#) Rebel cites ARCO's appellate Motion to Reconsider the [Rebel I](#) decision for the proposition that ARCO has conceded that a question of fact exists as to whether below cost pricing occurred. In its Motion to Reconsider, ARCO argued that whether prices are below cost was a contested issue of fact. Rebel alleges that ARCO should be bound by this statement. This Court is not bound by ARCO's arguments in its Motion to Reconsider before the Ninth Circuit. Furthermore, the Motion was submitted to the Court of Appeals at a stage in the proceedings when the only substantive discovery that had taken place involved ARCO's market share and market power. No substantial discovery concerning ARCO's costs had been undertaken at the time ARCO's Motion was submitted. ARCO also contends that it was merely attempting to prevent Rebel from arguing that the Ninth Circuit adopted the Tosco agreement as the only cost measure. For these reasons, this Court finds that ARCO's arguments in its prior Motion to Reconsider are not binding in the current proceedings.

Rebel next relies on the law of the case doctrine and the Ninth Circuit's decision in [Rebel I](#) to support its use of the Tosco agreement. Rebel [\[\\*\\*35\]](#) cites footnote 1 of [Rebel I](#) for the proposition that the Ninth Circuit adopted the

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<sup>16</sup> Courts have held that similar "swaps" are trades, not sales, and therefore not subject to attack under the Robinson-Patman Act. See [Airweld, Inc., v. Airco, Inc., 576 F. Supp. 676, 679 \(D. Or. 1983\)](#).

Tosco agreement as the measurement of marginal cost to be utilized in this case. This argument is incorrect. The Ninth Circuit was merely setting forth Rebel's factual allegations. This is clear from the context of the footnote, "Rebel measured ARCO's marginal cost based upon an agreement that ARCO signed with Tosco Corp. . . . Rebel claims . . . The cost of this "last barrel" of gasoline represents ARCO's marginal cost for gasoline." *Rebel I*, 51 F.3d at 1431. As the issue of below cost pricing was not before the court in *Rebel I*, any dicta addressing cost measurements is not law of the case or binding upon this Court.<sup>17</sup> This Court cannot logically conclude that the Ninth Circuit would adopt Rebel's cost measurement as adequate when little or no discovery had been conducted on costs. Therefore, this Court must independently analyze whether the Tosco agreement is a relevant measure of cost under the Brooke Group analysis.

[\*\*36] Rebel bases its use of the Tosco agreement primarily on the testimony of Dr. Keith Leffler ("Leffler"). Leffler stated that he believed that refinery computer simulation models which measure marginal cost in the traditional economic methodology were available to all refiners and that this was an approach that ARCO would probably use. (Leffler's Statement in Response to ARCO's Mtn. for Summary Judgment). However, Leffler did not utilize this method, since he did not have the proper knowledge, or "have access to people at ARCO." (Leffler Depo. at 136). Rebel has made no showing that it ever attempted to obtain such information, [\*1202] and ARCO asserts that Rebel made no such discovery requests.

While Leffler stated that joint aspects of gas production make evaluation of average variable costs "problematic at best," he also stated that the variable cost of producing crude oil is "small for anybody" and can be close to zero. (Leffler Depo. Vol III at 427). Although this would indicate that the average variable cost of producing crude oil is substantially below the market price of oil, Leffler adopted the Tosco agreement as a "direct measure" of marginal cost. Since there is no price paid by [\*\*37] ARCO under the Tosco agreement, Leffler measured this "marginal cost" of gas to ARCO as the prevailing market price of the crude oil exchanged under the agreement, regardless of whether ARCO bought the oil, exchanged the oil, or was given the oil for free. (Leffler Depo. Vol III at 427).

The Tosco agreement merely measures the opportunity cost to ARCO of trading its crude oil for gasoline. *HN19* Opportunity costs are the benefits a firm foregoes by choosing one course of action over another. The Tosco agreement measures opportunity costs because it evaluates ARCO's "cost" of gasoline by the value of what it gave up by not selling the barrel of oil at market price. The opportunity costs of a decision are not one of the costs of implementing a particular business decision. *Continental Airlines*, 824 F. Supp. at 701. It is improper as a matter of law to use opportunity costs to show below cost pricing. *In re IBM Peripheral EDP Devices, Etc.*, 459 F. Supp. 626, 631 (N.D. Cal. 1978). Opportunity costs are not reflected in a profit and loss statement, and allowing opportunity costs as a method of cost measure in predatory pricing cases would impermissibly restrict the decision making power [\*\*38] of businesses. See Id. This was not the intent of the antitrust laws, and is not what is meant by predatory pricing. Id. Leffler noted that courts have rejected the use of opportunity costs in evaluating cost measurements, and Rebel has failed to supply any authority that utilizes opportunity cost as a valid measure of marginal cost in a predatory pricing or price discrimination case.

Rebel's use of the Tosco agreement is entirely based on the market price of the oil, but Brooke Group explicitly rejected measurements of cost which are below general market levels or the costs of a firm's competitors. 509 U.S. at 223. Rebel's measurement of the marginal cost of gasoline to ARCO is improper, as it is entirely dependent of fluctuations in market price. Accepting Rebel's analysis, ARCO's price would be above or below marginal costs

<sup>17</sup> Rebel cites Areeda and Hovenkamp, *Antitrust Law*, Vol. III (Revised Edition 1996). On pages 378-79, the authors discuss *Rebel I*, and state that if ARCO was unable to supply its own refineries, and purchased more gasoline from independent suppliers, this would measure marginal cost. If ARCO paid more than it charged upon resale, its price would be below marginal cost. However, the central concern regarding the Tosco agreement is that Rebel has not alleged ARCO purchased gas or incurred any *direct* cost in obtaining the gasoline. As Rebel's expert Dr. Leffler ("Leffler") admits, ARCO did not purchase additional barrels of gasoline, so there was no "cost" to ARCO in terms of a purchase price. Rebel evaluates ARCO's cost solely by the market price of oil. Leffler states that the marginal cost to ARCO is the market price of oil, whether ARCO purchased, exchanged, or was given the oil. Thus, Areeda and Hovenkamp's analysis, which may apply if ARCO purchased the gasoline, is inapplicable when Rebel values of the exchange solely on the prevailing market price of oil.

dependent entirely on fluctuations in the market price of crude oil, not dependent on any costs that ARCO actually incurred. This does not adequately approximate the costs to ARCO of producing gasoline. To accept Rebel's analysis, anytime ARCO priced gasoline below the *market price* of oil, they would violate the antitrust laws. Rebel [\*\*39] has made no attempt to measure ARCO's actual costs of producing and transporting oil to the Tosco refinery. The Tosco agreement fails to provide such a measurement, and therefore cannot be used as a proxy for marginal cost.

## 2. Los Angeles / Las Vegas Price Comparisons

Rebel also alleges ARCO's prices were below cost because its wholesale prices in Las Vegas from 1986-89 were below the wholesale rack price in Los Angeles.<sup>18</sup> [\*\*40] Rebel argues that since Los Angeles is a very competitive market, and the rack price is that charged by the most efficient seller, prices in Los Angeles are an adequate proxy for marginal cost.<sup>19</sup> Rebel's comparison of market price in two separate markets is merely a showing of the definition of price discrimination. Rebel has shown that ARCO charged different prices to different buyers in different markets. To accept this as a measure of cost would be to read the relevant [\*1203] measure of cost requirement out of Robinson-Patman Act claims. Furthermore, the Los Angeles rack price is a market price, clearly impermissible as a cost measurement under the analysis of Brooke Group.

Rebel cannot avoid the requirements of Brooke Group by alleging that one of the prices ARCO charged in discriminating against Rebel was a very efficient price, and therefore approximated marginal cost. Rebel has made no showing of ARCO's actual costs of producing gasoline. The only costs Rebel even attempted to show are the transportation costs of pumping the gasoline across the Cal-Nev pipeline and terminaling costs. However, as Rebel merely adds this cost to the prices in Los Angeles, this is insufficient to approximate the real cost to ARCO of producing gasoline for sale in Las Vegas.

## 3. Prices Charged to Prestige Stations by ARCO

Rebel alleges that the price ARCO charged to its wholly owned subsidiary Prestige Stations Inc. ("PSI") meant that PSI incurred large losses. This theory is supported by the testimony of Rebel expert Harry Holcombe ("Holcombe").<sup>20</sup> Holcombe concludes that PSI is controlled and dominated by ARCO, with no independence of its own. (Holcombe [\*\*41] Rep. p. 19). Holcombe analyzed profit and loss statements from 1985 to 1989 based on the dealer tankwagon ("DTW") price charged by ARCO, alleging this was the market price, and the price that ARCO charged its lessee dealers. *Id.* at 25. Since PSI lost substantial amounts of money during this period, ARCO was "willing to lose money" as a result of predatory pricing. *Id.* Holcombe supports this tautology by stating that "it is unlikely that ARCO would set a transfer price which is unrealistic." *Id.* at 26.

If ARCO and PSI are truly a combined unit, as Holcombe states, then the appropriate consideration is "the costs of the combined group to determine if the combined group sold below its costs." Vollrath Co. v. Sammi Corp., 9 F.3d 1455, 1460 [\*\*42] (*9th Cir. 1993*). HN20[] To show below costs sales by a parent corporation and a subsidiary, the costs of both parent and subsidiary must be proved. *Id. at 1461*. In Vollrath, the Ninth Circuit upheld the district court's grant of JNOV due to a lack of evidence of the parent company's costs. *Id.* Similarly, Rebel has failed to

<sup>18</sup> Rebel alleges that ARCO's price in Los Angeles was below its Las Vegas price during the period of recoupment. This has no bearing on whether ARCO charged below cost prices during the predatory period. These are two different requirements under an antitrust claim.

<sup>19</sup> According to economic theory, in a perfectly competitive market, a firm's price is equal to its marginal cost.

<sup>20</sup> Holcombe is qualified to testify as an expert in the petroleum industry, but is not qualified to testify as an economic expert. However, for purposes of addressing the PSI method of determining ARCO's costs, this Court will assume Holcombe's testimony is admissible.

show the costs of ARCO and PSI, rather has merely alleged that PSI lost money. This is insufficient to support a predatory pricing claim, and therefore this measure of cost is impermissible.

Holcombe also calculated ARCO's cost by merely comparing ARCO's profits in its Las Vegas operations with its nationwide gasoline sales. He then concluded that if ARCO had operated at these profit levels nationwide, it would have seen a large decrease in *income* over the relevant time period. (Holcombe Rep. p. 26). This is clearly insufficient to prove below cost pricing, and may be evidence of precisely the price competition that the antitrust laws are designed to encourage. In *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 99 (5th Cir. 1988), the court found that [HN21](#)<sup>↑</sup> operating at a substantially reduced profit margin was not pricing in a predatory matter, rather [\\*\\*43](#) it was simply pricing in a competitive manner. In order to meet the requirements of predatory pricing, the plaintiff must present some evidence that the defendant priced below *its* costs. *Id. at 100*. Holcombe also alleged that Rebel suffered losses in trying to match ARCO's prices, so "it stands to reason" that ARCO would suffer the same losses. (Holcombe Rep. P. 26). On the contrary, this does not "stand to reason," and may indicate a the lower cost structure of ARCO, as articulated by the Supreme Court in *Brooke Group*.

#### 4. Clear and Convincing Evidence of Predatory Intent

[HN22](#)<sup>↑</sup> Under Ninth Circuit authority, a plaintiff in a price discrimination case can also state a claim by showing clear and convincing evidence of predatory intent. In [\[\\*1204\] Drinkwine v. Federated Publications, Inc., 780 F.2d 735 \(9th Cir. 1985\)](#), the court held that since the plaintiff had failed to introduce any evidence on defendant's marginal, average variable or average total costs, they must prove by clear and convincing evidence that their pricing policy unreasonably restricted competition. *Id. at 739*. This Court is mindful of Brooke Group's admonition that measurements other than cost are extraordinarily [\\*\\*44](#) difficult for a court to undertake without chilling competition. Rebel has failed to provide any evidence that would meet this standard. Rebel has failed to provide evidence of limit pricing by ARCO in terms of lowering prices in response to specific firms attempting to enter the Las Vegas market. ARCO has also alleged strategic reasons for its generally lower prices, that of initial entry into the new market of cash only self serve sales. See [Transamerica, 698 F.2d 1377 at 1389](#).

Rebel has alleged that ARCO increased its prices from 1990 to 91, but as in *Transamerica*, this was during an inflationary period, the Gulf War, at a time when the price of all petroleum prices increased. Rebel has also alleged that from 1990-91 ARCO's Las Vegas prices exceeded its prices in Los Angeles. This price differential may be evidence of actual or potential recoupment, but it does not infer that prices in 1986-89 were below cost and therefore predatory. To accept later price increases as evidence of predatory intent would collapse predatory pricing cases into only a showing of recoupment. Rebel has offered no evidence that provides inferences of ARCO's predatory intent without impermissible speculation, [\\*\\*45](#) and has failed to provide clear and convincing evidence of such intent.

It may be that in cases where multiple products are produced at once such as gasoline and petroleum products, and where there is no "smoking gun" of predatory intent, plaintiffs will incur difficulties in proving antitrust violations. However, these difficulties must be balanced against the real dangers to competition from inferring predatory intent from circumstantial evidence and above cost pricing. Congress and the Supreme Court have struck that balance by requiring below cost pricing in order to sustain a price discrimination claim. The risks of chilling legitimate competition are simply too great to infer predatory intent from the showing Rebel has made of ARCO's alleged anticompetitive conduct. As Rebel's showing does not meet the legal standards under the antitrust laws, ARCO is entitled to summary judgment as a matter of law.

IT IS THEREFORE ORDERED THAT Defendant's Motion for Summary Judgment (# 617) is GRANTED and the Clerk of Court is hereby directed to enter Judgment in favor of Defendant ARCO and against Plaintiff Rebel.

IT IS FURTHER ORDERED THAT the Pretrial Conference, currently scheduled for [\\*\\*46](#) March 14, 1997, and the trial date previously scheduled for March 24, 1997, are hereby vacated.

DATED: March 5, 1997

957 F. Supp. 1184, \*1204Â 997 U.S. Dist. LEXIS 2749, \*\*46

PHILIP M. PRO

United States District Judge

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## Nursing Registry v. Eastern N.C. Regional Emergency Medical Servs. Consortium

United States District Court for the Eastern District of North Carolina, Eastern Division

March 7, 1997, Decided ; March 10, 1997, filed

No. 4:96-CV-69-B0(1)

### **Reporter**

959 F. Supp. 298 \*; 1997 U.S. Dist. LEXIS 3019 \*\*

NURSING REGISTRY, INC., d/b/a BETTER HEALTH AMBULANCE SERVICE, Plaintiff, v. EASTERN NORTH CAROLINA REGIONAL EMERGENCY MEDICAL SERVICES CONSORTIUM, INC., AMERICAN MEDICAL RESPONSE OF NORTH CAROLINA, INC., HALIFAX MEMORIAL HOSPITAL, INC., HALIFAX COUNTY, NORTHAMPTON COUNTY, WARREN COUNTY, WILLIAM A. PIERCE, III, QUINTON Q. QUALLS, KENNETH E. BRANTLEY, GEORGE C. PARRISH, JOHN D. HALL, HORACE JOHNSON, SR., HENRY MONCURE, R. JENNINGS WHITE, JR., WILLA MAJETT, WILLIAM T. BRIDGERS, JAMES C. BOONE, LUCIOUS HAWKINS, JAMES BYRD, JAMES D. HOLLOWAY, HARRY M. WILLIAMS, III, AND WILLIAM T. SKINNER, III, Defendants.

**Disposition:** [\*\*1] Defendants' motions to dismiss granted in full and Plaintiff's motion for leave to file amended complaint denied. Action DISMISSED in its entirety as to all defendants. Since the Consortium and the Hospital only raised the Noerr-Pennington doctrine as an affirmative defense, and did not file motions to dismiss pursuant to [Rule 12\(b\)\(6\)](#), this Court, sua sponte, dismisses the action against them.

### **Core Terms**

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ambulance service, ambulance, franchise, franchise ordinance, Ordinance, alleges, nongovernmental, claim for relief, monopoly, proposed amended complaint, original complaint, anti trust law, Sherman Act, nonemergency, state action doctrine, competitor, anticompetitive, defendants', terms, motion to dismiss, immunity, Amend, government action, relevant market, do business, provider, reasons, argues, divide, refute

### **LexisNexis® Headnotes**

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Governments > Local Governments > Licenses

#### [\*\*HN1\*\*](#) [down arrow] **Local Governments, Licenses**

See [N.C.G.S. § 153A-250](#) (North Carolina).

Governments > Local Governments > Licenses

#### [\*\*HN2\*\*](#) [down arrow] **Local Governments, Licenses**

See [N.C.G.S. § 153A-250\(a\)](#) (North Carolina).

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

### **HN3** **Noerr-Pennington Doctrine, Right to Petition Immunity**

There is a distinction between anticompetitive activity that violates the federal antitrust laws and protected political activity that happens to further an anticompetitive end. The Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis in the legislative history of that Act.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

### **HN4** **Noerr-Pennington Doctrine, Right to Petition Immunity**

Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

### **HN5** **Noerr-Pennington Doctrine, Right to Petition Immunity**

The Noerr-Pennington doctrine protects not only the right to petition a governmental body in order to further one's own interests, but also the right to convince a governmental body to either ignore the pleas of a competitor, or not hear the competitor at all. Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

### **HN6** **Noerr-Pennington Doctrine, Sham Exception**

The "sham" exception to the Noerr-Pennington doctrine refers to the situation in which a company abuses a governmental process for no other purpose than to hurt a competitor. A classic example is the filing of frivolous objections to the license applications of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means.

Antitrust & Trade Law > Sherman Act > General Overview

959 F. Supp. 298, \*298L<sup>A</sup> 1997 U.S. Dist. LEXIS 3019, \*\*1

## [\*\*HN7\*\*](#) [blue download icon] Antitrust & Trade Law, Sherman Act

See [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN8\*\*](#) [blue download icon] Antitrust & Trade Law, Sherman Act

See [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

## [\*\*HN9\*\*](#) [blue download icon] Exemptions & Immunities, Noerr-Pennington Doctrine

Noerr-Pennington immunity extends to claims brought under [42 U.S.C.S. § 1983](#).

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

## [\*\*HN10\*\*](#) [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

The corollary of the Noerr-Pennington doctrine is the state action doctrine, which allows a state government, in the exercise of its police powers, to restrict competition in an effort to regulate a particular segment of the state's economy. When the state action defense is raised by a political subdivision of the state, such as a city council, or a county Board of Commissioners, the Supreme Court holds that the state action doctrine is applicable as long as the local government's restriction of competition is an authorized implementation of state policy. To be exempt from antitrust laws municipalities must demonstrate that their anticompetitive activities were authorized by the State pursuant to a state policy to displace competition with regulation or monopoly public service.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

## [\*\*HN11\*\*](#) [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

It is enough if suppression of competition is the foreseeable result of what the statute authorizes.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

## [\*\*HN12\*\*](#) [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

The state action doctrine requires only that a local governmental body have state-granted authority to regulate, not state-granted authority to act in response to political pressure.

Governments > Local Governments > Licenses

## [\*\*HN13\*\*](#) [blue download icon] Local Governments, Licenses

959 F. Supp. 298, \*298L<sup>A</sup> 1997 U.S. Dist. LEXIS 3019, \*\*1

See Halifax County, North Carolina, Ordinance Regulating Ambulance Services and Granting of Franchises to Ambulance Operators, § 3.1.

Governments > Local Governments > Licenses

**HN14** [L] **Local Governments, Licenses**

See Halifax County, North Carolina, Ordinance Regulating Ambulance Services and Granting of Franchises to Ambulance Operators, § 4.1.

Governments > Local Governments > Licenses

**HN15** [L] **Local Governments, Licenses**

See Halifax County, North Carolina, Ordinance Regulating Ambulance Services and Granting of Franchises to Ambulance Operators, § 5.2.

Governments > Local Governments > Licenses

**HN16** [L] **Local Governments, Licenses**

See Halifax County, North Carolina, Ordinance Regulating Ambulance Services and Granting of Franchises to Ambulance Operators, § 5.4.

Governments > Local Governments > Licenses

**HN17** [L] **Local Governments, Licenses**

See [N.C.G.S. § 153A-250](#) (North Carolina).

**Counsel:** For NURSING REGISTRY, INC. dba Better Health Ambulance Service, plaintiff: Stephen D. Kiess, Everett, Warren, Harper & Swindell, Greenville, NC.

For EASTERN NORTH CAROLINA REGIONAL EMERGENCY MEDICAL SERVICES CONSORTIUM, INC., defendant: Cecil W. Harrison, Jr., Poyner & Spruill, Raleigh, NC. Joseph E. Zeszotarski, Jr., Poyner & Spruill, Raleigh, NC. For AMERICAN MEDICAL MEDICAL RESPONSE, OF NORTH CAROLINA, INC., defendant: Sharon L. McConnell, Kilpatrick Stockton LLP, Raleigh, NC. David B. Hamilton, Petree Stockton, Charlotte, NC. For HALIFAX MEMORIAL HOSPITAL, INC., defendant: Cecil W. Harrison, Jr., (See above). For HALIFAX COUNTY, NORTHAMPTON COUNTY, WARREN COUNTY, WILLIAM A. PIERCE, III, QUINTON Q. QUALLS, KENNETH E. BRANTLEY, GEORGE C. PARRISH, JOHN D. HALL, HORACE JOHNSON, **[\*\*2]** SR., HENRY MONCURE, R. JENNINGS WHITE, JR., WILLA MAJETT, WILLIAM T. BRIDGERS, JAMES C. BOONE, LUCIOUS HAWKINS, JAMES BYRD, JAMES D. HOLLOWAY, HARRY M. WILLIAMS, III, WILLIAM T. SKINNER, III, defendants: Elizabeth J. Hallyburton, Womble, Carlyle, Sandridge & Rice, Raleigh, NC.

**Judges:** TERRENCE W. BOYLE, UNITED STATES DISTRICT JUDGE

**Opinion by:** TERRENCE W. BOYLE

## Opinion

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### [\*300] ORDER

Plaintiff brought this action on May 13, 1996, alleging that the defendants successfully conspired to monopolize the market for ambulance services in three counties in Eastern North Carolina, in alleged violation of federal antitrust laws, federal civil rights laws, state antitrust laws, the North Carolina Constitution, North Carolina common law, and North Carolina's ambulance franchise statute. The county defendants and their respective commissioners have moved to dismiss all claims against them pursuant to [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#). American Medical Response of North Carolina has also moved to dismiss this action in its entirety pursuant to [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#), arguing that they are immune from liability for all claims against them under the [Noerr-Pennington](#) [\*\*3] doctrine. Halifax Memorial Hospital, Inc., and Eastern North Carolina Regional Emergency Medical Services Consortium, Inc., have invoked the [Noerr-Pennington](#) doctrine as an **affirmative defense** in their answer to the complaint.<sup>1</sup>

For the reasons discussed below, this action is dismissed in its entirety as to all defendants, and Plaintiff's motion for leave to amend the complaint is denied.

### I. STATEMENT OF THE CASE

The relevant factual allegations in the complaint, accepted as true for the sake of argument only, are [\*\*4] as follows:

In October of 1993, Nursing Registry, Inc., d/b/a Better Health Ambulance Service (hereinafter, "Plaintiff"), "provided ambulance services to residents of Halifax County, and had established contractual relationships with various nursing homes, residential care centers and skilled nursing facilities located in Halifax, Northampton, and Warren Counties, including Guardian Care of Scotland Neck, Guardian Care of Roanoke Rapids, Our Community Hospital and Halifax Department of Social Services."

According to Plaintiff, on January 1, 1994, the nongovernmental defendants in this action -- Eastern North Carolina Regional Emergency Medical Services Consortium, Inc. ("the Consortium"), American Medical Response of North Carolina, Inc. ("AMR"), and Halifax Memorial Hospital, Inc. ("the Hospital") -- began to conspire to destroy Plaintiff's business in Halifax, Northampton, and Warren Counties ("the three Counties," "the County defendants," or simply, "the Counties"). In furtherance of this conspiracy, the nongovernmental defendants allegedly did the following:

- Agreed on prices to charge for ambulance services;
- Agreed not to provide ambulance services to nursing [\*\*5] homes, residential care centers, or skilled nursing homes that did business with Plaintiff;
- [\*301] Agreed to divide up the Counties' market for ambulance services, as follows: AMR would provide non-emergency services throughout the Counties, and 13 Rescue Squads, all of whom were members of the Consortium, would divide up the Counties' market for emergency ambulance services;
- Agreed to refer patients to the Hospital, as long as the Hospital agreed only to employ the services of AMR and the Rescue Squads;

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<sup>1</sup> In their Memorandum in Opposition to Plaintiff's Motion for Leave to Amend Complaint, the Hospital and the Consortium note that since the [Noerr-Pennington](#) defense has been fully briefed in Defendant AMR's motion to dismiss, the Hospital and the Consortium did not feel it was necessary to file a motion to dismiss of their own. Apparently, the Hospital and the Consortium are relying on their affirmative defense as the sole basis for dismissing the action against them.

-- Agreed to engage in "an effort to have [the three Counties and their respective Commissioners] act outside their prescribed authority and . . . force nursing homes, residential care centers and skilled nursing homes not to use [Plaintiff] for their transportation needs";

-- And, finally, agreed "not to use wheelchair vans as a lower cost alternative to ambulance transportation." <sup>2</sup>

[\*\*6] On April 3, 1995, the Counties "delegated the responsibility for choosing an exclusive ambulance provider or providers for each of their respective counties to the Consortium." <sup>3</sup>

On April 25, 1995, the Consortium chose its own members to be the exclusive providers of ambulance services in the Counties.

On May, 1995, the Counties selected the members of the Consortium as the only approved providers of ambulance services for their respective counties, agreeing that AMR would provide non-emergency services, and that the 13 Rescue Squads would provide emergency services.

On July 10, 1995, Halifax County promulgated an "Ordinance Regulating Ambulance Services and Granting of Franchises to Ambulance Operators" (the "Ordinance"). <sup>4</sup> [\*\*7] According to Plaintiff, "the Ordinance was promulgated in derogation of [Plaintiff's] rights, including those rights prescribed by N.C.G.S. § 153A-250."<sup>5</sup>

[\*\*8] In October of 1995, Plaintiff, for reasons not specified in the complaint, ceased providing ambulance services to residents of Halifax County, and no longer had "contractual relationships with various nursing homes, residential care centers, and skilled nursing facilities located in Halifax, Northampton, and Warren Counties. . . ."

On May 13, 1996, Plaintiff brought this action, alleging that the Consortium, AMR, the Hospital, the Counties, and the Counties' respective Commissioners had engaged in a concerted effort to destroy Better Health's [\*302]

<sup>2</sup>The complaint does not explain why the alleged agreement not to use wheelchair vans as a lower cost alternative to ambulance services threatened Better Health's business.

<sup>3</sup>The members of the Consortium are AMR, the Hospital, and 13 emergency rescue squads.

<sup>4</sup>The Complaint is silent as to the other two County defendants -- Northampton County and Warren County.

<sup>5</sup>N.C.G.S. § 153A-250 provides, in relevant part, as follows:

**HN1** (a) [a] county may by ordinance franchise ambulance services provided in the county to the public at large, whether the service is based inside or outside the county. The ordinance may:

- (1) Grant franchises to ambulance operators on terms set by the board of commissioners;
- (2) Make it unlawful to provide ambulance services or to operate an ambulance in the county without such a franchise;
- (3) Limit the number of ambulances that may be operated within the county;
- (4) Limit the number of ambulances that may be operated by each franchised operator;
- (5) Determine the areas of the county that may be served by each franchised operator;
- (6) Establish and from time to time revise a schedule of rates, fees, and charges that may be charged by franchised operators; . . .
- (8) Establish other necessary regulations consistent with and supplementary to any statute or any Department of Human Resources regulation relating to ambulance services. . . .

If a person, firm, or corporation is providing ambulance services in a county or any portion thereof on the effective date of an ordinance adopted pursuant to this subsection, the person, firm, or corporation is entitled to a franchise to continue to serve that part of the county in which the service is being provided. The board of commissioners shall determine whether the person, firm, or corporation so entitled to a franchise is in compliance with Chapter 130, Article 26 [now § 131E-155, et seq.]; and if that is the case, the board shall grant the franchise.

business, in alleged violation of state and federal **antitrust law**, state and federal constitutional law, state franchise law, and state tort law.

On June 25, 1996, Defendant AMR filed a motion to dismiss the entire action, arguing that its successful campaign to win an exclusive ambulance franchise, while admittedly motivated by a desire to suppress competition, was protected political activity and not a violation of the antitrust laws. On July 3, 1996, the County Defendants also filed a motion to dismiss the entire action, arguing that they are immune from liability under the **state action** doctrine.

On July 18, 1996, Plaintiff filed [\*\*9] a motion to amend the original complaint, in order "to allege, with particularity, such facts as may be necessary to refute defendants' claims of immunity," (Motion For Leave to Amend Complaint, P9), implicitly acknowledging that the faces alleged in the original complaint were insufficient. Specifically, Plaintiff seeks to further allege the following:

\* \* \*

In November of 1994, the Consortium informed Plaintiff that the Consortium had been granted plenary authority by the Counties to decide which ambulance companies would be granted a franchise, and that Plaintiff would have to submit a proposal to the Consortium if Plaintiff wanted to continue providing ambulance services.

Beginning in December of 1994, Plaintiff was informed by its customers that they could no longer use Plaintiff's services, "based on statements made by the Consortium." (Motion to Amend Complaint, p. 4).

In January of 1995, Plaintiff submitted a proposal to the Consortium "for permission to continue providing ambulance services in [the Counties]," but after reviewing Plaintiff's proposal, the Consortium "adopted certain specifications in an effort to disqualify [Plaintiff] from providing such services." [\*\*10] (*Id.*)

Beginning in April of 1995, Plaintiff asked the Consortium for permission to attend any meetings the Consortium might have concerning the provision of ambulance services in the Counties, but the Consortium refused.

On April 15, 1995, Plaintiff submitted a second proposal to the Consortium, satisfying the specifications adopted by the Consortium for the provision of ambulance services.

On May 3, 1995, Plaintiff informed Halifax County, including the County Attorney of Halifax County, and the Consortium, that Plaintiff was currently providing ambulance services in Halifax County, and that Plaintiff was therefore entitled, according to the terms of the ambulance franchise statute of North Carolina, [N.C.G.S. § 153A-250](#), to continue providing ambulance services if a franchise ordinance was issued.<sup>6</sup>

[\*\*11] On May 15, 1995, Halifax County "adjudicated [Plaintiff's] claim for the right to provide ambulance services in Halifax County by denying [Plaintiff's] request, adopted and ratified the acts of the Consortium with respect to [Plaintiff's] proposal, and denied [Plaintiff] of its right to provide ambulance services in Halifax County." (Motion to Amend Complaint, p.6). The proposed amended complaint does not explain the precise manner in which Plaintiff's "claim," otherwise referred to by Plaintiff as a "request," was "adjudicated," and then "denied." Nor does the proposed amended complaint explain whether or not Plaintiff ever informed the other two county defendants that Plaintiff had a right to continue providing services in the event that an ambulance franchise ordinance was issued.

On May 15, 1995, Plaintiff was informed by the Consortium and Halifax County that Halifax County's "ruling" against Better Health included the denial of whatever franchise rights Better Health might have. (*Id.*, at 7).

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<sup>6</sup>  [N.C.G.S. § 153A-250\(a\)](#) provides that "if a person, firm, or corporation is providing ambulance services in a county or any portion thereof on the effective date of an [ambulance franchise] ordinance adopted pursuant to this section, the person, firm, or corporation is entitled to a franchise to continue to serve that part of the county in which the service is being provided. The board of commissioners shall determine whether the person, firm, or corporation so entitled to a franchise is in compliance with Chapter 130, Article 126 [now [§ 131E-155, et seq.](#)]; and if that is the case, the board shall grant the franchise.

[\*303] On July 10, 1995, Halifax County adopted the ambulance franchise ordinance now in effect in Halifax County.

As is true of the original complaint, the proposed amended [\*\*12] complaint does not allege that Plaintiff actually applied for a franchise in Halifax County, as is required under the ambulance franchise ordinance, and that Plaintiff's application was actually rejected. Further, the proposed amended complaint, as is true of the original complaint, makes no mention of any ambulance franchise ordinances in Northampton and Warren Counties.

\* \* \*

In both the original and proposed amended complaints, Plaintiff seeks triple the amount of the compensatory damages, as determined by a jury, and which Plaintiff has estimated to be \$ 2,100,980; injunctive relief remedying the anticompetitive consequences of the defendants' acts and preventing the Consortium and the Hospital "from maintaining, extending, or exploiting their monopoly power or attempting to do so"; injunctive relief ordering the Consortium to be dissolved; injunctive relief ordering the members of the Consortium not to impede or prohibit Plaintiff from competing for ambulance services in Halifax, Northampton, or Warren Counties; and attorneys' fees and costs.

## **II. DISCUSSION**

There is no dispute between the parties that the ***relevant market*** is the provision of nonemergency [\*\*13] ambulance services in Halifax, Warren, and Northampton Counties. The only issue in dispute is whether the alleged conspiracy to monopolize the relevant market rises to the level of actionable misconduct under state or federal law. The three nongovernmental defendants -- the Consortium, the Hospital, and AMR -- argue that they are immune from liability for their alleged involvement in the conspiracy under the Noerr-Pennington doctrine, while the three County defendants claim absolute immunity under what is known as the ***state action*** doctrine. Since the Noerr-Pennington doctrine, and the state action doctrine, are analytically distinct, the claims against the nongovernmental defendants, and the claims against the County Defendants, will be analyzed separately.

### **A. Defendants' Motions to Dismiss the Original Complaint**

#### ***1. Claims Against the Nongovernmental Defendants*** <sup>7</sup>

[\*\*14] At the outset, it is important to emphasize the precise nature of the anticompetitive conduct in which the nongovernmental defendants allegedly engaged. In the original complaint, Plaintiff alleges what appear, at first glance, to be classic violations of the antitrust laws: price-fixing, regional market allocation, intent to boycott, monopoly, restraint of trade, and artificially inflated prices.

But when the original complaint is stripped of its conclusory allegations concerning the supposed unlawfulness of the defendants' conduct, all that is left is a concerted effort, on the part of a group of ambulance companies and one hospital, to influence three Counties in Eastern North Carolina to grant the group an exclusive franchise to provide ambulance services. This campaign on the part of the nongovernmental defendants was indisputably anticompetitive, in both its aim, and effect, for Plaintiff claims to have lost its share of the relevant market because of it. However, it is clear from the allegations in the complaint that the damages Plaintiff allegedly suffered were not caused by the defendants' price-fixing, market allocation, intent to boycott, etc., but by ***the passage*** [\*\*15] ***of the ambulance franchise ordinance at issue in this case***, which prevented Plaintiff from competing. And so even if it is true, as Plaintiff argues, that the nongovernmental defendants successfully conspired to monopolize the

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<sup>7</sup> On occasion, for the sake of simplicity, this Court will refer to the three nongovernmental defendants, collectively, as simply ***the Consortium***, since both the Hospital and AMR are members of the Consortium, and since all three nongovernmental defendants have raised the same defense.

relevant market, it is clear, from the allegations in the complaint, that this monopoly was achieved not through the illegal exercise [**\*304**] of market power, but, rather, through the lawful exercise of political power.

#### **a. The Noerr-Pennington Doctrine**

The Supreme Court has long recognized [\*\*HN3\*\*](#) a distinction between anticompetitive activity that violates the federal antitrust laws, and **protected political activity that happens to further an anticompetitive end**. In [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 \(1961\)](#) ("Noerr"), the Supreme Court held that

. . . the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly.

\* \* \*

To hold that the government retains the power to act in this representative [**\*\*16**] capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis in the legislative history of that Act.

[Noerr, 365 U.S. at 136-7, 81 S. Ct. at 529, 5 L. Ed. 2d at 470-71.](#)

Four years later, in [United Mine Workers v. Pennington](#), the Supreme Court made it clear that the parties' motivation in petitioning their elected officials is irrelevant:

[\*\*HN4\*\*](#) Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

[Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 1593, 14 L. Ed. 2d 626, 636 \(1965\).](#)

The Supreme Court's decisions in [Noerr](#) and [Pennington](#) form the basis of what has long been referred to as the [Noerr-Pennington](#) doctrine, the essence of which was nicely summed [**\*\*17**] up by the Court in [City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 383, 111 S. Ct. 1344, 1355, 113 L. Ed. 2d 382, 383 \(1991\)](#) -- to wit, "that the antitrust laws regulate business, not politics."

In [City of Columbia](#), a company that had long controlled 95% of a city's billboard business was suddenly faced with the arrival of a potential competitor. But rather than subjecting itself to the perils of open competition, the company met with its friends on the city council and convinced them to pass a zoning ordinance that effectively shut the new competitor out of the market. The competitor sued, claiming that the company had improperly exploited its longstanding, intimate relationship with the members of the local governmental body. What the competitor argued, in effect, was that the market for political power had been improperly monopolized, and since the political process itself was not competitive, and therefore tainted, whatever laws that were passed as a result of it were not entitled to protection under the [Noerr-Pennington](#) doctrine.

The Supreme Court disagreed, holding that [\*\*HN5\*\*](#) the [Noerr-Pennington](#) doctrine protects not only the right to petition [**\*\*18**] a governmental body in order to further one's own interests, but also the right to convince a governmental body to either ignore the pleas of a competitor, or not hear the competitor at all:

Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act. In the present case, of course, any denial to [Plaintiff] of "meaningful access to the appropriate city administrative and legislative fora" was achieved by [Defendant] in the course of an attempt to influence governmental action . . . If

the denial was wrongful there may be other remedies, but as for the Sherman Act, the Noerr exemption applies.

[City of Columbia, supra, 499 U.S. at 382, 111 S. Ct. at 1355.](#)

The Supreme Court's reasoning in City of Columbia is equally applicable here. According [**\*305**] to the allegations in the complaint, the Consortium approached the Commissioners of the three Counties and requested an exclusive franchise to provide [**\*\*19**] ambulance services; the Counties complied, in effect, by granting the Consortium the authority to decide which companies would be granted a franchise, the region in which each company would operate, and the prices to be charged for their services. Understandably, the Consortium wanted less competition, rather than more, and so it denied Plaintiff an opportunity to participate in the decisionmaking process, and denied Plaintiff's repeated requests for a share of the market. The Commissioners of Halifax County, in response to the Consortium's recommendations, then drafted an ambulance franchise ordinance, the terms of which would ensure that the Consortium's wishes were satisfied.

Plaintiff claims that the Commissioners of Halifax County did not have the authority, under North Carolina's ambulance franchise statute, to grant the Consortium complete discretion to divide up the market for ambulance services. Plaintiff further claims that the Consortium knew full well that it was not entitled to complete discretion to dictate the terms of the ambulance franchise statute, but that the Consortium nonetheless influenced the County Commissioners to "act outside their prescribed authority" [**\*\*20**] and grant the Consortium unfettered control over the decisionmaking process. Plaintiff argues that the Consortium's successful attempt to convince a governmental body to do something that it did not have the authority to do is not **protected political activity** for purposes of antitrust analysis, and that the Consortium's behavior falls under what is known as the "sham" exception to the Noerr-Pennington doctrine.

Plaintiff is wrong. [HN6↑](#) The "sham" exception to the Noerr-Pennington doctrine, as explained by the Supreme Court in City of Columbia, refers to the situation in which **a company abuses a governmental process for no other purpose than to hurt a competitor.**

A classic example is the filing of frivolous objections to the license applications of a competitor, with no expectation of achieving denial of the license but simply in order impose expense and delay. . . . A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, [], not one who "who 'genuinely seeks to achieve his governmental result, but does so through improper means.'" . . .

[City of Columbia, \[\\*\\*21\] supra, 499 U.S. at 380, 111 S. Ct. at 1354](#) (citations omitted).

Here, there is no question that the Consortium's actions were genuinely aimed at procuring favorable government action -- an exclusive franchise -- and so the "sham" exception to the Noerr-Pennington doctrine is clearly inapplicable. Even if it is true, as Plaintiff claims, that the Consortium gained a monopoly in the relevant market as a result of exercising discretion to which it was not entitled, then it is the County defendants, and not the Consortium, who are to blame.<sup>8</sup>

For the foregoing reasons, the first three claims for relief in the complaint, [**\*\*22**] which name one or more of the nongovernmental defendants,<sup>9</sup> and which allege violations of sections 1 and 2 of the Sherman Act<sup>10</sup>, are dismissed.

<sup>8</sup> Whether or not the Counties had the authority, under North Carolina's ambulance franchise statute, to grant the Consortium complete discretion to divide up the market for ambulance services, will only become relevant when this Court considers the Counties' claims of immunity under the state action doctrine, the applicability of which depends on the Counties having implemented state policy.

<sup>9</sup> The first claim for relief is against all defendants, including the nongovernmental defendants, for an alleged violation of § 1 of the Sherman Act; the second claim for relief is against the Consortium and AMR, for an alleged violation of § 2 of the Sherman Act; and the third claim for relief is against the Hospital, for an alleged violation of § 2 of the Sherman Act.

[\*\*23] [\*306] The Fifth Claim for Relief, which seeks recovery under [42 U.S.C. § 1983](#), and which adopts the same factual allegations that form the basis of the federal antitrust claims, is also dismissed. Plaintiff alleges that the Consortium and AMR, acting under color of state law, deprived Plaintiff of property without due process of law, in violation of the [Fourteenth Amendment of the United States Constitution](#). This claim is dismissible on two separate grounds. First, as will be explained more fully when this Court considers the claims for relief against the County defendants, Plaintiff had no right to participate in the process by which the County awarded ambulance franchises, nor did Plaintiff, having failed to apply for a franchise, have a protectable property interest at stake. The second basis for dismissing Plaintiff's [§ 1983](#) claim against the nongovernmental defendants is that [HN9](#)<sup>↑1</sup> Noerr-Pennington immunity extends to claims brought under [42 U.S.C. § 1983](#). See, e.g., [Racetrac Petroleum, Inc. v. Prince George's County](#), 601 F. Supp. 892, 914 (D.Md. 1985), aff'd, 786 F.2d 202 (4th Cir. 1986); [Boulware v. State of Nevada Department of Human Resources](#), 960 F.2d 793, 800 [\*24] (9th Cir. 1992) ("activity protected by Noerr-Pennington cannot form the basis of [§ 1983](#) liability"); and [Video Int'l Production, Inc. v. Warner-Amex Cable Communications, Inc.](#), 858 F.2d 1075, 1084 (5th Cir. 1988), cert. denied, 490 U.S. 1047, 109 S. Ct. 1955, 104 L. Ed. 2d 424 (1989)(holding "that any behavior by a private party that is protected from antitrust liability by the [Noerr-Pennington](#) doctrine is also outside the scope of [section 1983](#) liability.").

The only remaining claims for relief against the nongovernmental defendants, all of which adopt the same factual allegations that form the basis of the federal claims, allege violations of state law: the Sixth, Seventh, and Eighth Claims for Relief allege that the Consortium, AMR, and the Hospital all violated North Carolina's antitrust statutes, [N.C.G.S. §§ 75-1, 75-2](#), and [75-5](#); the Tenth Claim for Relief alleges that AMR, the Consortium, and the Hospital all violated North Carolina's unfair and deceptive trade practices statute, [N.C.G.S. § 75-1.1](#); the Eleventh Claim for Relief alleges that the Consortium, AMR, and the Hospital tortiously interfered with Plaintiff's contracts; and finally, the Fourteenth [\*25] Claim for Relief alleges that all of the defendants, including the nongovernmental defendants, violated [Art I, § 34 of the North Carolina Constitution](#), which prohibits monopolies.

In view of the dismissal of all federal claims for relief against the nongovernmental defendants, this Court, acting within its discretion, declines to hear the supplemental state law claims. Therefore, all claims in the original complaint against the nongovernmental defendants are DISMISSED.

## 2. Claims Against the County Defendants

There are two federal causes of action against the County defendants: the First Claim for Relief alleges that all defendants, [including the County defendants](#), violated [§ 1](#) of the Sherman Act; the Fourth Claim for Relief, brought under [42 U.S.C. § 1983](#), alleges that the County Defendants deprived Plaintiff of property without due process of law, in violation of the [Fourteenth Amendment](#). This Court will first consider Plaintiff's claim for relief under the Sherman Act.

### a. The State Action Doctrine

[HN10](#)<sup>↑1</sup> The corollary of the [Noerr-Pennington](#) doctrine is the **state action** doctrine, which allows a state government, in the exercise of its police [\*26] powers, to restrict competition in an effort to regulate a particular segment of the state's economy. See [Parker v. Brown](#), 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). When the state action defense is raised by a political subdivision of the state, such as a city council, or a county Board of Commissioners, the Supreme Court has held that the state action doctrine is applicable as long as the local government's "restriction of competition [is] an authorized implementation of state policy . . ." [City of Columbia](#).

<sup>10</sup> [HN7](#)<sup>↑1</sup> [§ 1](#) of the Sherman Act provides, in relevant part, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." [15 U.S.C. § 1](#)

[HN8](#)<sup>↑1</sup> [§ 2](#) of the Sherman Act provides, in relevant part, that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony." [15 U.S.C. § 2](#)

supra, 499 U.S. at 370, 111 S. Ct. at 1349. In the words of the Fourth Circuit, "to be exempt from [\*307] antitrust laws municipalities must demonstrate that their anticompetitive activities were authorized by the State pursuant to a state policy to displace competition with regulation or monopoly public service." Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Memorial Hospital Inc., 795 F.2d 340, 341 (4th Cir. 1986)(internal quotation omitted).

Here, there is no question that the County defendants had the authority, under state law, to restrict competition in the market for ambulance services, for the ambulance franchise statute at issue in this [\*\*27] case, N.C.G.S. § 153A-250, clearly allows, as the County defendants argue, "wide latitude to regulate, establish, operate, or contract with ambulance services." (County Def.s' Motion to Dismiss, p. 9). While it is true that the statute does not explicitly permit the displacement of competition, the Supreme Court has held that HN11[<sup>1</sup>] "it is enough . . . if suppression of competition is the 'foreseeable result' of what the statute authorizes. . . ." City of Columbia, supra, 499 U.S. at 373, 111 S. Ct. at 1350 (citations omitted).

Plaintiff argues that the anticompetitive activity in which the County defendants allegedly engaged is not protectable under the state action doctrine, for two reasons: 1) the Counties did not have statutory authority to grant the Consortium complete discretion to divide up the market for ambulance services, and 2) the Counties did not have the statutory authority to act upon the Consortium's recommendations by "conferring upon the Consortium a monopoly in, and . . . excluding [Plaintiff] from, the market for ambulance services in Halifax, Northampton, and Warren Counties," (Complaint, P33), since a grandfather clause in North Carolina's ambulance [\*\*28] franchise statute provides that companies who are providing ambulance services at the time a franchise ordinance is issued shall be entitled to a franchise to continue doing business. Therefore, argues Plaintiff, the County defendants engaged in anticompetitive activity that was not sanctioned by state policy, and the state action doctrine is thus inapplicable.

Each of Plaintiff's arguments will be considered in turn: First, Plaintiff argues that the Counties did not have the statutory authority to grant the Consortium complete discretion to divide up the market for ambulance services. In support of its argument, Plaintiff cites no case law, and relies only on the terms of the ambulance franchise Ordinance at issue. But while it may be true that the franchise Ordinance at issue in this case does not explicitly authorize the Counties to defer to an ambulance company's judgment in deciding how to divide up and apportion the market for nonemergency ambulance services, Plaintiff neglects to explain why such explicit authority is necessary. The responsibility of a local government to regulate a particular segment of the economy frequently requires consideration of, and deference to, the [\*\*29] partial judgments and selfish wishes of companies that are vying for the local government's patronage. HN12[<sup>1</sup>] The state action doctrine requires only that a local governmental body have state-granted authority **to regulate**, not state-granted authority to act in response to political pressure. As the Supreme Court noted in City of Columbia, in response to the plaintiff's argument in that case that the city council was merely rubber-stamping the local monopolist's zoning proposal, "it is . . . inevitable . . . that public officials often agree to do what one or another group of private citizens urges upon them . . ." Id., 499 U.S. at 375, 111 S. Ct. at 1351.

The problem with Plaintiff's second argument -- that the County defendants did not have the authority to grant the Consortium's request for a monopoly -- is that the complaint fails to allege that the County defendants **actually performed some governmental action that facilitated the establishment of the Consortium's alleged monopoly.** Plaintiff merely alleges that Halifax County passed an ambulance franchise Ordinance, and Plaintiff expects this Court to assume that the Ordinance somehow automatically established, [\*\*30] "in derogation of [Plaintiff's] rights," the Consortium's monopoly in the market for nonemergency ambulance services. But the very terms of the Ordinance, which is attached to the complaint, contradicts Plaintiff's theory of [\*308] the case, for there is no mention of the members of the Consortium, and no mention of Plaintiff. The Ordinance is an eleven-page document that sets forth, in general terms, the requirements for providing nonemergency ambulance services in Halifax County. The Ordinance is not a self-executing document, and it requires ambulance companies to affirmatively apply for a franchise before receiving one. The Ordinance provides, in relevant part, as follows:

HN13[<sup>1</sup>] § 3.1 -- No person either as owner, agent or otherwise, shall furnish, operate, conduct, maintain, advertise or otherwise be engaged in or profess to be engaged in the business or service of nonemergency

transportation of patients within Halifax County unless the person holds a valid permit for each ambulance used by the North Carolina Department of Human Resources and has been granted a franchise for the operation of such business or service by the County pursuant to this Ordinance.

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[\*\*31] **HN14** § 4.1 -- Application for a franchise to operate ambulances in Halifax County shall be made by the ambulance provider upon such forms as may be prepared or prescribed by the County and shall contain . . . any information the County shall deem reasonably necessary for a fair determination of the capability of the applicant to provide ambulance services in Halifax County in accordance with the requirements of state laws and the provisions of this regulation.

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**HN15** § 5.2 -- An applicant may only apply for a franchise to operate nonemergency transportation services.

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**HN16** § 5.4 -- A franchise may be granted if the County finds that:

- (a) The applicant shows a reasonable effort to meet State standards and standards outlined in the franchise ordinance.
- (b) The proposed service will fit within the existing service so as not to adversely affect the level or service or operations of other franchisees to render service.
- (c) A need exists for the proposed service in order to improve the level of ambulance services available to residents of the County and that this is a reasonable and cost effective manner of meeting the need.

(Complaint, [\*\*32] Ex. A).

Plaintiff argues that the terms of the Ordinance are irrelevant, since Plaintiff was automatically entitled to continue doing business under the grandfather clause in N.C.G.S. § 153A-250. But the problem with Plaintiff's argument is that the grandfather clause in N.C.G.S. § 153A-250, like the franchise Ordinance that was promulgated pursuant to N.C.G.S. § 153A-250, is not self-executing: **HN17** "The board of commissioners shall determine whether the person, firm, or corporation . . . is in compliance with [all state statutory regulations concerning the provision of ambulance services <sup>11</sup>]; and if that is the case, the board shall grant the franchise." In order to notify the board of commissioners that one is currently providing ambulance services, and in order to give the board an opportunity to affirmatively grant a franchise to continue doing business, ***it is necessary that an ambulance company actually submit an application that can be granted***. The complaint conspicuously fails to allege that Plaintiff actually submitted an application to the County defendants for a franchise; that Plaintiff's application was then wrongly denied; and that an application for a franchise [\*\*33] submitted by AMR -- the member of the Consortium who was to provide nonemergency ambulance services -- was granted. Since the complaint fails to allege that the County defendants actually caused Plaintiff's alleged damages -- i.e., the loss of its business in the relevant market -- the Sherman Act claim against the County defendants [\*309] is dismissed.<sup>12</sup>

<sup>11</sup> When Halifax County issued its ambulance franchise Ordinance, on July 10, 1995, the state regulations concerning the provision of ambulance services were set forth in N.C.G.S. Chapter 130, Article 26, which was repealed on November 1, 1995, and can now be found in N.C.G.S. § 131E-155 et seq.

<sup>12</sup> The complaint also conspicuously fails to allege any governmental action whatsoever on the part of Northampton and Warren Counties, both of whom are named as defendants. The only ambulance franchise Ordinance mentioned in the complaint was passed by Halifax County. Apparently, Plaintiff expects this Court to assume that after the Consortium conspired with the Commissioners of Northampton County, and with the Commissioners of Warren County, to shut Plaintiff out of the relevant market in those two counties, the Consortium's monopoly in Northampton and Warren Counties spontaneously came into existence, and with such force, that Plaintiff's business was instantly obliterated as a result. This Court will make no such assumption. Plaintiff's failure to allege any governmental action by Northampton and Warren counties is a sufficient basis in itself for dismissing the federal antitrust claim against them.

[\*\*34] The Fourth Claim for Relief, which alleges that the County defendants deprived plaintiff of its [Fourteenth Amendment](#) due process rights, in violation of [42 U.S.C. § 1983](#), is also dismissed. As this Court has explained at length, Plaintiff did not have a right to participate in the process by which the Counties decided the terms of their ambulance franchise ordinances, and Plaintiff did not have a protectable property interest at stake, since it never applied for a franchise, as was required under both the ambulance franchise Ordinance, and the ambulance franchise statute pursuant to which the Ordinance was issued.

The only remaining claims against the County defendants, all of which adopt the same factual allegations that form the basis of the federal claims, allege violations of state law: the Ninth Claim for Relief alleges that the County defendants violated North Carolina's ambulance franchise statute, [N.C.G.S. § 153A-250](#); the Twelfth, Thirteenth, and Fourteenth Claims for Relief allege that the County defendants violated various provisions of the North Carolina Constitution -- Art 1, § 19, Art 1, § 32, and Art 1, § 34.

In view of the dismissal of all federal claims for relief [\*\*35] against the County defendants, this Court, acting within its discretion, declines to hear the supplemental state law claims. Therefore, all claims in the original complaint against the County defendants are DISMISSED.

\* \* \*

## **B. Plaintiff's Motion For Leave to File Amended Complaint**

In an effort "to refute defendants' claims of immunity," (Motion for Leave to Amend Complaint, p.9), Plaintiff seeks leave to supplement its complaint with additional factual allegations.

### ***a. Plaintiff's Attempt to Refute Noerr-Pennington Defense***

In its proposed amended complaint, Plaintiff seeks to allege, for the first time, that the Consortium, ***prior to engaging in its campaign to influence the County governments***, contacted the companies with whom Plaintiff did business, and made unspecified "statements" that caused these companies to inform Plaintiff that they could no longer do business with Plaintiff.

Starting on or about December 1994, [Plaintiff] was informed by its customers that they could no longer use [Plaintiff] as a provider of ambulance services ***based on statements made by the Consortium***. (Motion to Amend, p.4, emphasis added).

[\*\*36] There are two reasons why this proposed allegation fails to state a claim upon which relief can be granted: first, it is not a violation of the antitrust laws to make "statements" to a competitor's customers.

Second, even assuming, solely for the sake of argument, that the Consortium's alleged "statements" to Plaintiff's customers amounted to illegal threats to boycott (which the proposed amended complaint does not allege), the allegation would still not successfully refute the Consortium's Noerr-Pennington defense, for there is no question, based on the allegations in the proposed amended complaint, that Plaintiff's alleged damages were caused solely by the passage of the ambulance franchise Ordinance at issue in this case, and not by any threats to boycott Plaintiff's customers.

### ***b. Plaintiff's Attempt to Refute State Action Defense***

Plaintiff seeks to refute the County defendants' state action defense by alleging the [\*310] following: Plaintiff made a formal "claim," otherwise referred to as a "request," for a franchise; Plaintiff's "request" was then, in some unspecified fashion, "adjudicated"; after being adjudicated, the "request" was then "denied"; and, finally, this [\*\*37] denial was communicated by means of a "ruling," the precise nature of which is unclear, in which the County defendants explained to Plaintiff that it had no right to a franchise under an Ordinance that was not yet in existence.

The problem with Plaintiff's proposed amended complaint, like the problem with Plaintiff's original complaint, is that it seeks to state an antitrust claim against the County defendants without alleging that the County defendants actually performed some governmental action that facilitated the establishment of the Consortium's alleged monopoly. Specifically, the proposed amended complaint fails to allege that after the franchise Ordinance at issue in this case was passed, a) Plaintiff submitted an application for a franchise, b) Plaintiff's application was wrongly denied, and c) AMR, the member of the Consortium who was to provide nonemergency ambulance services, also submitted an application for a franchise, which was granted.

### **III. CONCLUSION**

For the foregoing reasons, Defendants' motions to dismiss are granted in full, and Plaintiff's motion for leave to file an amended complaint is denied.

Accordingly, this action is DISMISSED in its entirety **[\*\*38]** as to all defendants.<sup>13</sup>

SO ORDERED.

This 7TH day of March, 1997.

TERRENCE W. BOYLE

UNITED STATES DISTRICT JUDGE

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End of Document

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<sup>13</sup> Since the Consortium and the Hospital only raised the Noerr-Pennington doctrine as an affirmative defense, and did not file motions to dismiss pursuant to [Rule 12\(b\)\(6\)](#), this Court, sua sponte, dismisses the action against them.

## Rozema v. Marshfield Clinic

United States District Court for the Western District of Wisconsin

March 10, 1997, Decided ; March 10, 1997, FILED

96-C-592-C, 96-C-916-C, 96-C-730-C

**Reporter**

1997 U.S. Dist. LEXIS 8261 \*; 1997-1 Trade Cas. (CCH) P71,796

HENRY AND JOANN ROZEMA, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE MARSHFIELD CLINIC and SECURITY HEALTH PLAN OF WISCONSIN, INC., Defendants. KATHLEEN V. MALEK, STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, and, Plaintiffs, v. THE MARSHFIELD CLINIC, SECURITY HEALTH PLAN OF WISCONSIN, INC., NORTH CENTRAL HEALTH PROTECTION PLAN, and RHINELANDER MEDICAL CENTER, S.C., Defendants. HARRIET HALIDA, LAWRENCE HALIDA, ISLAND SPORTS CENTER, INC., a corporation, MARK MCKAY, and TOWN OF MERCER SANITARY DISTRICT # 1, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE MARSHFIELD CLINIC, SECURITY HEALTH PLAN OF WISCONSIN, INC., NORTH CENTRAL HEALTH PROTECTION PLAN, and RHINELANDER MEDICAL CENTER, S.C., Defendants.

**Disposition:** [\*1] Motions to dismiss of defendants The Marshfield Clinic, Security Health Plan, Inc., North Central Health Protection Plan, and Rhinelander Medical Center, S.C. and motion to strike of defendants The Marshfield Clinic and Security Health Plan, Inc. DENIED.

## **Core Terms**

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health plan, Clinic, antitrust, defendants', markets, allegations, plaintiffs', territories, conspiracy, contracts, complaints, purchasers, providers, physician's services, customers, collateral estoppel, motion to dismiss, anti-competitive, healthcare services, subrogation, subscribers, healthcare, geographic, prices, relevant market, products, health maintenance organization, offensive, anti trust law, Sherman Act

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

### **HN1[ Motions to Dismiss, Failure to State Claim**

In considering a motion to dismiss for failure to state a claim, the court must accept as true the well-pleaded factual allegations in the complaint, drawing all reasonable inferences in favor of the plaintiff. The court may dismiss a complaint for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#) only if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

## **HN2** Complaints, Requirements for Complaint

The standard for pleading is low, requiring only a short and plain statement of the claim showing that the pleader is entitled to relief. [Fed. R. Civ. P. 8\(a\)\(2\)](#). A plaintiff is not required to plead the particulars of his or her claim unless it deals with fraud or mistake. One pleads a claim for relief by briefly describing the events. Matching facts against legal elements comes later, such as in consideration of motions for summary judgment. On a motion to dismiss, the plaintiff receives the benefit of the imagination, so long as the hypotheses are consistent with the complaint. The pleading rule is equally applicable in antitrust cases.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

## **HN3** Pleadings, Rule Application & Interpretation

Federal courts are not to interpolate a requirement of fact pleading into the federal rules.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

## **HN4** Pleadings, Rule Application & Interpretation

Although a plaintiff need not plead facts and may plead conclusions, a plaintiff must provide the defendant with minimal notice of the claim, and include enough information to "outline or adumbrate" the basis of the claim.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

## **HN5** Antitrust & Trade Law, Sherman Act

To bring a successful claim under [§ 1](#) of the Sherman Act, a plaintiff must allege 1) a contract, combination or conspiracy; 2) a resultant unreasonable restraint of trade in the relevant market; and 3) an accompanying injury. There are two standards for evaluating whether an alleged restraint of trade is unreasonable: the rule of reason and the per se rule.

Antitrust & Trade Law > Sherman Act > General Overview

## **HN6** Antitrust & Trade Law, Sherman Act

The Wisconsin [antitrust law](#), [Wis. Stat. § 133.03](#), was modeled after the Sherman Act. What amounts to a conspiracy in restraint of trade under the Sherman Act amounts to a conspiracy in restraint of trade under the state act.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

## **HN7** [down arrow] **Private Actions, Standing**

Parties who may bring an antitrust action are limited to those 1) who have suffered the type of injury that the antitrust laws were intended to prevent (antitrust injury) and 2) whose injuries are a result of defendant's unlawful conduct (antitrust standing). To establish an antitrust injury, which is sometimes considered an element of antitrust standing, a plaintiff must be able to show that the antitrust laws protect his or her interests and that the violation was the cause-in-fact of the injury. Plaintiff's loss must be attributable to the anti-competitive aspect of the practice under scrutiny. One purpose of the antitrust laws is to protect consumers from the anti-competitive conduct of suppliers. Consumer plaintiffs must show that their injury results from defendants' acts that reduce output or raise prices in the relevant market.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Civil Procedure > ... > Justiciability > Standing > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

## **HN8** [down arrow] **Purchasers, Direct Purchasers**

Antitrust standing examines the connection between the asserted wrongdoing and plaintiff's claimed injury. Only those who are in the best position to vindicate the alleged violation are awarded standing; plaintiffs whose injuries are indirect or secondary will be unsuccessful. Factors relevant to the standing determination include: 1) the causal connection between the violation and the injury; 2) the nature of the injury; and 3) whether plaintiff's claim for damages is speculative, potentially duplicative, or involves complex apportionment. When the plaintiff's injury is linked to the injury inflicted upon the market the compensation of the injured party promotes the designated purpose of the antitrust law-the preservation of competition. To the extent that plaintiffs are direct purchasers of services from defendants, they have antitrust standing.

Contracts Law > Third Parties > Subrogation

Insurance Law > Claim, Contract & Practice Issues > Subrogation > General Overview

## **HN9** [down arrow] **Third Parties, Subrogation**

Wis. Stat. § 49.89(2) states that if the Department of Health and Family Services provides public assistance as a result of the occurrence of an injury, sickness or death that creates a claim or cause of action, whether in tort or contract, on the part of a public assistance recipient against a third party, the Department is subrogated to the rights of the recipient. On its face, the statute appears to apply only where the occurrence of injury or sickness creates a claim.

Civil Procedure > Parties > Joinder of Parties > General Overview

Insurance Law > Claim, Contract & Practice Issues > Subrogation > General Overview

## **HN10** [blue icon] **Parties, Joinder of Parties**

Under [Wis. Stat. § 803.03\(2\)\(a\)](#), public assistance recipients asserting a claim for affirmative relief are required to join the public assistance provider that has a right of subrogation under [Wis. Stat. § 49.89\(2\)](#).

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

## **HN11** [blue icon] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The McCarran-Ferguson Act, [15 U.S.C.S. §§ 1012\(b\)](#), removes from antitrust scrutiny all conduct that is part of the "business of insurance" and regulated by state law. However, [15 U.S.C.S. § 1013\(b\)](#) makes the Sherman Act applicable in any event to acts of coercion, intimidation or boycott. The three part standard for determining what constitutes "business of insurance" for purposes of [15 U.S.C.S. § 1012\(b\)](#) is: 1) whether the practice has the effect of transferring or spreading a policyholder's risk; 2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and 3) whether the practice is limited to entities within the insurance industry.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

## **HN12** [blue icon] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

An insurance company's contracts with participating pharmacies are merely arrangements for the purchase of goods and services from a third party and are not part of the business of insurance.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

## **HN13** [blue icon] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

The relevant market defines the scope of an antitrust claim because both the wrongful conduct and the resulting injury must occur within the same market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

## **HN14** [blue icon] **Regulated Practices, Market Definition**

The ultimate determination of the relevant market is an issue of fact for the jury.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

## [HN15](#) [+] **Private Actions, Standing**

Wis. Stat. § 133.14 provides for recovery by a person who has made payments under or pursuant to contracts or agreements made by any person while a member of any combination or conspiracy prohibited by Wis. Stat. § 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

## [HN16](#) [+] **Estoppel, Collateral Estoppel**

Offensive collateral estoppel involves a plaintiff seeking to estop a defendant from relitigating the issues that the defendant previously litigated and lost against another plaintiff. Trial courts have broad discretion to determine when offensive collateral estoppel should be applied but indicated that courts should not allow it where a plaintiff easily could have joined in the earlier action or where it would be unfair to the defendant. Unfairness may result in cases in which the defendant had little incentive to defend in the prior suit, the judgment serving as the basis for collateral estoppel is inconsistent with other prior judgments in favor of the defendant, or the second action affords the defendant procedural opportunities unavailable in the first action that could result in a different outcome.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

## [HN17](#) [+] **Estoppel, Collateral Estoppel**

For collateral estoppel to apply, four elements must be met: 1) the issue sought to be precluded must be the same as that involved in the prior action, 2) the issue must have been actually litigated, 3) the determination of the issue must have been essential to the final judgment, and 4) the party against whom estoppel is invoked must be fully represented in the prior action.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

## [HN18](#) [+] **Motions to Strike, Immaterial Matters**

Under [Fed. R. Civ. P. 12\(f\)](#), the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Motions to strike are not favored and usually will be denied unless the allegations are not related to the subject matter of the litigation and are prejudicial to the objecting party. Thus, a motion to strike frequently is denied when no prejudice could result from the challenged allegations, even though the matter literally is within the categories set forth in [Fed. R. Civ. P. 12\(f\)](#). Any doubts are to be resolved in favor of the objecting party.

**Counsel:** For ROZEMA, HENRY, ROZEMA, JOANN, HALIDA, HARRIETT, PLAINTIFFS (96-C-0730-C): JAMES A. OLSON, LAWTON & CATES, S.C., MADISON, WI.

For THE MARSHFIELD CLINIC SECURITY HEALTH PLAN OF WI., INC., MARSHFIELD CLINIC, DEFENDANTS (96-C-0730-C): STEVEN J. CAULUM, BELL, METZNER, GIERHART & MOORE, MADISON, WI.

**Judges:** BARBARA B. CRABB, District Judge

**Opinion by:** BARBARA B. CRABB

## Opinion

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### OPINION AND ORDER

These are civil antitrust actions for monetary, declarative and injunctive relief brought pursuant to the Sherman Act, [15 U.S.C. § 1](#), and [Wis. Stat. § 133.03](#). The Rozema plaintiffs contend that defendants The Marshfield Clinic and Security Health Plan of Wisconsin, Inc. violated the federal and state statutes by entering into a continuing contract, combination or conspiracy to divide markets illegally in restraint of trade. The Halida and Malek plaintiffs contend that defendants The Marshfield Clinic, Security Health Plan of Wisconsin, Inc., [\*2] Rhinelander Medical Center, S.C. and North Central Health Protection Plan violated the statutes by agreeing with a number of their competitors and co-conspirators to divide markets, territories and customers. These cases are before the court on the motions to dismiss filed pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) by 1) defendants The Marshfield Clinic and Security Health Plan of Wisconsin, Inc. separately against the Rozema, Malek and Halida plaintiffs; 2) defendant Rhinelander Medical Center, S.C. separately against the Malek and Halida plaintiffs; and 3) defendant North Central Health Protection Plan separately against the Malek and Halida plaintiffs. Defendant Rhinelander Medical Center, S.C. has moved to dismiss the complaints of the Malek and Halida plaintiffs under [Fed. R. Civ. P. 12\(b\)\(7\)](#) for failure to join other alleged co-conspirators under [Fed. R. Civ. P. 19](#). In the alternative to their motion to dismiss the Halida complaint, defendants The Marshfield Clinic and Security Health Plan, Inc. have moved to strike certain paragraphs of the complaint as irrelevant and immaterial under [Fed. R. Civ. P. 12\(f\)](#).

Defendants generally contend that plaintiffs fail to set forth sufficient [\*3] facts alleging an antitrust conspiracy and injury under state or federal law, fail to plead collateral estoppel and are barred from invoking it and cannot seek damages under [Wis. Stat. § 133.14](#). Defendants The Marshfield Clinic and Security Health Plan, Inc. assert that plaintiff Halida cannot allege that their refusal to pay for her care by a particular chiropractor is an antitrust violation. Defendants The Marshfield Clinic, Security Health Plan, Inc. and North Central Health Protection Plan contend that because plaintiff Malek and the plaintiffs whom she represents are Medicaid recipients, they do not have standing to bring an antitrust claim. Finally, defendants The Marshfield Clinic and Security Health Plan, Inc. argue that plaintiff Wisconsin Department of Health and Family Services cannot be subrogated under [Wis. Stat. § 49.89\(2\)](#) to the Malek plaintiffs' claims.

I conclude that 1) all plaintiffs have alleged antitrust claims under federal and state law and possible relief under [Wis. Stat. § 133.14](#); 2) plaintiff Malek and the plaintiffs whom she represents have antitrust standing and have alleged an antitrust injury; 3) plaintiff Wisconsin Department of Health and Family [\*4] Services can be subrogated to the claims of the Malek plaintiffs; and 4) plaintiff Halida may allege that defendants The Marshfield Clinic and

Security Health Plan, Inc. terminated her chiropractor from its plan. Because no defendant has briefed the question whether parties must be joined under Fed. R. Civ. P. 19, defendant Rhinelander Medical Center's motion to dismiss under Fed. R. Civ. P. 12(b)(7) will be denied. The motion to strike of defendants The Marshfield Clinic and Security Health Plan, Inc. will be denied because the paragraphs in question are not completely unrelated to plaintiffs' claims and defendants will not suffer prejudice.

For the sole purpose of deciding this motion, I find that plaintiffs' complaints fairly allege the following.

#### ALLEGATIONS OF FACT

##### A. Factual Allegations Common to All Complaints

The three complaints make substantially similar allegations of fact. To the extent that the complaints allege additional facts, those factual allegations are set out in subsections B and C below.

Defendant The Marshfield Clinic is a Wisconsin corporation organized under Wis. Stat. Ch. 180 and the largest physician-owned clinic in the state of Wisconsin, with annual [\*5] revenues of over \$ 200 million. Its main office is in Marshfield, Wisconsin and it maintains 21 branch offices in 14 counties in North Central Wisconsin.

Defendant Security Health Plan, Inc. is a Wisconsin health maintenance organization organized under Wis. Stat. Ch. 613 and a wholly owned subsidiary of The Marshfield Clinic. Since 1987, The Marshfield Clinic has controlled Security Health Plan, Inc.'s policies, practices and procedures and has maintained Security Health Plan, Inc. as its exclusive health maintenance organization. (A health maintenance organization charges its subscribers a fixed annual fee for services instead of charging separately for each medical procedure and provides services through physicians who contract with it.) Security Health Plan, Inc. provides services to approximately 70,000 enrollees, who are referred to physicians and specialists at The Marshfield Clinic.

I take judicial notice of the following facts alleged in the complaints. On February 16, 1994, Blue Cross & Blue Shield United of Wisconsin and Compcare Health Services Insurance Corporation filed claims in this court against The Marshfield Clinic and Security Health Plan, Inc. alleging that defendants' [\*6] principal business strategies and activities violated §§ 1 and 2 of the Sherman Act and Wis. Stat. § 133.03. Blue Cross & Blue Shield United of Wisconsin sought significant damages, including overcharges as a result of the antitrust violations and treble damages and recoupment of contract payments made for products and services under Wis. Stat. § 133.14. In addition, Blue Cross & Blue Shield United of Wisconsin requested that the court enjoin The Marshfield Clinic from future anti-competitive conduct. The jury found that The Marshfield Clinic and Security Health Plan, Inc. had entered into a contract, combination or conspiracy to allocate customers, territories and product or service markets in violation of § 1 of the Sherman Act and Wis. Stat. § 133.03.

The Honorable Judge Shabaz denied post-trial motions relating to the § 1 violations in Blue Cross v. Marshfield Clinic, 883 F. Supp. 1247 (W.D. Wis. 1995), determining that there was evidence that defendants allocated markets and territories with Rhinelander Medical Center, S.C., North Central Health Protection Plan, Wausau Medical Center and Wausau area physicians. The court entered an injunction that included provisions [\*7] voiding agreements and understandings to allocate customers, territories, and product and service markets among The Marshfield Clinic, Security Health Plan, Inc., Rhinelander Medical Center, S.C., Wausau area physicians, North Central Health Protection Plan, Ministry Corporation, Gunderson Clinic and Rice Clinic.

On April 21, 1995, The Marshfield Clinic appealed the verdict. Although the Seventh Circuit reversed the verdict on other grounds, it affirmed the liability finding relating to the § 1 conspiracy to divide markets and remanded the case for a new trial to determine damages resulting solely from the division of markets. See Blue Cross v. Marshfield Clinic, 65 F.3d 1406, 1416 (7th Cir. 1995), cert denied, 134 L. Ed. 2d 233, 116 S. Ct. 1288 (1996). The court of appeals directed the district court to rewrite the injunction but held that the provisions forbidding defendants from allocating customers, territories and product and service markets with Wausau Area Physicians, North Central Health Protection Plan, Rhinelander Medical Corporation, S.C. and Ministry Corporation must stand. See id.

##### B. Rozema Complaint

The Rozema complaint contains the following additional [\*8] allegations of fact. Plaintiffs Henry and Joann Rozema are married and reside at 10136 Stadt Road, Marshfield, Wisconsin. The Rozemas were purchasers of physician services from defendant The Marshfield Clinic and purchasers of Health Maintenance Organization health care services from defendant Security Health Plan, Inc. during the period of the alleged antitrust violations by defendants The Marshfield Clinic and Security Health Plan, Inc. The Rozemas are suing on behalf of themselves and other purchasers of physician services from The Marshfield Clinic and Security Health Plan, Inc. (Physician services are products and services related to primary and specialty health care, including pharmaceuticals, laboratory tests, in-patient and out-patient services and health maintenance organization health care packages, services and products.)

Beginning as early as 1987 and continuing to the present, The Marshfield Clinic allocated customers and territories with the Rhinelander Medical Center, S.C., North Central Health Protection Plan, Wausau Area physicians and the Wausau Medical Center and allocated customers, territories, products and services with the Sisters the Sorrowful Mother Ministry [\*9] Corporation. As a result of these practices, the prices of physician services were raised, fixed, pegged or stabilized and plaintiffs have and continue to be damaged in an amount to be determined.

#### C. Malek and Halida Complaints

##### 1. Malek Complaint

Plaintiff Kathleen V. Malek resides in Woodruff, Oneida County, Wisconsin. Malek has been and will continue to be a purchaser of health care services from defendant The Marshfield Clinic. The fees charged to Malek by The Marshfield Clinic for health care services have been paid in part by the Wisconsin Medical Assistance Plan, which is administered by the Wisconsin Department of Health and Family Services. Plaintiff Wisconsin Department of Health and Family Services is joined as a party pursuant to its subrogation interest for fees charged by defendants that were paid in part by the Wisconsin Medical Assistance Plan. Malek is suing on behalf of herself and purchasers of health care services from one or more of the defendants during the period of alleged antitrust violations, including those purchasers reimbursed in whole or in part by the Wisconsin Medical Assistance Plan.

##### 2. Halida Complaint

Plaintiffs Harriet Halida [\*10] and Lawrence Halida, residents of Loyal, Clark County, Wisconsin, are subscribers to The Marshfield Clinic's Greater Marshfield Health Plan, which is underwritten by defendant Security Health Plan, Inc. Plaintiff Island Sports Center is a corporation organized and existing under Wisconsin law that operates a sporting goods store in Minocqua, Wisconsin. Island Sports Center is the purchaser of an employer group health maintenance organization plan from Security Health Plan, Inc. Plaintiff Mark McKay resides in Hazelhurst, Oneida County, Wisconsin. McKay is an individual subscriber to The Marshfield Clinic's Greater Marshfield Health Plan, which is underwritten by Security Health Plan, Inc., under the employer group plan issued to Island Sports Center. Plaintiff Town of Mercer Sanitary District # 1 is organized under Wisconsin law with its principal place of business in Mercer, Wisconsin. The Sanitary District is a purchaser of an employer group health maintenance organization plan from Security Health Plan, Inc. The named plaintiffs are suing on behalf of themselves, individual and employer group subscribers to the Greater Marshfield Health Plan, purchasers of defendants' health care [\*11] plans and employers and employees enrolled or subscribing to defendants' health care plans.

As a result of The Marshfield Clinic's anti-competitive conduct, The Marshfield Clinic and Security Health Plan, Inc. have the power to terminate health care providers and deny subscribers access to those providers. Effective January 1996, The Marshfield Clinic and Security Health Plan, Inc. required all chiropractic providers in or near Clark County, Wisconsin, to become part of Allied Health of Wisconsin, S.C. or not continue as providers for Security Health Plan, Inc. Dr. Gallen Scharer, D.C. is a chiropractor in Owen, Wisconsin, who has treated plaintiff Halida for several years and has relieved her lower back and leg pain with a special technique not used by any other chiropractor in Clark County. Because Dr. Scharer chose not to merge his practice into Allied Health of Wisconsin, S.C., he was not allowed to continue to be a provider for Security Health Plan, Inc. Halida informed Security Health Plan, Inc. that other chiropractic providers could not give her the same relief and asked The Marshfield Clinic and Security Health Plan, Inc. to pay for her care by Dr. Scharer. Security Health [\*12] Plan, Inc.

refused Halida's request on or about February 20, 1996, and since then, Halida has suffered substantial pain, discomfort and injury.

### 3. Common allegations of fact

The complaints filed in the Malek and Halida cases are identical with respect to the following allegations. Defendant North Central Health Protection Plan is a health care maintenance organization under Wisconsin law with its principal place of business in Wausau, Wisconsin. North Central Health Protection Plan has approximately 37,000 subscribers in the Wausau area. Defendant Rhinelander Medical Center, S.C. is a not-for-profit corporation, organized and existing under Wisconsin law with its principal place of business in Rhinelander, Wisconsin.

Defendants sell a number of products and services, including total physician care, primary and specialty health care, managed health care plans, inpatient and outpatient hospital services, pharmaceuticals, laboratory tests, outpatient services and facilities packages. The Marshfield Clinic sells its physician and other services and products through Security Health Plan, Inc.

Defendants operate in a number of defined geographic markets, offering particular products [\*13] and services in each market. Generally, a geographic market includes either an approximate 25-mile radius or a county. For example, defendants' non-competition agreements with their participating physicians define a market as a county or as an area approximately 25 miles in radius around the branch clinic or practice location. However, for total physician services, primary health care and hospital services, the geographic market is defined by the reasonable distance most patients will travel for those services. For specialty physician and outpatient services, the market is the county in which the specialized care is provided and those immediately adjacent counties in which specialized care is unavailable. The geographic market of a managed health care plan depends on that of the participating primary care physicians who either directly treat or refer patients to specialized physicians.

Since at least 1987 and continuing into the present, The Marshfield Clinic, Security Health Plan, Inc., North Central Health Protection Plan, Rhinelander Medical Center, S.C., unaffiliated physicians and clinics and other co-conspirators have divided markets, customers and territories for health plan [\*14] and health care services. The Marshfield Clinic, Security Health Plan, Inc. and North Central Health Protection Plan agreed not to open offices in each other's territories. In 1992, although Security Health Plan, Inc. had fewer than thirty percent of the health maintenance organization subscribers in the counties of Lincoln and Marathon where North Central Health Protection Plan was active, it enrolled more than ninety percent of the subscribers in the surrounding counties of Oneida, Price, Taylor, Clark and Ward.

The actions of defendants have had a number of effects. Competition has been eliminated between The Marshfield Clinic, Security Health Plan, Inc., North Central Health Protection Plan, Rhinelander, their co-conspirators and would-be competitors. Products are defined and controlled by defendants' division of geographical markets, territories and customers and there are no viable substitutes for defendants' products. Prices of health care services, health plans, and health care insurance within the markets where the defendants have divided customers, territories and markets have been fixed, raised, maintained and stabilized at artificially high and uncompetitive levels throughout [\*15] North Central Wisconsin. For example, physician fees and rates charged by The Marshfield Clinic within the geographic markets where it has a dominant number of physicians and market power are substantially higher (as much as twenty percent) than those in comparable areas. Published independent studies indicate that The Marshfield Clinic has the highest-priced physician services in Wisconsin, with prices substantially above the average. The premiums charged by Security Health Plan, Inc. are substantially higher than other health maintenance organizations and exceed Wisconsin state averages for federal and state employee plans.

Plaintiffs have been injured because they have paid more for health plan services and health care services than they would have otherwise paid in a free and open competitive market.

### OPINION

#### I. MOTIONS TO DISMISS

Defendant Rhinelander Medical Center, S.C. has not submitted a brief but instead incorporates by reference the briefs of defendants The Marshland Clinic, Security Health Plan, Inc. and North Central Health Protection Plan. Therefore, I will address defendant Rhinelander Medical Center's motions to dismiss only to the extent that they have been addressed [\*16] in the briefs of the other defendants. Because no defendant has briefed the question whether parties must be joined under [Fed. R. Civ. P. 19](#), defendant Rhinelander Medical Center's motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(7\)](#) will be denied.

#### A. Failure to State a Claim Under the Sherman Act and [Wis. Stat. § 133.03](#)

**HN1**[] In considering a motion to dismiss for failure to state a claim, the court must accept as true the well-pleaded factual allegations in the complaint, drawing all reasonable inferences in favor of the plaintiff. [Hishon v. King & Spalding](#), 467 U.S. 69, 72, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); [Porter v. DiBlasio](#), 93 F.3d 301, 305 (7th Cir. 1996); [Yeksigian v. Nappi](#), 900 F.2d 101, 102 (7th Cir. 1990). The court may dismiss a complaint for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#) only if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. [Porter](#), 93 F.3d at 305 (citation omitted).

**HN2**[] The standard for pleading is low, requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief." [Fed. R. Civ. P. 8\(a\)\(2\)](#). A plaintiff is not required to plead the particulars [\*17] of his or her claim unless it deals with fraud or mistake. See [Leatherman v. Tarrant County Narcotics Unit](#), 507 U.S. 163, 168, 113 S. Ct. 1160, 1163, 122 L. Ed. 2d 517 (1993); [Hammes v. Aamco Transmissions, Inc.](#), 33 F.3d 774, 778 (7th Cir. 1994). "One pleads a 'claim for relief' by briefly describing the events." [Sanjuan v. American Bd. of Psychiatry and Neurology](#), 40 F.3d 247, 251 (7th Cir. 1994). Matching facts against legal elements comes later, such as in consideration of motions for summary judgment. *Id.*; [Palmer v. Bd. of Education Community United School District](#), 46 F.3d 682, 688 (7th Cir. 1995). On a motion to dismiss, "the plaintiff receives the benefit of the imagination, so long as the hypotheses are consistent with the complaint." [Sanjuan](#), 40 F.3d at 251 (citation omitted). The pleading rule is equally applicable in antitrust cases. See [MCM Partners v. Andrews-Bartlett & Associates](#), 62 F.3d 967, 976 (7th Cir. 1995); [Sanjuan](#), 40 F.3d at 251; [Hammes](#), 33 F.3d at 782.

Defendants cite several cases in arguing that an antitrust plaintiff may not assert bald legal conclusions unsupported by allegations of fact. See, e.g., [Palda v. General Dynamics Corp.](#), 47 F.3d 872, 875 (7th Cir. 1995); [Schiffels v. Kemper Financial Services](#), 978 F.2d 344 (7th Cir. 1992); [Benson v. Cady](#), 761 F.2d 335 (7th Cir. 1985); [Car Carriers, Inc. v. Ford Motor Co.](#), 745 F.2d 1101 (7th Cir. 1984); [Sutliff, Inc. v. Donovan Companies, Inc.](#), 727 F.2d 648 (7th Cir. 1984). However, as the Seventh Circuit held in [Hammes](#), cases that seemingly apply a heightened pleading requirement for antitrust claims cannot be considered authoritative after [Leatherman](#), 507 U.S. 163, 122 L. Ed. 2d 517, 113 S. Ct. 1160, which was decided in 1993. [Hammes](#), 33 F.3d at 782. In [Leatherman](#), the Supreme Court made clear that **HN3**[] federal courts are not to "interpolate a requirement of fact pleading into the federal rules." [Jackson v. Marion County](#), 66 F.3d 151, 153 (7th Cir. 1995). All but one of the cases cited by defendants were decided before [Leatherman](#). In the more recent case of [Palda](#), 47 F.3d 872, the plaintiff alleged extensive facts but left out the one fact critical to his claim from which the court inferred that the fact was adverse to the plaintiff. See [Jackson](#), 66 F.3d at 154. "Palda probably went as far in the direction of [\*19] requiring factual allegations as the rules could be thought to permit ..." *Id.*

**HN4**[] Although a plaintiff need not plead facts and may plead conclusions, a plaintiff must provide the defendant with minimal notice of the claim, *id. at 153*, and include enough information to "outline or adumbrate" the basis of the claim, [Panaras v. Liquid Carbonic Industries Corp.](#), 74 F.3d 786, 792 (7th Cir. 1996). **HN5**[] To bring a successful claim under [§ 1](#) of the Sherman Act, a plaintiff must allege "1) a contract, combination or conspiracy; 2) a resultant unreasonable restraint of trade in the relevant market; and 3) an accompanying injury." [Denny's Marina, Inc. v. Renfro Productions, Inc.](#), 8 F.3d 1217, 1220 (7th Cir. 1993). "There are two standards for evaluating whether an alleged restraint of trade is unreasonable: the rule of reason and the *per se* rule." *Id.* (citations omitted). Plaintiffs' allegations of division of markets, territories and customers constitute *per se* unreasonable restraints of trade. See [Hammes](#), 33 F.3d at 782 (citing [Palmer v. BRG of Georgia, Inc.](#), 498 U.S. 46, 112 L. Ed. 2d 349, 111 S. Ct. 401 (1990) (per curiam)). **HN6**[] The Wisconsin **antitrust law**, [Wis. Stat. § 133.03](#), was modeled after the Sherman Act. What amounts to a conspiracy in restraint of trade under the Sherman Act amounts to a conspiracy in

restraint of trade under the state act. See *State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 574, 261 N.W.2d 147, 155 (1978); *Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 375, 243 N.W.2d 422, 428 (1975).

Defendants have challenged the sufficiency of plaintiffs' complaints regarding allegations of a contract, combination or conspiracy, antitrust standing and injury and relevant markets.

## 1. Contract, combination or conspiracy

Plaintiffs are required to plead the "existence of an agreement in the form of a contract, combination or conspiracy that imposes an unreasonable restraint on trade." *Pudlo v. Adamski*, 789 F. Supp. 247, 249 (N.D. Ill. 1992) (ruling on motion to dismiss an antitrust claim). Further, the alleged conspiracy must be cognizable under the antitrust laws. See id. (agreement between officers of the same firm is not a § 1 conspiracy). Defendants The Marshfield Clinic, Security Health Plan, Inc. and North Central Health Protection Plan contend that plaintiffs do not allege facts to [\*21] support their broad conclusions that defendants contracted, combined or conspired to divide markets. Specifically, defendants assert that plaintiffs must offer some description of the alleged agreement, its purpose and the details surrounding its formation.

The Rozema complaint reveals a theory of a contract, combination or conspiracy to restrain trade. Plaintiffs allege that since 1987, defendants allocated customers, territories, products or services with various competitors. In support of its theory, the Rozema plaintiffs allege that the prices of physician services were raised, fixed, pegged or stabilized and that defendants The Marshfield Clinic and Security Health Plan, Inc. have been found liable for market division with respect to the same customers, territories, products or services. The Malek and Halida complaints are identical with respect to a theory of a contract, combination or conspiracy. These plaintiffs allege that defendants The Marshfield Clinic, Security Health Plan, Inc., North Central Health Protection Plan and Rhinelander Medical Center, S.C. divided markets, customers and territories for health plan and health care services. The Malek and Halida plaintiffs [\*22] allege that prices were raised and stabilized at high and uncompetitive levels, competition was eliminated and defendants were not active within each other's territories. The division of markets and the allocation of customers, territories, products and services are practices that violate § 1 of the Sherman Act. See *Palmer*, 498 U.S. at 48-49; *Blue Cross*, 65 F.3d at 1415.

As discussed above, plaintiffs are not required to allege specific facts in support of their conclusions, providing that they sufficiently outline the contours of their claim. Plaintiffs have done more than make bald legal conclusions of a contract, combination or conspiracy; they have alleged facts relating to the approximate date, purpose and effect of defendants' agreement. It is conceivable that plaintiffs could prove a set of facts supporting their allegations, from which a contract, combination or conspiracy can be inferred. See *MCM*, 62 F.3d at 977. The detail sought by defendants is not required by *Fed. R. Civ. P. 8(a)*. It can be developed either during discovery or summary judgment. See *Hammes*, 33 F.3d at 782; *Three Crown Ltd. Partnership v. Caxton Corp.*, 817 F. Supp. 1033, 1048 (S.D.N.Y. [\*23] 1993).

Defendant North Central Health Protection Plan argues that the Halida and Malek plaintiffs did not allege any specific act by it, mentioning it by name only five times in their complaints. Defendant is correct that the complaints focus primarily on defendants The Marshfield Clinic and Security Health Plan, Inc. However, defendant North Central Health Protection Plan is identified clearly as a defendant in each complaint. Both the Halida and Malek complaints specifically allege that since 1987, defendant North Central Health Protection Plan divided markets, customers and territories for health plan and health care services with others. In addition, plaintiffs allege that defendant North Central Health Protection Plan agreed not to open offices in the territories of defendants The Marshfield Clinic and Security Health Plan, Inc. As a result, the complaints do provide at least minimal notice to defendant North Central Health Protection Plan of the claim against it.

## 2. Antitrust standing and injury

**HN7** Parties who may bring an antitrust action are limited to those 1) who have suffered the type of injury that the antitrust laws were intended to prevent (antitrust injury) and [\*24] 2) whose injuries are a result of defendant's unlawful conduct (antitrust standing). *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 595 (7th Cir. 1995) (citing

*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977); *Blue Cross & Blue Shield v. Marshfield Clinic*, 881 F. Supp. 1309, 1314-15 (W.D. Wis. 1994) (citations omitted). To establish an antitrust injury, which is sometimes considered an element of antitrust standing, a plaintiff must be able to show that the antitrust laws protect his or her interests and that the violation was the cause-in-fact of the injury. See *Blue Cross*, 881 F. Supp. at 1314-15. Plaintiff's loss must be attributable to the "anti-competitive aspect of the practice under scrutiny." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). One purpose of the antitrust laws is to protect consumers from the anti-competitive conduct of suppliers. See *Serfecz*, 67 F.3d at 597; *Stamatakis Industries, Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992) (citations omitted). Consumer plaintiffs must show that their injury results from defendants' acts [\*25] that reduce output or raise prices in the relevant market. See *Stamatakis*, 965 F.2d at 471.

**HN8** [↑] Antitrust standing examines the connection between the asserted wrongdoing and plaintiff's claimed injury. *Blue Cross*, 881 F. Supp. at 1315 (citation omitted). Only those who are in the best position to vindicate the alleged violation are awarded standing; plaintiffs whose injuries are indirect or secondary will be unsuccessful. *Id.* Factors relevant to the standing determination include: 1) the causal connection between the violation and the injury; 2) the nature of the injury; and 3) whether plaintiff's claim for damages is speculative, potentially duplicative, or involves complex apportionment. See *Serfecz*, 67 F.3d at 595-96. "When the plaintiff's injury is linked to the injury inflicted upon the market . . . the compensation of the injured party promotes the designated purpose of the **antitrust law**-the preservation of competition." *Id. at 597*. To the extent that plaintiffs are direct purchasers of services from defendants, they have antitrust standing. See *Blue Cross*, 65 F.3d at 1414 (noting patients directly paying for physician services may recover costs to the [\*26] extent that they are not reimbursed).

#### a. Antitrust standing and injury of Rozema plaintiffs

Plaintiffs allege that they are all purchasers of physician services from defendants The Marshfield Clinic and Security Health Plan, Inc. and that as a result of defendants' anti-competitive conduct, they were injured because the prices of physician services were raised, fixed, pegged or stabilized. Plaintiffs have made sufficient allegations of an antitrust injury and antitrust standing under the standards outlined above. Because plaintiffs have alleged loss flowing from anti-competitive acts that affect consumer prices and restrict competition, they have alleged a cognizable antitrust injury. As alleged direct purchasers or consumers, plaintiffs are among those protected by the antitrust laws and have antitrust standing.

However, defendants The Marshfield Clinic and Security Health Plan, Inc. contend that plaintiffs' allegations lack sufficient detail to state a claim. Specifically, defendants note that plaintiffs do not allege what services were received, how much was paid for the services, whether they were reimbursed for any payments or how the price was affected by the alleged market [\*27] division. Plaintiffs generally describe services received as physician services, which include primary and specialty health care, and indicate that prices of these services were raised, fixed, pegged or stabilized. The degree of detail sought by defendants with respect to specific services and payments is not required by *Fed. R. Civ. P. 8(a)* and can be developed as the case proceeds. See *Hammes*, 33 F.3d at 782. "The discovery process and other pre-trial procedures will provide 'whatever additional sharpening of the issues is necessary.'" *Three Crown*, 817 F. Supp. at 1048 (citations omitted).

#### b. Antitrust injury to Malek and Halida plaintiffs

Defendants The Marshfield Clinic and Security Health Plan, Inc. contend that plaintiffs have not shown competitive harm resulting from the alleged conspiracies or injury resulting from that harm. However, plaintiffs allege that they have overpaid for health plan and health care services. They allege that because of defendants' anti-competitive conduct, the prices of health care services, health care plans and health care insurance have been fixed, raised, maintained and stabilized at artificially high and uncompetitive levels. Plaintiffs [\*28] also allege that defendants' division of markets has eliminated competition and dictated the products available without substitute in the relevant market. Because plaintiffs have alleged overpayments flowing from anti-competitive acts that affect consumer prices and restrict competition, they have alleged the type of injury that the antitrust laws were intended to prevent. As discussed above, any further detail sought by defendants can be developed during later proceedings.

### c. Antitrust standing of Malek plaintiffs

Defendants The Marshfield Clinic, Security Health Plan, Inc. and North Central Health Protection Plan raise concerns related to the standing of plaintiff Malek and those whom she represents. Plaintiffs have alleged that they are purchasers of health care services from one or more of defendants and that the fees charged to them for health care services have been paid in whole or in part by the Wisconsin Medical Assistance Plan, administered by plaintiff Wisconsin Department of Health and Family Services. Defendants argue that plaintiffs have not suffered any loss because *Wis. Stat. § 49.45(18)* dictates that they do not pay for their services beyond a nominal co-payment [\*29] of \$ 3.00. Defendants contend that the remainder of the physician's fee is paid by the state, up to an amount determined by the state, and that the provider is prohibited from billing the patient for the shortfall under [\*Wis. Stat. § 49.49\(3m\)\*](#).

Although defendants' argument may have merit, determining whether plaintiffs have standing is premature. The facts surrounding plaintiffs' particular involvement in the public assistance program will need to be developed. Plaintiffs do not allege that they are enrolled in any particular program or outline the payment structure for health services that they receive. Therefore, it is conceivable that plaintiffs could prove a set of facts establishing their antitrust standing. However, those plaintiffs who have been reimbursed in full from plaintiff Wisconsin Department of Health and Family Services do not have standing and will not be included in the plaintiff class if one is certified because they would not have suffered any injuries from defendants' conduct. See [\*Blue Cross, 65 F.3d at 1414\*](#). The remaining plaintiffs may recover only to the extent that they paid directly for their services and were not reimbursed for those amounts. *Id.* [\*30] (purchasers cannot recover reimbursed amounts). Further, if the cost of services received by plaintiffs is set by the Wisconsin Medical Assistance Plan, it is unlikely that plaintiffs receiving aid under the plan were injured by overcharges or high prices resulting from defendants' alleged anti-competitive conduct.

### d. Subrogation interest of plaintiff Wisconsin Department of Health and Family Services

In their complaint, plaintiffs join plaintiff Wisconsin Department of Health and Family Services pursuant to its subrogation interest under [\*Wis. Stat. § 49.89\(2\)\*](#). Defendants The Marshfield Clinic and Security Health Plan, Inc. argue that the department cannot be subrogated to plaintiffs' claims because the state was named involuntarily and the subrogation right is limited to benefits paid as the result of injury, sickness or death that creates a cause of action in tort or contract.

[Section 49.89\(2\) HN9](#) states that if the Department of Health and Family Services provides public assistance as a result of the occurrence of an injury, sickness or death that creates a claim or cause of action, whether in tort or contract, on the part of a public assistance recipient against a third party, [\*31] the department is subrogated to the rights of the recipient. On its face, the statute appears to apply only where the occurrence of injury or sickness creates a claim. In addition, the majority of cases addressing [\*§ 49.89\*](#) or its predecessor, § 49.65, involve malpractice, personal injury or other tort actions. See, e.g., [\*Ritt v. Dental Care Associates, S.C., 199 Wis. 2d 48, 543 N.W.2d 852 \(Ct. App. 1995\)\*](#).

Plaintiffs are seeking relief for excessive prices charged as a result of alleged anti-competitive conduct. Their cause of action was not created by the occurrence of an injury, sickness or death but by defendants' alleged anti-competitive practices. Plaintiffs' sickness, for which they paid and received treatment from defendants, merely gives them standing to bring suit. However, the subrogation statute may be applicable to plaintiffs' claims for relief under [\*Wis. Stat. 133.14\*](#), which provides for the recovery of payments made on illegal contracts. See Subsection B of this opinion. To the extent that plaintiffs are allowed to recover under [\*§ 133.14\*](#), the department could have a subrogation interest under [\*§ 49.89\(2\)\*](#).

[HN10](#) Under [\*Wis. Stat. 803.03\(2\)\(a\)\*](#), public assistance recipients [\*32] asserting a claim for affirmative relief are required to join the public assistance provider that has a right of subrogation under [\*§ 49.89\(2\)\*](#). [\*Wis. Stat. § 803.03\(2\)\(a\)\*](#) (Supp. 1996); see also [\*Radloff General Casualty Company of Wisconsin, 147 Wis. 2d 14, 16-17, 432 N.W.2d 597, 598 \(Ct. App. 1988\)\*](#) (discussing same). The allegations of fact do not indicate that plaintiff Wisconsin Department of Health and Family Services objects to the joinder. Presumably, it is aware of the action because [\*Wis.\*](#)

Stat. § 49.89(3m) requires a lawyer representing a public assistance recipient to notify the department as soon as practicable after filing a claim that is subject to subrogation under § 49.89(2). If plaintiff Wisconsin Department of Health and Family Services chooses not to participate or is shown not to have a right to subrogation, it will be dismissed. See Radloff, 147 Wis. 2d at 16-17, 432 N.W.2d at 598. At this time, this aspect of defendants' motion to dismiss will be denied.

e. Termination of plaintiff Halida's chiropractor

Defendants The Marshfield Clinic and Security Health Plan, Inc. raise specific concerns about plaintiff Halida's alleged injury from defendant Security [\*33] Health Plan, Inc.'s decision not to include her chiropractor, Dr. Scharer, in its panel of providers. Defendants argue that plaintiff cannot state an antitrust claim on the basis of this alleged circumstance because it does not relate to her allegations of market division. Plaintiff alleges in her complaint that as a result of defendant The Marshfield Clinic's "elimination of competition through unlawful acts," defendants The Marshfield Clinic and Security Health Plan, Inc. "have the power to terminate health care providers and deny subscribers access to those providers." She alleges that defendants' termination of her chiropractor "was made possible as a result" of their division of markets. Defendants certainly have the power to contract with health care providers on their own terms. However, the termination of Dr. Scharer may be related to a contract, combination or conspiracy to allocate markets, customers and territories. Plaintiff alleges that defendant Security Health Plan, Inc. required all chiropractic providers in or near Clark County, Wisconsin to become part of Allied Health of Wisconsin, S.C. or not continue as a provider for Security Health Plan, Inc. It is conceivable [\*34] that plaintiff Halida could prove facts showing that defendant Security Health Plan, Inc.'s decision to terminate its chiropractic providers in Clark County is connected to defendants' alleged market division agreements and activities.

In the alternative, defendants argue that plaintiff Halida's claim with respect to her chiropractor is barred by the McCarran-Ferguson Act, 15 U.S.C. §§ 1012(b) and 1013(b). Section 1012(b) HN11[<sup>15</sup>] removes from antitrust scrutiny all conduct that is part of the "business of insurance" and regulated by state law. See Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 219, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979). However, § 1013(b) makes the Sherman Act "applicable in any event to acts of coercion, intimidation or boycott." Id. The Supreme court has articulated a three part standard for determining what constitutes "business of insurance" for purposes of § 1012(b): "1) whether the practice has the effect of transferring or spreading a policyholder's risk; 2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and whether the practice is limited to entities within the insurance industry." [\*35] American Deposit Corp. v. Schacht, 84 F.3d 834, 839 (7th Cir. 1996) (citing Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 73 L. Ed. 2d 647, 102 S. Ct. 3002 (1982); Group Life, 440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067).

Defendants argue that their alleged refusal to offer plaintiff a specific type of health care coverage goes to the terms of her contract with defendant Security Health Plan, Inc. and, therefore, is within the "business of insurance." In support, defendants cite Health Care Equalization Committee v. Iowa Medical Society, 851 F.2d 1020 (8th Cir. 1988), arguing that the case involved a claim similar to that of plaintiff Halida. In Health Care, plaintiff alleged that defendant had monopolized health care insurance in Iowa by taking over coverage of patients previously afforded third party coverage for chiropractic services by private insurers. Health Care, 851 F.2d at 1027. The court noted that plaintiff's allegations were aimed specifically at the contractual relationship between the insurer and its subscribers and held that these contracts were part of the business of insurance. Id.

Although the termination of Dr. Scharer may have [\*36] had an indirect effect on the contract between defendants and plaintiff Halida, plaintiff Halida's allegations relate primarily to the contractual relationship between defendants and her former chiropractor. In Group Life, the Supreme Court held that HN12[<sup>16</sup>] an insurance company's contracts with participating pharmacies are "merely arrangements for the purchase of goods and services" from a third party and are not part of the business of insurance. See Health Care, 851 F.2d at 1028 (quoting Group Life, 440 U.S. at 215-16) (distinguishing contracts between insurer and subscribers from contracts between insurer and providers); Brillhart v. Mutual Medical Ins., Inc., 768 F.2d 196, 199 (7th Cir. 1985) (holding insurance company a purchaser of medical services from participating doctors). Defendants' contracts with participating physicians are

similar; they are for the purchase of goods and services, see Group Life, 440 U.S. at 232 n.40; Brillhart, 768 F.2d at 199. They do not involve the transferring or spreading of a policyholder's risk, see Pireno, 458 U.S. at 130 (holding transfer of risk effected and completed by contract between insurer and insured), or an integral [\*37] part of the policy relationship between the insurer and its subscribers, see Group Life, 440 U.S. at 215-217 (rejecting argument that provider agreements are exempt because they are so closely related to the insured's policies). Accordingly, defendants' motion to dismiss will be denied as to this aspect of plaintiff Halida's claim.

### 3. Relevant market

Defendants contend that the Rozema, Halida and Malek plaintiffs did not define the "relevant market," or the market in which the alleged anti-competitive conduct and resulting injury took place. The relevant market includes the geographic and product markets that defendants have allegedly divided. See Besser Publishing Company v. Pioneer Press, Inc., 571 F. Supp. 640, 641 (N.D. Ill. 1983). HN13[] The relevant market defines the scope of an antitrust claim because both the wrongful conduct and the resulting injury must occur within the same market. See Serfecz, 67 F.3d at 596.

The Rozema plaintiffs have alleged that they are purchasers of the products of defendant The Marshfield Clinic and Security Health Plan, Inc. and allege that defendants' sell physician services, including pharmaceuticals, laboratory tests, in-patient [\*38] and out-patient services and health maintenance organization health care. The Court of Appeals for the Seventh Circuit has indicated that physician services do constitute a cognizable product market. See Blue Cross, 65 F.3d 1406. The Rozema plaintiffs also allege that defendant The Marshfield Clinic operates in 14 counties in North Central Wisconsin and wholly owns and maintains defendant Security Health Plan, Inc. The Malek and Halida plaintiffs allege that they are purchasers of defendants' products, including total physician care, primary and specialty health care, managed health care plans, inpatient and outpatient hospital services, pharmaceuticals, laboratory tests, outpatient services and facilities packages. The Malek and Halida plaintiffs allege that defendants operate in a variety of geographic markets, which are defined generally by county or an approximate 25-mile radius from a defendant's branch clinic or practice location. The Malek and Halida plaintiffs also allege that defendant The Marshfield Clinic operates in 14 counties in North Central Wisconsin. The Rozema, Malek and Halida plaintiffs apparently are alleging that each defendant agreed to sell its products [\*39] in its own territory or geographical area and refrain from selling any or at least some products in other areas, resulting in a division of product and geographic markets.

HN14[] The ultimate determination of the relevant market is an issue of fact for the jury. See Blue Cross, 881 F. Supp. at 1321. Although the specific geographic and product markets will have to be defined at trial, all plaintiffs have made allegations sufficient to outline their antitrust claims. The detail that defendants are looking for is not required by Fed. R. Civ. P. 8(a). See, e.g., Serfecz, 67 F.3d at 596 (defining relevant market as retail grocery and retail shopping center markets); MCM, 62 F.3d at 975-76 (defining relevant market as rentals to convention and trade show business was sufficient to survive motion to dismiss). Plaintiffs could prove a set of facts linking defendants' alleged anti-competitive conduct and plaintiffs' alleged antitrust injury to the product and geographic markets alleged in the complaint.

### B. Failure to State a Claim Under Wis. Stat. § 133.14

Defendants argue that plaintiffs cannot seek relief under Wis. Stat. § 133.14, which HN15[] provides for recovery by a person who [\*40] has made payments under or pursuant to "contracts or agreements made by any person while a member of any combination or conspiracy prohibited by s. 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly." Plaintiffs maintain the contracts at issue are between defendants and themselves for the provision of physician services and were made while defendants were in violation of § 133.03. Relying on Roux Laboratories, Inc. v. Beauty Franchises, Inc., 60 Wis. 2d 427, 210 N.W.2d 441, 442 (1973), and Open Pantry Food Marts v. Falcone, 92 Wis. 2d 807, 286 N.W.2d 149 (App. 1979), defendants respond that for a person to seek relief under § 133.14, the contract itself must violate § 133.03. Defendants contend that plaintiffs' contracts with them for

physician services are not in violation of [§ 133.03](#). However, neither Roux nor Open Pantry support defendants' argument directly.

Roux involved a contract dispute in which the defendant counter claimed that plaintiff gave advertising rebates to competitors but did not give rebates to him, alleging anti-competitive [\*41] conduct on the part of plaintiff. [Roux, 60 Wis. 2d at 428](#). The defendant sought both to void the contract with plaintiff for the sale of goods and recover his advertising costs under the contract payment recovery statute on the grounds that plaintiff's anti-competitive conduct rendered the contract illegal under § 133.26 (redesignated [§ 133.14](#)). *Id.* The Wisconsin Supreme Court found that the statute did not apply to the contract between plaintiff and defendant for the sale of goods because defendant did not receive an alleged illegal rebate. [Id. at 429](#). In Open Pantry, the Wisconsin Court of Appeals held that a plaintiff could not recover payments made on matters outside the illegal contract, allowing recovery "to the extent that the pleadings request only recovery of monies paid on a contract said to be in restraint of trade." [Open Pantry, 92 Wis. 2d at 812-13](#). In both cases, the courts refused recovery under the statute because the parties were seeking to recover general expenses paid to the alleged antitrust violator, not payments made pursuant to a contract.

The Wisconsin Supreme Court addressed the constitutionality of the contract recovery statute in [Hyland, \[\\*42\] 73 Wis. 2d at 384, 243 N.W.2d at 432](#), on defendant's demurrer. In Hyland, the plaintiffs alleged that defendants colluded to fix bids on contracts with plaintiffs and sought recovery of payments made under several construction contracts with defendants. *Id.* In its discussion of the applicable statute of limitation, the court noted that the wrongfulness alleged with respect to the contracts was not that they were per se tortious, but that they were tortious as being the product of the conspiracy. *Id.* The court held the statute constitutional and permitted the contract recovery claim to go forward. [Id., 73 Wis. 2d at 387, 243 N.W.2d at 434-35](#). Given the court's description of the contracts and subsequent allowance of a contract recovery claim, it would seem that the contract at issue does not have to be illegal in order for a plaintiff to recover payments made pursuant to it. This reading also is consistent with the plain language of the statute, which requires the contract to be founded upon, the result of, connected with or grow out of a violation of [§ 133.03](#). Permitting recoupment only when the contract at issue is itself a violation of antitrust law apparently would [\*43] be reading the statute too narrowly.

All three complaints in this consolidated case allege the existence of illegal contracts between plaintiffs and defendants for physician services and their entitlement to recovery under [§ 133.14](#). Defendant North Central Health Protection Plan contends that plaintiff Malek has not alleged a contract with it and that the plaintiffs whom she represents would not have contracts with it. To the extent that there is no contract between a specific plaintiff and a specific defendant, [§ 133.14](#) will not apply. Because plaintiffs could prove a set of facts establishing that they have contracted with defendants and the contracts resulted from, grew out of or were at least connected with defendants' alleged violations of state antitrust law, I will allow plaintiffs to proceed with their claims under [§ 133.14](#).

#### C. Offensive Non-Mutual Collateral Estoppel

Because all three complaints refer to an earlier judgment against defendants The Marshfield Clinic and Security Health Plan, Inc. for market division, all of the defendants assume that plaintiffs will seek to invoke offensive non-mutual collateral estoppel against them. Defendants The Marshfield Clinic, [\*44] Security Health Plan, Inc. and North Central Health Protection Plan argue that plaintiffs have not alleged the essential elements for the use of offensive non-mutual collateral estoppel and that it is impossible for plaintiffs to invoke it against any of the defendants.

**HN16** [↑] Offensive collateral estoppel involves a plaintiff seeking to estop a defendant from relitigating the issues that the defendant previously litigated and lost against another plaintiff. See [Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329, 58 L. Ed. 2d 552, 99 S. Ct. 645 \(1979\)](#). In Parklane, the Supreme Court held that trial courts have broad discretion to determine when offensive collateral estoppel should be applied but indicated that courts should not allow it where a plaintiff easily could have joined in the earlier action or where it would be unfair to the defendant. [Parklane, 439 U.S. at 331](#). Unfairness may result in cases in which the defendant had little incentive to defend in the prior suit, the judgment serving as the basis for collateral estoppel is inconsistent with other prior judgments in favor of the defendant, or the second action affords the defendant procedural opportunities

unavailable [\*45] in the first action that could result in a different outcome. *Id. at 330*. The Seventh Circuit has held that [HN17](#) [↑] "for collateral estoppel to apply, four elements must be met:

- 1) the issue sought to be precluded must be the same as that involved in the prior action, 2) the issue must have been actually litigated, 3) the determination of the issue must have been essential to the final judgment, and 4) the party against whom estoppel is invoked must be fully represented in the prior action."

[\*La Preferida v. Cerveceria Modelo, S.A. de C.V., 914 F.2d 900, 905-906 \(7th Cir. 1990\)\*](#).

Defendants The Marshfield Clinic and Security Health Plan, Inc. argue that plaintiffs are the type of "wait and see plaintiffs" that Parklane sought to prohibit and that allowing the use of offensive non-mutual collateral estoppel would be unfair because the Blue Cross verdict is ambiguous. Although these issues may arise on summary judgment or at trial, they cannot be resolved from the allegations in the complaints. Additional facts are required. Plaintiffs could adduce facts sufficient to meet the four elements required for collateral estoppel to apply; nothing alleged in plaintiffs' [\*46] complaints clearly prohibits its use against defendants The Marshfield Clinic and Security Health Plan, Inc. The adjudicatory facts show that defendants The Marshfield Clinic and Security Health Plan, Inc. were parties to the prior suit and the judgment relating to market division is final. More information is needed concerning which issues, if any, will be the basis of collateral estoppel, plaintiffs' involvement in or knowledge of the prior lawsuit and defendants' incentives in defending the prior lawsuit. Because defendants' concerns regarding the ambiguity of the Blue Cross verdict depend in part on the issues, if any, that will be the basis of offensive non-mutual collateral estoppel, I will reserve ruling on this matter until plaintiffs have identified the relevant issues. I do note that the special verdict used in the Blue Cross case delineates the jury's findings on the specific grounds for liability and is not in itself ambiguous. The court of appeals' concern with the special verdict related to the structure of the form: "we do not suggest that this form would have constituted reversible error . . . we merely offer . . . our belief that it is not the best possible form, [\*47] because it does not force jurors to think before filling it out." [Blue Cross, 65 F.3d at 1417](#). The court made clear that "the jury verdict on liability must stand insofar as the charge of a division of markets is concerned." *Id.*

The Malek and Halida plaintiffs will not be permitted to invoke offensive non-mutual collateral estoppel against defendants North Central Health Protection Plan or Rhinelander Medical Center, S.C. Because neither defendant was a party in the earlier lawsuit and both are competitors of defendants The Marshfield Clinic and Security Health Plan, Inc., plaintiffs cannot prove a set of facts showing that defendants North Central Health Protection Plan and Rhinelander Medical Center, S.C. were fully represented in Blue Cross. See [La Preferida, 914 F.2d at 906](#). The use of offensive collateral estoppel would be unfair to defendants. See [Parklane, 439 U.S. at 331](#). However, I am not dismissing plaintiffs' claims against defendants North Central Health Protection Plan and Rhinelander because, in lieu of invoking offensive non-mutual collateral estoppel, plaintiffs may be able to adduce sufficient facts from which a reasonable jury could find liability.

## [\*48] II. MOTION TO STRIKE PORTIONS OF HALIDA COMPLAINT

In the alternative to their motion to dismiss the Halida complaint, defendants The Marshfield Clinic and Security Health Plan, Inc. have moved to strike as irrelevant and immaterial paragraphs 17-19, 23-25, 28, 30-33, 35-36, 38-39, 42-43, and 61.B-61.K of plaintiffs' complaint. Defendants argue that these paragraphs bear no connection to plaintiffs' single allegation of market division and are prejudicial because they add complexity, have a cumulative effect and may mislead the jury. Plaintiffs make the general argument that the challenged paragraphs are relevant and material to their claim of market division.

[HN18](#) [↑] Under [Fed. R. Civ. P. 12\(f\)](#), "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are not favored and usually will be denied unless the allegations are not related to the subject matter of the litigation and are prejudicial to the objecting party. [Capitol Indemnity Corp. v. Tranel Developments, Inc., 144 F.R.D. 346, 347 \(N.D. Ill. 1992\)](#); [Hanna v. Lane, 610 F. Supp. 32, 34 \(D.C. Ill. 1985\)](#) (citation omitted). "Thus, [\*49] a motion to strike frequently has been denied when no prejudice could result from the challenged allegations, even though the matter literally is within the

categories set forth in [Rule 12\(f\)](#)." 5A Charles Alan Wright and Arthur R. Miller, [Federal Practice and Procedure](#) Civil 2d § 1382, at 690-92 (1990) (citations omitted). Any doubts are to be resolved in favor of the objecting party. See [Pain Prevention Lab, Inc. v. Electronic Waveform Labs, Inc., 657 F. Supp. 1486, 1491 \(N.D. Ill. 1987\)](#).

The paragraphs in question generally relate to employment and affiliation agreements with physicians (paragraphs 17-19, 23-25, 35-36, 42-43 ) and alleged acts by defendants to maintain dominant market power (paragraphs 28, 30-33, 38-39, 61.B-61.K). Although much of this information relates directly to monopolization, it is not clear that it is completely irrelevant to plaintiffs' allegations of market division. Paragraphs 32-33 and 39 discuss market division in conjunction with either affiliated physicians or market power. Monopolies and market division are interrelated and may involve similar methods of proof. For example, information about market power and affiliated physicians could [\[\\*50\]](#) be relevant in proving the alleged contract, combination or conspiracy to divide markets and in defining the market in question. After a thorough review of the complaint, I cannot say that the circumstances surrounding defendants' affiliations with physicians and overall market power are completely unrelated to plaintiffs' claims.

Defendants' main concern is the cumulative and confusing effect of the challenged paragraphs. The allegations involving the restraint of trade through aggregation of market power and exclusive affiliation with physicians may be cumulative but it is unclear how this is prejudicial to defendants. The complaint is not evidence and will not be shown to the jury. Defendants are correct that plaintiffs' complaint is lengthy, verbose, poorly organized and redundant. Although plaintiffs may not have followed the [Fed. R. Civ. P. 8\(a\)](#) mandate for a short and plain statement of their claim, striking several paragraphs of their complaint is not appropriate in the absence of prejudice or scandalous or inflammatory allegations. Because defendants have not shown that the challenged portions of plaintiffs' complaint have no value in determining the issues of this case and [\[\\*51\]](#) will prejudice them, their motion to strike will be denied. See [Capitol Indemnity, 144 F.R.D. at 348.](#)

## ORDER

**IT IS ORDERED** that the motions to dismiss of defendants The Marshfield Clinic, Security Health Plan, Inc., North Central Health Protection Plan, and Rhinelander Medical Center, S.C. and the motion to strike of defendants The Marshfield Clinic and Security Health Plan, Inc. are DENIED.

Entered this 10th day of March, 1997.

## BY THE COURT:

**BARBARA B. CRABB**

**District Judge**



## American Professional Testing Serv. v. Harcourt Brace Jovanovich Legal & Professional Publs.

United States Court of Appeals for the Ninth Circuit

December 10, 1996, Argued, Submitted, Pasadena, California ; March 11, 1997, Filed

Nos. 95-56513, 95-56523

### **Reporter**

108 F.3d 1147 \*; 1997 U.S. App. LEXIS 4296 \*\*; 1997-1 Trade Cas. (CCH) P71,741; 97 Cal. Daily Op. Service 1791; 97 Daily Journal DAR 3389

AMERICAN PROFESSIONAL TESTING SERVICE, INC., Plaintiff-Appellant-Cross-Appellee, v. HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC., Defendant-Appellee-Cross-Appellant.

**Prior History:** [\*\*1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-92-03107-HLH. Harry L. Hupp, District Judge, Presiding.

**Disposition:** AFFIRMED.

### **Core Terms**

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courses, hiring, exclusionary, district court, disparagement, predatory, fliers, rival, monopoly power, competitor, law school, advertising, barriers, unfair competition, probability, Sherman Act, monopolization, costs, anti trust law, offers, talent, law student, Lanham Act, neutralization, prevailed, markets, buyers

### **LexisNexis® Headnotes**

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Torts > Business Torts > Unfair Business Practices > Elements

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Trade Libel > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

#### **HN1[] Unfair Business Practices, Elements**

While the disparagement of a rival or compromising a rival's employee may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act. 15 U.S.C.S. § 2. The court therefore insists on a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer) before these practices can rise to the level of exclusionary conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

## **HN2** [down] **Actual Monopolization, Claims**

To succeed on its claim for actual monopolization under [§ 2](#), plaintiff must prove defendant: (i) possessed monopoly power in the relevant markets; (ii) willfully acquired or maintained its monopoly power through exclusionary conduct; and (iii) caused antitrust injury. [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > General Overview

## **HN3** [down] **Antitrust & Trade Law, Sherman Act**

False statements about rivals can obstruct competition on the merits and possess no off-setting redeeming virtues. But distinguishing false statements on which buyers do, or ought reasonably to, rely from customary puffing is not easy. Even at common law, this is a tort that never has been greatly favored. More importantly, the effects upon a rival would usually be very speculative, especially when disparagement is not systematic. Many buyers, moreover, recognize disparagement as non-objective and highly biased. Although hardly a justification for falsehood, buyer distrust of a seller's disparaging comments about a rival seller should caution us against attaching much weight to isolated examples of disparagement. Essential, therefore, is a serious de minimis test. The court would go further and suggest that such claims should presumptively be ignored.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > Presumptions

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

## **HN4** [down] **Antitrust & Trade Law, Sherman Act**

To prove that a false and misleading advertising constituted exclusionary conduct, the disparagement must overcome a presumption that the effect on competition was de minimis. A plaintiff may overcome de minimis presumption by cumulative proof that the representations were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals. A plaintiff must satisfy all six elements to overcome de minimis presumption. Otherwise, it fails to prove its claim.

Antitrust & Trade Law > Sherman Act > General Overview

## **HN5** [down] **Antitrust & Trade Law, Sherman Act**

The actual compromising of rival employees is not grounds for Sherman Act [§ 2](#) liability in the absence of a continued pattern of such behavior or of reason to believe that the actual effect was probably significant. [15 U.S.C.S. § 2](#).

108 F.3d 1147, \*1147L<sup>A</sup>997 U.S. App. LEXIS 4296, \*\*1

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

#### **HN6** [down] **Antitrust & Trade Law, Sherman Act**

Unlawful predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor. Such cases can be proved by showing the hiring was made with such predatory intent, i.e. to harm the competition without helping the monopolist, or by showing a clear nonuse in fact. Absent either of those circumstances, the hiring should not be held exclusionary.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

#### **HN7** [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

Acquiring talent not to use it but to deny it to possible rivals is exclusionary. Such an arrangement has the same harmful tendency and the same lack of redeeming virtue as the promise by a non-employee that he will not compete with the monopolist. But unlike the latter agreement whose existence or nonexistence is a rather clear-cut question, exclusionary employment would be hard to identify. A monopolist would probably use important talent once acquired. And the court should not try to judge whether the acquired talent was used more effectively than readily available alternative personnel. Nor should it try to do so when the defendant pursues a hard-to-match, if not unmatchable, program of recruiting, say, young researchers in his field. In the absence, therefore, of the monopolist's proved subjective intent to hire talent preclusively or of clear nonuse in fact, employment should not be held exclusionary.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN8** [down] **Sherman Act, Claims**

To establish a 15 U.S.C.S. § 2 violation for an attempt to monopolize, plaintiff must show, *inter alia*, that there is a dangerous probability that defendant will achieve monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

#### **HN9** [down] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power is defined as the power to control prices or exclude competition. Mere proof of exclusionary conduct is not sufficient to prove defendant's dangerous probability of success; other proof of market power is required.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

#### [HN10](#) [blue icon] **Monopolies & Monopolization, Actual Monopolization**

Neither monopoly power nor a dangerous probability of achieving monopoly power can exist absent evidence of barriers to new entry or expansion.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

#### [HN11](#) [blue icon] **Monopolies & Monopolization, Actual Monopolization**

A mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

#### [HN12](#) [blue icon] **Monopolies & Monopolization, Actual Monopolization**

Entry barriers are 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. The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale. In evaluating entry barriers, the court focuses on their ability to constrain not those already in the market, but those who would enter but are prevented from doing so.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

#### [HN13](#) [blue icon] **Monopolies & Monopolization, Actual Monopolization**

For purposes of proving a monopoly, reputation alone does not constitute a sufficient entry barrier.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

#### [HN14](#) [blue icon] **Costs & Attorney Fees, Costs**

District courts often order both parties to bear their own costs when both prevail in whole or in part at trial.

**Counsel:** John G. Roberts, Jr., Adam H. Charnes, Hogan & Hartson, Washington, D.C.; Thomas G. Jackson, Phillips Nizer Benjamin Krim & Ballon, New York, New York; Marc E. Golden, Riley & Reiner, Los Angeles, California, for the plaintiff-appellant-cross-appellee.

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**Judges:** Before: Harry Pregerson, Dorothy W. Nelson, and Diarmuid F. O'Scannlain, Circuit Judges. Opinion by Judge O'Scannlain.

**Opinion by:** O'SCANNLAIN

## Opinion

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### [\*1149] OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the sponsor of BAR/BRI, the nation's dominant bar review course, violated the Sherman Act by distributing disparaging fliers about, and hiring a faculty member away from, the sponsor of Barpassers, one of its competitors.

I

Bar review companies offer courses to recent law school graduates who are preparing [\*\*2] to sit for a state bar examination. The bar examination of most states includes a "multistate" portion consisting of a standardized 200 question multiple-choice test (identical in all states), and a state-law component that tests the law of the particular state offering the examination. A full service bar review course prepares a student for both portions of a state's bar examination: multistate and state law. A supplemental bar review course prepares a student for only one portion of a state's bar examination.

Bar review course sponsors compete for potential customers on law school campuses through distribution of advertising fliers, sponsored student events, and advertisements in student newspapers. These businesses promote their courses directly to law students throughout their three years of law school. Some law students are employed as sales representatives to market courses to their classmates, and full-time sales personnel "table sit" at law schools to promote their firm's courses.

American Professional Testing Service, Inc. ("American") provides full service bar review courses under the name Barpassers, offers supplemental bar review courses under the name APTS Multistate [\*\*3] Maximizer, and publishes legal study aids under the name Sum & Substance. Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("Harcourt") provides full service bar review courses under the name BAR/BRI, offers supplemental bar review courses [\*1150] under the name Gilbert Multistate Workshop, and publishes legal study aids under the name Gilbert Legal Summaries.

Harcourt offers its BAR/BRI course in 46 states and enrolls far more students than its nearest competitor. Harcourt owns and operates BAR/BRI bar review courses in 26 jurisdictions and has license agreements with licensees in another 20 states.<sup>1</sup> Barpassers was first offered in California in preparation for the Winter 1986 bar examination.

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<sup>1</sup> In 1967, the Bar Review Institute, Inc. ("BRI") bar review course was founded in Illinois by Richard Conviser and others. In the early 1970s, Bay Area Review, Inc. ("BAR") offered a bar review course in California. In 1974, Harcourt Brace Jovanovich, Inc., acquired BAR and BRI. BAR and BRI merged into Harcourt and began doing business under the trade name "BAR/BRI." By 1974, BAR and BRI were offering full service bar review courses in various jurisdictions. BRI was offering full service bar review

Barpassers has been offered continuously in California since that time, in Arizona since 1992, and in Nevada and Florida since 1993.

[\*\*4] In September 1991, American became a wholly-owned subsidiary of College Bound, Inc. ("CBI"). Seven months later, a receiver was appointed for CBI in an action commenced by the U.S. Securities and Exchange Commission. CBI, under fire from federal regulators for overstating revenue and earnings by millions of dollars, filed for bankruptcy protection and was subsequently placed under the control of a Chapter 11 Trustee. In July 1992, CBI disposed of its entire interest in American.

According to American, Harcourt seized on CBI's troubles to "launch a campaign to forestall competition from American" through the distribution on law school campuses of anonymous advertising fliers that suggested that American was implicated in the SEC investigation and might not be able to continue to offer its bar review courses because of CBI's bankruptcy. However, American and its officers were never the subject of the SEC investigation or even accused of fraud or securities violations. Nonetheless, American allegedly suffered "a tremendous drop in enrollments and concomitant loss of profits." American claims Harcourt offered its courses at below-cost prices, provided gratuities to law school administrators [\*\*5] to obtain preferential treatment, and ripped down American's advertising materials. American also maintains that Harcourt's alleged predatory hiring of American Professor Robert Jarvis, who also taught at BAR/BRI, "crippled American's effort to compete in the Florida market."

In May 1992, American filed this action alleging that Harcourt engaged in actual and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; unlawful mergers and acquisitions in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18; price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13; false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); unfair competition; tortious interference with contractual relations; trade libel; and violations of California's Unfair Practices Act. Harcourt filed counterclaims alleging violation of the Lanham Act and various state-law torts.

In April and May 1994, the case was tried before a jury, which returned special verdicts for American on its claims under § 2, the Lanham Act, tortious interference and unfair competition, but against American and for Harcourt on its claims that American had violated [\*\*6] the Lanham Act and had engaged in tortious interference and unfair competition. Trial testimony lasted 11 days, during which the jury heard 29 witnesses and the court admitted over 140 exhibits into evidence. The jury was given a detailed 37-page special verdict form to guide its deliberations. After finding injury proximately caused by Harcourt's exclusionary conduct, the jury awarded American damages (before trebling) of \$ 784,753 for injury in California, \$ 121,000 for injury in Florida, and \$ 110,000 for injury in New York.

The district court subsequently granted Harcourt's motion for judgment as a matter of law ("JMOL") on the Sherman Act claim, [\*1151] concluding that there was insufficient evidence that Harcourt either (i) engaged in exclusionary conduct in violation of the Sherman Act or (ii) possessed monopoly power or a dangerous probability of obtaining monopoly power in any market. The district court also denied a motion for a new trial. American and Harcourt each filed timely notices of appeal.

After the jury verdicts, the parties settled all claims except for American's § 2 allegation and court costs which are the subject of these appeals.

II

Considering first the Sherman [\*\*7] Act claim, we must determine whether the district court erred in overturning the jury's factual findings that: (a) Harcourt's disparagement of American constituted exclusionary conduct in California; (b) Harcourt's predatory hiring of American's faculty member constituted exclusionary conduct in Florida; and (c) Harcourt's anti-competitive conduct in the relevant markets resulted in a dangerous probability of monopolization.

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courses in Illinois, Arizona, Colorado, Washington D.C., Georgia, New Jersey, Texas, Pennsylvania, Virginia, and Maryland (as a joint venture). BAR was offering full service bar review courses in California and other Western states. BAR and BRI, as part of a joint venture, began offering a bar review course in New York in 1973 under the name BAR/BRI.

**HN1**[] While the disparagement of a rival or compromising a rival's employee may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act. See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'") (citation omitted); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993) ("The law directs [\*\*8] itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. . . . Thus, this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it."); *Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 370 (9th Cir.), cert. denied, 488 U.S. 870, 102 L. Ed. 2d 149, 109 S. Ct. 180 (1988) ("The goal of the antitrust laws, . . . unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors.") We therefore insist on a "preliminary showing of significant and more-than-temporary harmful effects on *competition* (and not merely upon a competitor or customer)" before these practices can rise to the level of exclusionary conduct. 3 P. Areeda & D. Turner, *Antitrust Law* Par. 737b at 278 (1978).

**HN2**[] To succeed on its claim for actual monopolization under § 2, American must prove Harcourt: (i) possessed monopoly power in the relevant markets; (ii) willfully acquired or maintained its monopoly power through exclusionary conduct; and (iii) caused antitrust injury. *Movie 1 & 2 v. United Artists*, I\*\*91 909 F.2d 1245, 1254 (9th Cir. 1990), cert. denied, 501 U.S. 1230, 111 S. Ct. 2852, 115 L. Ed. 2d 1020 (1991). American urges that it has made a preliminary showing of two grounds of exclusionary conduct and a dangerous probability of monopolization.

<sup>2</sup>

A

American first argues that the district court erred [\*\*10] in overturning the jury's factual determination that Harcourt's implementation of a campaign designed to disparage American's bar review courses in the California, Arizona, Florida, New York, and national bar review markets through the distribution [\*1152] of anonymous, false, and deceptive advertising fliers on law school campuses constituted exclusionary conduct. We disagree.

While false or misleading advertising directed solely at a single competitor may not be competition on the merits, the fliers in question must have a significant and enduring adverse impact on competition itself in the relevant markets to rise to the level of an antitrust violation.

**HN3**[] False statements about rivals can obstruct competition on the merits and possess no off-setting redeeming virtues. But distinguishing false statements on which buyers do, or ought reasonably to, rely from customary puffing is not easy. Even at common law, this is 'a tort that never has been greatly favored.' More importantly, the effects upon a rival would usually be very speculative, especially when disparagement is not systematic. Many buyers, moreover, recognize disparagement as non-objective and highly biased. Although hardly [\*\*11] a justification for falsehood, buyer distrust of a seller's disparaging comments about a rival seller should caution us against attaching much weight to isolated examples of disparagement. Essential, therefore, is a serious de minimis test. *We would go further and suggest that such claims should presumptively be ignored.*"

**Antitrust Law**, Par. 737b at 280-81.

<sup>2</sup> American alleged that Harcourt intended to monopolize the full service bar review market of those states in which it possesses monopoly power. BAR/BRI allegedly enjoyed a complete monopoly or control, either by itself or through an affiliation, of over 70% of the full service bar review markets in Georgia, Minnesota, Alabama, Nevada, Hawaii, North Carolina, Colorado, Kentucky, Mississippi, Tennessee, South Carolina, Wyoming, Florida, New Jersey and Pennsylvania. In those states where it has substantial competition, Harcourt allegedly has pursued a policy of offering students substantial discounts from the price which they would pay for a full service bar review course if they contracted for the course at a time early in their education.

**HN4** To prove that Harcourt's false and misleading advertising constituted exclusionary conduct, the disparagement must overcome a presumption that the effect on competition of the fliers was de minimis. *National Ass'n of Pharmaceutical Mfrgs. v. Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir. 1988). "[A] plaintiff may overcome de minimis presumption 'by cumulative proof that the representations were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals." *Id.* (citation omitted). American must satisfy all six elements to overcome de minimis presumption. Otherwise, American fails to prove its claim.

[\*\*12] Assuming American's testimony and evidence at trial is correct, the entire disparagement claim hinges on five fliers: "SEC Sues BARPASSERS' Parent Company, Questions Its Enrollment, Financial Health," "CAN BARPASSERS AFFORD TO KEEP THE LIGHTS ON?," "Federal Judge Appoints Receiver To Run Parent of APTS, Barpassers," "BARPASSERS', APTS' parent files for BANKRUPTCY." These fliers were distributed on law school campuses during a two-month period. American also relied on a survey conducted by Dr. Michael Kamins to demonstrate how the fliers suggested to law students that American was in "financial trouble, might be unable to operate its bar review courses, and had been accused of fraud by the SEC." For example, 53 percent of the survey respondents had some belief in or agreed with the statement that "because of its financial circumstances, I would expect the Barpassers course in the future to be less beneficial to me." Furthermore, the district court found that the "fliers came at a bad time for [American]; they surfaced at California (also Arizona and Florida) law schools during the time third year law students had to make financial decisions and pay the tuition for bar review courses, [\*\*13] and there is evidence that the usual increase in sign-ups for [American's] course did not occur for that year, substantially injuring profitability for that year."

However, American presented little evidence, other than the survey, that law students were "clearly likely" to rely on the fliers or that Harcourt's false advertising was not readily susceptible to neutralization or other offset by American. The argument that its neutralization efforts were not completely successful is unavailing; the test refers to "susceptible to neutralization" not "successful in neutralization."

For these reasons, we conclude that the district court did not err in its judgment as to the disparagement of rival issue.

## B

American next argues that the jury properly found Harcourt guilty of predatory [\*1153] conduct in Florida for hiring Professor Robert Jarvis, a well-known Florida law professor, away from American. Jarvis, who began working for American in March 1992, agreed to teach Florida constitutional law for Barpassers in August 1992. In 1991 and 1992, Jarvis also taught for BAR/BRI. After Jarvis accepted American's offer to teach the Florida Barpassers course, Harcourt countered with an offer that [\*\*14] precluded Jarvis' continued work for American or any other bar review course. Jarvis accepted Harcourt's offer which included increased compensation and greater lecturing and administrative duties.

American does not allege that Harcourt hired any other Barpassers instructor. Absent a continued pattern of compromising American's employees, this one-time hiring of Jarvis by Harcourt is not sufficient to constitute an antitrust violation: **HN5** "Nor should the actual compromising of rival employees be grounds for § 2 liability in the absence of a continued pattern of such behavior or of reason to believe that the actual effect was probably significant." *Antitrust Law*, Par. 737b at 281.

Most importantly, this court's decision in *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256 (9th Cir. 1990) is controlling on these facts. There, we reviewed whether there were any genuine issues of material fact with respect to Universal's claim that MacNeal's hiring of five of Universal's six key technical employees in 1986 and 1987 was predatory in violation of § 2. This was the first reported case of a claimed § 2 violation as a result of alleged employee raiding or predatory [\*\*15] hiring. *Universal Analytics* held that an internal memo of the producer referring to "wounding" of a competitor by hiring key technical employees showed at most that a secondary motivation of the hirings was to disadvantage competition and was insufficient to show predatory conduct in

violation of the Sherman Act. [HN6](#) [↑] "Unlawful predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor. Such cases can be proved by showing the hiring was made with such predatory intent, i.e. to harm the competition without helping the monopolist, or by showing a clear nonuse in fact." [Id. at 1258](#). Absent either of those circumstances, the court agreed with Professors Areeda and Turner that the hiring should not be held exclusionary:

[HN7](#) [↑] Acquiring talent not to use it but to deny it to possible rivals is exclusionary. Such an arrangement has the same harmful tendency and the same lack of redeeming virtue as the promise by a non-employee that he will not compete with the monopolist. But unlike the latter agreement whose existence or nonexistence is a rather clear-cut question, exclusionary employment would be hard to identify. [\*\*16] A monopolist would probably use important talent once acquired. And the court should not try to judge whether the acquired talent was used more effectively than readily available alternative personnel. Nor should it try to do so when the defendant pursues a hard-to-match, if not unmatchable, program of recruiting, say, young researchers in his field. In the absence, therefore, of the monopolist's proved subjective intent to hire talent preclusively or of clear nonuse in fact, employment should not be held exclusionary.

*Id.* (quoting from [\*Antitrust Law\*](#), Par. 702b at 110).

Because American failed to meet the two-prong test set forth in *Universal Analytics* (harm American without helping Harcourt or Harcourt did not use Jarvis' services), we conclude that the district court did not err in its judgment as to the predatory hiring issue.

C

American next argues that the district court erred in overturning the jury's factual finding that Harcourt's anti-competitive conduct resulted in a dangerous probability of monopolization. [HN8](#) [↑] To establish a [§ 2](#) violation for an attempt to monopolize, American must show, *inter alia*, that there is a dangerous probability that Harcourt [\*\*17] will achieve monopoly power. See [\*Spectrum Sports\*, 506 U.S. at 455-460](#).

[\*1154] [HN9](#) [↑] Monopoly power is defined as "the power to control prices or exclude competition." [\*United States v. E.I. DuPont de Nemours & Co.\*, 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 \(1956\)](#). Mere proof of exclusionary conduct is not sufficient to prove Harcourt's dangerous probability of success; other proof of market power is required. [\*Spectrum Sports\*, 506 U.S. at 459](#) (concluding that dangerous probability of success element is "plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics. . . . Demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market.") (emphasis added).

Even if Harcourt has a high market share, [HN10](#) [↑] neither monopoly power nor a dangerous probability of achieving monopoly power can exist absent evidence of barriers to new entry or expansion. The Ninth Circuit in [\*Rebel Oil Co. v. Atlantic Richfield Co.\*, 51 F.3d 1421](#) (9th Cir.), cert. denied, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1995), addressed the final factors in market power analysis: barriers to [\*\*18] entry and barriers to expansion.

[HN11](#) [↑] A mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price.

[HN12](#) [↑] Entry barriers are "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." The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale. In evaluating entry

barriers, we focus on their ability to constrain not "those already in the market, but . . . those who would enter but are prevented from doing so."

*Id.* at 1439 (citations and footnote omitted).

The only entry barrier upon which American relies on appeal is Harcourt's [\*\*19] reputation for offering high quality courses. Contrary to American's argument, [HN13](#) [↑] reputation alone does not constitute a sufficient entry barrier in this Circuit. See [\*United States v. Syufy Enterprises, 903 F.2d 659, 669 \(9th Cir. 1990\)\*](#) ("We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition.") (citations omitted). Moreover, the existence of 29 bar review courses in California suggests that any barriers to entry may not be that significant.

In light of the persuasive precedent of this court, we conclude that there was insufficient evidence of a dangerous probability of monopoly power in the relevant markets.<sup>3</sup> The district court did not err in its judgment as to the monopoly power issue.

## [\*\*20] III

Finally, Harcourt contends that it is entitled to costs because it "prevailed *in toto* with respect to the part of the case that the parties did not settle." We disagree. Following the jury verdicts (not including the [§ 2](#) claims), Harcourt prevailed on all but three of American's claims against Harcourt. American prevailed on: (1) its Lanham Act claim, [15 U.S.C. 1125\(a\)](#), where a verdict was rendered in favor of American in the amount of \$ 700,000; (2) its interference with actual and prospective economic advantage claim, where a verdict was rendered in favor of American in the amount of \$ 236,442; and (3) its California Business & Professions Code [\*1155] claim. Harcourt prevailed on all of its counterclaims against American except for the violation of [\*California Business & Professions Code §§ 17040, 17043, 17045\*](#); trade libel; violation of [\*Arizona Revised Statutes §§ 44-1481\*](#) (unfair competition); and violation of [\*Florida Statutes ch. 501.204\*](#) (unfair competition). While the parties did settle all of these remaining unfair competition claims, [HN14](#) [↑] district courts often order both parties to bear their own costs when both prevail in whole or in part at trial. See [\*Allen & O'Hara, Inc. v. \[\\*\\*21\] Barrett Wrecking, Inc., 898 F.2d 512, 517 \(7th Cir. 1990\)\*](#); [\*Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279\*](#) (8th Cir.), cert. denied, 449 U.S. 1042, 66 L. Ed. 2d 504, 101 S. Ct. 622 (1980).

Because Harcourt offers no evidence that the district court abused its discretion, we conclude that the court did not err in ordering Harcourt and American to bear their own costs.<sup>4</sup>

## IV

For the foregoing reasons, we affirm the district court's orders granting the judgment as a matter of law and providing that each party bear its own costs.<sup>4</sup>

AFFIRMED.

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<sup>3</sup> American argues that the district court ignored the jury's award of \$ 110,000 (before trebling) of damages specifically arising from Harcourt's monopoly attempt in New York. American claims that the trial evidence established that it was forced to abandon plans to offer its Barpassers course in New York as a result of Harcourt's alleged anti-competitive conduct in California. Because Harcourt is not liable for attempted monopolization in California and American failed to prove evidence on its New York claim, American's argument is unavailing.

<sup>4</sup> Harcourt also cross-appeals various evidentiary rulings at trial. In light of our decision to affirm the JMOL, we need not rule on those contentions.



## *Le Baud v. Frische*

United States District Court for the Western District of Oklahoma

March 13, 1997, Decided ; March 13, 1997, Filed

No. CIV-95-918-L

**Reporter**

1997 U.S. Dist. LEXIS 22474 \*

PIERRE LE BAUD, M.D., Plaintiff, v. ERIC E. FRISCHE, M.D., et al., Defendants.

**Disposition:** [\*1] Defendants' Motion for Summary Judgment (Docket No. 132) GRANTED.

## **Core Terms**

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Defendants', privileges, Credentials, healthcare, immunity, hearing panel, damages, revoked, peer review, recommendation, patients, cases, peer review process, surgical, orthopedic surgeon, antitrust, antitrust claim, by-laws, Staff, summary judgment motion, staff privileges, revocation, surgery, entitled to judgment, reasonable belief, written report, monopolization, alleges, letters, notice

## **LexisNexis® Headnotes**

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[Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview](#)

[Evidence > Weight & Sufficiency](#)

[Civil Procedure > Judgments > Summary Judgment > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule](#)

[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 > Appropriateness](#)

[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 > Trials > General Overview

## [\*\*HN1\*\*](#) [down] Summary Judgment, Opposing Materials

Summary judgment is appropriate if the pleadings, affidavits, and depositions show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). Any doubt as to the existence of a genuine issue of material fact must be resolved against the party seeking summary judgment. In addition, the inferences drawn from the facts presented must be construed in the light most favorable to the nonmoving party. Nonetheless, a party opposing a motion for summary judgment may not simply allege that there are disputed issues of fact; rather, the party must set forth specific facts showing that there is a genuine issue for trial. [Fed. R. Civ. P. 56\(e\)](#). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. In addition, the plain language of [Rule 56\(c\)](#) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Governments > Local Governments > Employees & Officials

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## [\*\*HN2\*\*](#) [down] Costs & Attorney Fees, Clayton Act

The Local Government Antitrust Act, [15 U.S.C.S. §§ 34-36](#), provides that no damages, interest on damages, costs, or attorney fees may be recovered under § 15, § 15(a) or § 15(c) of this title from any local government, or official or employee thereof acting in an official capacity. [15 U.S.C. § 35\(a\)](#). "Local government" is defined as including a school district, sanitary district, or any other special function governmental unit established by state law in one or more states. [15 U.S.C. § 34\(1\)\(B\)](#).

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > ... > Actions Against Facilities > Defenses > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > Enforcement

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

## [\*\*HN3\*\*](#) [down] Antitrust Actions, Facilities

Under the Health Care Quality Improvement Act (act), participants in a peer review process are immune from damages if the review process satisfies the requirements of the act. That is, the review action must be taken: (1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). [42 U.S.C.S. §§ 11111\(a\)\(1\), 11112\(a\)](#). The act provides that a review action shall be presumed to have met these standards unless the presumption is rebutted by a preponderance of the evidence. [42 U.S.C.S. § 11112\(a\)](#). Failure to fulfill any one of the four standards negates the qualified immunity defense. In assessing compliance with the act, the court applies an objective standard. Assertions of bad faith and anticompetitive motive are irrelevant to the question of whether a decision was taken in a reasonable belief that it would further quality health care.

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

#### [HN4](#) Business Administration & Organization, Peer Review

The Health Care Quality Improvement Act confers immunity on any person who makes a report to the National Practitioner Data Bank without knowledge of the falsity of the information contained in the report. [42 U.S.C.S. § 11137\(c\)](#). Thus, immunity for reporting exists as a matter of law unless there is sufficient evidence for a jury to conclude the report was false and the reporting party knew it was false.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Public Health & Welfare Law > Healthcare > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

#### [HN5](#) Antitrust Actions, Facilities

The Health Care Quality Improvement Act specifically provides that it does not apply to damages under any law of the United States or any state relating to the civil rights of any person. [42 U.S.C.S. § 11111\(a\)](#).

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

#### [HN6](#) Antitrust Actions, Physicians

The elements of monopolization under [§ 2](#) are the possession of monopoly power in the relevant market and 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. In addition, proof of monopoly power requires a showing of both power to control prices and power to exclude competition.

Antitrust & Trade Law > Sherman Act > Claims

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

## **HN7** [down arrow] Sherman Act, Claims

Section 1 of the Sherman Act prescribes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint to trade or commerce. 15 U.S.C.S. § 1. The essential elements of a § 1 claim are concerted action and restraint of trade. Unilateral action will not support a § 1 claim. Moreover, in order to recover, plaintiff must establish antitrust injury, that is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services, not just his own welfare. Moreover, the key question in determining the defendants' ability to cause a restraint of trade to be imposed is whether the defendants had control over the decisionmaking process, or the ability to coerce or unduly influence the decision. Where a reasonable jury could conclude from the evidence that the defendants controlled, coerced, or unduly influenced the decision that resulted in a restraint of trade, a genuine issue of material fact exists on the issue of causation.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

## **HN8** [down arrow] Constitutional Law, Substantive Due Process

The due process clause of the fourteenth amendment provides that no state may deprive any person of life, liberty or property without due process of law. U.S. Const. amend. XIV, § 1.

Governments > Local Governments > Charters

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Local Governments > Employees & Officials

## **HN9** [down arrow] Local Governments, Charters

A property interest is determined by whether the terms of employment created by contract, federal statute, city charter or an employee manual create a sufficient expectancy of continued employment to constitute a property interest which must be afforded constitutionally guaranteed due process.

Administrative Law > ... > Hearings > Right to Hearing > Due Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

#### **HN10** [blue speech bubble icon] Right to Hearing, Due Process

The due process clause only requires that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

#### **HN11** [blue speech bubble icon] Procedural Due Process, Scope of Protection

The key requirement is that the employee is entitled to a pre-termination opportunity to respond; more specifically, to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Torts > Intentional Torts > Defamation > Slander

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defenses > Privileges > General Overview

Torts > ... > Defenses > Privileges > Statutory Privileges

Torts > ... > Defamation > Defenses > Truth

Torts > Intentional Torts > Defamation > Libel

#### **HN12** [blue speech bubble icon] Defamation, Slander

Under Oklahoma law, libel is a false or malicious unprivileged publication by writing. 12 [Okla. Stat. tit. 12, § 1441](#). Slander is a false and unprivileged publication, other than libel. [Okla. Stat. tit. 12, § 1442](#). Truth is a defense to either claim. In addition, if the communication is privileged, a libel or slander action will not lie. [Okla. Stat. tit. 12, § 1444.1](#).

Torts > Business Torts > Fraud & Misrepresentation > General Overview

#### **HN13** [blue speech bubble icon] Business Torts, Fraud & Misrepresentation

Oklahoma law provides a private right of action for persons damaged by another's deceit. One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers. [Okla. Stat. tit. 76, § 2](#). "Deceit" is defined as: 1. the suggestion, as a fact, of that which is not true by one who does not believe it to be true; 2. the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; 3. the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or, 4. a promise, made without any intention of performing. [Okla. Stat. tit. 76, § 3](#).

**Counsel:** For PIERRE LE BAUD, M.D., plaintiff: William K Osmond, Patton & Robinett, Frank Gregory, Tulsa, OK.

For ERIC E FRISCHE, M.D., JAMES E FAHEY, JR, M.D., R BRENT SMITH, M.D. defendants: George F Short, Perry T Marrs, Jr, Cynthia L Sparling, Short Wiggins Margo & Alder, Oklahoma City, OK.

For RANDY SEGLER, SR, DONALD S BENTLEY, SHON ERWIN, MARY LOUISE LAWSON, HERB STONEHOCKER, URBANE SKINNER, RANDY L CURRY, COMANCHE COUNTY HOSPITAL AUTHORITY, defendants: James W Connor, Jr, Mary B Hanan, A Scott Johnson, Michael J Heron, Kimberly S Majors, Brent L Thompson, Johnson & Hanan, Michael D Denton, Jr, Hiltgen & Brewer, Oklahoma City, OK.

**Judges:** TIM LEONARD, United States District Judge.

**Opinion by:** TIM LEONARD

## Opinion

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### ORDER

Plaintiff, Pierre LeBaud, is a physician who was trained as an orthopedic surgeon. Prior to May 7, 1994, plaintiff possessed staff privileges at defendant Comanche County Memorial Hospital ("Memorial"). On May 7, 1994, plaintiff's surgical privileges at Memorial were summarily suspended, but he retained admitting privileges. Thereafter, all of plaintiff's staff privileges were revoked by Memorial. [\*2] Plaintiff filed this action on June 20, 1995, seeking damages and injunctive relief for alleged violations of the antitrust laws of the United States and the State of Oklahoma. In addition, plaintiff seeks damages pursuant to [42 U.S.C. § 1983](#) for alleged violations of his due process rights. Finally, plaintiff asserts state law libel, slander and deceit claims against certain defendants. In addition to Memorial, plaintiff named the following individuals as defendants: two competing orthopedic surgeons, Eric E. Frische and James F. Fahey, Jr.; the chief of staff of Memorial in May 1994, Richard Brent Smith; the administrator of Memorial, Randy L. Curry; the chief operating officer of Memorial, Randy Segler; the four members of the Credential Committee at the time the recommendation was made to revoke plaintiff's staff privileges;<sup>1</sup> [\*3] the three members of the Hearing Panel that reviewed the recommendation of the Credential Committee;<sup>2</sup> and the five members of the Board of Trustees of Memorial.<sup>3</sup> On March 3, 1997, a Stipulation for Dismissal was filed, dismissing with prejudice plaintiff's claims against the members of the Credentials Committee and the Hearing Panel.

This matter is before the court on defendants' motion for summary judgment. [HN1](#)[] Summary judgment is appropriate if the pleadings, affidavits, and depositions "show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#). Any doubt as to the existence of a genuine issue of material fact must be resolved against the party seeking summary judgment. In addition, the inferences drawn from the facts presented must be construed in the light most favorable to the nonmoving party. [Board of Education v. Pico, 457 U.S. 853, 863, 73 L. Ed. 2d 435, 102 S. Ct. 2799 \(1982\)](#). Nonetheless, a party opposing a motion for summary judgment may not simply allege that there are disputed issues of fact; rather, the party "must set forth specific facts showing that there is a genuine issue for [\*4] trial." [Fed. R. Civ. P. 56\(e\)](#) (emphasis added). See also, [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." [Anderson, 477 U.S. at 249-50](#) (citations omitted). In addition, "the plain language of [Rule 56\(c\)](#) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to

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<sup>1</sup> The members of the Credential Committee were Donald Garrett, M.D., Allen Aycock, M.D., John Carter, M.D., and Rex Stockard, M.D.

<sup>2</sup> The members of the Hearing Panel were Robert Hillis, M.D., Ron Cagle, M.D., and Ron Woodson, M.D.

<sup>3</sup> The members of the Board of Trustees are Donald S. Bentley, Shon Erwin, Mary Louise Lawson, Herb Stonehocker and Urbane Skinner.

that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

## Background

The undisputed facts<sup>4</sup> establish that plaintiff was recruited by Southwestern Medical Center ("Southwestern") to practice orthopedic surgery in Lawton, Oklahoma. Plaintiff moved to Lawton and began practicing at Southwestern in March 1992. Before plaintiff moved to Lawton, there were only two orthopedic [\*5] surgeons practicing at the civilian hospitals in Lawton, defendants Frische and Fahey. Frische and Fahey practiced at both Southwestern and at Memorial. Likewise, plaintiff intended to practice at both hospitals. On February 16, 1993, Randy Curry informed plaintiff that the Board of Trustees had voted unanimously to approve plaintiff's appointment to the medical staff at Memorial. As a new member of the medical staff at Memorial, plaintiff was provided with a copy of the current medical staff bylaws. He agreed to abide by those bylaws, which included sections regarding peer review and hearing and appeal procedures related thereto.

[\*6] The events leading up to the present lawsuit began on January 10, 1994, when Marilyn Magid, the Director of Surgical Services at Memorial, sent a memorandum to defendant Brent Smith, who was then Memorial's Chief of Medical Staff. In the memorandum, Magid expressed concern regarding two surgical incidents in which plaintiff was involved. Exhibit 30 to Defendants' Joint Motion for Summary Judgment [hereinafter cited as Defendants' Motion]. Based on this memorandum, Curry and Smith contacted plaintiff and indicated that an investigation was warranted. Plaintiff concurred, but asked that the investigation include the practice of all three orthopedic surgeons who had privileges at Memorial. Exhibit 34 to Defendants' Motion. Curry and Smith agreed that it would be fair to include Frische and Fahey in this review as well.

Thereafter, Curry and Smith contacted Memorial's insurance agent, Hospital Casualty, to find an orthopedic surgeon outside the Lawton area to examine some cases to determine if further review was warranted. Plaintiff's Answer to Defendants' Motion for Summary Judgment at Volume III, pp. 17-18 [hereinafter cited as Hrg. Tr. at \_\_]. As a result of this request, [\*7] James M. Griffin, an orthopedic surgeon in Tulsa, Oklahoma was contacted. Griffin was sent data for five patients to evaluate.<sup>5</sup> On January 25, 1994, Griffin sent a written report of his findings to Curry. Exhibit 31 to Defendants' Motion. Griffin concluded that the operative procedures fell below the standard of care with respect to two of the four patients treated by plaintiff. *Id.* at 3-4.

Based on this report, Curry and Smith determined that further review was necessary and that a blind, independent review of the orthopedic surgery department was warranted. Hrg. Tr. at 20. Curry again contacted Hospital Casualty and was referred to Forensic Medical Advisory Service, which suggested that Memorial retain the services of two orthopedic surgeons from Baltimore, Maryland [\*8] to perform a review of the orthopedic surgeons. *Id.* at 20-21. On May 6, 1994, the two surgeons, Robert O. Kan and Kenneth R. Lippman, came to Lawton for this review. Kan and Lippman reviewed a random selection of 175 surgical cases from the orthopedic department dating from the beginning of 1993 through March of 1994. Exhibit 32 to Defendants' Motion. The cases included an equal number of surgeries performed by all three doctors. While the cases were arranged by doctor, Kan and Lippman did not know which doctor was which while they were reviewing the cases, as the cases were labeled "Doctor A," "Doctor B," and "Doctor C." Based on that review, Kan and Lippman concluded that:

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<sup>4</sup> In conformity with Local Rule 56.1(b), defendants began their brief with "a concise statement of material facts to which the moving party contends no genuine issue of fact exists." In his response brief, plaintiff did not specifically dispute any of the material facts presented by defendants. Local Rule 56.1(c) provides that "all material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party." In accordance with Local Rule 56.1(c), defendants' statement of material facts is deemed admitted.

<sup>5</sup> Four of the patients had been treated by plaintiff, while the fifth had been treated by Fahey. With respect to Fahey's patient, Griffin found that "the operation was performed in a capable fashion." Exhibit 31 to Defendants' Motion at 3.

The arthroscopic technique of Dr. LeBaud was inadequate in all cases reviewed, showing a lack of proper visualization, orientation, diagnosis, joint distraction, and technique. This was harmful to the patients who suffered significant articular cartilage damage.

there was a significant problem noted in judgment (sic) of surgical indications. . . . where patients were subjected to unnecessary anesthesia and procedures.

There was a major problem in selecting and carrying out the proper surgical [\*9] procedure with disastrous results for the patients. . . .

This doctor appears willing to undertake complex procedures with which he has no or little experience, and which should routinely be referred to centers specializing in such problems.

Id. at 5.

Kan and Lippman orally reported their findings to Curry and Smith on Saturday, May 7, 1994. Hrg. Tr. at 21. Based on the oral report and the fact that plaintiff was to perform surgery on a child on Monday morning, Curry and Smith decided to summarily suspend plaintiff's surgical privileges at Memorial. Id. at 22. Plaintiff's admitting privileges were not affected by this action. Exhibit 40 to Defendants' Motion. Kan and Lippman prepared a written report, which was transmitted to Memorial on March 12, 1994. Exhibit 32 to Defendants' Motion. Once the written report was received, the matter was referred to the hospital's Credentials Committee in accordance with the bylaws. Id. After reviewing the report, the Credentials Committee unanimously recommended revoking all of plaintiff's privileges at Memorial.<sup>6</sup> Exhibit 42 to Defendants' Motion. Although Frische was a member of the Credentials Committee, he recused himself [\*10] from this meeting because he and plaintiff were economic competitors.

On May 18, 1994, plaintiff was notified of the Credentials Committee's action and was advised of his right to request a hearing. Exhibit 43 to Defendants' Motion. Plaintiff requested a hearing, which was ultimately held on October 31, 1994. Plaintiff received notice of the hearing date and a list of proposed witnesses and exhibits. Prior to the hearing date, plaintiff retained Patrick Evans, an orthopedic surgeon in Oklahoma City, Oklahoma, to conduct a review of the cases examined by Kan and Lippman. Evans reviewed the cases on September 28, 1994 and prepared a written report on October 21, 1994. Exhibit 57 to Defendants' [\*11] Motion.

At the hearing, the Credentials Committee presented the testimony of Smith, Curry, Lippman and Kan, all of whom were subjected to cross-examination by plaintiff's counsel. Plaintiff testified on his own behalf and, by agreement of the parties and the Hearing Panel, presented the testimony of Patrick Evans by video-taped deposition. Thereafter, the Hearing Panel voted unanimously to recommend to the Board of Trustees that it affirm the recommendation of the Credentials Committee and revoke all of plaintiff's staff privileges at Memorial. The Hearing Panel's written findings reflect that:

The basis for this recommendation consists of all of the information considered by the Panel which can essentially be summarized by reference to the reports of Drs. Lippman and Kan as reflected in their report from Forensic Medical Advisory Service dated May 12, 1994 and the report of Dr. Evans dated September 28, 1994 (sic). These reports and all of the other information received by the Panel reflect a clear pattern of Dr. LeBaud failing to exercise appropriate judgment in selecting those procedures which he was competent to perform and failing to recognize his lack of competence while [\*12] continuing such procedures.

Based upon all of the information received, it was the unanimous opinion of the hearing panel that no action short of complete revocation of all of Dr. LeBaud's privileges could adequately assure high quality care of his patients at Comanche County Memorial Hospital.

Exhibit 46 to Defendants' Motion at 1-2. Plaintiff received the Hearing Panel's decision on December 23, 1994. Exhibit 47 to Defendants' Motion.

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<sup>6</sup> It should be noted that while Donald Garrett was a member of the Credentials Committee, he was not present at the May 16, 1994 meeting when the recommendation was made to revoke plaintiff's privileges. Exhibit 4 to Defendants' Motion at P 3. As a result, he did not vote on the motion to revoke plaintiff's privileges. Id.

Pursuant to the bylaws, plaintiff had the right to appeal the Hearing Panel's decision. Exhibit 37 to Defendants' Motion at 52. The appeal section provides that "if such appellate review is not requested within 10 days as provided herein, both parties shall be deemed to have accepted the recommendation involved and it shall thereupon become final and immediately effective." *Id.* at 53. Plaintiff did not appeal the Hearing Panel's decision. Therefore, on January 17, 1995, the Board of Trustees formally voted on and endorsed the recommendation of the Credentials Committee that plaintiff's staff privileges be revoked. Exhibit 56 to Defendants' Motion.

On January 31, 1995, Memorial submitted an adverse action report to the National Practitioner [\*13] Data Bank regarding the revocation of plaintiff's privileges. The report stated that:

The Board of Trustees revoked all of Dr. Pierre LeBaud's staff privileges after an internal peer review investigation and hearing which established a pattern of sub-standard care to his patients resulting from poor surgical and arthroscopic technique and a complete lack of clinical judgment as to both those procedures he was competent to perform and those procedures he was incompetent to perform.

Exhibit 48 to Defendants' Motion. At the request of plaintiff's attorney, Memorial submitted a second adverse action report on March 20, 1995. This report amended the description of the reasons taken to reflect that:

The Board of Trustees revoked all of Dr. Pierre LeBaud's privileges after an internal peer review investigation and hearing which established a clear pattern of Dr. LeBaud failing to exercise appropriate judgment in selecting those procedures which he was competent to perform and failing to recognize his lack of competence while continuing such procedures.

Exhibit 49 to Defendants' Motion. Plaintiff filed this action two months later.

### Discussion

Defendants [\*14] seek summary judgment in their favor on each of plaintiff's claims. After reviewing the voluminous briefs and numerous exhibits presented by the parties, the court concurs with defendants' assessment of plaintiffs case. This entire matter is "a tale . . . full of sound and fury, Signifying nothing." William Shakespeare, MacBeth, act 5, sc. 5. After pursuing this case for nearly two years, plaintiff cannot present even a scintilla of evidence in support of his myriad claims. The continued prosecution of these claims represents, at best, a serious error in judgment.

### Antitrust Claims

While plaintiffs complaint alleges both state and federal antitrust violations, plaintiff appears to have abandoned his state law antitrust claim as his brief makes no mention of such a claim. In fact, plaintiff characterizes his antitrust claims as follows:

Plaintiff alleges that Defendant Frische and the Defendant Hospital have combined to help Dr. Frische retain his monopoly, and that Dr. Frische has individually monopolized the market. Plaintiff has never based his suit on the claim that the Hospital has individually monopolized the market. Plaintiff further alleges that the Hospital and [\*15] Dr. Frische combined to restrain trade under § 1 of the Sherman Act, and that the combinations by which the Defendants go together in the name of "peer review" also violated § 1 of the Sherman Act."

Plaintiff's Answer to Defendants' Motion for Summary Judgment at 21 [hereinafter cited as Plaintiff's Answer]. Thus, plaintiff alleges a section 2 monopolization claim against Frische and a section 1 conspiracy to restrain trade claim against Memorial and Frische.<sup>7</sup>

In response to plaintiff's antitrust claims, defendants contend that Memorial, its officials, and its employees are protected by the Local Government Antitrust Act, 15 U.S.C. § 34-36 ("LGAA"), from any antitrust damage or fee award. In addition, defendants argue that they are immune from any liability for federal or state claims pursuant to

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<sup>7</sup> Because the Complaint uses imprecise language, it is not clear whether the antitrust claims are asserted against any other defendants.

the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152 [\*16] ("the Health Care Act"). Finally, defendants assert that plaintiff cannot establish the essential elements of any of his antitrust claims.

**HN2**[] The LGAA provides that "no damages, interest on damages, costs, or attorney fees may be recovered under § 15, § 15(a) or § 15(c) of this Title from any local government, or official or employee thereof acting in an official capacity." [15 U.S.C. § 35\(a\)](#). "Local government" is defined as including "a school district, sanitary district, or any other special function governmental unit established by State law in one or more States." [15 U.S.C. § 34\(1\)\(B\)](#). It is undisputed that Memorial is a public trust hospital under Oklahoma law and is entitled to the protection of Oklahoma's Governmental Tort Claims Act. 60 O.S. § 176-180; Exhibit 28 to Plaintiff's Answer; 51 O.S. §§ 152(8)(d), 152.1. Thus, the court concludes that Memorial is immune from antitrust damages pursuant to the LGAA. C.f. [Tarabishi v. McAlester Reg'l Hosp., 951 F.2d 1558, 1566-67 \(10th Cir. 1991\)](#), cert. denied, 505 U.S. 1206, 112 S. Ct. 2996, 120 L. Ed. 2d 872 (1992) (finding no immunity for a public trust hospital under a prior version of Oklahoma's Governmental Tort Claims [\*17] Act, but noting that amendments to the Act "might suggest a different result"). In addition, the members of the Credentials Committee, the members of the Hearing Panel, and the Board of Trustees are likewise entitled to immunity from damages under the LGAA. These defendants were all clearly acting in their official capacities when they took the actions at issue here with respect to plaintiff's peer review.

In addition to immunity under the LGAA, defendants also claim immunity under the Health Care Act.<sup>8</sup>

In 1986, Congress adopted the Health Care Quality Improvement Act in response to "the increasing occurrence of medical malpractice and the need to improve the quality of medical care." See [42 U.S.C. § 11101\(1\), \(2\) \(1994\)](#). Recognizing "the threat of private money damage liability . . . Unreasonably discourages physicians from participating in effective professional peer review," see [42 U.S.C. § 11101\(4\)](#), Congress deemed it essential for the legislation to provide qualified immunity from damages actions for hospitals, doctors and others who participate in professional peer review proceedings. [Imperial v. Suburban Hosp. Ass'n, Inc., 37 F.3d 1026, 1028 \(4th Cir. \[\\*18\] 1994\)](#).

[Brown v. Presbyterian Healthcare Services, 101 F.3d 1324, 1333 \(10th Cir. 1996\)](#). **HN3**[] Under the Health Care Act, participants in a peer review process are immune from damages if the review process satisfies the requirements of the Act. That is, the review action must be taken:

- (1) in the reasonable belief that the action was in the furtherance of quality health care,
- (2) after a reasonable effort to obtain the facts of the matter,
- (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
- (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

[42 U.S.C. §§ 11111\(a\)\(1\), 11112\(a\)](#). The Health Care Act provides that a review action shall be presumed to have met these standards "unless the presumption is rebutted by a preponderance of the evidence." [42 U.S.C. § 11112\(a\)](#). Thus, plaintiff in this case has the burden of proving that the peer review action in this case did not meet the requirements of the Health [\*19] Care Act. This does not mean, however, that plaintiff must establish that the process failed to satisfy all four requirements; rather, failure to fulfill any one of the four standards negates the qualified immunity defense. [Brown, 101 F.3d at 1333](#). In assessing compliance with the Health Care Act, the court applies an objective standard. *Id.* See also [Mathews v. Lancaster Gen'l Hosp., 87 F.3d 624, 635 \(3d Cir. 1996\)](#). "Assertions of bad faith and anticompetitive motive are irrelevant to the question of whether a decision was taken in a reasonable belief that it would further quality health care." [Mathews, 87 F.3d at 635](#) (quoting [Mathews v. Lancaster Gen'l Hosp., 883 F. Supp. 1016, 1030 \(E.D. Pa. 1995\)](#)).

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<sup>8</sup> Defendants contend that the Health Care Act provides "absolute immunity from Federal **and** State law private civil liabilities." Defendants' Motion at 21 (emphasis in original). This statement is incorrect. The Health Care Act provides only a qualified immunity from damages. See [Brown v. Presbyterian Healthcare Services, 101 F.3d 1324, 1334 n.9 \(10th Cir. 1996\)](#).

[\*20] The court finds that plaintiff has failed to rebut the Health Care Act's presumption that the peer review process met the standard for immunity. First, defendants in this case clearly undertook a reasonable effort to obtain the facts. Unlike the review process the Court found to be deficient in Brown, the review here encompassed 84 patients over a fifteen month time frame. The written report of this review, which indicated serious problems with plaintiff's practice, was before the Credentials Committee when it recommended revocation of plaintiff's privileges. In addition, the Hearing Panel received oral testimony from Kan and Lippman, as well as plaintiff and his expert witness, Dr. Evans. All of the evidence before the Credentials Committee and the Hearing Panel supports the conclusion that the peer review action in this case was taken "in a reasonable belief that the action was in furtherance of quality health care." 42 U.S.C. § 11112(a)(1). Plaintiff's conclusory allegations of conspiracy and improper motive for the peer review action are simply insufficient to create a genuine issue of material fact, much less rebut the presumption contained in the Health Care Act. Throughout [\*21] his brief in opposition to defendants' motion, plaintiff asserts that there is "not insignificant direct evidence as to Dr. Frische's actual involvement in the revocation of Dr. Le Baud's privileges at Memorial . . ." Plaintiff's Answer at 33. Plaintiff, however, offers no such evidence. The record is devoid of any involvement of Frische in the peer review process. In fact, although Frische was a member of the Credentials Committee, he did not attend the meeting during which plaintiff's case was discussed, nor did Frische testify at the evidentiary hearing before the Hearing Panel. C.f. Brown, 101 F.3d at 1333 ("the record is replete with evidence tending to show Ms. Miller and Dr. Williams were the catalysts behind, or played a crucial role in, every step of the proceedings against Dr. Brown."). In addition, plaintiff's privileges were only revoked after notice to plaintiff and an extensive hearing, which was rescheduled a number of times to accommodate plaintiff and his counsel. Finally, the evidence presented to the Credentials Committee and the Hearing Panel fully supports a reasonable belief that the action taken was warranted by the facts. Even plaintiff's expert witness, [\*22] J. Patrick Evans, found that plaintiff's surgical abilities were deficient and that his surgical privileges should be restricted. In his report, Evans concluded that plaintiff:

has not demonstrated satisfactory arthroscopic abilities for both visualization and treatment in either the knee or shoulder as demonstrated on these cases. . . . I would also recommend that he have restriction of his privileges as regards to arthroscopic surgery in either the knee or shoulder until such time as he satisfactorily demonstrates satisfactory abilities for this procedure. It also would be my recommendation that he not be allowed to undertake total joint revision surgery.

Exhibit 57 to Defendants' Motion at 1. In short, based on the totality of the circumstances, the court finds that defendants are entitled to immunity from damages under the Health Care Act for plaintiff's antitrust claims.

In addition, the court finds that Curry and Memorial are entitled to immunity under the Health Care Act for plaintiff's state law claim for libel and slander. This claim is based on the allegation that the first report transmitted to the National Practitioners Data Bank "was and is inaccurate [\*23] and improper, false and malicious, being designed to injure Dr. Le Baud's reputation nationwide." Complaint at P 47. HN4[] The Health Care Act "confers immunity on any person who makes a report to the National Practitioner Data Bank 'without knowledge of the falsity of the information contained in the report.' 42 U.S.C. § 11137(c) (1994). Thus, immunity for reporting exists as a matter of law unless there is sufficient evidence for a jury to conclude the report was false and the reporting party knew it was false." Brown, 101 F.3d at 1334. There is no such evidence in this case. The statements contained in the first report are amply supported by the record before the Hearing Panel. There is simply no evidence from which a reasonable jury could conclude that the report was false and that Curry or Memorial knew it was false. Therefore, Curry and Memorial are entitled to immunity from libel and slander damages as a matter of law.

The Health Care Act, however, does not provide immunity with respect to plaintiff's remaining state law claims, which will be discussed below. Nor does the Health Care Act provide immunity from damages for plaintiff's due process claim, as HN5[] the Health Care Act [\*24] specifically provides that it does not apply "to damages under any law of the United States or any State relating to the civil rights of any person . . ." 42 U.S.C. § 11111(a). Furthermore, finding defendants immune from damages under the LGAA and the Health Care Act does not end the

inquiry with respect to plaintiff's antitrust claims as plaintiff has requested injunctive relief as well damages.<sup>9</sup> The court therefore turns to an analysis of plaintiff's antitrust claims.

The law in the Tenth Circuit is clear regarding the necessary elements [\*25] that plaintiff must establish to support a section 2 monopolization claim.

**HN6**[] The elements of monopolization under Section 2 are "the possession of monopoly power in the relevant market" and "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."

Tarabishi, 951 F.2d at 1567 (citations omitted). In addition, "proof of monopoly power requires a showing of both power to control prices and power to exclude competition." Id. Plaintiff, however, has offered no evidence regarding Frische's ability to control prices, which is "a critical element of proof of monopoly power in this circuit." Id. In fact, plaintiff simply fails to mention this element in either his Complaint or his brief in response to defendants' motion.<sup>10</sup> This failure of proof is fatal to plaintiff's monopolization claim. Id.

[\*26] Plaintiff also does not present evidence to support his section 1 claim. **HN7**[] Section 1 of the Sherman Act prescribes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint to trade or commerce. . . ." 15 U.S.C. § 1. The essential elements of a section 1 claim are concerted action and restraint of trade. See Systemcare, Inc. v. Wang Lab. Corp., 85 F.3d 465, 469 (10th Cir. 1996). Unilateral action will not support a section 1 claim. Mathews, 87 F.3d at 639. Moreover, in order to recover, plaintiff must establish antitrust injury, that is "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). "An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services," not just his own welfare." Mathews, 87 F.3d at 641 (citation omitted). Moreover,

The key question in determining the defendants' ability to "cause a restraint [of trade] to be imposed" is whether the defendants had control over the decisionmaking [\*27] process, or the ability to coerce or unduly influence the decision. . . . Where a reasonable jury could conclude from the evidence that the defendants controlled, coerced, or unduly influenced the decision that resulted in a restraint of trade, a genuine issue of material fact exists on the issue of causation.

Brown, 101 F.3d at 1335.

Plaintiff offers no evidence of any concerted action by Memorial and Frische with respect to the peer review process. It is undisputed that Frische did not initiate the peer review process, did not attend the Credentials Committee meeting, and did not testify before the Hearing Panel. Nor did Frische identify the files that were reviewed by Kan and Lippman; and, in fact, Frische's files were reviewed as well. In short, there is nothing to tie him to the revocation of plaintiff's privileges at Memorial. The peer review process had a life of its own, unaided by Frische. Plaintiff attempts to link Frische to the peer review process by noting that the person who initiated the incident report that led to the review is a former employee of Frische. See Plaintiff's Answer at 12. This attempted link, however, is -- at best -- nothing more than [\*28] fanciful speculation. Moreover, plaintiff has failed to allege, much less prove, any antitrust injury based on the revocation of his privileges at Memorial. It is undisputed that plaintiff continued to practice at Southwestern after his privileges were revoked at Memorial. Thus, there was no

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<sup>9</sup> It is not clear to the court whether plaintiff's claim for injunctive relief is still viable. In his Complaint, plaintiff sought injunctive relief because "if such actions and practices of the Defendant continue, Plaintiff may be forced to terminate his practice in the Lawton area. . . ." Complaint at P 30. It is undisputed that plaintiff did, indeed, move from the Lawton area in 1996 and now practices in Idabel, Oklahoma. Exhibit 18 to Defendants' Motion at 27-29.

<sup>10</sup> Plaintiff does refer to a "price fixing conspiracy" in his Complaint, but there are no factual allegations regarding such a conspiracy. Complaint at P 23.

diminution in the availability of orthopedic services in Lawton based on the peer review action. Plaintiff's failure to prove that the revocation of his privileges at Memorial "affected competition, as opposed to [plaintiff] himself as a competitor, doomed plaintiffs' section one claims to failure." [Tarabishi, 951 F.2d at 1571](#).

### Due Process Claim

Plaintiff contends that he was denied procedural due process when his hospital privileges at Memorial were revoked. In his Complaint, plaintiff offers a litany of procedural defects surrounding Memorial's action:

- a) Plaintiff's hospital privileges were initially suspended and subsequently revoked through actions of the credentials committee, without any notice to Plaintiff or opportunity for hearing.
- b) The deficiency in the initial action against Plaintiff was particularly onerous and objectionable in light of certain provisions [\*29] of the Hospitals's by-laws, and the hearing procedures followed subsequently. The burden of proof was placed on Plaintiff to overturn the actions of the credentials committee; and to do so, Plaintiff was required to show that such action was arbitrary and capricious.
- c) Plaintiff sought, but was refused, meaningful discovery rights. Thus, Plaintiff was not provided adequate information as to the nature of the charges against him, and by reason thereof, was denied a fair opportunity to frame a defense.
- d) Plaintiff was denied the opportunity to adequately prepare his defense by reason of the fact that he was not accorded an opportunity to interview witnesses against him, or otherwise obtain adequate means of addressing and rebutting the testimony to be presented against him before the hearing panel in order to adequately present his case to such panel.
- e) Plaintiff was denied the opportunity for his case to be heard by a competent, unbiased and objective tribunal.
- f) Plaintiff was denied the opportunity to have his case heard by a tribunal having no economic interest in the outcome thereof.
- g) Plaintiff was denied the right of appeal because he was not given [\*30] notice of the date and time of the appeal hearing before the Board of Trustees of the Hospital.

Complaint at P 35.

**HN8**[] The [due process clause of the fourteenth amendment](#) provides that no state may "deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV, [§ 1](#). Whether plaintiff had a protected property right in continued privileges at Memorial is a question of state law. [Bishop v. Wood, 426 U.S. 341, 344, 48 L. Ed. 2d 684, 96 S. Ct. 2074 \(1976\)](#). **HNg**[] "[A] property interest is determined by whether the terms of employment created by contract, federal statute, city charter or an employee manual create a sufficient expectancy of continued employment to constitute a property interest which must be afforded constitutionally guaranteed due process." [Vinyard v. King, 728 F.2d 428, 432 \(10th Cir. 1984\)](#). Plaintiff, however, has made no attempt to prove that he had a protected property interest. Based on the court's review of the hospital's by-laws, it appears that staff privileges are temporary and that renewal of such privileges is not automatic.<sup>11</sup>

[\*31] Nonetheless, because the record does not indicate the length of plaintiff's appointment and whether it could only be revoked "for cause," the court will examine the merits of his procedural due process claim. Plaintiff argues that he was not afforded a predeprivation hearing before his hospital privileges were revoked. Plaintiff's argument, however, is logically flawed for two reasons. First, his argument focuses on the Credentials Committee.<sup>12</sup> [\*33] It

<sup>11</sup> See Exhibit 37 to Defendants' Motion at 37 ("Appointment to the medical staff is a privilege which shall be extended only to professionally competent individuals who continuously meet the qualifications, standards and requirements set forth in this policy and in such policies as are adopted from time to time by the Board.") (emphasis added); at 39 ("Continued appointment after the [six month] provisional period shall be conditioned on an evaluation of the factors to be considered for reappointment."); and at 62 ("Reappointment, if granted by the Board, shall be for a period of not more than two years . . .").

<sup>12</sup> In his brief in response to defendants' motion, plaintiff complains that he:

is undisputed, however, that the Credentials Committee did not have the power to revoke his hospital privileges; only the Board of Trustees could do that.<sup>13</sup> Second, plaintiff did have a predeprivation hearing before the Board of Trustees acted.<sup>14</sup> [\*34] This hearing was held before a panel of three physicians, none of whom were in economic competition with plaintiff for patients or otherwise. [HN10](#)[<sup>15</sup>] The due process clause only requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest."[Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 105 S. Ct. 1487 \(1985\)](#) (quoting [Boddie v. Connecticut, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780](#) [\*32] (1971)) (emphasis in original). While the clause does not require a full evidentiary hearing,<sup>15</sup> that is, in fact, what plaintiff received. At the hearing before the Hearing Panel, plaintiff was represented by counsel who cross-examined the witnesses presented by the Credentials Committee. In addition, plaintiff presented his own evidence, including the testimony of an expert witness. In fact, the Hearing Panel specifically left the record open so that it could review the video-taped deposition of plaintiff's expert. Prior to the hearing, plaintiff received the written report of Kan and Lippman, which detailed the charges against him together with the evidence in support of those charges. See Exhibits 43, 51, and 55 of Defendants' Motion. In short, plaintiff received all the process he was due.<sup>16</sup>

Nonetheless, plaintiff argues that he did not receive notice of the meeting at which the Board of Trustees considered the decision of the Hearing Panel and therefore he could not present his [\*35] case to that tribunal. In making this argument, however, plaintiff conveniently forgets that he did not appeal the decision of the Appeals

was given no opportunity to present reasons before the Credential's (sic) Committee why the proposed action should not be taken.

Plaintiff had no right to call witnesses before such Committee.

Dr. Le Baud had no opportunity to know the evidence against him at that time.

Since no evidence was presented, he had no opportunity to have the Credential's (sic) Committee's decision based solely on the evidence presented.

He had no ability to question or cross-examine evidence or witnesses before such Committee.

Because the Credential's (sic) Committee took action without even a minimal hearing and with none of the safeguards normally associated with due process, there was no opportunity for any meaningful review of the Committee's decision.

Plaintiff's Answer at 36.

<sup>13</sup> Plaintiff was clearly apprised of this fact at the hearing when counsel for the Credentials Committee stressed, "We have to remember that it's the board that grants or revokes staff privileges. It's not the credentials committee. It's not this hearing panel. It is only the board that can take that action." Hrg. Tr. at 5.

<sup>14</sup> Although plaintiff's surgical privileges were summarily suspended without a hearing, no due process violation occurred as "not even an informal hearing . . . must precede a deprivation undertaken to protect the public safety." [Caine v. Hardy, 943 F.2d 1406, 1412 \(5th Cir. 1991\)](#) (*en banc*), cert. denied, [503 U.S. 936, 112 S. Ct. 1474, 117 L. Ed. 2d 618 \(1992\)](#). It is undisputed that Smith and Curry suspended plaintiff's surgical privileges only after receiving the unfavorable oral report from Kan and Lippman and determining that plaintiff was scheduled to perform surgery on a child the following Monday. In this case the need for quick action was followed by an adequate post-deprivation remedy in the form of the hearing before the Hearing Panel. The court finds the analysis of the *en banc* Court of Appeals for the Fifth Circuit in a strikingly similar case to be persuasive. See [Caine, 943 F.2d at 1411-15](#). Under the balancing test enunciated in [Mathews v. Eldridge, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893](#) (1976), plaintiff received all the process he was due.

<sup>15</sup> [HN11](#)[<sup>15</sup>] "The key requirement is that the employee is entitled to a pre-termination opportunity to respond; more specifically, 'to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.'" [Benavidez v. City of Albuquerque, 101 F.3d 620, 627 \(10th Cir. 1996\)](#) (quoting [Loudermill, 470 U.S. at 546](#)).

<sup>16</sup> Plaintiff's argument that his due process rights were violated because the burden of proof was unfairly placed on him at the Hearing Panel is without merit. Plaintiff received extensive predeprivation process, including the ability to confront and to cross-examine witnesses, to present evidence and to state his position both orally and in writing. To the extent any burden was placed on plaintiff during the hearing, it does not rise to the level of a constitutional deprivation. See [Benavidez, 101 F.3d at 626-28](#).

Panel. The by-laws clearly state that if appellate review "is not requested within 10 days . . . both parties shall be deemed to have accepted the recommendation involved and it shall thereupon become final and immediately effective." Exhibit 37 to Defendants' Motion at 88. Thus, under the by-laws, plaintiff was not entitled to an additional hearing before the Board, nor was such hearing required by the due process clause. Defendants are entitled to judgment in their favor on plaintiff's due process claim.

#### Libel and Slander Claim

Likewise, the court finds that Fahey and Curry are entitled to judgment in their favor on plaintiff's libel and slander claim. Although plaintiff's complaint alleges "a campaign of libel and slander" by Fahey, Frische, and Curry, there is no evidence of any communication by Fahey or Curry.<sup>17</sup> Rather, it appears that this claim arises out of two letters written solely by Frische in October 1994 to the Chief of Staff at Southwestern. In the absence of any credible proof of a conspiracy between Fahey, Curry and [\*36] Frische, Fahey and Curry cannot be held accountable for any libelous statements made by Frische. Fahey and Curry are thus entitled to judgment as a matter of law with respect to this claim.

With respect to Frische, however, the court must examine the letters he wrote to determine if a libel or slander action lies against him. HN12[] Under Oklahoma law, libel is a "false or malicious unprivileged publication by writing." 12 O.S. § 1441. Slander is a "false and unprivileged publication, other than libel." 12 O.S. § 1442. Truth is a defense to either claim. In addition, if the communication is privileged, a libel or slander action will not lie. See 12 O.S. § 1444.1. In the first letter, Frische stated:

This letter is to alert you to quality problems at Southwestern Medical Center which I bring [\*37] to you in your capacity as Chief of Staff of the hospital. I bring these problems to your attention in confidentiality and within the limits of what I believe to be legitimate peer review for such concerns. . . . It is my considered opinion that Dr. LeBaud's work is below the standard of care for this or any other community. As long as he continues to do surgery, innocent and unsuspecting patients will continue to be needlessly injured.

Exhibit 29 to Plaintiffs Answer at 1-2. In the second letter, Frische named the patients for whom he had expressed concern in his prior letter. He stressed that "I believe the nature of the problem is widespread, in that it covers a broad range of types of cases. Only a comprehensive review will suffice to handle this question. Once again, I would suggest that this be done by an outside individual who is qualified to do this type of evaluation." Id. at 3 (emphasis in original).

Frische contends that the letters to Southwestern were written in the context of peer review and thus should be privileged pursuant to Oklahoma law, which provides that:

Any person who supplies information in good faith and with reasonable belief that [\*38] such information is true to a professional review body shall not be liable in any way in damages with respect to giving such information to the professional review body.

76 O.S. § 26. Plaintiff counters that the letters cannot be considered part of a peer review process because no such process was initiated by Southwestern.<sup>18</sup> Furthermore, plaintiff argues that Frische cannot establish the subjective element of his good faith. The court finds that it need not address the good faith issue, as Frische has presented sufficient evidence to establish the truth of the assertions contained in the letters. See Exhibits 1, 2, 3, 31, 32, and 57 to Defendants' Motion. In turn, plaintiff has presented no evidence to refute the accuracy of the statements

<sup>17</sup> Plaintiff cannot assert a libel claim against Curry based on the reports sent to the National Practitioners Data Bank because such reports are privileged pursuant to the Health Care Act. See, *supra*, at 13.

<sup>18</sup> In fact, it is undisputed that no adverse action was taken against plaintiff as a result of these letters. Plaintiff continued to practice at Southwestern until he moved to Idabel.

contained in the letters. The court concludes that Frische is entitled to judgment as a matter of law with respect to this claim.

#### **[\*39] Deceit Claim**

In his final claim for relief, plaintiff asserts that R. Brent Smith, the Chief of Staff of Memorial in 1994, deceived him into believing that the peer review process would not occur. Specifically, plaintiff claims that Smith told him "in substance that 'it was all a misunderstanding and forgotten,' telling Plaintiff that he had nothing to worry about." Complaint at P 53. [HN13](#) Oklahoma law provides a private right of action for persons damaged by another's deceit.

One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

76 O.S. [§ 2](#). "Deceit" is defined as:

1. The suggestion, as a fact, of that which is not true by one who does not believe it to be true.
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.
3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
4. A promise, made without any intention of performing.

76 O.S. [§ 3](#).

In order [**\*40**] to recover under this claim, plaintiff must establish that Smith willfully misrepresented the status of the peer review process and that plaintiff suffered damages due to his reliance on that misstatement. Plaintiff, however, has made no attempt to establish either element of this claim. In fact, plaintiff did not even respond to defendants' motion for summary judgment with respect to this claim. The court, therefore, finds that plaintiff has abandoned this claim. In addition, the court finds that plaintiff's own words belie any assertion that he relied on the alleged statement by Smith. On January 14, 1994, plaintiff wrote that he had been advised by Smith and Curry on January 11, 1994 that "an investigation will be conducted concerning my practice." Exhibit 34 to Defendants' Motion. Thus, Smith is entitled to judgment in his favor on this claim.

#### Conclusion

In sum, plaintiff has failed to offer even a scintilla of evidence in support of his claims for relief. His broad, unsupported allegations of multiple conspiracies appear to be more properly viewed as a fictionalized account of imagined events, rather than as a fact-based legal cause of action that is grounded in reality. Defendants' [**\*41**] Motion for Summary Judgment (Docket No. 132) is GRANTED. Judgment will issue accordingly.

It is so ordered this 13th day of March, 1997.

TIM LEONARD

United States District Judge

#### **JUDGMENT**

Pursuant to the Order issued this date, judgment is hereby entered in favor of defendants Eric E. Frische, M.D., James E. Fahey, Jr., M.D., R. Brent Smith, M.D., Randy Segler, Sr., Donald S. Bentley, Shon Erwin, Mary Louise Lawson, Herb Stonehocker, Urbane Skinner, Randy Curry, and Comanche County Hospital Authority, d/b/a Comanche County Memorial Hospital and against plaintiff, Pierre LeBaud, M.D. Pursuant to the Stipulation for

Dismissal filed March 3, 1997, the claims against defendants Ron Woodson, M.D., Robert Hillis, M.D., Ron Cagle, M.D., Rex Stockard, M.D., John Carter, M.D., Allen Aycock, M.D., and Donald Garrett, M.D. were dismissed with prejudice.

Entered this 13th day of March, 1997.

TIM LEONARD

United States District Judge

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## **HTI Health Servs. v. Quorum Health Group**

United States District Court for the Southern District of Mississippi, Western Division

March 14, 1997, Decided ; March 17, 1997, FILED

CIVIL ACTION NO. 5:96-CV-108Br(S)

### **Reporter**

960 F. Supp. 1104 \*; 1997 U.S. Dist. LEXIS 5104 \*\*; 1997-2 Trade Cas. (CCH) P71,889

HTI HEALTH SERVICES, INC., PLAINTIFF VS. QUORUM HEALTH GROUP, INC., RIVER REGION MEDICAL CORPORATION (Formerly known as ParkView Medical Corporation), and VICKSBURG CLINIC, P.A., DEFENDANTS

**Disposition:** [\*\*1] Columbia's request for injunctive and all other relief denied.

### **Core Terms**

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Clinic, merger, patients, managed care, geographic, primary care, markets, antitrust, market share, Region, submarket, primary care physician, postmerger, physician's services, hospital service, pediatric, Street, general surgery, anti trust law, recruitment, multispecialty, provider, urology, prices, consumers, medical community, concentration, plans, acute, anticompetitive

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

#### **HN1[] Actual Monopolization, Anticompetitive & Predatory Practices**

See [15 U.S.C.S. § 18.](#)

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN2[] Monopolies & Monopolization, Actual Monopolization**

See [15 U.S.C.S. § 2.](#)

960 F. Supp. 1104, \*1104L 1997 U.S. Dist. LEXIS 5104, \*\*1

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

### **HN3** [+] Remedies, Injunctions

Section 16 of the Clayton Act entitles private persons to sue for injunctive relief 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](#). Under Section 16, permanent injunctive relief may issue upon a demonstration of "threatened" injury, even though the plaintiff has not yet suffered actual injury. In other words, a plaintiff may qualify for permanent injunctive relief under the statute by demonstrating a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation that is likely to continue or recur. The remedy is flexible and may be adapted to achieve a reconciliation of the public interests that Congress sought to protect with competing private needs.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

### **HN4** [+] Injunctions, Preliminary & Temporary Injunctions

When adjudicating preliminary injunction requests under the antitrust laws, the courts in this circuit require that the movant meet its burden under a well-established four-pronged test by proving that: (1.) there is a substantial likelihood of success on the merits; (2.) there is a substantial threat that the movant will suffer irreparable injury if the injunction is not issued; (3.) the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4.) the injunction will not disserve the public interest. The precedent in the Fifth Circuit clearly warns that a preliminary injunction is an extraordinary remedy that can be granted only if the movant has clearly shown all four prerequisites. Indeed, the Fifth Circuit Court of Appeals instructs that the grant or denial of injunctive relief must be the product of a reasoned application of the foregoing four factors and cannot be based solely on an inquiry into the underlying merits of the substantive antitrust claims.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

960 F. Supp. 1104, \*1104L 1997 U.S. Dist. LEXIS 5104, \*\*1

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

## **HN5** [down arrow] Remedies, Injunctions

An antitrust injury is a merits issue that must be decided at trial before a preliminary injunction can issue. Establishing a substantial likelihood of suffering antitrust injury is an overarching prerequisite to obtaining injunctive relief under Section 16 of the Clayton Act, [15 U.S.C.S. § 26](#); it is equally applicable to cases brought under [Section 2 of the Sherman Act](#), [15 U.S.C.S. § 2](#), and those under Section 7 of the Clayton Act, [15 U.S.C.S. § 18](#). The doctrine of antitrust standing demands a showing of more than the constitutional standing requirement of injury in fact; a plaintiff must also demonstrate that it is the proper party to bring a private antitrust action. In suits for damages, courts may assess several factors in an antitrust standing analysis: (1) the nature of the plaintiff's alleged injury (i.e., whether the plaintiff can prove antitrust injury); (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

## **HN6** [down arrow] Remedies, Injunctions

The U.S. Supreme Court has distinguished the standing analysis for injunctive relief under Section 16 of the Clayton Act, [15 U.S.C.S. § 26](#), by explaining that some of the factors (other than antitrust injury) that are appropriate to a determination of standing in an action for damages are not relevant in an action for injunctive relief. Such irrelevant factors would include the threat of multiple lawsuits or duplicative recoveries. 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 Fifth Circuit has further explained that antitrust injury is proof of an anticompetitive effect upon the plaintiff. Antitrust injury must be interpreted narrowly, and that the plaintiff's burden is a heavy one.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

## [HN7](#) [down] Antitrust Actions, Facilities

Examples of anticompetitive effects that are accepted as proof of antitrust injury include increased prices and decreased output. Antitrust injury, however, does not encompass the threat of decreased competition. The fear of the loss of profits due to price competition is not antitrust injury. Similarly, the notion that a plaintiff is facing the specter of a monopoly or speculation that the plaintiff will be sold or go out of business is not enough to establish antitrust injury. In sum, speculative statements about anticompetitive effects will not satisfy the narrow standard for establishing antitrust injury.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

## [HN8](#) [down] Antitrust, Horizontal Mergers

In broad terms, a horizontal merger occurs when the merging firms are in the same product and geographic market. The basic economic reason for limiting horizontal mergers is the generally accepted theory that horizontal mergers increase market concentration, which, in turn, can substantially lessen competition among rivals, particularly with respect to price.

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

### [\*\*HN9\*\*](#) [down] **Antitrust, Vertical Acquisitions**

A vertical merger joins companies that share a supplier-customer relationship. Unlike horizontal mergers, vertical arrangements do not inherently remove an independent competitor from the market. Vertical integration may be "upstream," when a firm produces supplies or component materials that could have been supplied by independent producers, or "downstream," when a firm processes or distributes products that could have been sold to independent producers or distributors.

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

### [\*\*HN10\*\*](#) [down] **Antitrust, Vertical Acquisitions**

Whereas horizontal mergers are commonly analyzed in terms of market concentration, there is no comparable theoretical basis for evaluating the anticompetitive effects of a vertical merger. This is because firms that merge vertically are engaged in different product markets; thus, a simple vertical merger neither combines market concentrations nor increases the market power of the merging entities. Courts therefore evaluate the anticompetitive effects of a vertical merger in terms of other structural consequences or economic barriers such as whether the merger "forecloses" competitors of the merging entities from a source of supply that would otherwise be open to them.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

### [\*\*HN11\*\*](#) [down] **Market Definition, Relevant Market**

In assessing the merits of a claim under Section 7 of the Clayton Act, [15 U.S.C.S. § 18](#), a court must appraise not merely the immediate impact of the merger upon competition, but it also must predict the merger's impact upon competitive conditions in the future. The burden is on the plaintiff to show that a probable anticompetitive impact will flow from the merger. To do so, the plaintiff must show that the merger of the two clinics will substantially lessen competition within an established area of effective competition, or relevant market. A relevant market is determined

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by proof of a (1) product market (the line of commerce); and (2) geographic market (the section of the country). Instead of mandating a formal or legalistic structure for defining relevant markets, Congress has adopted a pragmatic, factual approach.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Evidence > Inferences & Presumptions > General Overview

## **HN12** [blue icon] **Regulated Practices, Market Definition**

The burden is on the plaintiff to prove the relevant product market or markets. Determining a relevant product market is generally a question of fact for the jury or factfinder, although in certain instances a legal conclusion is required. The classic test for defining the outer boundaries of a specific product market is to identify a set of goods or services that are reasonably interchangeable by consumers for the same purpose or use. A product market is composed of products that have reasonable interchangeability for the purposes for which they were produced-price, use and qualities considered. Interchangeability of products is often explained in terms of the cross-elasticity of demand between the product itself and substitutes for it. This concept considers the alternative products to which consumers might turn in the event of a price increase. A high cross-elasticity of demand between two products indicates, for antitrust purposes, that the products are in the same relevant product market.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

## **HN13** [blue icon] **Relevant Market, Product Market Definition**

Consistent with U.S. Supreme Court precedent, the factfinder in an antitrust case may determine that well-defined submarkets exist within a specific product market. Economically significant submarkets themselves can constitute relevant product markets and are often determined by examining: industry or public recognition of the submarket as a separate economic entity; the product's peculiar characteristics and uses; unique production facilities; distinct customers; distinct prices; sensitivity to price changes; and specialized vendors.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

## **HN14** [blue icon] **Regulated Practices, Market Definition**

The Antitrust Division of the U.S. Department of Justice has recognized that general surgery services are ordinarily considered a separate product market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

### **HN15** [blue icon] Regulated Practices, Market Definition

In cases involving service industries such as banking and retailing, courts sometimes recognize a "cluster of services" as the relevant product market. For example, products and services constituting commercial banking are sufficiently inclusive to be deemed a distinct line of commerce. The reliability of using a cluster of services approach in evaluating hospital mergers has been called into question recently. In light of the evolving and increasingly complex health care services market, there is concern that the cluster approach might lead to distorted results. It is the plaintiff's burden to define its product markets.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

### **HN16** [blue icon] Regulated Practices, Market Definition

It is well-established that, in defining a market, one must determine whether products or services exist that are good substitutes for the product or service in question.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

### **HN17** [blue icon] Relevant Market, Geographic Market Definition

The burden of producing evidence of geographic markets rests with the plaintiff. A properly defined geographic market reflects the commercial realities of the industry at issue and is one that is economically significant. The Fifth Circuit has explained that the geographic component of a relevant market definition encompasses the area of effective competition in which the product or its reasonably interchangeable substitutes are traded. Stated otherwise, the key question in determining a geographic market is: where does a potential buyer look for potential suppliers of the service--what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative services? Precedent unmistakably demonstrates that delineating geographic markets is no easy endeavor and that some "fuzziness" may be inherent in any attempt to do so.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

## [\*\*HN18\*\*](#) [blue icon] Regulated Practices, Market Definition

The Elzinga-Hogarty (E-H) test is a well-known tool of economists. In a merger setting, the purpose of the E-H test is to analyze patterns of consumer origin and destination and then to use that information to. A geographic market is an area where there are (1) relatively few imports of the product (little comes in from the outside or LIFO); and (2) few exports of the product (little goes out from the inside or LOFI). The E-H test is a matter of looking at how many people leave an area to get services (outflow) and how many people come into an area to get services (inflow). Both inflow and outflow are important in determining how much prices would have to increase within that area before lost business would make the price increase unprofitable. Although often used in merger studies, the E-H test is not without its critics.

[Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities](#)

[Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview](#)

[Mergers & Acquisitions Law > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers](#)

## [\*\*HN19\*\*](#) [blue icon] Regulated Industries, Financial Institutions

In addition to coal, examples of homogeneous products would include commodities such as crude, oil, steel and cement. In contrast, differentiated products are commonly associated with service sectors such as commercial banking or health care. A merger of differentiated product markets is said to occur when the products of the merging firms are close but not perfect substitutes. Because the entire notion of market share in the economist's competition model rests on the premise that all competing firms produce identical products, product differentiation presents an added wrinkle in estimating the anticompetitive consequences of a merger.

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation](#)

[Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market](#)

[Mergers & Acquisitions Law > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > Horizontal Mergers](#)

## [\*\*HN20\*\*](#) [blue icon] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Once the relevant markets are defined, the plaintiff's final hurdle in presenting its *prima facie* case under Section 7 of the Clayton Act, [15 U.S.C.S. § 18](#), is establishing probable anticompetitive impact within the relevant markets. In a horizontal merger situation, there are two basic methods that a plaintiff can employ to meet its burden of proof: (1) demonstrate that the size of the merging entities makes them inherently suspect in light of Congress' design to prevent undue economic concentration, resulting in a significant increase in market share and an undue market concentration; and (2) in cases where size is not inherently suspect, show that other characteristics of the market make the merger more economically harmful than the bare market share and market concentration statistics would otherwise indicate.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation  
Evidence > Inferences & Presumptions > General Overview

## [HN21](#) [] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

Appellate courts have held that a district court acts within its discretion in determining that evidence of a high market share establishes a *prima facie* antitrust violation, which shifts the burden of rebuttal to the defendant. The law is clear, nonetheless, that evidence of high market share does not require a district court to conclude that there is an antitrust violation.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

## [HN22](#) [] **Regulated Practices, Monopolies & Monopolization**

Natural monopolies have been described as occurring when, because of the high ratio of fixed costs to variable costs, a single firm has declining average costs at the level of demand in the industry, such that the single firm can supply the service more cheaply than two firms could. A shorthand definition: a natural monopoly is a market that can practically accommodate only one competitor. For example, a small town may not be able to support more than one movie house. In such a case, demand is too thin and monopoly is inevitable. Where the character of the market makes monopoly inevitable, commentators have observed that it would be futile and a waste of judicial resources to hold such a monopoly unlawful. Natural monopolies do not run afoul of the antitrust laws so long as the monopoly in question acquired and maintained its position by business acumen, superior quality or other honest means and did not exclude competitors improperly.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

## [HN23](#) [] **Regulated Practices, Market Definition**

Present consumer preferences are not dispositive in determining whether viable alternatives exist in any given market. The key inquiry must focus upon where consumers can practicably go for primary care services after the merger, not where consumers have been going, or where they would prefer to go.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

## [\*\*HN24\*\*](#) [ ] **Antitrust & Trade Law, Clayton Act**

Antitrust case law exhibits a long-drawn-out battle over what percentage share of a given market is sufficient to demonstrate market power. Understandably, the U.S. Supreme Court has never defined "undue percentage share" in terms of a hard and fast numerical threshold. The emphasis in merger cases brought under Section 7 of the Clayton Act, [15 U.S.C.S. 18](#), has been to analyze carefully the likely harm to consumers, instead of accepting a firm's postmerger market share as conclusive proof of its market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

## [\*\*HN25\*\*](#) [ ] **Regulated Practices, Market Definition**

Courts must not dwell on an individual competitor's singular problems. In accord with the broad purpose of [antitrust law](#), the proper focus must be on proof of harm to the market as a whole. To prevent antitrust laws from becoming trivialized, the key is impact on competition as a whole within the relevant market; workplace grievances between physicians and hospitals should not be elevated to the status of an antitrust action.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

## [\*\*HN26\*\*](#) [ ] **Antitrust Statutes, Clayton Act**

Although no precise formula exists for determining whether a vertical merger may lessen competition, the traditional analysis involves an examination of certain market factors, which are applied to the merger at hand. Those factors include: the nature and economic purpose of the arrangement; the likelihood and size of any market foreclosure; the extent of concentration of sellers and buyers in the industry; the capital cost required to enter the market; the market share needed by a buyer or seller to achieve a profitable level of production or "scale economy"; the existence of a trend toward vertical concentration or oligopoly in the industry; and whether the merger will eliminate potential competition by one of the merging parties. Other factors may include the degree of market power that would be possessed by the merged entity and the number and strength of competing suppliers and purchasers. By applying these factors to a given case, courts attempt to predict the probable future consequences of a vertical merger.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > 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

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

## **HN27** [blue icon] **Scope, Monopolization Offenses**

Section 2 of the Sherman Act prohibits persons from combining or conspiring to monopolize interstate commerce among the states or with foreign nations. [15 U.S.C. § 2](#). The terms "combine" and "conspire" are used interchangeably by the courts and refer to the same offense. The elements of a Section 2 conspiracy claim are: (1.) the existence of specific intent to monopolize; (2.) the existence of a combination or conspiracy to achieve that end; (3.) overt acts in furtherance of the combination or conspiracy; and (4.) an effect on a substantial amount of interstate commerce.

**Counsel:** For HTI HEALTH SERVICES, INC., plaintiff: Heber S. Simmons, III, ARMSTRONG, ALLEN, PREWITT, GENTRY, JOHNSON & HOLMES, Jackson, MS. Wendy E. Ackerman, Steven C. Sunshine, Jonathan L. Greenblatt, Matthew David Lee, Thomas Aquinas McGrath, III, Linda M. McMahon, SHEARMAN & STERLING, Washington, DC.

For QUORUM HEALTH GROUP, INC., defendant: Jon Randall Patterson, William N. Reed, BAKER, DONELSON, BEARMAN & CALDWELL, Jackson, MS. Sean M. Haynes, W. Michael Richards, BAKER, DONELSON, BEARMAN & CALDWELL, Memphis, TN. For RIVER REGION MEDICAL CORPORATION fka Parkview Medical Corporation, defendant: William N. Reed (See above). For VICKSBURG CLINIC, P.A., defendant: Todd C. Richter, WATSON & JERNIGAN, P.A., Jackson, MS. John P. Sneed, PHELPS DUNBAR, Jackson, MS.

**Judges:** David Bramlette, UNITED STATES DISTRICT JUDGE

**Opinion by:** David Bramlette

## **Opinion**

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### **[\*1107] OPINION**

Plaintiff HTI Health Services, Inc., d/b/a Columbia Vicksburg Medical Center ("Columbia") brought this antitrust action to enjoin a pending merger involving the defendants Quorum Health Group, Inc. ("Quorum Health"), River Region Medical Corporation (formerly known as ParkView Medical Corporation, referred to herein as "River Region") **\*\*2** and the Vicksburg Clinic, P.A. (the "Vicksburg Clinic"). The co-defendants are referred to collectively herein as "Quorum". The merger is structured to align the two largest physician clinics in Vicksburg, Mississippi with one of the town's largest hospitals, Parkview Regional Medical Center ("ParkView"). ParkView's leading hospital

rival, the Vicksburg Medical Center ("VMC"), is owned and operated by Columbia. Columbia is a wholly-owned subsidiary of Columbia/HCA HealthCare Corp., the largest for-profit hospital chain in the country. Quorum Health, the indirect majority shareholder of River Region, is also a large, for-profit health care corporation.

In its complaint filed July 29, 1996, Columbia alleged antitrust violations under the Sherman and Clayton Acts and requested preliminary and permanent injunctive relief to prohibit the merger's consummation. Following expedited discovery, the parties' opted to proceed directly to trial. The Court heard the case without a jury from September 30 through October 16, 1996. After the parties gave their closing arguments on November 6, 1996, the Court took the case under advisement. Now having thoroughly considered the record, legal arguments **[\*\*3]** and case law, it is this Court's opinion, based on the findings of fact and conclusions of law to follow, that Columbia has failed to carry its burden of proof under the relevant antitrust laws. Columbia's request for injunctive and all other relief must therefore be denied.

#### **[\*1108] BACKGROUND**

A long and competitive history of a divided medical community creates the setting for this contested merger. For many years, VMC and ParkView (previously named Mercy Hospital) have been considered the leading hospitals in Vicksburg and the surrounding areas of Warren County, Mississippi. Vicksburg, a city of roughly 30,000 people, is located in the southwest quadrant of the state on the Mississippi River border with Louisiana. Although in the past as many as four hospitals have operated in Vicksburg, ParkView and VMC are the only survivors, and the city has become a "two-hospital town."

The Street Clinic and the Vicksburg Clinic are the city's oldest physician clinics. Both have operated since approximately the World War I era, and both have maintained a traditional alliance with one of the two hospitals: the Street Clinic with Parkview and the Vicksburg Clinic with VMC. The Street Clinic is **[\*\*4]** located on ParkView's medical campus, and physicians associated with that clinic are shareholders in River Region. The Vicksburg Clinic operates as a professional association and is officed on VMC's campus in space that it leases from Columbia. Without delving into the historic reasons for these hospital/clinic alliances, suffice it to say that the age-old schism running through Vicksburg's medical community has divided the dominant doctor and hospital groups into two, well-matched rivals.

According to the executed merger agreement dated May 31, 1996 among ParkView Medical Corporation (predecessor to River Region), Parkview Sub Inc. and the Vicksburg Clinic (the "Merger Agreement"), the merger is structured to accomplish a stock-for-stock swap between River Region and the Vicksburg Clinic. In short, once the merger is consummated, the Vicksburg Clinic physicians will join their longstanding rivals at the Street Clinic as shareholders of River Region. The merged clinics (referred to herein as the "River Region Clinic") will become the single largest physician clinic in the Vicksburg area.

Although the Street and Vicksburg Clinics are currently the largest and most diversely specialized **[\*\*5]** clinics in Warren County, they are not the only ones. Mission Primary Care (the "Mission Clinic"), also located in Vicksburg, is a family medicine clinic that was established in 1995 and is managed by a Columbia-owned medical services organization, VIP, Inc. Other clinics in Vicksburg include the Better Living Clinic and two small clinics that are operated by River Region, The Family Medicine Clinic of Vicksburg and the Women's Clinic of Vicksburg. In addition to these smaller clinics, a number of independent physicians practice in and around Vicksburg. Columbia's VIP manages, in whole or in part, many of the independent physicians' practices.

The revolutionary reorganization of the health care industry, which has swept much of the country since the early 1990s, has been slow to arrive in Vicksburg. Innovations that are prevalent elsewhere, such as integrated health care delivery systems, intrastate and regional networking among hospitals and other providers, and managed care options in health insurance coverage, are new to the Vicksburg community. Essentially, managed care plans such as health maintenance organizations ("HMOs") and preferred provider organizations ("PPOs") negotiate **[\*\*6]** with doctors, hospitals and other health service providers to establish a health care network that will serve the plan's enrollees. Because managed care plans purchase services in quantity, they negotiate for discounted rates from the

health care providers, which, in principle, are passed along to customers in the form of lower health care coverage costs. With or without the pending merger, the expectation is that managed care will grow over time in Vicksburg and Warren County, thereby stimulating price competition as plan providers scramble for new customers. Managed care may make additional inroads into Warren County through a Medicaid managed care pilot program, which is slated to begin in eleven Mississippi counties but which was inactive at the time of trial.

Also new to Vicksburg is the growth of casino gambling. Along with the development of the casino industry, Vicksburg and Warren County are experiencing significant economic growth, a decline in unemployment [\*1109] and the entry of new, nongaming businesses. Documents in evidence indicate that, between 1980 and 1994, Warren County's median family income increased 404% and its per capita income rose 126%.

Against this backdrop of [\*\*7] changing times, a group of Vicksburg's independent physicians and clinic doctors formally met in the summer of 1993 to discuss ideas about reorganizing the area's hospital and medical services. One idea was to eliminate the duplication of services and procedures performed at the two hospitals by assigning a specific set of services to each hospital. For example, ParkView might be designated as the pediatric and ob/gyn center, while VMC would develop as the surgical care center. The hope was that, eventually, a new hospital could be constructed on a separate, neutral site and the old hospitals could be used for psychiatric units, nursing home facilities or other purposes. Another concern voiced by the physicians was Vicksburg's need for technologically advanced medical equipment including, but not limited to, a cardiac catheterization laboratory, open heart surgery facilities and a permanent magnetic resonance imaging ("MRI") device. Because of intense competition between the two hospitals, neither had been successful in receiving the required approval from the state authorities for procuring such equipment. As a general rule, Mississippi requires that hospitals receive state regulatory [\*\*8] approval in the form of a "certificate of need" or "CON" before capital expenditures for certain equipment or new technology may be incurred. In an attempt to end the regulatory gridlock, the Vicksburg doctors discussed approaching the CEOs of the two hospitals to encourage them to join forces and procure the cardiac catheterization laboratory and MRI in a profit-sharing arrangement. The doctors hoped that, by forming a joint venture, the state regulators would no longer be forced to choose between the two hospitals and could award certificates of need to the unified project. Following the 1993 meeting, letters were sent to the executives of the owners of both hospitals, but the physicians' efforts failed. Vicksburg's need for technologically advanced equipment remained unresolved at the time of trial.

Dissatisfaction with the medical delivery system continued to grow among the community's physicians in general, and the Vicksburg Clinic physicians in particular. In December 1994, the nineteen physician shareholders at the Vicksburg Clinic wrote to the CEO of HealthTrust, owner and operator of VMC at that time, to complain about the hospital's failure to execute a several-year-old plan [\*\*9] to expand the clinic's physical facilities and improve services. The physician group expressly requested a definite commitment from HealthTrust for expansion, recruitment and strategic planning and also requested a meeting with senior management to formulate such plans. In the spring of 1995, Columbia acquired HealthTrust and assumed the management and operation of VMC. Thereafter, the Vicksburg Clinic's executive committee met with Columbia management to discuss the clinic's continuing need for expanded office space, strategic planning concerns and the doctors' perception that Columbia's management service organization, VIP, Inc., was competing directly with the Vicksburg Clinic's physician recruitment efforts. Despite verbal assurances from Columbia, tension increased between the Vicksburg Clinic physicians and Columbia management. By November 1995, the Vicksburg Clinic members had initiated discussions with both River Region and Columbia regarding proposals for reorganizing the clinic through an asset purchase or otherwise. Several months later, after considering proposals from both sides, the Vicksburg Clinic's board of directors and shareholders held a special meeting and voted [\*\*10] to pursue River Region's stock acquisition proposal. By February 1996, the physicians and River Region had signed a letter of intent. Negotiations continued, and the parties entered into the Merger Agreement in May 1996.

Also in the spring of 1996, the merger participants received notice that the Department of Justice ("DOJ") had opened an antitrust investigation of the proposed acquisition. To date, DOJ has not filed suit or taken any action against the Vicksburg Clinic merger. In the absence of agency intervention, [\*1110] Columbia filed this private Civil action for injunctive and other relief.

## FINDINGS AND CONCLUSIONS

### I. Antitrust Claims

Columbia's offensive against the merger is two-fold. First, under Section 7 of the Clayton Act,<sup>1</sup> Columbia claims that the proposed merger is likely to substantially lessen competition in Vicksburg's physician, hospital and managed care markets. (Count I, Complaint.) The result, according to Columbia, will be higher prices for health care services and medical insurance coverage, which will harm the citizens of Vicksburg as well as employers such as Columbia. Second, Columbia alleges that Quorum violated [Section 2](#) of the Sherman Act [[\\*\\*11](#)]<sup>2</sup> by combining or conspiring to monopolize Vicksburg's physician and hospital services with the specific intent of making Vicksburg a "one hospital town." (Complaint, Count II.)

#### [\*\*12] A. Injunctive Relief Standard

Columbia has asked for both preliminary and permanent injunctive relief pursuant to Section 16 of the Clayton Act. [HN3](#)<sup>↑</sup> Section 16 entitles private persons to sue for injunctive relief "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.A. § 26 \(West Supp. 1996\)](#) [hereinafter "Section 16"]. Under Section 16, permanent injunctive relief may issue upon a demonstration of "threatened" injury, even though the plaintiff has not yet suffered actual injury. [Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562 \(1969\)](#). In other words, a plaintiff may qualify for permanent injunctive relief under the statute by demonstrating a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation that is likely to continue or recur. *Id.* The remedy is flexible and may be adapted to achieve a reconciliation of the public interests that Congress sought to protect with competing private needs. [Id. at 131](#).

[HN4](#)<sup>↑</sup> When adjudicating preliminary injunction requests under the antitrust [[\\*\\*13](#)] laws, the courts in this circuit require that the movant meet its burden under a well-established four-pronged test by proving that:

1. there is a substantial likelihood of success on the merits;
2. there is a substantial threat that the movant will suffer irreparable injury if the injunction is not issued;
3. the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and

<sup>1</sup> [HN1](#)<sup>↑</sup> Section 7 of the Clayton Act provides in pertinent part:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . .

[15 U.S.C.A. § 18 \(West Supp. 1996\)](#).

<sup>2</sup> [HN2](#)<sup>↑</sup> [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 \$ 10,000,000 if a corporation, or, if any other person, \$ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[15 U.S.C.A. § 2 \(West Supp. 1996\)](#).

4. the injunction will not disserve the public interest.

[H & W Indus., Inc. v. Formosa Plastics Corp., U.S.A.](#), 860 F.2d 172, 179 (5th Cir. 1988); [Pearl Brewing Co. v. Miller Brewing Co.](#), 1993 U.S. Dist. LEXIS 16841, 1993 WL 424236 (W.D.Tex., Mar. 31, 1993), aff'd, 52 F.3d 1066 (5th Cir. 1995).

The precedent in our circuit clearly warns that a preliminary injunction is an extraordinary remedy that can be granted only if the movant has clearly shown all four prerequisites. [Mississippi Power & Light v. United States Gas Pipe Line](#), 760 F.2d 618, 621 (5th Cir. 1985). [\*1111] Indeed, the Fifth Circuit Court of Appeals instructs that the grant or denial of injunctive relief must be the product of a reasoned application of the foregoing four factors and cannot be based [\*\*14] solely on an inquiry into the underlying merits of the substantive antitrust claims. [H & W Indus.](#), 860 F.2d at 179 (reversing the district court's denial of a preliminary injunction where the court's ruling was based solely on the underlying merits of the plaintiff's antitrust and breach of contract claims). With these principles in mind, the Court turns first to evaluate the likelihood of Columbia's success on the merits.

## B. Antitrust Injury

An initial merits issue that this Court must decide is whether Columbia has shown the threat of an "antitrust injury." [Cargill, Inc. v. Monfort](#), 479 U.S. 104, 108, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); [Phototron Corp. v. Eastman Kodak Co.](#), 842 F.2d 95, 98 (5th Cir. 1988) ([HN5](#)↑) antitrust injury is a merits issue that must be decided at trial before a preliminary injunction can issue), cert. denied, 486 U.S. 1023, 100 L. Ed. 2d 228, 108 S. Ct. 1996 (1988). Establishing a substantial likelihood of suffering antitrust injury is an overarching prerequisite to obtaining injunctive relief under Section 16; it is equally applicable to cases brought under [Section 2](#) of the Sherman Act and those under Section 7 of the Clayton Act. [T.O. Bell v. Dow Chemical, Co.](#), 847 F.2d 1179, 1182 & n.4 (5th Cir. [\*\*15] 1988). Unless Columbia can establish its antitrust injury in this case, it will lack standing<sup>3</sup> to sue. [Phototron](#), 842 F.2d at 98 (construing [Cargill](#), 479 U.S. 104 at 113); see also [T.O. Bell](#), 847 F.2d at 1182.

[\*\*16] The United States Supreme Court has defined antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." [Cargill](#), 479 U.S. at 109 (quoting [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.](#), 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)); see also [Associated Gen. Contractors](#), 459 U.S. at 538-39. In the wake of this Supreme Court precedent, the Fifth Circuit has further explained that antitrust injury is proof of an anticompetitive effect upon the plaintiff. [T.O. Bell](#), 847 F.2d at 1182 n.4. It is clear from this circuit's precedent that antitrust injury must be interpreted narrowly, e.g., [Anago Inc. v. Tecnol Med. Products, Inc.](#), 976 F.2d 248, 249 (5th Cir. 1992), and that the plaintiff's burden is a heavy one. [Phototron](#), 842 F.2d at 98. [HN7](#)↑ Examples of anticompetitive effects that are accepted as proof of antitrust injury include increased prices and decreased output. Antitrust injury, however, does not encompass the threat of decreased competition. [Anago](#), 976 F.2d at 249; see also [Pearl Brewing Co. v. Miller Brewing Co.](#), 1993 U.S. Dist. LEXIS 16841, 1993 WL 424236 (W.D.Tex. 1993), aff'd, 52 F.3d 1066 (5th Cir. 1995) (the [\*\*17] fear of the loss of profits due to price competition is not antitrust injury). Similarly, the notion that a plaintiff is facing the specter of a monopoly or speculation that the plaintiff will be sold or go out of business is not enough to establish

<sup>3</sup>The Supreme Court has explained that the doctrine of antitrust standing demands a showing of more than the constitutional standing requirement of injury in fact; a plaintiff must also demonstrate that it is the proper party to bring a private antitrust action. [Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters](#), 459 U.S. 519, 535 n.31, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). In suits for damages, courts may assess several factors in an antitrust standing analysis: (1) the nature of the plaintiff's alleged injury (i.e., whether the plaintiff can prove antitrust injury); (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. [T.O. Bell](#), 847 F.2d at 1183 (construing [Associated Gen. Contractors](#), 459 U.S. 519). [HN6](#)↑ The Supreme Court, however, has distinguished the standing analysis for injunctive relief under Section 16 by explaining that some of the factors (other than antitrust injury) that are appropriate to a determination of standing in an action for damages are not relevant in an action for injunctive relief. Such irrelevant factors would include the threat of multiple lawsuits or duplicative recoveries. [Cargill](#), 479 U.S. at 111 n.6.

antitrust injury. *Phototron, 842 F.2d at 100*. In sum, it is clear from the case law that speculative statements about anticompetitive effects will not satisfy the narrow standard for establishing antitrust injury. E.g., *Anago, 976 F.2d at 249; Doctor's Hospital of Jefferson, Inc. v. [\*1112] Southeast Medical Alliance, Inc., 897 F. Supp. 290, 293 (E.D.La. 1995)* (expert's speculative statements about increased health care costs and an environment conducive to increased prices for inpatient and outpatient hospital care fell short of the strict Fifth Circuit standard for antitrust injury), *appeal pending*, No. 96-30220 (5th Cir. argued Oct. 3, 1996).

In essence, Columbia asserts that it will suffer two separate types of antitrust injury from the merger: one being an anticompetitive horizontal injury in certain physician services and managed care purchasing markets and the other being a vertical injury in the acute inpatient hospital [\*\*18] services market.<sup>4</sup> Columbia's theory of horizontal injury focuses on its assertion that the merger will empower Quorum to raise prices for a number of physician services in Vicksburg. In its capacity as an employer of over 400 employees in the Vicksburg community and as a purchaser of physician services for these employees, Columbia contends that it is a proper plaintiff under the antitrust laws to challenge the alleged harm. See *Blue Shield of Va. v. McCready, 457 U.S. 465, 481-84, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)* (consumer of mental health services had standing to challenge anticompetitive conduct in psychotherapy market). In addition, Columbia claims that it will suffer horizontal injury in the managed care purchasing markets because, as a self-insured employer, it is in the process of "seeking to contract" for managed care physician services for its employees. Columbia argues that, after the merger, "it will no longer be able to play the two multispecialty physician groups in Vicksburg against each other" in price negotiations. Letter from Columbia to the Honorable David C. Bramlette (11/13/96) at 5 [hereinafter "Columbia Posttrial Letter"].

[\*\*19] Columbia also asserts that it will suffer a separate injury from the likely vertical effects of the merger. Columbia argues that by virtue of the postmerger economic integration of the Vicksburg Clinic and ParkView, Quorum will have the power and economic incentive to foreclose Columbia from the acute care hospital services market. This anticompetitive vertical effect will result, according to Columbia, from the Vicksburg Clinic physicians' financial incentive and ability to shift their patient admissions to ParkView (instead of VMC) and from Quorum's postmerger power to exclude Columbia from competition for managed care contracts.

In response, Quorum urges that Columbia's entire standing argument rests entirely on speculation of what might happen postmerger and is therefore insufficient to demonstrate antitrust injury under the Fifth Circuit's narrow standard. Quorum further argues that Columbia has no standing to complain of injury in at least one of the alleged

<sup>4</sup> **HN8** [↑] In broad terms, a horizontal merger occurs when the merging firms are in the same product and geographic market. 1984 DOJ Merger Guidelines § 3.0, reprinted in ANTITRUST LAWS AND TRADE REGULATION PRIMARY SOURCE PAMPHLET (Matthew Bender 1996) [hereinafter PRIMARY SOURCE]. The basic economic reason for limiting horizontal mergers is the generally accepted theory that horizontal mergers increase market concentration, which, in turn, can substantially lessen competition among rivals, particularly with respect to price. 4 PHILLIP AREEDA & DONALD R. TURNER, **ANTITRUST LAW** P 1000a (1980).

In contrast, **HN9** [↑] a vertical merger joins companies that share a supplier-customer relationship. *Brown Shoe v. United States, 370 U.S. 294, 323, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. Unlike horizontal mergers, vertical arrangements do not inherently remove an independent competitor from the market. 2A PHILLIP AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, **ANTITRUST LAW** P 570a (1995). Vertical integration may be "upstream" (when a firm produces supplies or component materials that could have been supplied by independent producers) or "downstream" (when a firm processes or distributes products that could have been sold to independent producers or distributors). 3 AREEDA & TURNER, *supra*, at P 723.

**HN10** [↑] Whereas horizontal mergers are commonly analyzed in terms of market concentration, there is no comparable theoretical basis for evaluating the anticompetitive effects of a vertical merger. This is because firms that merge vertically are engaged in different product markets; thus, a simple vertical merger neither combines market concentrations nor increases the market power of the merging entities. 4 *id.* at P 1000(a). Courts therefore evaluate the anticompetitive effects of a vertical merger in terms of other structural consequences or economic barriers such as whether the merger "forecloses" competitors of the merging entities from a source of supply that would otherwise be open to them. *Id.*; see also *Brown Shoe, 370 U.S. at 324*.

product markets -- physician services [\*1113] purchased by managed care -- because, as a factual matter, Columbia is neither a managed care company nor an employer that purchases managed care products.

Recognizing the fundamental [\*\*20] importance of the antitrust injury prerequisite to the viability of Columbia's lawsuit, the Court requested and received supplemental briefing from the parties on the issue of standing. Having thoroughly reviewed and considered the supplemental briefing, counsel's oral arguments at trial on this issue and the many other written briefs, documents and case law submitted to the Court by the parties, it is this Court's conclusion that Columbia has established the requisite threat of antitrust injury and, accordingly, has standing to sue for injunctive relief under Section 16.

Because of the arguably speculative nature of Columbia's complained injury, the Court acknowledges, particularly in the light of this circuit's narrow standard, that some might regard this as a close call. However, the precise antitrust laws at issue in this case expressly require courts to deal in uncertainties and make reasoned assessments of the probable future effects of a proposed business transaction. See [United States v. Rockford Memorial Corp., 898 F.2d 1278, 1286 \(7th Cir. 1990\)](#) ("It is regrettable that antitrust cases are decided on the basis of theoretical guesses as to what particular market-structure [\*\*21] characteristics portend for competition . . ."). Based on Columbia's thorough pleading and briefing, which cannot be criticized as "bare bones," it is this Court's view that Columbia's allegations of antitrust injury must not be lightly dismissed as speculative and are sufficient to persuade this Court that a serious analysis of the full merits of this case is warranted. The Court's conclusion at this early stage of its consideration is supported by the following evidence.

Mr. William Patterson, chief executive officer of VMC, testified credibly that Columbia is a purchaser of hospital and physician services for its employees in the Vicksburg market. (Trial Tr. at 1653.) The fact that Columbia purchases health care services in the Vicksburg market was not contested by Quorum's expert witness, Mr. Lloyd E. Oliver. (*Id. at 2632*.) The parties do not dispute that, following the merger, the surviving clinic will be the largest physician clinic in the Vicksburg area and the only multispecialty physician clinic<sup>5</sup> in Vicksburg. It will possess, as a statistical matter, high percentages of market share in the alleged physician services markets. According to Dr. David Eisenstadt, Columbia's [\*\*22] expert witness, these market share percentages demonstrate a substantial likelihood of monopoly power in the alleged physician services markets. It appears to this Court that Columbia's allegations of postmerger market concentration raise, at the very least, a classic antitrust issue: whether the effect of the merger may be to substantially lessen competition in the alleged product markets and hurt consumers by empowering the postmerger survivors to raise prices. [Rockford, 898 F.2d at 1282-83](#). This is precisely the type of injury that the antitrust laws are designed to prevent. [Cargill, 479 U.S. at 109](#); see also [Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1167 \(W.D.Ark. 1995\)](#) (protecting consumers from monopoly prices is the central concern of [antitrust law](#)).

[\*\*23] The Court's analysis of Columbia's showing of antitrust injury does not rest on the evidence of market share data alone. See [Community Publishers, 892 F. Supp. at 1167](#) (interpreting [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#), as rejecting the proposition that antitrust injury may be presumed on the basis of market share data). Among other things, the Court has considered the abundant testimony regarding the historic competition and rivalry between the Street Clinic and the Vicksburg Clinic. The testimony indicated that the two clinics have been direct and significant competitors not [\*1114] just in terms of price, but also on the basis of quality and services offered. Even without the assistance of market share data, the fact that the merger will eliminate this tradition of multifaceted competition between the city's two leading, rival clinics is enough to raise concerns about the threat of postmerger anticompetitive effects.

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<sup>5</sup> Multispecialty physician clinics have been described as an alternative to the traditional, single specialty practices offered by members of a medical staff. In general, multispecialty clinics are designed to provide "one-stop shopping" for various medical specialties and are intended to be a cost-effective means of health care delivery. They may also provide extended hours, house calls and other patient benefits. See Remarks of Mary Lou Steptoe, Acting Director FTC Bureau of Competition, delivered 4/5/95 to ABA Antitrust Section, *reprinted in* 1995 WL 150724 (F.T.C.).

Considering the high postmerger market concentrations in the physician markets that Columbia has alleged and demonstrated, coupled with evidence regarding the consequences of the merger, the Court is satisfied that Columbia has shown the [\*\*24] requisite threat of antitrust injury and has presented something more than "the notion that [it is] facing the specter of a monopoly." [Phototron, 842 F.2d at 100](#).

Arguably more speculative is Columbia's theory of vertical injury in the acute care inpatient hospital services market. The linchpin of this theory is Columbia's contention that, because the Vicksburg Clinic physicians will become postmerger equity shareholders in River Region Medical Corporation, these physicians will have a financial incentive, directly caused by the merger, to send their patients to ParkView for hospital services. Conceding that these physicians will have no postmerger contractual obligation to refer their patients to ParkView, Columbia maintains that the merger nonetheless creates the threat that Columbia will lose its primary source (or upstream supply) of hospital patient referrals and thereby become foreclosed from competing in the downstream market of acute care inpatient hospital services. In this regard, the Court noted the testimony of Dewey Greene, President of Columbia's Delta Division, who stated that the Vicksburg Clinic physicians account for 80% or more of VMC's total patient activity. [\*\*25] (Trial Tr. at 533.) It is well-established that the primary vice of a vertical merger is foreclosing a competitor from a key source of supply that, absent the merger, would otherwise be open to it. [Brown Shoe, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502](#). Setting aside the ultimate merits of this contention (which are addressed in Part I.C. below), the Court cannot ignore the allegation that the merger creates a questionable financial incentive for the Vicksburg Clinic physicians to steer their hospital patients to ParkView rather than VMC. But for the merger, this unique financial incentive would not exist. Finding that the alleged incentive is not beyond the realm of possibility, the Court concludes that Columbia has demonstrated the requisite threat of antitrust injury. See [Community Publishers, 892 F. Supp. at 1167](#) (holding that a plaintiff/newspaper-owner had established the requisite threat of antitrust injury and therefore had standing to challenge a local newspaper acquisition because the transaction would create an incentive for the target newspaper to terminate its advertising sharing agreement with the plaintiff). Satisfied with Columbia's demonstration of threatened antitrust injury from [\*\*26] both the horizontal and vertical effects of the proposed merger, the Court will proceed to evaluate Columbia's likelihood of success on the merits of these antitrust claims.

## C. Merits of Section 7 Clayton Act Claim

**HN11** [↑] In assessing the merits of Columbia's Section 7 claim, this Court must appraise not merely the immediate impact of the merger upon competition, but it also must predict the merger's impact upon competitive conditions in the future. [United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362, 10 L. Ed. 2d 915, 83 S. Ct. 1715 \(1963\)](#). The burden is on Columbia to show that a probable anticompetitive impact will flow from the merger. [Domed Stadium Hotel, Inc., v. Holiday Inns, Inc., 732 F.2d 480, 492 \(5th Cir. 1984\)](#). To do so, Columbia must show that the merger of the two clinics will substantially lessen competition within an established "area of effective competition," or relevant market. [Brown Shoe, 370 U.S. at 324](#). A relevant market is determined by proof of a (1) product market (the line of commerce); and (2) geographic market (the section of the country). *Id.*; see also [Domed Stadium, 732 F.2d at 491](#) (first step in analyzing a Section 7 claim is defining the relevant product and [\*\*27] geographic markets). Instead of mandating a formal or legalistic structure for defining relevant markets, Congress has adopted a pragmatic, factual [\*1115] approach. [Brown Shoe, 370 U.S. at 336](#).

### 1. The Alleged Product Markets

**HN12** [↑] The burden is on the plaintiff to prove the relevant product market or markets. [Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182 \(1st Cir.\), cert. denied, 136 L. Ed. 2d 214, 117 S. Ct. 294 \(1996\); C.E. Services, Inc. v. Control Data Corp., 759 F.2d 1241 \(5th Cir.\), cert. denied, 474 U.S. 1037, 88 L. Ed. 2d 583, 106 S. Ct. 604 \(1985\)](#). Determining a relevant product market is generally a question of fact for the jury or factfinder, although in certain instances a legal conclusion is required. [Seidenstein v. Nat'l Medical Enter., Inc., 769 F.2d 1100, 1106 \(5th Cir. 1985\); Domed Stadium, 732 F.2d at 487](#). The classic test for defining the outer boundaries of a specific product market is to identify a set of goods or services that are reasonably interchangeable

960 F. Supp. 1104, \*1115-997 U.S. Dist. LEXIS 5104, \*\*27

by consumers for the same purpose or use. *Brown Shoe*, 370 U.S. at 325; *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956); *Dougherty v. Continental Oil Co.*, 579 F.2d 954, <sup>1\*\*28]</sup> 963, n.4 (5th Cir. 1979) (a product market is "composed of products that have reasonable interchangeability for the purposes for which they were produced-price, use and qualities considered"). Interchangeability of products is often explained in terms of the "cross-elasticity of demand" between the product itself and substitutes for it. *Brown Shoe*, 370 U.S. at 325. This concept considers the alternative products to which consumers might turn in the event of a price increase. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL **ANTITRUST LAW** § 3.3 (1985). A high cross-elasticity of demand between two products indicates, for antitrust purposes, that the products are in the same relevant product market. *Id.*

**HN13**<sup>↑</sup> Consistent with Supreme Court precedent, the factfinder may also determine that well-defined submarkets exist within a specific product market. *Brown Shoe*, 370 U.S. at 325. Economically significant submarkets themselves can constitute relevant product markets and are often determined by examining: industry or public recognition of the submarket as a separate economic entity; the product's peculiar characteristics and uses; unique production facilities; distinct customers; distinct <sup>1\*\*29]</sup> prices; sensitivity to price changes; and specialized vendors. *Id*; *Domed Stadium*, 732 F.2d at 487-88.

Columbia has focused on two broad categories of product markets: physician services and hospital services. Within the physician services category, Columbia has sought to prove four distinct product markets: (1) primary care; (2) general surgery; (3) urology; and (4) otolaryngology (ear-nose-throat or "ENT"). In addition, Columbia argues that two submarkets exist in the physician services category, which are pediatrics (a submarket of primary care) and physician services purchased by managed care (also referred to during the course of this litigation as the "multispecialty clinic submarket"). The Court concludes that, except for physician services purchased by managed care, Columbia has alleged proper product markets. The Court will address each product market and submarket.

#### a. Primary Care

According to Columbia, the primary care market in Vicksburg consists of general practitioners, family practitioners, internists and, as a distinct submarket, pediatricians. Columbia deliberately excludes obstetricians and gynecologists ("ob/gyn") from its definition of the primary care <sup>1\*\*30]</sup> market on the grounds that (i) ob/gyns do not typically provide routine primary care services to their female patients in the Vicksburg area; (ii) managed care plans could not use an ob/gyn to substitute for a primary care physician in forming a physician panel; and (iii) only adult women seek out ob/gyns for services.

Although Quorum does not dispute the recognition of primary care as a relevant product market, it does dispute Columbia's proposed market make-up. Quorum contends that the primary care market includes family practitioners, pediatricians, internists and ob/gyns. Quorum also denies that pediatrics is a separate submarket. In support of <sup>1\*\*1116]</sup> its position, Quorum points to Drs. Sessums and Giffin, family practitioners at the Mission Clinic. Each of these doctors dedicates 20% or more of his practice to providing pediatric care to children. On the other hand, Quorum names no specific Vicksburg area physician who provides both ob/gyn and routine primary care services to patients.

Having considered the evidence and the interchangeability of the services at issue, the Court accepts Columbia's definition of primary care for the purposes of this antitrust lawsuit. On this issue, <sup>1\*\*31]</sup> the Court found informative the testimony of Columbia's expert, Dr. Eisenstadt, who stated his belief that general practitioners, family practitioners and internists in the Vicksburg area are considered "in some sense substitutable for one another and therefore they could be called primary care physicians." (Trial Tr. at 2116.) Dr. Eisenstadt further testified that, while pediatricians provide primary care to children, they cannot substitute for internists or general practitioners in the formation of a managed care panel. (*Id.* at 2117.) From an antitrust market-definition perspective, Dr. Eisenstadt concluded that pediatricians would be a relevant submarket under primary care physicians. However, Dr. Eisenstadt neither included ob/gyns in the primary care market nor considered them as a submarket of primary care based on his belief that women in the Vicksburg area would not routinely use an ob/gyn for primary care purposes.

Dr. Eisenstadt's opinion was partially corroborated by Ms. Sharon Petty, vice-president and CFO of the Ameristar Casino in Vicksburg. As a health benefits provider to over 1,000 employees, Ms. Petty stated that she could not offer her employees an ob/gyn or **[\*\*32]** a pediatrician as a substitute for an internist. (*Id. at 1180-81.*)

The record does not identify any specific ob/gyn in the Vicksburg area who is generally capable of providing primary care services to the population as a whole and who would therefore be an acceptable substitute for general practitioners, family practitioners or internists. The testimony regarding the extent to which Vicksburg area ob/gyns provide primary care services to women patients was vague and unsubstantiated. See, e.g., *id. at 1122* (testimony of Dr. Fagan citing unnamed surveys to support the notion that one-third of all women see only a gynecologist as a physician); *id. at 2662* (Quorum's expert incorrectly citing Dr. Fagan for the proposition that 70% of all women see only an ob/gyn). Recognizing that Columbia's proposed definition of the primary care market may not be perfect,<sup>6</sup> it is nonetheless adequately defined and inadequately refuted for the purposes of obtaining Clayton Act relief. *Rockford*, 898 F.2d at 1285 (forced to choose between two imperfect market definitions, court of appeals chose the less imperfect one).

#### **[\*\*33] b. Other Physician Markets**

The additional physician markets proposed by Columbia (general surgery, urology and ENT) are unopposed by Quorum in its final briefing to this Court. At trial, Quorum's expert, Mr. Oliver, accepted general surgery and urology as appropriate markets.<sup>7</sup> Mr. Oliver expressed some reservation about the proposed ENT market because there was testimony at trial suggesting that Dr. Bradfield, an ENT at the Vicksburg Clinic, might have intentions of leaving the Vicksburg area. In the event that Dr. Bradfield left Vicksburg, Mr. Oliver suggested that the postmerger monopoly in ENT could disappear. With respect to the task at hand -- defining relevant product markets that are supported by the record evidence -- the Court finds that speculation about what Dr. Bradfield might or might not do lacks probative value. In the light of little to no opposition from Quorum, the Court accepts Columbia's definition of the physician product markets for general surgery, urology and ENT.

#### **[\*\*34] [\*1117] c. Submarket of Physician Services purchased by Managed Care (or the "multispecialty clinic submarket")**

Columbia's proposed submarket for physician services purchased by managed care,<sup>8</sup> also referred to as the "multispecialty clinic submarket," is not so easily demarcated as the preceding practice specialties. Indeed, Columbia itself has exhibited some difficulty throughout this litigation in naming and presenting a consistent, well-defined statement of the market that it now asks this Court to recognize. Initially, Columbia sketched a separate product market (not submarket) of "managed care contracting for physician *and hospital* services." (Complaint P 44, emphasis added). This description has evolved into Columbia's latest articulation on the subject, which depicts a leaner submarket without the added weight of hospital services:

Plaintiff also alleged ... and proved a submarket [of the physician services product market] consisting of physician services purchased by managed care plans. This submarket can also be referred to as a multispecialty clinic submarket in Vicksburg because of the configuration of doctors in Vicksburg -- two multispecialty clinics and **[\*\*35]** only a few independent physicians. Given this configuration, a managed care plan must purchase physician services from one of the two multispecialty clinics to have a marketable panel.

<sup>6</sup> For example, it is not entirely clear (logically speaking) why pediatricians should be considered a submarket of primary care but ob/gyns are not. Neither party has proposed this seemingly plausible, parallel submarket structure nor introduced evidence to support it.

<sup>7</sup>  DOJ's Antitrust Division has recognized that general surgery services are ordinarily considered a separate product market. See DOJ Business Review Letter, 1996 WL 285712 (D.O.J.), at n.1 (March 19, 1996).

<sup>8</sup> A managed care executive testified at trial that he defines managed care as the "application of any number of methodologies to health care delivery" with the purpose of achieving two goals: (1) increasing efficiency; and (2) increasing the quality of a health care delivery system. (Trial Tr. at 260.)

Whether this market is called a "multispecialty clinic submarket" or "physician services purchased by managed care submarket," it does not change the fact that without the merger there are only two significant sellers of physician services in Vicksburg -- the Vicksburg Clinic and the Street Clinic -- and after the merger there would be only one -- River Region.

Columbia Posttrial Letter at 3.

Having studied Columbia's most recent effort to nail down a definition of this seemingly slippery submarket, the Court refers to [\*\*36] the testimony of Columbia's own expert witness, Dr. Eisenstadt. Contrary to Columbia's written and oral arguments to this Court, Dr. Eisenstadt specifically asserted on cross-examination that managed care purchases of multispecialty clinic services are not a submarket, but rather a separate product market. (Trial Tr. at 2292.) Dr. Eisenstadt also described multispecialty clinic services as a "cluster of services" market.<sup>9</sup> Columbia, however, has not pursued this theory in its final briefs or arguments to this Court. (*Id.* at 2125.)

[\*\*37] It is the plaintiff's burden to define its product markets, *C.E. Services, 759 F.2d at 1244*, and the Court now has before it a cafeteria of differing definitions from which to chose. On the basis of these inconsistencies alone, some might find that Columbia has failed to define its product market sufficiently. The Court, however, will disregard Columbia's earlier variations on the theme of managed care and multispecialty clinics and will focus its attention on the final interpretation, cited in pertinent part above. See Columbia Posttrial Letter at 3-4.

Quorum vigorously argues against the proposed multispecialty clinic submarket on the ground that Columbia is attempting to allege an invalid cluster of services market. According to Quorum, multispecialty clinics do not gather complex, interrelated and interdependent services under one roof like commercial banks (see *supra* note 9); rather, they offer separate and sometimes competing [\*1118] services that are available independently elsewhere. Relying on *Blue Cross & Blue Shield of Wisc. v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995)*, Quorum further argues that purchases by managed care are nothing more than discounted [\*\*38] pricing methods and, like an HMO (which is a form of managed care), do not constitute a separate product market. *Id. at 1409, 1411* (reversing jury finding that HMO was a separate product market; "HMO is basically a method of pricing services").

This Court is aware of no precedent that has recognized either physician services purchased by managed care or multispecialty physician clinics as a relevant product market (and/or submarket) under the antitrust laws. In the absence of precedent bearing directly on point, the Court will depend on conventional antitrust tools to parse an arguably unconventional market. See, e.g., *Brown Shoe, 370 U.S. at 325*; see also *supra* discussion at Part I.C.1.

A review of the facts regarding the current state of managed care in Vicksburg is essential to determining whether the market segment identified by Columbia qualifies as an economically significant submarket under the *Brown Shoe* doctrine. On this issue, the Court found credible the testimony of Charles Pitts, CEO of United HealthCare of Mississippi, Inc. ("United Health"), a subsidiary of a nationwide managed health care services company. Mr. Pitts also serves as board chair of Mississippi's [\*\*39] HMO trade association and testified that he is familiar with the development of managed care nationwide and, most importantly, in Mississippi. (See generally Trial Tr. at 258-379.) Pitts stated that, compared with the rest of the country, managed care is in its infancy in Mississippi. He estimated that only 1% to 2% of Mississippi's population is enrolled in an HMO product (compared with 20% to 25% for the nation as a whole). Within Mississippi, the HMO industry is better-established in the southeast corner of the state as compared to Vicksburg, which is one of the industry's newer locations. Pitts further testified that United Health has marketed its managed care products in Vicksburg only since March 1996, although United Health

<sup>9</sup> **HN15↑** In cases involving service industries such as banking and retailing, courts sometimes recognize a "cluster of services" as the relevant product market. E.g., *Philadelphia Nat'l Bank, 374 U.S. at 357* (products and services constituting commercial banking were sufficiently inclusive to be deemed a distinct line of commerce).

The reliability of using a cluster of services approach in evaluating hospital mergers has been called into question recently by the court in *F.T.C. v. Butterworth Health Corp., 946 F. Supp. 1285, 1996 WL 570479 (W.D. Mich. 1996)*. In light of the evolving and increasingly complex health care services market, the *Butterworth* court expressed a concern that the cluster approach might lead to distorted results. *Id.* at \*19 n.5.

recently acquired a company that has been offering "a product" in Vicksburg for several years. Pitts did not offer any specifics about the product or its performance record.

Pitts's testimony regarding the infancy of managed care in Mississippi was confirmed by the testimony of Dr. Eisenstadt (*id.* at 2399), by the testimony of Rissa Richardson, a provider relation manager for American Medical Plans of Mississippi (*id. at 388*), and by Columbia's [\*\*40] own documents. (Exhibit DQ-121, p. HCA9685 (VMC's Strategic Review FY '96 noting "relatively immature status" of managed care)). Ms. Richardson explained that her company markets both commercial and Medicaid HMO/managed care products in Mississippi. At the time of trial, American Medical had no Vicksburg enrollees for its commercial product, and the anticipated Warren County Medicaid pilot program (in which Richardson hopes to participate as an HMO provider) had not begun operations. Richardson testified that there are only fourteen HMOs in Mississippi, all in varying stages of development including those with membership, those that are poised to begin services, and those "that are just in the loose stages of forming and developing." (Trial Tr. at 385.) With respect to managed care companies, Richardson further stated, "... almost everyone in Mississippi is a new kid on the block." (*Id. at 388*.)

The Court found informative Mr. Pitts's testimony about his company's efforts to construct its Vicksburg network of physician providers.<sup>10</sup> At the time of trial, United Health had contracted with primary care physicians and specialists who practice independently in the Vicksburg area [\*\*41] and at the [\*1119] Vicksburg Clinic. According to Pitts, the "rule of thumb" in developing a network of physician providers is to attempt to contract with representatives of every service available in the market (primary care physicians, cardiologists, etc.) and to secure as large a representation as possible. Pitts stressed that, particularly in a fledgling managed care market like Mississippi, a managed care product designer needs to attract new customers by offering the broadest physician choice possible in its provider network. Ideally, the network would include from 40% up to 100% of the primary care physicians available in the local market; in Vicksburg, it also would include physicians located in towns within close proximity to Vicksburg and Jackson specialists, if none are available in Vicksburg. By way of example, Pitts testified that it would not be desirable, from a marketability standpoint, to contract solely with the Mission Clinic in establishing his network of physician providers because this would result in a very limited representation. He conceded, nonetheless, that the five or six primary care physicians associated with the Mission Clinic would be sufficient to service the [\*\*42] adult primary care needs of his company's entire customer population in Vicksburg and Warren County.

Similarly, Ms. Richardson testified that health care consumers prefer a broad choice of physicians on HMO provider panels. In terms of marketability, Richardson stated that she would want to have at least one of the two largest clinics in Vicksburg on her panel. Although she already has a contract with the primary care physicians at the Vicksburg [\*\*43] Clinic, she nonetheless has contracted with other physicians, including those at the Mission Clinic and the Better Living Clinic. Richardson testified that her company is continuing to meet and negotiate with physicians in order to broaden its Vicksburg provider panel.

Based on the evidence, including the aforementioned trial testimony, the Court finds as a fact that the managed care industry is still in its early stages of development in the Vicksburg area. Indeed, managed care providers are just beginning to enter the Vicksburg health care market. They are in the process of simultaneously building the broadest possible provider panels and establishing first-time client relationships with area employers. At this juncture, managed care purchases of physician services in Vicksburg can hardly be described as a well-defined, economic entity within the meaning of *Brown Shoe*.<sup>11</sup> In sum, it is this Court's view that Columbia is, at best, precipitous in seeking submarket status for a very limited and economically immature segment of the Vicksburg

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<sup>10</sup> As used in the managed care industry, Pitts defined "provider" to mean anyone who delivers health care services such as physicians, hospitals, home health agencies and emergency service companies. Perhaps most frequently, the term is used in reference to physicians. A "network of providers" refers to the total health care delivery system constructed by the managed care company and offered to its customers. The network is comprised of all health care providers who have contracted with the managed care company to provide health care services. (Trial Tr. at 270-71.)

<sup>11</sup> The Court notes that the record is silent as to the total dollar amount of multispecialty physician services purchased by managed care in Vicksburg or anywhere else.

physician services market. See *Butterworth Health Corp.*, 946 F. Supp. 1285, 1996 WL 570479, at \*15 & n.5 (criticizing the FTC for its artificial and misleading [\*\*44] focus on recipients of hospital services purchased by managed care at discounted rates -- a very limited segment of hospital care consumers).

The premise of Columbia's proposed multispecialty clinic submarket is that, postmerger, a managed care plan must purchase physician services from the River Region multispecialty clinic in order to have a marketable provider panel. At the heart of this premise is Dr. Eisenstadt's opinion that, in communities where multispecialty clinic services are available, managed care plans prefer to "one-stop shop" at the multispecialty clinic, rather than build a provider panel of smaller clinics and independent physicians. (Trial Tr. at 2044.) In essence, Columbia claims that the River Region Clinic will be the only place to one-stop shop in Vicksburg after the merger and that no substitute for this multispecialty [\*\*45] clinic will be available to managed care plans. The Court concludes that Columbia's fundamental premise in this regard is unfounded.

**HN16** It is well-established that, in defining a market, one must determine whether products or services exist that are good substitutes for the product or service in question. *Brown Shoe*, 370 U.S. at 325; see generally ANTITRUST ADVISER § 1.23 (Irving Scher ed. 1995). Based on the testimony of Charles Pitts, the Court finds as a fact that physicians not associated with the Vicksburg and Street Clinics are currently [\*1120] being used by, and are available for use by, managed care plans. Nothing in the record suggests that independent physicians in the Vicksburg area or physicians associated with the smaller Vicksburg clinics (e.g., the Mission Clinic) are incapable of providing acceptable physician services to managed care plans. To the contrary, the testimonial and documentary evidence indicates that a number of physicians such as Drs. Sessums (Mission Clinic), Daniel Dare (Southern Orthopedics), Yoshinobu Namihira (Better Living Clinic), Roy Kellum, Joel Payne, Earl Stubblefield and James Tucker serve on managed care panels. (Trial Tr. at 146, 148-49, [\*\*46] 283; Exhibits DVC-373; DQ-532, -533, -534, -535, -536, -541, -545, -546, -547 and -551; PX-454.) Pitts voiced no dissatisfaction with the independent physicians currently serving on his company's panel and expressed a clear desire to sign up as many of these doctors as possible. It therefore appears to this Court that there is an inconsistency between Dr. Eisenstadt's opinion and the testimony of Mr. Pitts. Although Dr. Eisenstadt's opinion regarding one-stop shopping may hold true in other parts of the country, the Court finds that it is not the rule in Vicksburg's yet-to-be-developed managed care market. As Mr. Pitts credibly testified, the best standard in Vicksburg is an offering of the broadest physician choice possible at this stage of managed care development. The Court further notes that, even if one-stop shopping were the preference of managed care companies in Vicksburg, there is nothing in the antitrust laws or in our precedent that protects a consumer's shopping preference where viable substitutes are available in the market. Simply put, the antitrust laws protect consumer access to free and competitive markets; they do not protect the personal likes and dislikes of every [\*\*47] consumer in that market.

Thus, in the total absence of evidence to prove the incompetence of any Vicksburg area physician who is not associated with the Vicksburg or Street Clinics, this Court finds as a fact that, from an antitrust perspective, valid substitutes for the physician services offered by the two dominant clinics not only exist in Vicksburg but they are being solicited by managed care providers.

Before leaving this issue the Court notes that, to the extent Columbia is claiming submarket status based on the distinct discount pricing that is associated with managed care purchases (see Columbia Posttrial Letter at 4), the Court rejects this argument as myopic. Although distinct pricing is one of the indicia to be considered under the *Brown Shoe* submarket test, the seven factors listed in *Brown Shoe* are neither comprehensive nor definitive and must be applied in accord with the peculiar attributes of any given market and the specific facts of a given case. Considering the totality of the record evidence in this case, Columbia's proposed submarket of managed care purchases of physician services does not pass muster under *Brown Shoe*. *Brown Shoe*, 370 U.S. at [\*\*48] 325; see also *Marshfield Clinic*, 65 F.3d at 1409, 1411 (HMO, a method of discount pricing, was not a separate product market in the light of record evidence).

#### **d. The Hospital Market**

Columbia defines the relevant hospital services market as "acute inpatient hospital services provided *in common* by Parkview and VMC." (Plaintiff's Proposed Findings of Fact and Conclusions of Law at P 116; emphasis in original.)

Quorum offers no opposition to this market. In fact, Quorum's expert, Mr. Oliver, affirmatively testified that acute inpatient hospital services constitute a relevant product market in this case. (Trial Tr. at 2805.) The Court therefore finds that Columbia has identified an appropriate hospital services product market.

## 2. The Geographic Markets

The next hurdle that Columbia must overcome in presenting its *prima facie* case is to define the proper geographic market for each identified product market.<sup>12</sup> See *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 669, 41 L. Ed. 2d 1016, 94 S. Ct. 2788 [\*1121] (1974) (HN17↑) burden of producing evidence of geographic markets rests with the plaintiff). A properly defined geographic market reflects the commercial realities of the industry at issue and is one [\*\*49] that is economically significant. *Brown Shoe*, 370 U.S. at 336-37. The Fifth Circuit has explained that the geographic component of a relevant market definition encompasses the area of effective competition in which the product or its reasonably interchangeable substitutes are traded. *Hornsby Oil Co. Inc. v. Champion Spark Plug Co., Inc.*, 714 F.2d 1384, 1393 (5th Cir. 1983). Stated otherwise, the key question in determining a geographic market is "where does a potential buyer look for potential suppliers of the service--what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative services?" *United States v. Grinnell Corp.*, 384 U.S. 563, 588-89, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). Our precedent unmistakably demonstrates that delineating geographic markets is no easy endeavor and that some "fuzziness" may be inherent in any attempt to do so. *Philadelphia Nat'l Bank*, 374 U.S. at 360 n.37. This case is no exception.

### [\*\*50] a. Primary Care

At its broadest, Columbia delineates the geographic market for primary care physician services as Warren County and five surrounding zip codes: 71282 (Tallulah, Louisiana); 39150 (Port Gibson, Mississippi); 39086 (Hermanville, Mississippi); 39144 (Pattison, Mississippi); and 39156 (Redwood, Mississippi) (Exhibit PX-419.) Columbia's expert, Dr. Eisenstadt, testified that 87% of the visits to the primary care physicians at the Vicksburg, Street and Mission Clinics (the "representative clinics") were made by patients living in this geographic area. (Trial Tr. at 2132.) Dr. Eisenstadt based this opinion on physician visit data produced by the representative clinics to which he applied a modified Elzinga-Hogarty analysis.<sup>13</sup> Because [\*1122] of a lack of certain patient destination data, Dr. Eisenstadt

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<sup>12</sup> Having already disposed of Columbia's proposed multispecialty clinic submarket, the Court has no need to address the evidence of geographic market for that product and no need to address any remaining issues related to that proposed submarket.

<sup>13</sup> HN18↑ The Elzinga-Hogarty ("E-H") test is a well-known tool of economists that was devised by Professor Kenneth B. Elzinga of the University of Virginia and Thomas F. Hogarty, formerly professor of economics at Virginia Polytechnic Institute and State University. Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45 (1973) [hereinafter Elzinga & Hogarty, *Market Delineation*]; Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation Revisited: the Case of Coal*, 23 ANTITRUST BULL. 1 (1978) [hereinafter Elzinga & Hogarty, *Market Delineation Revisited*]. In a merger setting, the purpose of the E-H test is to analyze patterns of consumer origin and destination and then to use that information to identify geographically the relevant competitors of the merging firms. *F.T.C. v. Freeman Hosp.*, 69 F.3d 260, 264-65 (8th Cir. 1995); *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1266 (N.D.Ill. 1989), aff'd 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920, 112 L. Ed. 2d 249, 111 S. Ct. 295 (1990). As explained by Professor Elzinga, a geographic market is an area where there are (1) relatively few imports of the product (little comes in from the outside or LIFO); and (2) few exports of the product (little goes out from the inside or "LOFI"). Kenneth G. Elzinga, *Defining Geographic Market Boundaries*, 26 ANTITRUST BULL. 739, 742 (1981) [hereinafter Elzinga, *Market Boundaries*]. At trial, Dr. Eisenstadt explained in basic terms that the E-H test is a matter of looking at how many people leave an area to get services (outflow) and how many people come into an area to get services (inflow). (Trial Tr. at 2064-66.) Both inflow and outflow are important in determining how much prices would have to increase within that area before lost business would make the price increase unprofitable. (*Id.*)

The methodology used in performing a traditional E-H analysis entails a minimum of four steps and employs two key calculations: LIFO and LOFI (defined above). Elzinga & Hogarty, *Market Delineation I* at 73-76 (outlining four-step process for

was unable to perform a complete E-H analysis of patient inflows and outflows in the primary care and other physician markets. Specifically, Dr. Eisenstadt had data showing the area from which the representative clinics draw their patients, which permitted him to perform a LOFI measurement (defined *supra* at note 13). He could not, however, perform a LIFO measurement (defined [\*\*51] *id.*) because none of the clinics, the State of Mississippi or any other public source keeps records that show where the residents of a specific area go for physician services. Notwithstanding the lack of patient destination data, Dr. Eisenstadt was able to express an unqualified opinion regarding the geographic market for primary care due, in part, to his experience in drawing inferences from hospital markets (for which there was complete patient flow data). (Trial Tr. at 2132-33.)

[\*\*52] In its challenge to the proposed geographic market, Quorum's expert, Mr. Oliver, stated to the Court that the defendants were not trying to define their own version of the geographic markets for physician services; instead, they were trying to show where it was likely that patients "come from and where they travel . . ." (*Id.* at 2706.) In this spirit, Mr. Oliver suggested that Columbia's proposed geographic market for primary care physician services was illogical because it extended thirty-six miles west but only seventeen miles east. Mr. Oliver postulated that, if people were willing to drive thirty-six miles in one direction, they would be willing to drive the same distance in all directions. To illustrate his point, Mr. Oliver presented the Court with a collection of diagrams, which are no doubt similar to what another Judge has described as "a dizzying series of concentric circles." Cf. *Marshfield Clinic*, 65 F.3d at 1411 (Posner, J.) (equating the plaintiff's proposed market derived from concentric circles drawn around clinic offices with a hunt for the snark of delusive exactness); Exhibits DQ-612-13. In Mr. Oliver's diagram of the primary care geographic market, each [\*\*53] circle represents an area thirty-six miles in radius that surrounds a community outside of Dr. Eisenstadt's proposed geographic market where, nonetheless, a family practitioner or internist practices.

estimating market size in terms of area and volume). The analysis begins by locating the larger of the merging firms and drawing a hypothetical market area around the firm. Professors Elzinga and Hogarty initially suggested that the analysis should begin by drawing the minimum geographic area necessary to account for 75% of product shipments from the merging firm. This hypothetical area would be redrawn or adjusted throughout the analysis to reflect the results of the LIFO and LOFI calculations. *Id.* at 73-74. They subsequently ratcheted upward the initial 75% benchmark. Elzinga & Hogarty, *Market Delineation Revisited*, *supra*, at 2; see discussion *infra* at note 15.

To better illustrate the mechanics of the analysis, an economist studying a hospital merger would begin by drawing a hypothetical or provisional "service area" around the larger of the merging hospitals. The provisional service area would represent the economist's initial estimate of the basic area from which the merging hospital attracts its patients. *Freeman Hosp.*, 69 F.3d at 264. In order to pinpoint where patients reside, the economist would compile a record of patient zip codes from the hospitals' patient discharge data. Using patient zip codes, the economist could then study the patients who reside within the provisional service area to determine where those patients go for hospital services. If it is discovered that the patients who live within an area use hospitals outside of that area, the economist has a basis for concluding that the outlying hospitals will act as a check on the exercise of market power by the merging hospitals. *Id. at 264-65* & n.9; *Rockford*, 717 F. Supp. at 1266.

Once satisfied with the hypothetical LIFO market, the economist would use zip code data to perform a LOFI measurement of the percentage of hospital patients who reside within the service area. This calculation assists the economist in determining whether a significant number of "immigrating patients" (i.e., patients who reside outside of the service area) travel into the service area for hospital care. If a large number of immigrating patients use hospitals located within the service area, the economist may conclude that outlying hospitals located nearer to the immigrating patients' residences could act as a check on the exercise of market power by the service area hospitals. *Rockford*, 717 F. Supp. at 1266.

In essence, LOFI measures patient immigration into the service area (or "inflow" in Dr. Eisenstadt's terminology), and LIFO measures patient outmigration (or "outflow"). *Rockford*, 717 F. Supp. at 1266-67.

Although often used in merger studies, the E-H test is not without its critics. *E.g.*, Elzinga & Hogarty, *Market Delineation Revisited*, *supra*, at 1-17; Elzinga, *Market Boundaries*, *supra*, at 739-52 (responding to Gregor y J. Werden's criticism of E-H test for, among other things, its focus on shipments data as the proper variable for estimating geographic market areas); see also *Rockford*, 717 F. Supp. at 1267 (court acknowledged general efficacy of the E-H test but criticized defendants' result-oriented application of the test).

Because it is not supported by record evidence, the Court rejects Mr. Oliver's theory that patients are just as likely to drive a certain distance in one direction as in any other direction<sup>14</sup> [\*\*55] and therefore finds that Quorum's concentric circle illustrations lack [\*\*1123] probative value in determining the geographic market for primary care services. More probative was Mr. Oliver's calculation and illustration of the area from which 90%<sup>15</sup> of the internal medicine and family practice visits to the Vicksburg and Street Clinics originate. (Exhibit DQ-612.) The Court notes that Mr. Oliver did not analyze data from the Mission Clinic. This analysis nonetheless resulted in a slightly larger geographic area than the one proposed by Dr. Eisenstadt and included certain communities that Dr. Eisenstadt had excluded such as Utica and Edwards, Mississippi. (Trial Tr. 2697.) Inexplicably, Quorum did not counter Dr. Eisenstadt's provisional service area with evidence of 90% of all primary care visits to [\*\*54] the representative clinics but instead focused on just two components of primary care and two of the representative clinics. Conceivably, the geographic market based on 90% of all primary care visits (not just internal medicine and family practice) would be even larger than the market presented by Quorum. However, no party has introduced evidence that supports such a configuration, and the Court is left to choose between a proposed geographic market that corresponds to the relevant product market (i.e., primary care physician services) and one that, for no reason apparent on this record, does not. Having thoroughly reviewed the record before reaching a decision on this issue, the Court has weighed, among other things, Dr. Eisenstadt's detailed testimony regarding the rationale behind his methodology with the troublesome gaps that pepper the expert testimony offered by Quorum. On this record, the Court must choose Columbia's proposed geographic market of Warren County and the five surrounding zip codes as set forth on Exhibit PX-419.

#### [\*\*56] b. Pediatrics Submarket

Columbia proposes a pediatrics geographic market consisting of the area where patients reside and who account for 88% of the pediatric visits to the Vicksburg and Street Clinics. (Exhibit PX-430.) Roughly, this geographic area encompasses Vicksburg and the immediately surrounding zip codes. (Trial Tr. at 2141-42.) Dr. Eisenstadt testified that Columbia's proposed geographic area for the pediatrics market was very close in size and zip code identity to that of the hospital market, which he consistently used as a reference point in drawing the provisional geographic markets. Quorum offered no alternative geographic market for pediatrics and no specific challenge to Columbia's proposal. In the absence of opposition (setting aside Quorum's general opposition to the recognition of pediatrics as a submarket), the Court accepts Columbia's proposed geographic market for pediatrics.

#### c. General Surgery

Columbia proposes a general surgery geographic market consisting of the area where patients reside and who account for 82% of the general surgery visits to the Vicksburg and Street Clinics, the only clinics that offer general surgery services. (Exhibit [\*\*57] PX-429.) Like the geographic market for pediatrics, Columbia's proposed area for general surgery encompasses Warren County and the immediately surrounding zip codes.

Quorum offers an alternative geographic market that consists of an area representing patients who comprise 90% of the general surgery visits to the Vicksburg and Street Clinics. (Exhibit DQ-614.) This area includes Warren

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<sup>14</sup> Not only is there no record evidence to prove that patients willingly drive thirty-six mile distances irrespective of the direction traveled, but the theory itself defies logic. It seems much more logical to this Court that simple reasons such as highway conditions and the quality of the services available at the end of the road will effect a person's decision to drive or not to drive.

<sup>15</sup> The proper inclusion percentage or "cutoff point" is hotly debated among experts and generally falls, depending on the product involved, in the range of 75% (the benchmark initially endorsed by Professors Elzinga and Hogarty) to 90% (now accepted as indicating a "strong market"). See discussion *supra* at note 13; *Freeman Hosp.*, 69 F.3d at 264. In a physician services market, for example, this percentage is nothing more than the economist's determination of what portion of the patient population should be included in the service area in order to paint an accurate picture of the physicians' main patient base. It therefore defines "the degree of inclusiveness of the service area, or the degree to which the area accounts for the physicians' business." *Freeman Hosp.*, 69 F.3d at 264 n.8. An inverse relationship thus develops: the lower the cutoff point, the higher the amount of patient business that is not included in the analysis. Despite this dichotomy, experts may favor a low cutoff point, if, for example, immigrating patients are not representative of the main patient base because they overwhelmingly seek specialized services. *Id.*

County and approximately ten [\*1124] surrounding zip codes. (*Id.*) Mr. Oliver suggested that the geographic market could be even larger than this 90% area if one took into consideration the overlap among concentric circles of thirty-six and fifty-one mile radii drawn around nearby cities with general surgeons. (*Id.*; Trial Tr. at 2699-2700.)

The Court declines to adopt Mr. Oliver's concentric circle theory for the reasons explained above. See *supra* discussion at Part I.C.2.a. The Court would be inclined to accept Quorum's proposed 90% area, but the record evidence suggests that there are no general surgeons who practice in Quorum's additional outlying area (i.e., the area that exceeds Columbia's proposed 82% geographic market area). (Trial Tr. at 2141.) Ultimately, this means that, whether the Court [\*58] accepts Columbia's 82% area or Quorum's 90% area, the geographic market selected will have no impact on calculating market concentration -- the final element in the plaintiff's *prima facie* case and the last step in this analytical exercise. See market share discussion at Part I.C.3. below. Because the testimony indicates that reasonable economists differ in their choice and use of inclusion percentages, and because the Court's determination of this geographic market will have little or no effect on the calculation of postmerger market share in general surgery, the Court accords Columbia the benefit of the doubt and accepts its proposed geographic area for the general surgery market.

#### **d. Urology**

Based on the same methodology used for the preceding geographic markets, Columbia proposes a market for urology services that includes the area where patients reside and who account for 86% of the urology visits to the Vicksburg and Street Clinics, the only clinics in Vicksburg that offer urology services. (Exhibit PX-442.) Quorum proposes an area that represents the residences of patients who account for 90% of the urology visits to the two clinics. The record indicates that no independent [\*59] urologists practice in the Vicksburg area. (Exhibit DVC-395.)

Finding little material difference in the size of the 86% and 90% areas and no difference whatsoever in the ultimate market share calculations for these two proposed areas, the Court accepts Columbia's geographic market for urology services.

#### **e. ENT**

According to the testimony and other evidence, Columbia's proposed geographic market for ENT services represents the area where patients reside and who account for 90% of the ENT patients at the Vicksburg and Street Clinics (Trial Tr. at 2141; Exhibit PX-446), while that of Quorum represents 90% of the ENT visits to only one physician, Dr. Windham of the Street Clinic. (Trial Tr. at 2701; Exhibit DQ-611.) Finding little material difference in the size of the two proposed markets, the Court accepts Columbia's geographic market for ENT services.

#### **f. Acute Inpatient Hospital Services**

Columbia claims that the proposed geographic market for acute inpatient hospital services is Warren County, a portion of Madison Parish in Louisiana, and a portion of Claiborne County in Mississippi. (Trial Tr. at 2059; Exhibit PX-428; see Exhibit PX-411 for zip codes comprising the [\*60] provisional geographic market.) In addition to the VMC and ParkView hospital complexes, Columbia's proposed area contains two smaller hospitals: Claiborne County Hospital and Madison Parish Hospital. Dr. Eisenstadt testified that the four hospitals located within this provisional area exhibited a 17% inflow rate and an 18% outflow rate. The expert further explained that these inflow/outflow rates indicated that 17% of the patient discharges from the provisional area hospitals were comprised of patients living outside of the provisional area (i.e., the inflow rate) and 18% of patients living within the provisional area were discharged from hospitals other than the four hospitals located within the provisional area (i.e., the outflow rate). (Trial Tr. at 2077.) According to Dr. Eisenstadt, under a traditional E-H analysis of homogeneous products such as coal,<sup>16</sup> inflow and outflow rates [\*1125] of 10% or less would be considered to indicate a strong

<sup>16</sup>  [HN19](#) In addition to coal, examples of homogeneous products would include commodities such as crude, oil, steel and cement. [Callaway Mills Co. v. F.T.C.](#), 362 F.2d 435, 444 (5th Cir. 1966). In contrast, differentiated products are commonly associated with service sectors such as commercial banking or health care. A merger of differentiated product markets is said to

market. (*Id.* at 2074.) He added, however, that with differentiated products such as hospital services, inflow and outflow rates in excess of 10% were, in his experience, routine. (*Id.* at 2074-75.)

[\*\*61] Quorum proposes an initial hospital services geographic market comprised of the area where 90% of VMC's and ParkView's patients live. (*Id.* at 2765-66; Exhibit DQ-616.) Mr. Oliver testified that his proposed area was based on an analysis of patient inflow to the two hospitals, but he had not taken into consideration patient outflow. (Trial Tr. at 2766.) In drawing the proposed area, Mr. Oliver did not consider patient inflow or outflow with respect to any outlying hospitals such as those in Claiborne County or Madison Parish. (*Id.* at 2765-66.) Mr. Oliver did suggest, generally, that a number of hospitals, clinics and health centers within seventy-five miles of Vicksburg exert competitive influences on Parkview, which would argue in favor of a more expansive geographic market.

Mr. Oliver also analyzed patient origination data for the Jackson hospitals and placed particular emphasis in his testimony on the results of his review of patient data from the Methodist Medical Center ("Methodist") in Jackson. (Trial Tr. at 2716-20; Exhibits DQ-617-18.) Significantly, the record indicates that Methodist is located approximately twenty-nine miles from downtown Vicksburg and about fifteen [\*\*62] miles from the Warren County line. (Trial Tr. at 932-33.) In order to extract the effect of patient outmigration to Jackson for tertiary services that are not offered in Vicksburg (and which are not included in the acute inpatient hospital services market as defined in this case), Mr. Oliver isolated and studied only the hospital procedures that are performed by both the Vicksburg and Jackson hospitals. He concluded that Methodist was drawing patients from Vicksburg for procedures that were available at the Vicksburg hospitals.<sup>17</sup> (*Id.* at 2719.) Comparing the area from which the Vicksburg hospitals draw 90% of their patients with the area from which the six major Jackson hospitals draw 90% of their patients, Mr. Oliver noted a "significant overlap" and concluded that Jackson is in the same geographic hospital market as Vicksburg. (*Id.* at 2720.)

[\*\*63] Having listened to and reread the testimony and cross-examination of the two experts, and having reviewed the exhibits in evidence that they prepared, the Court is persuaded that the methodology employed by Columbia's expert is thorough and, as between the two alternatives, the more reliable on this issue. See *F.T.C. v. Freeman Hosp.*, 69 F.3d 260, 269 n.13 (8th Cir. 1995) ("District court has the discretion to evaluate the credibility of expert witnesses and accept the testimony it finds most plausible."). This is not to say that Columbia's provisional market for this product is free from flaws. One defect that Quorum notes is Columbia's failure to include in its geographic market the sites where consumers of acute care inpatient hospital services could practicably turn for alternative sources of the product should the merger be consummated. *Id.* at 268.<sup>18</sup> Sensitive to the fact of Methodist's [\*1126] close proximity to the Warren County line and the range of services offered at that hospital, the Court has carefully weighed the validity of including Methodist (as well as the other Jackson area hospitals) within the hospital services geographic market in this case. It is fair to [\*\*64] say that the evidence falls on both sides of the fence and pits a wealth of testimony regarding patient preferences for local hospitalization against the testimony of several Vicksburg physicians who claim that they are competing with and losing patients to the Jackson hospitals. Although one could easily conclude from this record that Jackson hospitals should be included in defining a geographic market for tertiary hospital services that are not offered in Vicksburg (such as cardiovascular surgery, neonatal

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occur when the products of the merging firms are close but not perfect substitutes. ANTITRUST ADVISER § 3.23 (Irving Scher ed. 1995). Because the entire notion of market share in the economist's competition model rests on the premise that all competing firms produce identical products, product differentiation presents an added wrinkle in estimating the anticompetitive consequences of a merger. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL *ANTITRUST LAW* § 11.6 (1985).

<sup>17</sup> However, only three of the zip codes included in Mr. Oliver's 90% provisional hospital market for the Vicksburg area overlap with the relevant Methodist zip codes. (Exhibits DQ-616-17.) According to Mr. Oliver's analysis, the overlap (zip codes 39066, 39180 and 39194) accounts for just 3.33% of Methodist's patients who receive the shared procedures.

<sup>18</sup> The Eighth Circuit in *Freeman Hospital* found that the FTC's *prima facie* case contained a fatal flaw because the agency failed "to present evidence addressing the critical issue of where consumers of acute care inpatient hospital services could practicably turn for alternative sources of the product should the ... merger be consummated and ... prices become anticompetitive." *Freeman Hosp.*, 69 F.3d at 268. The Court notes that, unlike the plaintiff in *Freeman Hospital*, Columbia addressed the issue of alternative sources at various times throughout this trial. (E.g., Trial Tr. at 103-04, 903, 1145-48; Exhibits PX-448-49.) The issue of alternative sources is further discussed at Part I.C.3.b.4. below.

intensive care and pediatric oncology), the same conclusion is not so apparent for primary and secondary services that are currently available at the Vicksburg hospitals. Considering the totality of the evidence (including the E-H analyses and other expert testimony and the testimony of market participants with respect to consumer habits, preferences, travel impairments, employment demands and managed care considerations), it is this Court's opinion that Vicksburg and the surrounding areas as identified by Columbia represent a viable, stand-alone geographic market for acute inpatient hospital services that is economically distinct from the Jackson market.

### **[\*\*65] 3. Probable Anticompetitive Impact**

**HN20** [↑] Once the relevant markets are defined, the plaintiff's final hurdle in presenting its Section 7 *prima facie* case is establishing probable anticompetitive impact within the relevant markets. Domed Stadium, 732 F.2d at 491. In a horizontal merger situation, there are two basic methods that a plaintiff can employ to meet its burden of proof: (1) demonstrate that the size of the merging entities "makes them inherently suspect in light of Congress' design to prevent undue [economic] concentration," resulting in a significant increase in market share and an undue market concentration; and (2) in cases where size is not inherently suspect, show that other characteristics of the market make the merger more economically harmful than the bare market share and market concentration statistics would otherwise indicate. *Id.* With respect to the physician services markets, Columbia relies on the first method and offers postmerger market share calculations to prove its case. However, because Columbia has alleged vertical injury in the acute inpatient care hospital services market, market share calculations are inapplicable to that claim. See *supra* [\*\*66] discussion at note 4. Columbia's proof of probable anticompetitive effect in that market must therefore be considered in the light of other structural consequences. Brown Shoe, 370 U.S. at 324.

#### **a. Market Concentration in the Physician Markets**

Regarding the physician markets, Columbia's expert testified that, based on office visit data, the River Region Clinic would have the following postmerger market shares in the geographic markets heretofore accepted by the Court:

- (i) 70% for primary care physician services;<sup>19</sup>
- [\*\*67] (ii) 100% for pediatric services;
- (iii) 100% for general surgery services;
- [\*1127] (iv) 100% for urology services; and
- (v) 67% (based on physician headcount) for ENT services.

(Trial Tr. at 2149-53; Exhibits PX-420-23.)

Quorum offers little or no direct attack on Columbia's calculation of these market shares. Like the defendants in *Butterworth*, Quorum apparently concedes that the merger will result in high market concentrations. *Butterworth Health Corp.*, 946 F. Supp. 1285, 1996 WL 570479, at \*7-8 (defendants offered no contest to expert testimony regarding market concentrations of 47% to 65% in general acute care inpatient hospital services market; court concluded that the FTC established its Section 7 *prima facie* case).

<sup>19</sup> The 70% figure represents market share calculated by office visits in the primary care geographic market that the Court accepted in Part I.C.2.a. above. That geographic market roughly consists of Warren County, Tallulah, Port Gibson, Hermanville, Pattison and Redwood. (Exhibit PX-419.) If the market were comprised solely of Warren County, Columbia claims that the market share based on office visits would rise to 92%. (Plaintiff's Proposed Findings of Fact and Conclusions of Law at P 95.)

Columbia concedes in its briefs that, if postmerger market share for primary care physician services is calculated by total primary care physician headcount rather than by patient office visits, the market share drops to 55% in the geographic market that the Court has accepted. (*Id.* at n.10.)

Based on this record, the Court accepts Columbia's calculation of the market share percentages, except for the pediatric services submarket and, as discussed in Part I.C.3.b.4. below, the primary care market. The record clearly indicates that less than 100% of the physicians practicing pediatric medicine within the geographic market accepted by the Court will be affiliated with the River Region Clinic. For example, Dr. Sessums of the Mission Clinic testified on cross-examination [\*\*68] that he personally devotes approximately 20% of his practice to pediatric care and that one of his partners, Dr. Giffin, devotes an even larger amount of time to pediatric patients. (Trial Tr. at 131-34.) Dr. Sessums further testified under cross-examination that other physicians at the Mission Clinic provide pediatric care, that his partners are qualified to take care of infants and children and, correcting a statement made in his direct testimony, that the River Region Clinic would not possess a 100% market share in pediatrics. (*Id.* at 132-34.) The evidence shows that of the five physicians currently associated with the Mission Clinic, four of these doctors are engaged in full-time practices. (Exhibits DVC-395, PX-454-55; Trial Tr. at 92-93.) However, with the possible exception of Dr. Sessums, there is no evidence in the record that would permit this Court to calculate the practice time that each of these physicians devotes to pediatric services.

In addition, the record contains solid evidence that Columbia has recruited and signed an employment contract with an internal medicine/pediatrician, Dr. Steven W. Venters, who is committed to begin work at the Mission Clinic in August [\*\*69] 1997. (Trial Tr. at 177, 1709, 1865-67, Exhibit DQ-153.) On this record, Dr. Venters's contractual commitment and imminent arrival in Vicksburg (conceivably before the resolution of this litigation) can neither be dismissed nor discounted by this Court in its assessment of the postmerger pediatrics market. *Marshfield Clinic, 65 F.3d at 1411* (physicians may be part of a market even if not presently active in it); see also 1992 DOJ and FTC Horizontal Merger Guidelines § 3.2 n.27, reprinted in PRIMARY SOURCE, *supra* note 4 ("Firms which have committed to entering the market prior to the merger generally will be included in the measurement of the market."). However, there is no evidence that indicates how much time Dr. Venters will devote to pediatric services, and the Court is therefore at a loss in assessing his impact on the postmerger market.

In presenting its market share evidence, Columbia has failed to take into account, in any manner whatsoever, the Mission Clinic physicians or any independent physicians who provide pediatric services in the Vicksburg area or who are qualified to do so. On this record, an accurate calculation of the River Region Clinic's postmerger [\*\*70] pediatrics market share is impossible. Weighing the evidence that four, and soon to be five, Mission Clinic physicians practice some unknown quantum of pediatric medicine against the evidence of five practicing pediatricians at the River Region Clinic, the Court is left with nothing more than an uncertain, but undeniably overstated, presentation of market concentration. The Court therefore holds that Columbia has failed, on this record, to bear its burden of proving probable anticompetitive effects in the pediatrics submarket.<sup>20</sup>

#### [\*\*71] [\*1128] b. Other Relevant Factors in the Physician Markets

**HN21** [+] Appellate courts have held that a district court acts within its discretion in determining that evidence of a high market share establishes a prima facie antitrust violation, which shifts the burden of rebuttal to the defendant. *United States v. Syufy Enter., 903 F.2d 659, 664 n.6 (9th Cir. 1990)*; see also *Rockford, 898 F.2d at 1285* (defendants' immense shares in a reasonably defined market create a presumption of illegality); *F.T.C. v. University Health, Inc., 938 F.2d 1206, 1218-19 & n.25 (11th Cir. 1991)* (if government makes its showing, presumption of illegality arises). The law is clear, nonetheless, that evidence of high market share does not require a district court to conclude that there is an antitrust violation. *Syufy, 903 F.2d at 664 n.6; United States v. Mercy Health Servs., 902 F. Supp. 968, 976 (N.D.Iowa 1995)* (market share statistics are not conclusive indicators of anticompetitive effects).

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<sup>20</sup> The Court observes that, even if Columbia had been able to prove undue market concentration in the pediatrics submarket, its recent and successful recruitment of Dr. Venters, a pediatrician and internist, would seriously undercut any claim that significant barriers to entry exist in the pediatrics market. *United States v. Syufy Enter., 903 F.2d 659, 664 (9th Cir. 1990)* (a high market share will not raise an inference of monopoly power in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors).

At first blush, the market share percentages in this case, which range from 67% to 100%, are staggering. However, lest the Court's vision of the forest should become obstructed by some very tall statistical [\*\*72] trees, a closer look at the human component behind each relevant market appears appropriate.

## 1. Urology

Starting with urology, which displays a 100% postmerger market share, the evidence shows that the entire market is comprised of only two urologists, Drs. Fagan and Humble. (Exhibit PX-454.) After the merger, both urologists plan to practice together at the River Region Clinic. Although Columbia urges this Court to find the merger presumptively unlawful on the basis of this 100% postmerger market share in urology, the evidence contains practical, common-sense reasons that justify a combined practice between these two doctors. According to the testimony of physician witnesses, the key issue for doctors is back-up or physician coverage. Dr. Fagan testified that coverage is a serious concern for physicians who want to take a vacation or a weekend off. (Trial Tr. at 986.) Dr. Fagan's testimony was echoed by Drs. Hopson ("Everyone likes call coverage.") and Sessums ("Generally physicians now that come out of residency desire to be with a group to provide coverage where you can have some off time."). (*Id. at 126, 2574.*) Considering the specific character of this two-person market [\*\*73] that exists within a relatively small medical community, this Court finds it inconceivable that Congress intended the Clayton Act to prohibit two urologists in Vicksburg, Mississippi from practicing together under the same roof. The practical effect of such an impractical statutory interpretation could be to deprive two physicians from taking alternate weekends off or an occasional family vacation. With the real-life implications of this alleged antitrust violation in mind, it appears to this Court that, if there is any arguable monopoly here at all, it is a "natural monopoly." *Marshfield Clinic, 65 F.3d at 1412* (clinic employing all twelve physicians in a county might be considered a "natural monopolist" -- a firm that has no competitors simply because the market is too small to support more than a single firm).<sup>21</sup>

[\*\*74] [\*1129] The Court cannot overemphasize the fact that the urology services market now under consideration is the relevant market exactly as it was proposed, defined and presented by Columbia. The Court further observes that Columbia's market study for VMC (entitled "Strategic Review FY '96") contains data showing that only 2.77 urologists are needed in a community of 90,000. (Exhibit DQ-121, p. HCA9679.) This same market study provides an estimated 1993 population of 29,100 for Vicksburg and 50,871 for Warren County. (*Id. at p. HCA9620.*) William Patterson of Columbia testified that he knew the current population of Vicksburg to be around 30,000 and that of Warren County to be in the range of 49,000 to 50,000. (Trial Tr. at 1992.) Dr. Sessums testified similarly that the approximate population of Vicksburg is 28,000 within the corporate city limits and 48,000 for Warren County. (*Id. at 85.*) It simply defies logic to imagine that federal law requires this Court to enjoin two urologists from working together in a market so small that it might only support two full-time urologists. As Judge Posner explained in *Marshfield Clinic* when analyzing a medical community too small to support [\*\*75] more than a handful of physicians":

<sup>21</sup> **HN22** [Footnote] Natural monopolies have been described as occurring when, "because of the high ratio of fixed costs to variable costs, a single firm has declining average costs at the level of demand in the industry, such that the single firm can supply the service more cheaply than two firms could." *United Distribution Cos. v. F.E.R.C., 319 U.S. App. D.C. 42, 88 F.3d 1105, 1122 n. 4 (D.C. Cir. 1996)* (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 12.1, at 343-45 (4th ed. 1992). One court has offered a shorthand definition: "a natural monopoly is a market that can practically accommodate only one competitor." *Nat'l Reporting Co. v. Alderson Reporting Co., Inc., 763 F.2d 1020, 1023-24 (8th Cir. 1985).*

For example, a small town may not be able to support more than one movie house. 3 PHILLIP AREEDA & DONALD R. TURNER, *ANTITRUST LAW* P 621 (1978). In such a case, demand is too thin and monopoly is inevitable. *Id.* Where the character of the market makes monopoly inevitable, commentators have observed that it would be futile and a waste of judicial resources to hold such a monopoly unlawful. *Id.*

Natural monopolies do not run afoul of the antitrust laws so long as the monopoly in question acquired and maintained its position by business acumen, superior quality or other honest means and did not exclude competitors improperly. *Nat'l Reporting, 763 F.2d at 1023-24;* see also *Marshfield Clinic, 65 F.3d at 1412-13.*

If an entire county has only 12 physicians, one can hardly expect or want them to set up in competition with each other. We live in the age of technology and specialization in medical services. *Physicians practice in groups, in alliances, in networks, utilizing expensive equipment and support.* Twelve physicians competing in a county would be competing to provide horse-and-buggy medicine.

*Marshfield Clinic, 65 F.3d at 1412* (emphasis added)

Having listened to fourteen days of trial testimony and arguments of counsel, having thoroughly reviewed the trial transcript and the evidence produced at trial, and finding no evidence on this record of improper exclusion of competitors from the urology services market or any other sign of unlawful monopoly power, the Court concludes that Columbia has failed to prove a Section 7 violation in the urology market.

## 2. General Surgery

As with urology, Columbia has demonstrated a 100% market share in general surgery. The evidence shows that only five general surgeons practice in Vicksburg. After the merger, these five surgeons plan to practice as a group at the River Region Clinic. Columbia's **[\*\*76]** "Strategic Review FY '96" (Exhibit DQ-121) contains data indicating that a total of 8.79 general surgeons are needed for a population of 90,000. (*Id.* at p. HCA9679.) There is no record evidence whatsoever to suggest that anyone has attempted to exclude competitors from entering the general surgery market as defined in this case.

Just as the court in *Marshfield Clinic* found no reason under the antitrust laws to force the twelve physicians in that market to compete with each other, this Court must reach the same result in this small market of only five general surgeons. Once again, the Court is reminded that the narrow general surgery market now under consideration is precisely the market that Columbia proposed and presented to this Court.

Even if the general surgery market in this case were not viewed as a natural monopoly, the evidence proves that substantial competitive forces from Jackson and encroaching surgical centers will restrain any potential that these five Vicksburg surgeons might have to exercise postmerger market power. The Court was impressed by the trial testimony of two general surgeons, Dr. W. Briggs Hopson of ParkView and Dr. Hendrik Kuiper of the Vicksburg **[\*\*77]** Clinic, who are part of the relevant market. Both surgeons testified emphatically that, in the field of surgery, the Jackson surgical community presents very serious competition for the Vicksburg surgeons.<sup>22</sup> Dr. Hopson explained in detail how **[\*1130]** he has lost vascular surgery patients to competition from the Jackson medical community. (Trial Tr. at 2501-02.) Dr. Hopson attributed much of his lost surgical business to the fact that he must refer patients to Jackson for procedures such as arteriograms that are not available in Vicksburg. Once in Jackson, many of these patients stay in the state capital for vascular surgery. (*Id.*) Dr. Hopson testified unequivocally that referrals to Jackson for services that are not available in Vicksburg have a significant adverse effect on his practice area. (*Id.*)

**[\*\*78]** The evidence further demonstrates that Jackson hospitals are becoming more and more visible to the Vicksburg community through alliances such as the West Mississippi Heart Network, an affiliation between Methodist and VMC. (*Id.* at 2400.) In addition, Jackson hospitals and surgeons are exerting their presence in the Vicksburg surgical market by proposing the development of satellite clinics in Vicksburg. See Exhibit DQ-528 (letter from Director of Business Development, Methodist Medical Center, discussing development of satellite clinic in Vicksburg by Methodist neurosurgeons).

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<sup>22</sup> For example, excerpted from Dr. Kuiper's cross-examination testimony is the following:

... That's the whole point I'm trying to make. And as a clinician I've understood for years we are in competition with Jackson, absolutely.

(Trial Tr. at 3074-75.)

Based on the testimony of the Vicksburg surgeons and on other record evidence, the Court finds as a fact that the Jackson medical community is a restraining competitive force on the general surgery market as defined in this case. This is exactly the type of competitive check, which operates outside of the defined geographic market area (and, in this case, is encroaching into the geographic market area via outreach programs and satellite clinics), that economists and courts recognize as a restraint on the merging firms' exercise of market power. *E.g.*, [Freeman Hosp., 69 F.3d at 264 n.9](#); see Trial [\*\*79] Tr. at 2724-25 (expert testimony of Mr. Oliver explaining significance of outlying competitive forces); see also discussion *supra* at note 13. On the record before this Court, there is no credible evidence to prove that the five Vicksburg surgeons in this market could exclude, in any realistic manner, the ever-increasing competition from Jackson's sophisticated surgical market. The ability of the Vicksburg surgeons to achieve such a feat is highly unlikely. Therefore, finding no evidence of power to exclude the Jackson competition, the Court concludes that Columbia has failed to prove a Section 7 violation in the general surgery market. See [Syufy, 903 F.2d at 671](#) & n.21.

### 3. ENT

By physician headcount, the ENT market in this case exceeds the urology market by only one physician. Of the three ENTs who practice in Vicksburg, one is a well-respected, established independent physician, Dr. Chester W. Masterson. (Trial Tr. at 1008.) Dr. Masterson was often referred to during this litigation as "Dr. Masterson Sr." because his son practices medicine with the Mission Clinic. It is assumed that the remaining two ENT specialists, Drs. Windham and Bradfield, will practice together [\*\*80] at the River Region Clinic, thereby creating a 67% market share for River Region in this three-physician market. The evidence indicates that Columbia recently assisted in the recruitment of Dr. Bradfield to The Vicksburg Clinic. (*Id. at 1588-89*.) The record fails to establish whether Dr. Bradfield is successfully integrated into the Vicksburg medical community or whether he has any longterm commitment to remaining in Vicksburg after the expiration of his one-year contract with Columbia. (*E.g., id. at 2658-59.*)

Columbia's own market study materials indicate that a population of 90,000 needs 2.75 ENTs. (Exhibit DQ-121, p. HCA9679.) Once again, the Court is faced with an extremely small physician market. However, unlike the urology and general surgery markets, the handful of ENTs comprising this market do not all practice at the same "firm" and therefore cannot be characterized structurally as a natural monopoly. Arguably, Columbia has made its *prima facie* showing in the ENT market based on the 67% postmerger market share. Nonetheless, the Court finds that a competitive balance exists [\*1131] in this market by virtue of the fact that the independent ENT, Dr. Masterson, Sr., is a well-established [\*\*81] Vicksburg physician and represents by himself 33% of the entire ENT market. Weighing the competitive force of Dr. Masterson, Sr., against the combination of Dr. Bradfield's immature practice and that of Dr. Windham, this Court cannot conclude that, after the merger, Drs. Bradfield and Windham will be capable of wielding the market power necessary to set prices or exclude or lessen competition in any substantial manner. [Syufy, 903 F.2d at 671](#) & n.21; [University Health, 938 F.2d at 1220-21](#) (acquired firm's weakness is one of many factors that a defendant may introduce to undermine predictive value of market share statistics); [Mercy Health, 902 F. Supp. at 976](#) (in analyzing the accuracy of market share statistics to predict postmerger anticompetitive effects, one of the factors that courts consider is the continuation of active price competition). Accordingly, Columbia has failed to carry its ultimate burden of persuasion in the ENT market.

### 4. Primary Care

By Vicksburg standards, the primary care market exhibits a critical mass that is not present in the other physician markets. Throughout this litigation, the parties have debated the actual physician headcount within [\*\*82] this market. To clarify the now blurred borders between who's in and who's out, the Court finds that the River Region Clinic can be expected to have a total of twenty-one primary care physicians, which are broken down as follows:

eight family practitioners, eight internists and five pediatricians. (*Accord Plaintiff's Response to Defs.' Proposed Findings of Fact at 7-8*).<sup>23</sup>

Quorum has introduced rebuttal evidence of fifteen primary **[\*\*83]** care physicians who practice within the geographic area accepted by the Court. According to Quorum, these physicians are available as substitutes for the River Region doctors (or will be available imminently in the case of Dr. Venters). Quorum's list of substitute primary care physicians is comprised of five practitioners at the Mission Clinic, one at VMC, four in Port Gibson, Mississippi, and five in Tallulah, Louisiana.<sup>24</sup> Based on a post-merger physician headcount of 21 primary care physicians at the River Region Clinic and 15 physicians who will practice elsewhere within the geographic area, the Court calculates a primary care market share of 58.33% at the River Region Clinic and 41.67% practicing independently or with other clinics.

**[\*\*84]** Arguing that the primary care physicians in Port Gibson and Tallulah are not acceptable substitutes for the River Region doctors, Columbia urges this Court to discount the presence of these nine physicians who currently practice within the relevant geographic market and to refrain from including them in any market share calculations. To support its position, Columbia relies on the expert testimony of Dr. Eisenstadt (Trial Tr. at 2134-39) and on consumer testimony regarding a general preference, based largely on proximity, for Vicksburg physicians. (*E.g., id. at 1148.*) At trial, Dr. Eisenstadt offered the only qualitative criticism of the Tallulah and Port Gibson primary care physicians. Columbia's expert opined that "the practice capabilities of some of the outlying primary care physicians in Tallulah and Port Gibson *may be limited.*" (*Id. at 2137*, emphasis **[\*1132]** added.)<sup>25</sup> Although Dr. Eisenstadt conceded that residents from Tallulah and Port Gibson could possibly use primary care physicians in Vicksburg, he maintained that the reverse was not true. (*Id. at 2139*; Eisenstadt testifying that People who live in Vicksburg would not *want* to be directed to a primary care **[\*\*85]** doctor in Tallulah or Port Gibson." (emphasis added)). Dr. Eisenstadt further testified that he had uncovered no evidence to indicate that Vicksburg residents travel to outlying areas for primary care.

**[\*\*86]** The Court finds that Columbia has missed the point. [HN23↑](#) Present consumer preferences are not dispositive in determining whether viable alternatives exist in any given market. [\*Freeman Hosp., 69 F.3d at 271.\*](#) The key inquiry must focus upon where consumers can practicably go for primary care services after the merger, not where consumers have been going, or where they would prefer to go. [\*Id. at 268-71.\*](#) With this principle in mind,

<sup>23</sup> By name, the primary care physicians included in this tally are: family practitioners Abraham, Barnes, Butler, Easterling, Ford, Johnston, McMillan and Stanley; internists Bouldin, Edney, Habeeb, Low, Pierce, Ross, Tribble and Williams; and pediatricians Roy, Sluis, Smith, Weiland and Weller. (*Plaintiff's Response to Defs.' Proposed Findings of Fact at 7-8; Exhibit P-455.*) Although the Court has found that Columbia failed to carry its burden of proof in the pediatrics submarket, the Court will nonetheless include pediatricians in its headcount of primary care physicians.

<sup>24</sup> The physician headcount at the Mission Clinic includes Drs. Chiarito, Giffin, Masterson, Sessums and, for the reasons given in Part I.C.3.a. above, Venters. Because the evidence indicated that Dr. Burford's partners have no expectation that she will return to practice, the Court has not included her in the physician headcount. (Trial Tr. at 93.)

The remaining nine substitute primary care physicians according to Quorum are: in Port Gibson, Drs. Headley, Barnes, Marshall and Amork; and, in Tallulah, Drs. Newman, Newman, Shenier, Polquitt and Perry. (Exhibit DVC-395.)

<sup>25</sup> Dr. Eisenstadt's supposition about Tallulah's and Port Gibson's limited primary care services is not corroborated by any specific record evidence, and the Court therefore views it as conjecture. See [\*Freeman Hosp., 69 F.3d at 270-71\*](#) (district court did not err in refusing to credit plaintiff's testimony regarding limited quality and range of services in outlying hospitals where record lacked sufficient data and contained no formal analysis in support of such assertions). The Court found more creditworthy the testimony of Charles Pitts, CEO of United Health, who indicated that his company would have no qualitative problem with including physicians in outlying towns on its managed care panel; his only concern was proximity to Vicksburg. (Trial Tr. at 282.) Similarly, Rissa Richardson, another managed care witness, voiced no qualitative opposition to the primary care physicians in Port Gibson and Tallulah. Richardson noted that, if the Warren County Medicaid pilot project begins operations, participating Medicaid patients would be required to visit primary care physicians located within thirty minutes average travel time from the patient's residence. There is no reliable data in the record to prove that any potential Medicaid patient would be foreclosed from visiting a Port Gibson or Tallulah physician because of distance or travel time.

it appears to this Court that the market share percentage espoused by Columbia, which is based on last year's office visits to only three Vicksburg clinics, falls into the fallacy of overemphasizing where consumers have gone in the past. Columbia's calculation of a 70% market share (which results in a number that far exceeds a market share calculation based on physician headcount) neglects the presence of qualified primary care physicians who are located within the geographic market area and are available to provide services to consumers. The Court therefore finds that a market share calculation based on the primary care physician headcount (i.e., 58.33%) is the more useful tool in this case for analyzing the probability of postmerger anticompetitive effects. **[\*\*87]** This conclusion is buttressed by the fact that the record contains no formal evidence of qualitatively inferior or unacceptable services being offered by primary care physicians in Port Gibson and Tallulah.

The Court is unaware of any prior case law that has addressed the issue of what market share percentage, in the context of a clinic merger, is necessary to create a presumption of illegality.<sup>26</sup> Columbia argues that, by **[\*1133]** analogy to hospital merger cases, the excessively high postmerger market shares in this case make the merger presumptively unlawful on the basis of any single market. See *University Health*, 938 F.2d at 1219 (in hospital merger, 43% market share of inpatient acute care hospital services market established FTC's prima facie case; this conclusion was appropriate in light of Georgia's certificate of need law that regulated hospital expansions and raised substantial entry barriers for new competitors); *Rockford*, 898 F.2d at 1283-85 (64-72% share of inpatient acute care hospital services market created presumption of illegality in hospital merger). The Court finds, however, that the hospital merger cases are not wholly applicable to the primary care market now **[\*\*88]** under consideration because of the very point emphasized by the court in *University Health*, i.e., barriers to entry. Unlike hospitals, primary care physicians who seek to establish a new practice are not required to demonstrate, to the satisfaction of state regulators, that there exists a public need for their services. *University Health*, 938 F.2d at 1219-20. As discussed in detail below, the Court finds that the totality of the evidence in this case demonstrates low entry barriers to the primary care market.

**[\*\*89]** Courts and commentators have defined barriers to entry as "either '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 Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993) (quoting AREEDA & HOVENKAMP, **ANTITRUST LAW** P 409 (1992 Supp.)), cert. denied, 510 U.S. 1197, 127 L. Ed. 2d 658, 114 S. Ct. 1307 (1994). This record contains no evidence whatsoever of new primary care physicians incurring longterm costs that were not incurred by already-established physicians. Cf. *Morgan, Strand, Wheeler & Biggs v. Radiology Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991) (cost of equipping a physician's office was not significant entry barrier where evidence did not permit comparison of that cost to potential competitors' resources or expected returns). Moreover, the Court is not persuaded by Columbia's attempts to prove that factors indigenous to the Vicksburg market act as a deterrent to new primary care entrants. Among other things, Dr. Eisenstadt expressed his opinion that a timely, likely and sufficient<sup>27</sup> entry of new physicians into

<sup>26</sup> **HN24** [↑] Antitrust case law exhibits a long-drawn-out battle over what percentage share of a given market is sufficient to demonstrate market power. E.g., *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 201-02 (3d Cir. 1992) (a plaintiff must show a "significantly larger" market share than 55% to establish a prima facie case of market power), cert. denied, 507 U.S. 921, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993); *White Bag Co. v. Internat'l Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974) (defendant must control at least 70% of the relevant market to be subject to a monopolization charge); *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945) ("[Over 90%] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent [60 or 64%] would be enough; and certainly thirty-three percent [33%] is not."). Understandably, the Supreme Court has never defined "undue percentage share" in terms of a hard and fast numerical threshold. *Philadelphia Nat'l Bank*, 374 U.S. at 363 (merger that produces a firm controlling an "undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is inherently likely to lessen competition substantially); see ANTITRUST ADVISER § 3.21 (Irving Scher ed. 1995). Notably, since the Supreme Court rendered its decision in *United States v. General Dynamics Corp.*, 415 U.S. 486, 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974), the emphasis in Section 7 merger cases has been to analyze carefully the likely harm to consumers, instead of accepting a firm's postmerger market share as conclusive proof of its market power. *United States v. Baker Hughes Inc.*, 285 U.S. App. D.C. 222, 908 F.2d 981, 990-91 & n.12 (D.C.Cir. 1990).

the [\*\*90] Vicksburg market would be unlikely because physician demand in the area is "relatively flat" and there is no need for additional primary care physicians in Vicksburg. (Trial Tr. at 2171, 2486.) The Court finds that this opinion is contrary to the greater weight of the testimonial and documentary evidence, which points to a need for additional physicians in this field.

[\*\*91] The margin for growth in the primary care market is apparent in Columbia's "Strategic Review FY '96." (Exhibit DQ-121.) This [\*1134] report contains data demonstrating that a population of 90,000 needs 21.71 general and family practitioners, 20.94 internists and 9.79 pediatricians. (*Id.* at p. HCA9679.) Taking into consideration the current physician headcount discussed above, Columbia's own market analysis suggests that the primary care market has not reached saturation. This conclusion was confirmed by Quorum's expert, Mr. Oliver, who testified that the Vicksburg area is underserved in the field of primary care and that the market has not reached the point of saturation. (Trial Tr. at 2680-81.) Dr. Fagan of the Vicksburg Clinic testified that the clinic needs more primary care physicians. (*Id. at 1041.*) In addition, the Court found credible on this point the trial testimony of Columbia executive William Patterson, who stated that "primary care is in strong demand." (*Id. at 1657.*)

The high demand for primary care and the opportunity for growth in Vicksburg is further evidenced by the abundant testimonial and documentary proof of Columbia's own pursuit of physician recruitment, [\*\*92] including Columbia's investment in the recruitment of primary care physicians through its medical service organization, VIP, Inc. (E.g., Exhibit DQ-121, p. HCA9602; Trial Tr. at 1582, 1586-90.) On this score, the Court was impressed by William Patterson's testimony regarding general opportunities for new physicians in the Vicksburg market. (Trial Tr. at 1589-90.) Although this testimony was given in response to a question about the recruitment of specialists (which is arguably a more difficult task than primary care recruitment because of a smaller patient base and the need to generate that base through referrals from primary care physicians), Patterson's general observations about entry into the Vicksburg market and the advantages to practicing in Vicksburg are relevant to the primary care market:

I saw no barriers that would preclude us from being successful in recruiting physicians to the clinic. My experience in working in very competitive areas in Florida were that physicians were quick to look to opportunities like Vicksburg to practice, that those communities were not as competitive, the managed care had not entered the area as aggressively as it had in other areas, [\*\*93] and there were good opportunities to develop your practice and make a nice living and have a nice life-style . . . .

(*Id. at 1589-1590.*)

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<sup>27</sup> The "timely-likely-sufficient" standard has its origins in the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (the "Guidelines"). 1992 DOJ and FTC Horizontal Merger Guidelines § 3, reprinted in PRIMARY SOURCE, *supra* note 4. It is important to note that the Guidelines are not binding on the courts or the agencies. *Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1300 (9th Cir. 1993), cert. denied, 510 U.S. 1110, 127 L. Ed. 2d 373, 114 S. Ct. 1051 (1994).

At the heart of this standard is the theory that a "merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels." Guidelines § 3.0 (emphasis added). "Easy" entry is evaluated under the Guidelines by applying the timely-likely sufficient standard. *Id.* Essentially, to be "timely," the new entrant must be able to enter the market and achieve a significant market impact within two years of the merger. *Id.* at § 3.2. To be "likely," the entry must be profitable at premerger prices, and the new entrant must be able to obtain those prices. *Id.* at § 3.3. The final and strikingly circular step in the analysis states that an entry or multiple entries will be "sufficient" to deter or counteract anticompetitive postmerger effects whenever such entry passes muster under the "likely" test in section 3.3 of the Guidelines. *Id.* at § 3.4.

Although both expert witnesses acknowledged the propriety of using the timely-likely-sufficient standard to evaluate market entry, they reached polar opposite conclusions regarding the existence of significant barriers to entry. Not surprisingly, Dr. Eisenstadt concluded that entry barriers were significant, but Mr. Oliver concluded that they were not. (Compare Trial Tr. at 2168, 2171 with *id. at 2626-27, 2849.*)

Indeed, this Court would be hard-pressed to conclude that significant barriers to entry into the primary care market exist in the light of Columbia's recent and successful recruitment of three new primary care physicians to Vicksburg: Drs. Chiarito, Wooten and Venters. (Exhibit DQ-153.) Notably, Patterson testified that it took only two to three months to recruit Drs. Wooten and Venters. (Trial Tr. at 1708-09.) Also of note is the fact that Columbia succeeded in recruiting these three primary care physicians while merger discussions were pending between the Vicksburg Clinic and ParkView, and then succeeded in signing multiyear contracts with each of the new doctors after ParkView and the Vicksburg Clinic had executed their final Merger Agreement. This fact alone gives the Court serious pause when it weighs the credibility of Dr. Eisenstadt's opinion that a timely, likely and sufficient entry of new physicians after the merger is not feasible. (*Id.* at 2171.) Coupled with Dr. Sessums's estimate that a primary care physician can build [\*\*94] a successful practice in two to three years, and the fact that it is not uncommon for hospitals, such as Columbia, to guarantee a new physician's income for two years (the period of time generally considered necessary to establish a practice), this Court cannot conclude that a "timely" entry -- even one in strict compliance with the Guidelines -- is unlikely on this record. (*Id.* at 124, 126; see also Exhibit DQ-153 which summarizes employment contract terms and base salaries that Columbia offered to Drs. Chiarito, Wooten and Venters.) The Court therefore finds that it cannot accept Dr. Eisenstadt's opinion regarding the existence of significant entry barriers to this market.

In reaching this conclusion, the Court has not ignored the testimony of Columbia's physician recruiter, John McAfee of Hunt Company International. Mr. McAfee described problems that he has encountered with recruiting physicians to Vicksburg, in particular, and Mississippi, in general. He testified [\*1135] that negative perceptions and stereotypes about Mississippi exist, which make recruitment to Vicksburg difficult. (Trial Tr. at 210, 213, 230.) However, in the light of the greater body of evidence that indicates [\*\*95] strong entry opportunities into the Vicksburg primary care market, the Court finds that one witness's impressions about regional perceptions falls short of proving an entry barrier of any seriousness. See [Benjamin v. Aroostook Medical Center, 937 F. Supp. 957, 966 \(D.Me. 1996\)](#) (barriers to entry are technical concepts which require detailed supporting evidence).

Also considered was Columbia's evidence regarding its own peculiar problems in attracting and keeping new primary care physicians among its ranks in Vicksburg. However, after listening to two weeks of testimony from a host of witnesses, many of whom were Vicksburg doctors and hospital professionals, and after reviewing a wealth of documents, this Court is overwhelmingly persuaded that the root cause of Columbia's particular problems has not been antitrust-type entry barriers. Instead, a history of strained relations and personality conflicts has permeated the Vicksburg Clinic's association with VMC and Columbia management, which has culminated in this lawsuit and has had a direct, and perhaps continuing, influence on Columbia's recruitment efforts in primary care and elsewhere. (E.g., Trial Tr. at 231, 459-460, 648, [\*\*96] 1672; Exhibit DQ-65, p. HCA4561 ("Strategic Review 1994-1995" stating that "because of the personalities of the physicians it is very difficult to recruit to this group. We cannot allow their lack of expertise to hinder the build up of the medical staff, and we will be very political in our efforts concerning this group.").<sup>28</sup>

Once again, the Court was struck by William Patterson's testimony, of which the following is exemplary:

COUNSEL: You said that there had been problems in the past with respect to recruiting primary care physicians to the clinic. Would you describe to us what you mean by that.

PATTERSON: Well, there had been physicians who had been recruited and after a year or two had left due to personality differences in classes ... personality differences that had led individuals, specifically Dr. [\*\*97] Loper, who I had subsequent conversations with, to leave the clinic.

(Trial Tr. at 1600-01.)

In any event, precedent instructs that [HN25](#)<sup>29</sup> courts must not dwell on an individual competitor's singular problems. In accord with the broad purpose of [antitrust law](#), the proper focus must be on proof of harm to the market as a whole. [Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 543](#) (2d

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<sup>28</sup> Another nonantitrust concern that has dampened Columbia's recruitment prospects is the lack of additional physical space for any new physicians at the Mission Clinic. (Trial Tr. at 1659.)

Cir.) (interpreting *Atlantic Richfield*, 495 U.S. at 342-22), cert. denied, 510 U.S. 947, 126 L. Ed. 2d 337, 114 S. Ct. 388 (1993)); *Oskanen v. Page Memorial Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991) (to prevent antitrust laws from becoming trivialized, the key is impact on competition as a whole within the relevant market; workplace grievances between physicians and hospitals should not be elevated to the status of an antitrust action), cert. denied, 502 U.S. 1074, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992).

Considering the significant weight of evidence that proves an absence of entry barriers into the primary care market, the Court concludes that the River Region Clinic's postmerger market share, whether calculated at 58.33% as the Court has done or at the higher levels endorsed by Columbia, does not establish market [\*\*98] power on the part of the merging primary care physicians. *Syufy*, 903 F.2d at 664 & n.6. On the facts of this case and in the absence of proof of market power, Columbia has failed to establish a Section 7 violation in the primary care market. *Id. at 671*.

### c. Acute Inpatient Hospital Services

As previously noted, Columbia's claim in the hospital market is a vertical one, which is premised on the theory that a postmerger [\*1136] economic alignment between the Vicksburg Clinic and ParkView will cause physicians at the Vicksburg Clinic to steer their patients to ParkView rather than VMC. As explained by Columbia, "to prevail on this claim, Plaintiff must prove that Defendants will have market power in the physician markets and that the hospital market is sufficiently concentrated such that it is capable of sustaining competitive injury." (Posttrial Letter at 10.) The Court accepts Columbia's statement of the preconditions to its success on this claim. Accordingly, because the Court has found that Columbia failed to prove market power in the physician markets as discussed in detail above, an essential precondition to the hospital claim is not satisfied. Columbia's vertical claim under [\*\*99] Section 7 of the Clayton Act falls with its horizontal ones.

In addition to failing to satisfy the stated preconditions, Columbia has failed to prove any vertical illegality under the standard analytical framework. *HN26* [↑] Although no precise formula exists for determining whether a vertical merger may lessen competition, the traditional analysis involves an examination of certain market factors, which are applied to the merger at hand. *Brown Shoe*, 370 U.S. at 328-33; *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, 353 (2d Cir. 1979). Those factors include: the nature and economic purpose of the arrangement; the likelihood and size of any market foreclosure; the extent of concentration of sellers and buyers in the industry; the capital cost required to enter the market; the market share needed by a buyer or seller to achieve a profitable level of production or "scale economy"; the existence of a trend toward vertical concentration or oligopoly in the industry; and whether the merger will eliminate potential competition by one of the merging parties. *Brown Shoe*, 370 U.S. at 328-33. Some courts have added factors to the foregoing list such as the degree of market power that would be possessed [\*\*100] by the merged entity and the number and strength of competing suppliers and purchasers. *Fruehauf Corp.*, 603 F.2d at 353. By applying these factors to a given case, courts attempt to predict the probable future consequences of a vertical merger. *Brown Shoe*, 370 U.S. at 329-33.

Columbia's presentation at trial focused largely on the first two factors in the *Brown Shoe* litany: the nature and economic purpose of the arrangement and the likelihood and size of a vertical market foreclosure. At trial, Columbia sought to prove that the purpose of the merger is to align the financial incentives of the Vicksburg Clinic physicians with those of ParkView, thereby foreclosing Columbia from the primary source of its patient admissions. Testimony suggested that 80% or more of VMC's total patient activity is attributable to Vicksburg Clinic physicians. (Trial Tr. at 533.)

Having considered the totality of the evidence, the Court finds that there is no credible evidence that postmerger financial incentives will cause the Vicksburg Clinic physicians to shift their hospital patient admissions to ParkView. It is this Court's view that the testimony and expert opinion regarding a potential [\*\*101] shift in patient admissions to ParkView is conjecture that is based on an assumption lacking in evidentiary support. See *Fruehauf*, 603 F.2d at 354 (FTC's theory that vertical merger would provide incentive for supplier to divert sales to defendant in the event

of a product shortage lacked substantial evidentiary support).<sup>29</sup> Much like the FTC's diversion [**\*1137**] theory in *Fruehauf*, Columbia's patient shift theory does not appear, on its face, to be beyond the realm of possibility. *Id. at 355*. The theory nonetheless runs counter to the overwhelming weight of the record evidence. See *id.*

[\*\*102] The physician witnesses repeatedly testified at trial that the choice of hospital rests with the patient, not the doctor. In response to a question from the bench, Dr. Sessums testified that, since he began his practice in Vicksburg in 1983, he always leaves hospital choice to the patient. (Trial Tr. at 180.) Drs. Fagan, Habeeb, Hopson and Kuiper confirmed that the number one factor in admitting a patient to a certain hospital is the patient's preference. (*Id. at 1098, 1537, 2517, 3011-12.*) Dr. Hopson explained that, because of the historic Catholic affiliation with Parkview, religious reasons sometime underlie a patient's preference for one hospital over the other. (*Id. at 2518-19.*) The testimony of these physicians paralleled that of Columbia executive Patterson. According to Patterson, it's the patient's prerogative" in deciding where to be hospitalized. (*Id. at 1692-93.*)

While crediting patient preference as the primary determinant in hospital admissions, both Drs. Habeeb and Hopson testified that proximity to the hospital can play a role in hospital selection. Consistent with this observation, Dr. Habeeb, who is currently associated with the Vicksburg Clinic and [\*\*103] maintains his office on the VMC campus, testified that approximately 300 of his patients were admitted to VMC last year and only three of his patients went to Parkview. (*Id. at 1537-1538.*) Dr. Habeeb noted that, when a patient comes to the Vicksburg Clinic and needs to be hospitalized, the patient is likely to find VMC the most convenient because of its proximity to the clinic. (*Id.*) Similarly, Dr. Hopson, whose practice is located across the street from ParkView, testified that he will perform surgery at whichever hospital the patient prefers but that it is easier for him, because of proximity, to operate at ParkView. (*Id. at 2519-20.*) Dr. Hopson further testified that he earns the same surgery fee, which is based on a percentage of collections, whether the procedure is performed at VMC or ParkView. However, because of proximity, he can see more patients if they are admitted to ParkView. (*Id.*) Even William Patterson conceded that there would be a "clear preference" amongst doctors with patients in intensive care to be officed as closely as possible to the hospitalized patient in order to be responsive to their patients' needs. (*Id. at 1703.*)

In addition, the Court [\*\*104] finds as a fact that the Vicksburg Clinic's current office lease with VMC, which expires in the year 2006, creates a countervailing economic incentive for the physicians to maintain a cooperative association with VMC. The trial testimony indicated that Quorum intends for the Vicksburg Clinic to remain at its present location on the VMC campus and that the Vicksburg Clinic physicians have made no plans to move. (*Id. at 1014-15, 1438.*) No physical space is available at the Street Clinic to house the Vicksburg Clinic physicians, and there is no land available on the ParkView campus for construction of a new office building. (*Id. at 2603.*) Thus, in the light of the Vicksburg Clinic's pressing need for office space, the physicians' concerns that VMC, as lessor, might exercise its eviction powers under the lease (*Id. at 2980*), and the issues of patient choice, religious affiliation and proximity discussed above, the Court finds that any financial incentive or alleged ability on the part of the

<sup>29</sup> Illustrative of the overly speculative nature of Columbia's theory is the following excerpt from Dr. Sessums's testimony on cross-examination:

COUNSEL: You're not suggesting to us, are you, that Dr. Kuiper and his partners at the Vicksburg Clinic would make a decision based on their equity ownership in this hospital following the merger ... to hospitalize and overrule their patients' preference because of this equity ownership?

DR. SESSUMS: I don't know. I don't know. That requires a lot of speculation and things that I don't have any knowledge thereof.

(Trial Tr. at 181.)

Even more illuminating is the cross-examination testimony of William Patterson, Columbia's chief executive officer at VMC:

COUNSEL: And so you would agree, would you not, that doctors then will bring patients to Vicksburg Medical Center even though they may have a financial interest in ParkView.

PATTERSON: I think that that's -- that that's possible.

(*Id. at 1692.*)

960 F. Supp. 1104, \*1137L<sup>1997 U.S. Dist. LEXIS 5104, \*\*104</sup>

Vicksburg Clinic physicians to shift patients to ParkView is negated by the foregoing countervailing forces. Columbia's Section 7 claim in the hospital services market is therefore denied. **[\*\*105]**<sup>30</sup>

#### **[\*\*106] [\*1138] D. Merits of Section 2 Sherman Act Claim**

Among other things, **HN27** <sup>1</sup> Section 2 of the Sherman Act prohibits persons from combining or conspiring to monopolize interstate commerce among the states or with foreign nations. 15 U.S.C.A. § 2 (West Supp. 1996) [hereinafter "Section 2"].<sup>31</sup> The terms "combine" and "conspire" are used interchangeably by the courts and refer to the same offense. Richter Concrete Corp. v. Hilltop Basic Resources, Inc., 547 F. Supp. 893, 914 (S.D. Ohio 1981) (see cases cited therein), aff'd, 691 F.2d 818 (1982). The parties agree that the elements of a Section 2 conspiracy claim are:

1. the existence of specific intent to monopolize;
2. the existence of a combination or conspiracy to achieve that end;
3. overt acts in furtherance of the combination or conspiracy; and
4. an effect on a substantial amount of interstate commerce.

North Ms. Communications, Inc. v. Jones, 792 F.2d 1330, 1335 (5th Cir. 1986). One court has summarized the key requirements of a Section 2 conspiracy offense as specific intent, an agreement and at least one overt act. Servicetrends, Inc. v. Siemens Medical Systems, Inc., 870 F. Supp. 1042 **[\*\*107]** (N.D.Ga. 1994), amended on other grounds, 1994 U.S. Dist. LEXIS 15997, 1994 WL 776878 (N.D.Ga. June 24, 1994). On the facts of this case, the sole Section 2 element in controversy is whether Quorum specifically intended to monopolize the relevant physician and hospital markets.

<sup>30</sup> The Court is compelled to make a final observation regarding Columbia's financial incentive theory, which is prompted by William Patterson's response to a query from the bench:

COURT: ... Have you talked to any of the [Vicksburg Clinic doctors] about their willingness to continue to use your facility post-merger if the merger is allowed?

PATTERSON: Well, I don't know that I've posed that question to them directly in that sort of way. No, sir, I really haven't asked that question. I always hoped that they would but never really made that direct inquiry as to what their plans would be in that regard.

(Trial Tr. at 1721.)

The Court is perplexed by this testimony. If Columbia's executive officer at VMC, who has a professional and, in some cases, social relationship with the Vicksburg Clinic physicians, has sought no direct knowledge of the physicians' postmerger plans (notwithstanding his apparent ability to do so), how can this Court accept, instead, mere assumptions about the physicians' possible actions?

<sup>31</sup> Columbia's Section 2 conspiracy claim is not to be confused with a monopolization or attempted monopolization claim under that same statute. See statute reproduced *supra* note 2. Indeed, the claims of monopolization, attempt and conspiracy to monopolize under the Sherman Act are separate offenses that require distinct proofs. *E.g., Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 824, 844-45 (N.D.Ga. 1976) (see case citations therein). If the Section 2 allegation in this case were based on monopolization or attempted monopolization rather than conspiracy to monopolize, there could be no Sherman Act violation by virtue of the Court's prior findings with respect to the Clayton Act claims. Syufy, 903 F.2d at 671 & n.21 (by finding that defendant lacked power to set prices or to exclude competition under the Clayton Act, district court also disposed of plaintiff's monopolization and attempted monopolization under Section 2 of the Sherman Act). However, in a Section 2 conspiracy case, there is no need to consider monopoly power or market power in a relevant market. United States v. Yellow Cab Co., 332 U.S. 218, 225-26, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947), overruled on other grounds by Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984); Joe Westbrook, 419 F. Supp. at 845.

[\*\*108] Columbia argues that the evidence in this case overwhelmingly proves that Quorum acted with specific intent to monopolize because Quorum representatives and the Vicksburg Clinic doctors consistently expressed their desire to unify the Vicksburg medical community. Unification of the Vicksburg medical community, in Columbia's view, will lead to the creation of a one-hospital town. Columbia concedes, as it must, that it also has pursued the goal of "consolidating" the Vicksburg medical community and becoming the only hospital in town (e.g., Exhibits PX-103, DVC-182, DVC-186). Columbia asserts nonetheless that it has sought these goals through legitimate, competitive means such as physician recruitment, technology enhancement and improving patient care. (Trial Tr. at 1582.) In contrast, Columbia argues, Quorum seeks to achieve consolidation through an illegal and monopolistic merger that must be enjoined. Columbia's trek up the high road is somewhat tarnished by the fact that Columbia also proposed and discussed a merger deal with the Vicksburg Clinic physicians, which the physicians rejected in favor of the Quorum proposal. In addition, Columbia entertained the possibility of luring [\*\*109] the Street Clinic away from Parkview.<sup>32</sup> Columbia attempts to distinguish its [\*1139] proposed merger or joint venture with the Vicksburg Clinic from that of Quorum in temporal and structural terms. According to William Patterson, he had no short-term plans or intent to use the Columbia merger proposal as a vehicle for consolidating the Vicksburg medical community. (*Id.* at 1618-20.) By its very structure, the Columbia offer would not result in an immediate unification of the Vicksburg and Street Clinics. Instead, consolidation under the Columbia proposal would occur at some point in the future and would be achieved by building market share through a variety of competitive initiatives. (*Id.*) The Quorum merger, on the other hand, will immediately consolidate the Vicksburg and Street Clinics and, according to Columbia, bring about a one-hospital town.

[\*\*110] Quorum maintains that there is no evidence that it acted with specific intent to monopolize the physician and hospital markets. Marsha Powers, Quorum's regional vice-president, testified on cross-examination that, although she believes that Vicksburg should be a one-hospital town, achieving one-hospital status was not a goal of the merger transaction.<sup>33</sup> (*Id.* at 1308.) Powers explained that the reason for the transaction was not to create a regional medical center in the short term; however, the overall goal is "to develop an integrated delivery system that ... can compete on a long-term basis with the Jackson facilities." (*Id.* at 1473.) Quorum also argues that "loose talk" among the merger participants about consolidating the Vicksburg medical community and creating a one-hospital town is not sufficient to prove specific intent to monopolize. (Defs.' Post-Trial Brief at 3.)

<sup>32</sup> In response to a question from the bench, Columbia executive Patterson testified:

COURT: ... What would the result be, as a practical matter, if you had been successful in your bid for the Vicksburg Clinic, which you were trying to acquire -- ... -- and if you had also been successful in getting the Street Clinic in 1996, how would your situation then be different from the situation that the defendants in this suit are now trying to accomplish, insofar as Vicksburg and the patients are concerned?

PATTERSON: I think our situation would be similar in nature, that we would be able to attract more patients, we would be able to attract more managed care contracts, we would have the competitive advantages that my competitor now sees by purchasing the Vicksburg Clinic.

(Trial Tr. at 1602.)

<sup>33</sup> Parkview Medical Corp.'s Private Placement Memorandum dated June 7, 1996 gives the following reasons for the merger:

#### *ParkView Corp.'s Reasons for the Merger*

The ultimate goal of the merger is to expand the current ParkView Corp. integrated delivery system to continue to provide health care services to central and western Mississippi and eastern Louisiana as well as to enhance recruiting abilities for additional subspecialties. ... Integrated delivery systems have the potential to deliver patient care more efficiently. ...

#### *Vicksburg Clinic's Reasons for the Merger*

... The main reasons were the force of competition from the Jackson-Metropolitan area market penetrating the Vicksburg market, the allowance of recruitment of specialty services to supplement various physicians' practices, the ability to utilize the highest quality of personnel which would be available for delivery of each medical service and the ability to reduce the cost of duplication of services. ...

(Exhibit PX-96 at 16.)

[\*\*111] Several physician witnesses (Drs. Fagan, Hopson and Kuiper) consistently expressed at trial that the main reason for the merger is to create a unified medical staff. (Trial Tr. at 965, 2585, 3054.) Among the physician witnesses, Dr. Hopson explained that a unified medical community is needed: "to, one, be able to compete with Jackson, and two, to control costs." (*Id. at 2585.*) Dr. Kuiper stated that a united medical staff is needed to improve patient care in the Vicksburg Clinic and the surrounding areas. (*Id. at 3054.*) Dr. Kuiper also expressed his belief that a unified medical community will result in improved technologies and will attract needed specialists such as neurosurgeons and neonatologists to Vicksburg. (*Id. at 2959-63.*) Dr. Kuiper's hope is that such improvements will result in decreased morbidity and mortality. (*Id. at 2960.*)

Having weighed the evidence, the Court is not persuaded that Quorum entered into the merger with the specific intent of monopolizing the relevant physician and hospital markets in order to create a one-hospital town. As Drs. Fagan and Hobson testified, the idea of making Vicksburg a one-hospital town is nothing new but started when [\*\*112] the Sisters of Mercy took over the hospital that Parkview now operates. (*Id. at 961, 2518.*) This familiar [\*1140] but elusive pursuit continues to be a strategic and competitive goal of both VMC and ParkView. (Compare Exhibit DVC-182, Columbia's Market Consolidation Summary with Exhibit PX-198, ParkView Medical Corp. outline.) Based on the documentary evidence and trial testimony, the Court finds that the evidence regarding an expressed desire to become, in William Patterson's words, the "preeminent institution" with 100% market share (Trial Tr. at 1571-72) is insufficient proof of a specific intent to monopolize. See *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 663 F. Supp. 1360, 1488 (D.Kansas 1987) (alleged remark that HCA intended to put a large hospital in Wichita out of business did not prove the use of anticompetitive means to achieve that result), *aff'd and remanded*, 899 F.2d 951 (10th Cir. 1990), cert. denied, 497 U.S. 1005, 111 L. Ed. 2d 752, 110 S. Ct. 3241 (1990). Instead, such expressions are (1) reminders of the historic rivalry in the Vicksburg hospital market that began with the Sisters of Mercy and continues to thrive today; and (2) the freely expressed opinions and ideas of [\*\*113] physicians and other market participants, which have resulted from their discussions and brainstorming sessions about the ways to build an integrated health care delivery system. The simple truth is that this merger transaction is neither structured nor intended to create a one-hospital town. This is not a hospital merger. Two hospitals existed in Vicksburg before the merger, and two hospitals will exist after the merger is consummated. The dire consequences that Columbia predicts are far too remote and ephemeral to require judicial intervention at this point in time.

Even if each party to this merger ultimately wants Vicksburg to become a one-hospital town, such background hopes and desires do not abrogate the parties' credible testimony about their legitimate professional and personal intentions with respect to this transaction. The Court was most impressed by the highly credible testimony of the physician witnesses who expressed a sincere intent that this merger provide a means for improving medical services and saving patients' lives. Exemplary of the physicians' intent and motivation for entering into the merger is the following excerpt from Dr. Kuiper's testimony:

... [\*\*114] I had a patient who had what's called an acute extradural hematoma. That is where, due to an injury, blood gathers between the skull and the brain itself and causes pressure on the brain. It is a potentially lethal situation, but it's also a situation that is fraught with morbid outcomes and long-term outcomes. That patient I was finally able to transfer to Jackson, but in that delay, the patient ended up with permanent neurological damage. I vowed at that time that I would never get myself--allow that sort of situation to happen again. ...

(Trial Tr. at 2961.)

Because the Court finds as a fact that Quorum did not enter into the merger with the specific intent to monopolize, but with the intent to provide better health care to the Vicksburg community, Columbia's Sherman Act claim is denied.

## II. Remaining Injunctive Relief Considerations

In accord with the foregoing discussion, the Court concludes that Columbia fails to qualify for permanent injunctive relief under Section 16 because it has not demonstrated, on this record, that the merger poses a significant threat of injury from an impending violation of the antitrust laws. *Zenith Radio*, 395 U.S. at 130. With [\*\*115] respect to

Columbia's request for preliminary injunctive relief, the foregoing discussion disposes of the first step in this circuit's four-part preliminary injunction test (i.e., a substantial likelihood of success on the merits). As fully explained above, the Court concludes that Columbia has not demonstrated a substantial likelihood of success on the merits with respect to any of the Clayton or Sherman Act claims. Because the grant or denial of preliminary injunctive relief must be based on a reasoned application of all four factors in the Fifth Circuit's test, *H & W Indus.*, 860 F.2d at 179, the Court now analyzes the three remaining factors: the threat of irreparable injury to the plaintiff, the threat of [\*1141] injury to the defendant and the public interest.

#### A. Plaintiff's Irreparable Injury

Columbia has the burden of proving a substantial threat that it will suffer irreparable injury if the injunction is not issued. *Id.* At the Court's request, the parties submitted supplemental briefing regarding the consequences of a grant or denial of injunctive relief in this action. (Plaintiff's Response to Court's Questions [hereinafter "Plaintiff's Response"]; Responses of the [\*116] Defs. to Questions Posed by the Court on Oct. 8, 1996 [hereinafter "Defs.' Response".]) In its listing of the harm that it will suffer if an injunction does not issue, Columbia sets forth five points. First, Columbia repeats its argument that the Vicksburg Clinic doctors will have the ability and financial incentive to steer patients away from VMC and admit them to ParkView. (Plaintiff's Response at 5.) For the reasons discussed in Part I.C.3.c. above, the Court rejects this argument.

Columbia's second point is similar to its first. Columbia argues that the Vicksburg Clinic doctors will chose to perform high profit-margin procedures (e.g., surgical and outpatient procedures <sup>34</sup>) at Parkview rather than VMC, which will have an adverse effect on VMC's profits. However, as discussed at length above, this Court cannot credit unsubstantiated conjecture about what actions the doctors might take after the merger. In addition, the trial testimony demonstrates that Columbia does not lack options for competing with ParkView in these areas. Dr. Eisenstadt testified that Columbia's plans to add an ambulatory surgery center at VMC, for which \$ 8,000,000 in capital expenditure funds were included [\*117] in its FY'96 budget, could provide a competitive response to the merger. (Trial Tr. at 2284, 2287, 2406-07.)

Third, Columbia states that the combined market power of the doctors will permit them to exclude VMC from competing effectively for managed care contracts. The Court disposed of this assertion in its discussion of the merits of Columbia's Clayton Act claims by finding that Columbia failed to prove postmerger market power in the physician markets. The Court also notes that Columbia failed to define a proper managed care submarket as discussed in Part I.C.1.c. above. Finally, the testimony of Charles Pitts clearly demonstrates that, with or without the merger, Columbia will continue to have significant leverage in competing for managed care contracts because of its [\*118] far-reaching and well-established regional and national health care systems. As Pitts testified on cross-examination, his managed care company is interested in contracting with the Columbias and Quorums of the industry on a regional or national basis, as opposed to contracting with them for a single local market. (*Id. at 349-54.*)

The fourth harm that Columbia cites involves a prediction that VMC's revenues will decrease and that VMC's certificate of need applications will not be granted. Decreased revenues at VMC, according to Dewey Greene, will make it "extremely difficult to invest further capital in a situation where our facility is not a performer ... ." (*Id. at 555.*) A potential financial decision to shift vast sums of available investment capital from one property to another is speciously far from stating the type of severe financial harm that might merit injunctive relief. E.g., *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174 (5th Cir. 1989) (general rule is that preliminary injunctive relief is inappropriate where the potential harm to the movant is strictly financial; exception exists in extreme cases such as bankruptcy), cert. denied, [\*119] 493 U.S. 1075, 107 L. Ed. 2d 1030, 110 S. Ct. 1124 (1990). Likewise, a presupposed denial of pending or future certificate of need applications demonstrates no immediate injury to Columbia.

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<sup>34</sup> The Court notes that Columbia expressly excluded outpatient services from its definition of the relevant hospital services market in its Clayton and Sherman Act claims. (Plaintiff's Proposed Findings of Fact and Conclusions of Law P 119.)

The final injury alleged is a vague and overly broad assertion that the viability of VMC will be compromised. The only specific reason given for this assertion is, once again, that hospital patient activity generated by the Vicksburg Clinic physicians will shift to ParkView. Columbia claims that the [\*1142] presumed patient shift will reduce VMC's patient volume, which will reduce VMC's viability, which will lead to a one-hospital town. For all of the reasons given in Part I.C.3.c. above, the Court finds that this assertion is unsupported by the record and fails to demonstrate irreparable injury. The Court concludes that none of the harms cited by Columbia constitute immediate, irreparable injury. See [Pearl Brewing, 1993 U.S. Dist. LEXIS 16841, 1993 WL 424236](#) at \*5. In each instance cited, the harm is either conjectural or one that, on this record, does not rise to the level of judicial intervention. After reviewing two weeks of trial testimony and a large volume of documentary evidence, the Court is convinced that this merger will not hinder Columbia from remaining [\*\*120] in Vicksburg and competing in the medical service markets, if it so chooses. The choice is Columbia's, which the documentary evidence in this case clearly proves. See, e.g., documentary evidence regarding Columbia's postmerger options and plans for remaining in the Vicksburg market at Exhibits DQ-116 ("Business Plan" for postmerger competitive strategies and market expansion); DQ-140, DVC-188, DVC-214 (copies of 2/29/96 memorandum from William Patterson to Dewey Greene regarding ten-point plan to offset the Vicksburg Clinic's move to Quorum; DQ-190 (Columbia/VMC "Action Plan" including time table for executing merger responsive strategies such as new practice acquisition, marketing and product development, expansion toward Tallulah, Louisiana and other areas, political efforts, press campaigns and legal initiatives (e.g., "Block the deal/antitrust" and "Sue Quorum"); DVC-212 (William Patterson's handwritten outline of competitive steps to take if the Vicksburg Clinic moves to Quorum; includes discussion points that state: "Regardless of outcome we ... are not leaving.).

While it may turn out that Columbia is not perceived as the number one health care facility in Vicksburg after [\*\*121] the merger, the antitrust laws do not guarantee perpetual number one ranking to any single competitor. [Brown Shoe, 370 U.S. at 320](#) (antitrust laws protect competition, not competitors). If anything is clear to this Court after presiding over the trial, it is that Columbia has the necessary financial and human resources, as well as the business experience and acumen, to remain in Vicksburg after the merger and continue competing with ParkView. An added advantage is that Columbia is already well-established in what appears to be, on this record, a growth market with emerging opportunities in managed care contracting and elsewhere. Should Columbia slip to "number two" in the local rankings, this would not constitute irreparable injury under our precedent but would present, instead, a business opportunity to just try harder. See [Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 \(7th Cir. 1986\)](#) ("injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds").

## B. Defendants' Injury

In assessing whether the threatened injury to Columbia outweighs the threatened harm to Quorum, the Court has considered, [\*\*122] among other things, Quorum's list of likely consequences if the injunction should issue (Defs.' Response at 1-2) and the credible trial testimony of several physician witnesses. (E.g., Trial Tr. at 980, 2517, 2527, 2569.) Having already found as a fact that a strained relationship exists between the Vicksburg Clinic physicians and Columbia (e.g., *id.* at 1044), the Court believes that enjoining the merger would only deepen this rift and create even greater turmoil and animosity within the Vicksburg medical community. This would not only damage Quorum, but could potentially place all health care recipients in the Vicksburg area at risk.

The Court also notes that the physician testimony consistently indicates a belief that, without the merger, the doctors will be unable to carry out their plans to recruit needed specialists to Vicksburg such as a pulmonologist, rheumatologist, neurologist and others. The Court therefore concludes that, if the merger were enjoined, the harmful impact on Quorum, and particularly on the Vicksburg Clinic physicians who would be deprived of practicing their profession in a supportive and constructive work environment, [\*1143] outweighs the conjectural or [\*\*123] transitional injury to Columbia discussed above.

## C. Public Interest

The final step in a preliminary injunction analysis is to determine whether the plaintiff has shown that the injunction will not disserve the public interest. The Court views the public interest analysis in this case as a two-part inquiry: first, whether permitting the merger to go forward will result in better medical services for the Vicksburg community and outlying areas; and second, whether health care costs to consumers will rise if the merger is not enjoined.

With respect to the first inquiry, the evidence is convincing that medical services in Vicksburg should improve after the merger because of (i) an increase in the recruitment of needed specialists and subspecialists; and (ii) collaborative efforts by the physicians to procure technologically advanced medical equipment. The Court is persuaded that the combined and, most importantly, cooperative recruitment initiatives of the two clinics will attract new specialists to Vicksburg. Every physician witness who testified at trial, including Dr. Sessums of the Mission Clinic, acknowledged that the merger could attract new specialists to Vicksburg. (*Id. f\*\*124] at 127*, Dr. Sessums' testimony that the merger "could attract other specialties if there was a large enough group of patients to support a specialist"; see, e.g., *id. at 968*, Dr. Fagan's testimony that the merger will permit recruitment of a pulmonologist, neurosurgeon, neonatologist and others.) Currently, a Vicksburg area resident who is in need of such specialists must travel to Jackson or some other sophisticated medical center for specialized care. There can be no doubt that having these specialists in Vicksburg will benefit the public.<sup>35</sup>

The Court is also convinced by the testimony of Drs. Kuiper (*id. at 2982*) and Hopson (*id. at 2517*) that merging the clinics can result in the physicians working **[\*\*125]** together to procure much-needed, technologically advanced medical equipment that will benefit the Vicksburg community. A number of witnesses testified about the "certificate of need wars" within the Vicksburg medical community and the longstanding battles between the clinics and the hospitals in their individual efforts to secure state approval for a cardiac catheterization laboratory and other medical equipment. (E.g., *id. at 995-96*; 1097; 2517.) The twelve to fifteen year political gridlock in obtaining a cardiac catheterization unit for the Vicksburg community was aptly described by Dr. Hopson: "It's been fight, fight, fight, fight." (*Id. at 2517*.) This Court finds it regrettable that years of bickering within the medical community has played a role in depriving Vicksburg area residents of muchneeded life saving equipment. On this record, there can be no question that the current situation creates an untenable disservice to the community at large. Considering the public harm that will be caused by maintaining the status quo, the Court finds that the merger offers a reasonable business solution for mending the fault line that has divided the Vicksburg and Street Clinics. It is **[\*\*126]** this Court's view, based largely on the credible testimony of the physician witnesses, that the fusion of these clinics will foster cooperative, rather than divisive, efforts among the doctors to work together in obtaining advanced medical equipment for the community.

In evaluating the injunction's potential impact on the public interest, the Court also has given careful consideration to the evidence regarding an alleged price increase in medical services that may result from the merger. Columbia has argued throughout the course of this litigation that the merger will eliminate competition between the Vicksburg and Street Clinic doctors, lead to a one-hospital town, and thereby raise physician and hospital service prices for Vicksburg area residents. In support of this allegation, Columbia's expert, Dr. Eisenstadt, opined that the likely competitive effect of the transaction is higher prices. (*Id. at 2154*.) Dr. Eisenstadt's opinion was not, however, supported **[\*1144]** by any empirical evidence such as price studies of comparable markets where hospitals and/or clinics previously have merged. (*Id. at 2341-42*.)

The Court finds more compelling the evidence that other market forces (such **[\*\*127]** as the growth in managed care contracting, nonnegotiable or standardized pricing in certain government programs and Blue Cross Blue Shield contracts, and the perception amongst Vicksburg physicians that the Jackson medical community poses a competitive threat) will keep postmerger price increases at bay. (*Id. at 189, 438, 1504-05, 2584, 2604, 3075*.) For example, Charles Pitts testified that, if reasonable prices for specialists' services were unavailable in Vicksburg, his

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<sup>35</sup> As Dr. Hopson explained:

I think the citizens will have more services in Vicksburg than they have ever had before if [the merger is] allowed to go through. I think they will have to travel less miles. I think they will actually have better medical care.

(Trial Tr. at 2599.)

managed care company would contract instead with Jackson specialists. (*Id. at 361.*) Pitts further testified that the interest in negotiating managed care contracts on a regional basis could make it illogical for a hospital services provider to raise prices in one market at the risk of losing managed care contracts in other regions. (*Id. at 353-54.*) Marsha Powers of Quorum testified that, realistically, Quorum has little to no ability to raise prices for 85% of its hospital revenue sources (i.e., Medicare, Medicaid, Blue Cross Blue Shield, other existing managed care contracts and workers' compensation). With respect to the remaining 15% of revenues (i.e., self-pay and commercially insured patients), Powers **[\*\*128]** testified that Quorum would have little incentive to raise the prices charged to those patients because doing so would create a risk of losing Quorum's best paying clients. (*Id. at 1441-46.*) The Court further notes that Dr. Sessums of the Mission Clinic testified that he had no plans to raise his prices by a hypothetical 10% after the merger. (*Id. at 135.*) Dr. Hopson expressed his expectation that the citizens of Vicksburg may enjoy lower medical service costs following the merger. According to Dr. Hopson, lower prices are a possibility because a number of cost savings will result from merging the clinics and eliminating the duplication of services that currently exists between them. Such cost savings conceivably could be passed on to the patients. (*Id. at 2525, 2600, 2605.*)

In the light of the foregoing, Columbia has failed to convince this Court that the merger is likely to cause price increases in medical services. Considering the totality of the record evidence, this Court has no doubt that granting the injunction would perform a disservice to the Vicksburg area public. Columbia's request for preliminary injunctive relief is therefore denied.

### III. Conclusion

**[\*\*129]** Having seriously studied and considered the record as a whole, it is this Court's firm conviction that the challenged merger is neither the product of a concerted effort to monopolize nor likely to stifle competition to any substantial degree in the relevant markets. This record clearly demonstrates that the proposed merger is not an aberrant transaction that violates the spirit or letter of the antitrust laws. Instead, it is the natural byproduct of a rapidly evolving medical services market in which the key players are jockeying for position in a highly competitive race to provide quality services at reasonable prices. Rather than eliminate or lessen competition, the evidence indicates that the merger is likely to stimulate market competition, particularly in the light of Columbia's documented, multifaceted strategies for actively competing in Vicksburg after the merger. Importantly, the evidence also demonstrates that granting the requested injunction is likely to cause a genuine disservice to the public.

It is therefore the decision of this Court that Columbia's requests for (i) preliminary and permanent injunctive relief; (ii) an adjudication that the merger violates Section **[\*\*130]** 7 of the Clayton Act and Section 2 of the Sherman Act; (iii) an award of costs and attorneys' fees; and (iv) other relief, including rescission of any part of the transaction that already may have occurred, are denied in their entirety. Because the Quorum defendants are the prevailing parties in this matter, the Court finds that costs should be assessed against Columbia.

The Court also has before it the plaintiff's Emergency Motion for an Injunction Pending Appeal. An Order and Final Judgment will be entered herein as soon as the Court **[\*1145]** has had an opportunity to consider the motion.

This the 14th day of March, 1997.

David Bramlette

UNITED STATES DISTRICT JUDGE

## Saratoga Harness Racing v. Veneglia

United States District Court for the Northern District of New York

March 15, 1997, Decided ; March 18, 1997, FILED

94-CV-1400

**Reporter**

1997 U.S. Dist. LEXIS 3566 \*; 1997 WL 135946

SARATOGA HARNESS RACING INC., Plaintiffs, -v- PETER VENEGLIA, Individually and as Chairman of UNITED STANDBRED HORSEMEN OF NEW YORK; NORTHEASTERN HARNESS HORSEMEN'S ASSOC. Inc.; JOSEPH A. FARALDO; STANDBRED OWNERS ASSOC. OF NEW YORK; LEONARD D. POWELL; STANDBRED BREEDERS AND OWNERS ASSOC. OF NEW JERSEY, INC.; DOMINIC FRINZI; HARNESS HORSEMEN INTERNATIONAL, Defendants.

**Disposition:** [\*1] Plaintiff's motion to strike affirmative defenses granted in part and denied in part.

### **Core Terms**

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affirmative defense, pleadings, defenses, horsemen, defendants', negotiations, motion to strike, anti trust law, antitrust, answers, implied repeal, immunity, lack of personal jurisdiction, motion to dismiss, summary judgment, associations, injunction, asserting, estoppel, stricken, parties

### **LexisNexis® Headnotes**

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Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Pleading & Practice > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Waiver & Preservation of Defenses

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Judgments > Pretrial Judgments > General Overview

### **HN1 [↓] Pretrial Judgments, Judgment on Pleadings**

Fed. R. Civ. P. 12 provides in part that after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. An objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Fed. R. Civ. P. 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. A party is entitled to judgment on the pleadings pursuant to Rule 12(c) if it

has established that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. Where material fact issues remain, however, judgment on the pleadings is inappropriate.

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

## **HN2** **Pleading & Practice, Pleadings**

A material issue of fact that will prevent a motion under *Fed. R. Civ. P. 12(c)* from being successful may be framed by an express conflict on a particular point between the parties' respective pleadings. It also may result from defendant pleading new matter and affirmative defenses in his answer.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

Governments > Legislation > Initiative & Referendum

## **HN3** **Defenses, Demurrs & Objections, Motions to Strike**

*Fed. R. Civ. P. 12(f)* provides that a motion to strike portions of a pleading to which no responsive pleading is required must be brought within 20 days after service of the pleading. The rule also provides, however, that a court may order an insufficient defense stricken from a pleading at any time, on its own initiative. Numerous courts have held that the court's power to strike a defense on its own initiative at any time allows it to consider untimely motions to strike.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Strike > General Overview

## **HN4** **Defenses, Demurrs & Objections, Motions to Strike**

Well-pleaded facts are accepted as true for purposes of a motion to strike, and matters outside the pleadings will not be considered in support of the motion. A motion to strike an affirmative defense under *Fed. R. Civ. P. 12(f)* for legal insufficiency is not favored and will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense. In order to succeed on a motion to strike affirmative defenses, a plaintiff must establish three elements: (1) that there is no question of fact which would allow the defense to succeed; (2) that there is no question of law which would allow the defense to succeed; and (3) that the plaintiff would suffer prejudice from inclusion of the defense.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

## **HN5** **Preclusion of Judgments, Law of the Case**

The law of the case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. Application of the doctrine is discretionary, however, and it does not constitute a limitation on the court's power and need not be applied where no prejudice results from its omission.

Administrative Law > Separation of Powers > Legislative Controls > Implicit Delegation of Authority

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Legislation > Interpretation

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

## **HN6** [down arrow] **Legislative Controls, Implicit Delegation of Authority**

Repeals by implication, or implied antitrust immunity are not casually inferred. Only where there is a plain repugnancy between the antitrust and regulatory provisions will repeal be implied. The touchstone of the implied immunity analysis is Congressional intent since the principle is founded on the notion that, in some circumstances, a Congressional delegation of regulatory authority carries with it the implication that the antitrust laws shall not apply to the conduct thus regulated.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

## **HN7** [down arrow] **Defenses, Demurrs & Objections, Affirmative Defenses**

Affirmative defenses are subject to the general pleading requirements of [Fed. R. Civ. P. 8\(a\), 8\(e\)](#) and [9\(b\)](#), generally requiring only a short and plain statement of the facts but demanding particularity as to the circumstances constituting fraud and mistake.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > General Overview

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss

## **HN8** [down arrow] **Motions to Dismiss, Failure to State Claim**

The language of [Fed. R. Civ. P. 12\(b\)\(6\)](#) can be used on a motion to dismiss or as an affirmative defense, at the pleader's option. Furthermore, it is well settled that the failure-to-state-a-claim defense is a perfectly appropriate affirmative defense to include in the answer. While the defense may be redundant in that it is akin to a general denial, there is no prejudicial harm to plaintiff and the defense need not be stricken.

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Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

## **HNG[] Responses, Defenses, Demurters & Objections**

Fed. R. Civ. P. 12(h)(1) provides that the defense of lack of personal jurisdiction is waived if neither asserted by a Rule 12 motion nor included in the answer. Even if a litigant preserves this defense by including it in his answer, however, undue delay in challenging personal jurisdiction by a motion to dismiss may constitute waiver.

**Counsel:** Appearances:

For Plaintiffs: E. Guy Roemer Esq., ROEMER AND ASSOCIATES, Albany, NY.

For Peter J. Veneglia, United Standardbred Horsemen of NY, NorthEast Harness Horseman's Assoc., Inc., Joseph A Faraldo, Standardbred Owners Assoc. of NY, Inc., Leonard D. Powell, Defendants: Neil L. Levine, Esq., Jonathan P. Nye, Esq., WHITEMAN, OSTERMAN LAW FIRM, Albany, NY. For Dominic Frinzi and Harness Horsemen International, Defendants: Kenneth Ritzenberg, Esq., Kristin Carter Rowe, Esq., YOUNG & ROWE, Albany, New York.

**Judges:** Thomas J. McAvoy, Chief U.S. District Judge

**Opinion by:** Thomas J. McAvoy

## **Opinion**

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### **MEMORANDUM DECISION & ORDER**

Plaintiff in this antitrust lawsuit moves for an order, pursuant to Fed.R.Civ.P. 12(c), 12(f), and 12(h)(2), striking each and all of the affirmative defenses pleaded in the defendants' answers.

#### **I. BACKGROUND**

##### **A. Facts:**

This lawsuit stems from failed contract negotiations between plaintiff **Saratoga Harness Racing, Inc.**, which operates a harness race track at Saratoga, New York, and the horse owners who race at Saratoga. **Defendant Northeastern [\*\*2] Harness Horsemen's Association, Inc.** ("NHHA") is the trade organization of horsemen with which Saratoga previously had a contract relating to the terms and conditions of racing at Saratoga. That contract expired on November 30, 1993. **Defendant Powell** is a vice-president of **NHHA**. **Defendants Faraldo and Veneglia** are styled as members, agents and negotiators for **defendant NHHA**. Defendant Taraldo is also president of **defendant Standardbred Owners Association of New York, Inc.** ("SBOA-NY"), which represents horsemen at Yonkers racetrack. Defendant Veneglia is also an officer and member of **defendant United Standardbred Horsemen of New York ("USH")** an unincorporated group of horsemen's associations.<sup>1</sup> **Defendant Frinzi** is the president of **defendant Harness Horsemen International ("HHI")**, an association that

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<sup>1</sup> Defendants Veneglia, USH, NHHA, SBOA-NY and Powell are hereinafter referred to as "the New York defendants."

includes various horsemen's associations, including NHHA and SOA-NY. Negotiations for a new contract between plaintiff and **NHHA** took place during the fall of 1993 and the Spring of 1994: those negotiations ultimately failed.

[\*3] Plaintiff essentially states two separate antitrust claims against these defendants <sup>2</sup> based on their conduct during and since the time that negotiations broke down between plaintiff and the NHHA: **1)** that defendant NHHA, through defendants Faraldo, Powell, and Veneglia both individually and through defendant USH, and with the assistance of Frinzi and HHI, have organized a boycott of Saratoga by their membership and other horsemen, in violation of § 1 of the Sherman Act; and, **2)** that these defendants and local horsemen's associations at other tracks have engaged in an illegal "tying" operation, whereby these local associations, in combination with other defendants, threatened to withhold their consent to simulcasting of those other tracks' races if those other tracks simulcasted races to Saratoga.<sup>3</sup>

#### **[\*4] B. Procedural History:**

Plaintiff commenced this lawsuit on October 28, 1994 against all defendants except Frinzi and HHI. On December 15, 1994, plaintiff moved for a preliminary injunction. SBOA-NJ moved to dismiss for lack of personal jurisdiction on January 3, 1995; the remaining defendants moved to dismiss for lack of subject-matter jurisdiction on January 4, 1995.

The Court heard oral argument on all motions on January 27, 1995. In a bench decision, the Court denied all motions. (Transcript of Proceedings of January 27, 1995 ["Tr."] at 19). SBOA-NJ moved for reconsideration on May 22, 1995, which was denied by Memorandum, Decision and Order dated August 2, 1995.

On January 2, 1996, plaintiff moved to amend the Complaint to add Frinzi and HHI as defendants; the motion was granted. All defendants answered the Amended Complaint, asserting various affirmative defenses.

## **II. DISCUSSION.**

### **A. Plaintiff's Present Motion**

Plaintiff filed the present motion on October 10, 1996. Plaintiff moves, ostensibly pursuant to [Fed.R.Civ.P. 12\(c\)](#), [12\(f\)](#), and/or [12\(h\)\(2\)](#), to strike all affirmative defenses pleaded in the defendants' answers. Since the propriety and [\*5] posture of the motion are as much in dispute as is its substance, the procedural aspects merit some discussion.

We turn first to the rules themselves. [HN1](#) [↑] [Fed.R.Civ.P. 12](#) provides, in pertinent part:

**(c) Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

\* \* \*

### **(h) Waiver or Preservation of Certain Defenses**

<sup>2</sup> By stipulation and order dated July 22, 1996, defendant **Standardbred Breeders and Owners Horsemen Association of New Jersey, Inc.**, ("SBOA-NJ), was dismissed from the action.

<sup>3</sup> Plaintiff also asserts violations of New York State [antitrust law](#), N.Y. G. B. L. § 340, (the "Donnelly Act"), and a common law claim for tortious interference with contract.

\* \* \*

An objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under [Rule 7\(a\)](#), or by motion for judgment on the pleadings, or at the trial on the merits.

[Fed.R.Civ.P. 12](#). A party is entitled to judgment on the pleadings pursuant to [Rule 12\(c\)](#) if it has established "that no material issue of fact remains to be resolved and that [it] is entitled to judgment as a matter of law." [Juster Associates v. City of Rutland, Vermont, 901 F.2d 266, 269 \(2d Cir. 1990\)](#) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1368, at 690 (1969)). Where material fact issues remain, however, judgment on the pleadings is inappropriate. [George C. Frey Ready-Mixed Concrete, Inc. v. I\\*61 Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 \(2d Cir. 1977\)](#); [Shah v. New York State Dept. of Civil Service, 1996 WL 694340](#), at \*1 (S.D.N.Y. 1996).

Plaintiff's motion is curious in at least two respects. First, plaintiff asserts that "the present motion does not seek summary judgment," (Roemer Aff. P 12), and yet in support of its motion, plaintiff makes reference to a number of "matters outside the pleadings," (see, e.g., Pl. Mem. of Law at 5, 7 n.7) and further goes so far as to submit copies of defendants' answers to plaintiff's interrogatories. (Roemer Reply Aff. Ex. B). These materials, if not excluded by the Court, would in fact convert the motion to one for summary judgment. See Fed.R.Civ.P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment . . ."). If plaintiff indeed does not seek summary judgment, the Court is hard pressed to discern plaintiff's rationale in submitting such materials, although a disregard for [Rule 12](#)'s prerequisites comes to mind.<sup>4</sup>

[\*7] Second, plaintiff asserts that a number of "facts" are undisputed, e.g., that the boycott occurred, and that defendants supported it (See Roemer Aff. P 21), despite the fact that such assertions explicitly are denied to a large extent in defendants' answers. (See, e.g., NY Def. Answer PP 20-22; Frinzi/HHI Answer PP 19-23).<sup>5</sup>

For the reasons stated above, and despite plaintiff's reliance on [Rule 12\(c\)](#), the Court will treat plaintiff's motion as one to strike defendants' affirmative [\*8] defenses pursuant to [Rule 12\(f\)](#). See, e.g., Bazazi v. Michaud, 856 F. Supp. 33, 34 (D.N.H. 1994) (construing plaintiff's motion for judgment on the pleadings as motion to strike affirmative defenses pursuant to [Rule 12\(f\)](#)); [Ciminelli v. Cablevision, 583 F. Supp. 158, 161 \(E.D.N.Y. 1984\)](#) (treating plaintiff's motion for summary judgment dismissing affirmative defenses, which relied on federal rule for judgment on the pleadings, as motion to strike insufficient defense pursuant to [Rule 12\(f\)](#)).

Insofar as plaintiff's motion is brought pursuant to [Rule 12\(f\)](#) however, defendants object that it is untimely. [HN3](#) [↑] [Rule 12\(f\)](#) provides that a motion to strike portions of a pleading to which no responsive pleading is required must be brought within twenty days after service of the pleading. [Fed.R.Civ.P. 12\(f\)](#). The rule also provides, however, that a court may order an insufficient defense stricken from a pleading at any time, on its own initiative. Id. "Numerous courts have held that the court's power to strike a defense on its 'own initiative at any time' allows it to consider untimely motions to strike." [Dixie Yarns, Inc. v. Forman, 1993 U.S. Dist. LEXIS 8441, 1993 WL 227661](#) at

<sup>4</sup> Plaintiff further asserts that "the limited factual record described in P 11 of plaintiff's moving affirmation may be referenced on this motion pursuant to the terms of [Rule 12\(c\)](#) . . ." (Roemer Reply Aff. P 4). Absent converting the motion to one for summary judgment, however, plaintiff offers no support for consideration of this "abbreviated evidentiary record." (Roemer Aff. P 11).

<sup>5</sup> Defendants' inclusion of denials and affirmative defenses in their answers themselves militate against the propriety of judgment on the pleadings.

[HN2](#) [↑] A material issue of fact that will prevent a motion under [Rule 12\(c\)](#) from being successful may be framed by an express conflict on a particular point between the parties' respective pleadings. It also may result from defendant pleading new matter and affirmative defenses in his answer.

\*3 (S.D.N.Y. 1993) (citing [\*9] [\*National Union Fire Ins. v. Alexander\*, 728 F. Supp. 192, 203 \(S.D.N.Y. 1989\)](#); 2A J. Moore, *Moore's Federal Practice*, P 12.21 at 2420 (2d ed. 1983)); see also [\*Ciminelli\*, 583 F. Supp. at 161](#); [\*Uniroyal, Inc. v. Heller\*, 65 F.R.D. 83, 86 \(S.D.N.Y. 1974\)](#)). Thus, the Court will consider plaintiff's motion to strike.

### **B. Standard for a Motion Pursuant to [Fed.R.Civ.P. 12\(f\)](#).**

"Generally, [\*\*HN4\*\*](#) well-pleaded facts are accepted as true for purposes of a motion to strike, and matters outside the pleadings will not be considered in support of the motion." [\*United States v. \\$ 79,000 in Account Number 2168050/6749900 at the Bank of New York\*, 1996 U.S. Dist. LEXIS 16536, 1996 WL 648934](#), at \*2 (S.D.N.Y. 1996) (quoting 2A James W. Moore, *Moore's Federal Practice*, P 12.21[3], at 12-214-15 (2d ed. 1996)). "A motion to strike an affirmative defense under [Rule 12\(f\)](#) . . . for legal insufficiency is not favored and will not be granted 'unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense.'" [\*William Z. Salcer, Panfeld, Edelman v. Envicon Equities Corp.\*, 744 F.2d 935, 939 \(2d Cir. 1984\)](#) (quoting [\*Durham Industries, Inc. v. North\* \[\\*10\] \[\\*River Insurance Co.\\*, 482 F. Supp. 910, 913 \\(S.D.N.Y. 1979\\)\]\(#\), vacated on other grounds, 478 U.S. 1015 \(1986\).](#)

In order to succeed on a motion to strike affirmative defenses, a plaintiff must establish three elements: (1) that there is no question of fact which would allow the defense to succeed; (2) that there is no question of law which would allow the defense to succeed; and (3) that the plaintiff would suffer prejudice from inclusion of the defense. [\*SEC v. Thrasher\*, 1995 WL 456402, at \\*5 \(S.D.N.Y. 1995\); \*SEC v. Toomey\*, 866 F. Supp. 719, 722 \(S.D.N.Y. 1992\); see also \*Salcer\*, 744 F.2d at 939; \*Morse/Diesel v. Fidelity & Deposit Co. of Md.\*, 763 F. Supp. 28, 34 \(S.D.N.Y. 1991\).](#)

It is with this standard in mind that the Court turns to plaintiff's motion.

### **C. The Affirmative Defenses**

The defendants plead the following affirmative defenses: (1) failure to state a claim upon which relief may be granted; (2) implied antitrust immunity; (3) laches; (4) lack of standing; (5) voluntary consent to collective negotiations; (6) estoppel; (7) waiver; (8) implied repeal of antitrust laws; (9) no injury to business or property; (10) no antitrust injury; (11) lack of [\*11] personal jurisdiction; (12) insufficiency of process; (13) that any injury was caused by parties over whom defendants have no control. Defenses 11, 12 and 13 are pleaded by Frinzi and HHI only.

The Court will address these defenses as addressed by the parties.

#### **(a) Implied Antitrust Immunity/Implied Repeal of Antitrust Laws**

Plaintiff first argues that the defenses based upon the Interstate Horseracing Act of 1978, [\*15 U.S.C. § 3001 et seq.\*](#) ("IHA") should be stricken because Congress did not intend the Act to effect an implied antitrust repeal or immunity.

Much of the parties' arguments in this regard center on the Court's previous bench ruling on defendants's motion to dismiss for lack of subject matter jurisdiction and plaintiff's motion for a preliminary injunction. Thus, as an initial matter, we discuss what the Court did and did not hold.

First, in denying defendant's motion to dismiss, the Court did not rule on whether the IHA effects an implied repeal of antitrust laws with respect to the challenged conduct. Rather, the Court ruled that,

assuming . . . that the combination of the New York's regulatory scheme and the Interstate Horseracing Act gives rise [\*12] to any application of the doctrine [of implied repeal], review of the relevant caselaw reveals no such preclusive operation of the doctrine so that its invocation would completely divest this Court of subject matter jurisdiction over plaintiff's complaint. Rather, the proper approach in such a case is an analysis which reconciles the operation of both statutory schemes with one another, rather than holding one completely ousted.

(Tr. at 3-4). Thus, the Court's ruling was limited to whether the doctrine of implied repeal, if it applied at all, would serve to deprive the Court of subject matter jurisdiction. In ruling that it would not, the Court addressed, at least in part, the sufficiency of defendants' affirmative defense that

This Court lacks jurisdiction over the subject matter of this action, in whole or in part, by virtue of implied repeal of the antitrust laws with respect to the conduct challenged herein.

(NY Def. Ans. P 66; HHI Def. Ans. P 68). "However, even if the Court has previously decided [this] issue[], the doctrine of the law of the case does not prevent the Court from reconsidering [it]." *Oppel v. Empire Mut. Ins. Co., 92 F.R.D. 494, 496* [\*13] (*S.D.N.Y. 1981*). **HN5** The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Liona Corp. v. PCH Assocs., 949 F.2d 585, 592* (2d Cir. 1991) (quoting *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 100 L. Ed. 2d 811, 108 S. Ct. 2166* (1988)). Application of the doctrine is discretionary, however, see *Virgin Atl. Airways v. National Mediation Bd., 956 F.2d 1245, 1255* (2d Cir. 1992), and it "does not constitute a limitation on the Court's power and need not be applied where no prejudice results from its omission." *Oppel, 92 F.R.D. at 496*; see *Slotkin v. Citizens Cas. Co. of N.Y., 614 F.2d 301, 312* (2d Cir. 1979).

Furthermore, in denying defendants' motion to dismiss, the Court clearly left open the question of the precise interaction between the IHA and antitrust laws. (See Tr. at pp. 1-5). Similarly, in denying plaintiff's motion for a preliminary injunction, the Court once again expressed the need for caution at such a preliminary stage. As then stated, the difficulty arises because "what boycott participants do is not necessarily [\*14] different from what they would do in the absence of an impermissible boycott." *Alabama Sportservice Inc. v. National Horsemen's Ass'n, 767 F. Supp. 1573, 1579* (M.D.Fla. 1991). Of course, in denying the plaintiff's motion for injunctive relief, the Court in no way foreclosed an examination of the merits of either plaintiff's or defendants' positions. See, e.g., *DiLaura v. Power Authority of the State of New York, 982 F.2d 73, 76* (2d Cir. 1992) ("the decision of both the trial and appellate court on whether to grant or deny a temporary injunction does not preclude the parties in any way from litigating the merits of the case.") (quoting 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2962, at 630-31 (1973)). The Court thus turns to defendants' affirmative defenses of implied repeal and implied antitrust immunity.

**HN6** Repeals by implication, or implied antitrust immunity are not casually inferred. *Viacom Intern. Inc. v. Time Inc., 785 F. Supp. 371, 383* (*S.D.N.Y. 1992*). "Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York State Stock Exchange, Inc., 422 U.S. 659, 682, [\*15] 45 L. Ed. 2d 463, 95 S. Ct. 2598* (1975) (quoting *United States v. Philadelphia National Bank, 374 U.S. 321, 351, 10 L. Ed. 2d 915, 83 S. Ct. 1715* (1963)). "The touchstone of [the implied immunity] analysis is Congressional intent . . . since the principle is founded on the notion that, in some circumstances, a Congressional delegation of regulatory authority carries with it the implication that the antitrust laws shall not apply to the conduct thus regulated." *Viacom, 382 F. Supp. at 382* (quoting *Northeastern Telephone Co. v. American Telephone and Telegraph Co., 651 F.2d 76, 82* (2d Cir. 1981)).

The legislative history of the IHA gives some indication of its intended impact on antitrust law.

This legislation in no way modifies or affects the scope or application of the antitrust laws of the United States, nor does it confer upon any person or persons the right to enter into any agreement in restraint of trade which would be prohibited under the antitrust laws.<sup>6</sup> [\*17]

H.R. Rep. No. 1733, 95 Cong., 2d Sess., at 4 (1978), reprinted in 1978 U.S.C.A.N. 4132; see also *Hialeah, Inc. v. FHBPA, 899 F. Supp. 616, 621* (*S.D. Fla. 1995*) ("the Court recognizes [\*16] that the IHA provides no immunity to any party from federal antitrust law, nor does the legislative history indicate that this was Congress' intent").

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<sup>6</sup> There may be less to this passage than meets the eye. The quoted passage is from a House Report on H.R. 14089. See H.R. Rep. No. 1733, 95 Cong., 2d Sess., at 4, reprinted in 1978 U.S.C.A.N. at 4132. However, the bill that eventually became the IHA was S. 1185; neither the Senate Judiciary Committee Report nor the Senate Commerce, Science and Transportation Committee Report on S. 1185 make any mention of antitrust concerns. See 1978 U.S.C.A.N. at 4144.

Nonetheless, as the Court previously acknowledged, the "statutory framework bespeaks a certain amount of collective activity by horsemen through horsemen's associations." (Tr. at 12). Furthermore, Congress must have recognized that withholding consent under the IHA would inevitably result in diminished competition; the question under the Sherman Act, however, is "whether it is diminished sufficiently to be deemed illegal." [Alabama Sportservice, 767 F. Supp. at 1580](#). Similarly, while the literal language of § 1 of the Sherman Act sweeps broadly<sup>7</sup>, it is now well-settled that **antitrust law** prohibits only those contracts or combinations that are "unreasonably restrictive of competitive conditions." [Standard Oil Co. v. United States, 221 U.S. 1, 58, 55 L. Ed. 619, 31 S. Ct. 502 \(1911\)](#).

It is neither factually nor legally clear at this point whether the IHA envisions the horsemen's veto being so wielded; consent is to be "withdrawn or varied *only within the regular contractual process of negotiating an agreement as to terms and conditions between the horsemen's group and the host racing association.*" [Alabama Sportservice, 767 F. Supp. at 1579](#) (emphasis added). In the proper context then, "the freedom to negotiate contemplated by the IHA does not necessarily result in antitrust injury . . . when consent is withheld. *Id.*

Unsurprisingly, the Court is in no better position now to rule on the proper reconciliation of the two statutes than it was on the prior motion; [\*18] questions of fact and law pervade the analysis to such an extent that the Court is unprepared to rule at this stage whether the IHA provides a defense to conduct forbidden by the Sherman Act. The pleadings and memoranda of the parties are scarcely more developed than on the prior motion. Moreover, a motion to strike affirmative defenses "was never intended to furnish an opportunity for the determination of disputed and substantial questions of law." [William Z. Salcer, etc., 744 F.2d at 939](#) (quoting [Carter-Wallace, Inc. v. Riverton Laboratories, Inc., 47 F.R.D. 366, 367-68 \(S.D.N.Y. 1969\)](#)). Thus, plaintiff's motion to strike these affirmative defenses is denied.

### (b) The Equitable Defenses

Defendants also plead the affirmative defenses of waiver, estoppel, laches, and that plaintiff's action is barred by its voluntary consent to collective negotiations with horsemen.

As to the voluntary consent defense, defendants offer no factual or legal support for the proposition that such consent and participation in collective negotiations, in and of themselves, would bar any of plaintiff's causes of action. Furthermore, plaintiff may in fact suffer sufficient prejudice from [\*19] the increased time and money spent on discovery regarding an affirmative defense for which defendants provide no support, particularly since plaintiff does not contest its history of negotiation with the horsemen. [See PHH FleetAmerica Corp. v. Crawford & Co., Inc., 1995 WL 424986](#) at \*4 (S.D.N.Y. 1995). Thus, plaintiff's motion is granted as to this defense.

The remaining equitable defenses will be stricken without prejudice. First, plaintiff's citations to New York caselaw regarding the strict pleading requirements for these defenses are inapplicable in this federal action. [HN7](#) [↑] "Affirmative defenses are . . . subject to the general pleading requirements of [Rules 8\(a\), 8\(e\)](#) and [9\(b\)](#), generally requiring only a short and plain statement of the facts but demanding particularity as to the circumstances constituting fraud and mistake." [Instituto Nacional De Comercializacion Agricola \(Indeca\) v. Continental Illinois Nat. Bank & Trust Co., 576 F. Supp. 985, 988 \(N.D.Ill.1983\)](#); see also [Fed.R.Civ.P. 8\(b\)](#) ("A party shall state in short and plain terms the party's defenses to each claim asserted . . ."). Defendants' answers merely state, in conclusory terms, that plaintiff's claims are [\*20] barred by the doctrines of waiver, estoppel and laches; mere recitation of the legal buzzwords, however, will not suffice. [See, e.g., Paine Webber, Inc. v. International Mobile Machines Corp., 1992 WL 75068](#) at \*2 (S.D.N.Y. 1992) ("while an answer need not include a detailed statement of the applicable defenses, a defendant must do more than make conclusory allegations") (citing [Heller Financial, Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1294-95 \(7th Cir.1989\)](#)); [Telecommunications Proprietary, Ltd. v. Medtronic, Inc., 687 F.](#)

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<sup>7</sup> See, e.g., [Nat. Society of Professional Engineers v. U.S., 435 U.S. 679, 688, 55 L. Ed. 2d 637, 98 S. Ct. 1355 \(1978\)](#) ("read literally, § 1 would outlaw the entire body of private contract law"); [United States v. Topco Assoc., 405 U.S. 596, 606, 31 L. Ed. 2d 515, 92 S. Ct. 1126 \(1972\)](#) ("Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it.").

Supp. 832, 841 (S.D.N.Y. 1988) ("the word 'estoppel' without more is not a sufficient statement of a defense"). Defendants are granted leave to replead these three defenses within twenty days of the date of this Order.

### (c) The Remaining Defenses

#### *Failure to State a Claim/General Denials*

**HN8** [↑] The language of Fed.R.Civ.P. 12(b)(6) can be used on a motion to dismiss or as an affirmative defense, at the pleader's option. SEC v. Toomey, 866 F. Supp. 719, 723 (S.D.N.Y. 1992) (citing 5A C. Wright & A. Miller, Federal Practice & Procedure § 1349, at 190 (1990)). "Furthermore, it is well settled that the failure-to-state-a-claim defense is [\*21] a perfectly appropriate affirmative defense to include in the answer." Toomey, 866 F. Supp. at 723. While the defense may be redundant in that it is akin to a general denial, "there is no prejudicial harm to plaintiff and the defense need not be stricken." Oppel, 92 F.R.D. at 498; see Simon v. Manufacturers Hanover Trust Co., 849 F. Supp. 880, 882 (S.D.N.Y. 1994).

Similarly, defendants' "general denials" will not be stricken. These defenses are (1) that plaintiff has suffered no injury or damage; (2) that plaintiff has suffered no antitrust injury; (3) that defendants had no control over the injury-causing parties.; and (3) that plaintiff lacks standing. Although asserted as affirmative defenses, these are essentially general denials; nonetheless, plaintiff will suffer no prejudice from allowing them to stand. Oliner v. McBride's Indus., Inc., 106 F.R.D. 14, 19 (S.D.N.Y. 1985). Thus, plaintiff's motion is denied as to these defenses.

#### *Lack of Personal Jurisdiction/Insufficient Service of Process*

The HHI defendants plead, as affirmative defenses, that this Court lacks personal jurisdiction over them, and that service of process on them was insufficient. In [\*22] support of these defenses, defendants argue that because they deny plaintiff's allegations regarding the HHI defendants' contacts with New York in their Answer, the material facts regarding personal jurisdiction are in dispute.

**HN9** [↑] Fed.R.Civ.P. 12(h)(1) provides that the defense of lack of personal jurisdiction is waived if neither asserted by a Rule 12 motion nor included in the answer. The HHI defendants chose to do the latter. "Even if a litigant preserves this defense by including it in his answer, [however,] undue delay in challenging personal jurisdiction by a motion to dismiss may . . . constitute waiver." Krank v. Express Funding Corp., 133 F.R.D. 14, 16 (S.D.N.Y. 1990); see Burton v. Northern Dutchess Hospital, 106 F.R.D. 477, 481 (S.D.N.Y. 1985). Judge Edelstein in Burton articulated well a defendant's obligations:

Defendants have literally complied with Rule 12(h)(1) by asserting the defense of lack of jurisdiction in their answers. These responsive pleadings, however, do not preserve the defense in perpetuity. Defendants are required at some point to raise the issue by motion for the Court's determination. After preserving the jurisdictional defense in [\*23] their answers, defendants should have sought discovery immediately to ascertain whether service was proper. If they discovered that service was not proper, defendants should have moved at the earliest possible opportunity to dismiss the complaint.

Burton, 106 F.R.D. at 481.

In the present case, plaintiff filed its Amended Complaint on January 10, 1996. The HHI defendants answered on February 26, 1996 and filed an acknowledgment of service on March 8, 1996. Thus, the HHI defendants have had over one full year to contest either the sufficiency of process or this Court's personal jurisdiction over them. During that period, the HHI defendants have participated in status conferences and engaged in discovery. Furthermore, these defendants offer no arguments on this motion in support of their contentions regarding lack of personal jurisdiction or insufficient process. These circumstances militate in favor of a finding of waiver. See Datskow v. Teledyne, Inc., Continental Products Div., 899 F.2d 1298, 1303 (2d Cir. 1990); Caribe Carriers, Ltd. v. C.E. Heath & Co., 784 F. Supp. 1119, 1125 (S.D.N.Y. 1992); Krank, 133 F.R.D. at 17; Benveniste v. Eiseman, 119 F.R.D. 628,

629 [\*24] (S.D.N.Y. 1988). Therefore, the HHI defendants having waived these defenses, the Court grants plaintiff's motion to strike in this respect.

### **III. Conclusion**

For all of the foregoing reasons, plaintiff's motion to strike the affirmative defenses is granted in part and denied in part. The motion is granted, without prejudice, as to the defenses of estoppel, waiver, and laches, as to all defendants. Defendants are granted leave to amend the Answers as to these defenses within twenty days of the date of this Order. The motion is further granted, with prejudice, as to the HHI defendants' affirmative defenses of lack of personal jurisdiction and insufficient service of process. The motion is also granted, with prejudice, as to the affirmative defense of voluntary consent to collective negotiations, as to all defendants. The motion is denied as to all other defenses.

### **IT IS SO ORDERED**

March 15, 1997

Binghamton, New York

Thomas J. McAvoy

Chief U.S. District Judge

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## **United States v. Nippon Paper Indus. Co.**

United States Court of Appeals for the First Circuit

March 17, 1997, Decided

No. 96-2001

### **Reporter**

109 F.3d 1 \*; 1997 U.S. App. LEXIS 4939 \*\*; 1997-1 Trade Cas. (CCH) P71,750

UNITED STATES OF AMERICA, Appellant, v. NIPPON PAPER INDUSTRIES CO., LTD., ET AL., Defendants, Appellees.

**Prior History:** [\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Joseph L. Tauro, U.S. District Judge.

**Disposition:** Reversed and remanded.

### **Core Terms**

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Sherman Act, extraterritoriality, regulation, antitrust, indictment, international law, anti trust law, courts, Restatement, territory, principles, cases, conspiracy, statutory construction, criminal case, commerce, lenity, substantial effect, ambiguity, appears, comity, district court, interpreting, effects, canon, civil action, anticompetitive, construing, provisions, sovereign

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Sherman Act

#### **HN1[] Antitrust & Trade Law, Sherman Act**

Because it is a question of statutory construction, the appellate court reviews de novo the holding that the Sherman Act, [15 U.S.C.S. § 1 \(1994\)](#), does not cover wholly extraterritorial conduct in the criminal context.

Governments > Legislation > Interpretation

#### **HN2[] Legislation, Interpretation**

109 F.3d 1, \*11997 U.S. App. LEXIS 4939, \*\*1

Legislation of congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. In this context, inquiring courts must determine whether congress has clearly expressed an affirmative desire to apply particular laws to conduct that occurs beyond the borders of the United States.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### **HN3** International Aspects, International Application of US Law

The Sherman Act, [15 U.S.C.S. § 1 \(1994\)](#), applies to foreign conduct that is meant to produce and does in fact produce some substantial effect in the United States.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

### **HN4** International Aspects, Foreign Trade Antitrust Improvements Act

Civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within the jurisdictional reach of the Sherman Act, [15 U.S.C.S. § 1 \(1994\)](#).

Antitrust & Trade Law > Sherman Act > General Overview

### **HN5** Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1 \(1994\)](#).

Antitrust & Trade Law > Sherman Act > General Overview

### **HN6** Antitrust & Trade Law, Sherman Act

Courts shall interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil.

Governments > Legislation > Interpretation

### **HN7** Legislation, Interpretation

Identical words or terms used in different parts of the same act are intended to have the same meaning. The principle, which is called "the basic canon of statutory construction," operates not only when particular phrases appear in different sections of the same act, but also when they appear in different paragraphs or sentences of a single section.

Governments > Legislation > Interpretation

### **HN8** **Legislation, Interpretation**

The same phrase, appearing in the same portion of the same statute, cannot bear divergent interpretations in different litigation contexts.

Antitrust & Trade Law > Sherman Act > General Overview

### **HN9** **Antitrust & Trade Law, Sherman Act**

Acts that are done outside a jurisdiction, but are intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he has been present at the effect, if the state succeeds in getting him within its power. It is not much of a stretch to apply this same principle internationally, especially in a shrinking world.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

### **HN10** **Regulated Practices, Price Fixing & Restraints of Trade**

Criminal intent generally is required to convict under the Sherman Act, [15 U.S.C.S. § 1 \(1994\)](#). However, intent need not be shown to prosecute criminally conduct regarded as per se illegal because of its unquestionably anticompetitive effects. Defendants can be convicted of participation in price-fixing conspiracies without any demonstration of a specific criminal intent to violate the antitrust laws.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

**HN11** [blue download icon] International Aspects, International Application of US Law

In the case of regulatory statutes that may give rise to both civil and criminal liability, such as the United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law shall be found only on the basis of express statement or clear implication.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

**HN12** [blue download icon] Antitrust & Trade Law, Sherman Act

Any agreement in restraint of United States trade that is made outside of the United States is subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce. A country's decision to prosecute wholly foreign conduct is discretionary.

Governments > Legislation > Interpretation

Governments > Legislation > Interpretation > Rule of Lenity

**HN13** [blue download icon] Legislation, Interpretation

The rule of lenity is venerable; it provides that, in the course of interpreting statutes in criminal cases, a reviewing court shall resolve ambiguities affecting a statute's scope in the defendant's favor. However, the rule of lenity is inapposite unless a statutory ambiguity looms, and a statute is not ambiguous for this purpose simply because some courts or commentators have questioned its proper interpretation. Rather, the rule of lenity applies only if, after seizing everything from which aid can be derived, a court can make no more than a guess as to what congress has intended. The rule of lenity is a background principle that properly comes into play when, at the end of a thorough inquiry, the meaning of a criminal statute remains obscure. The rule of lenity cannot be used to create ambiguity when the meaning of a law, even if not readily apparent, is, upon inquiry, reasonably clear.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Governments > Courts > Judicial Comity

Governments > State & Territorial Governments > Relations With Governments

International Law > Dispute Resolution > Comity Doctrine > General Overview

**HN14** [blue download icon] International Aspects, International Application of US Law

International comity is a doctrine that counsels voluntary forbearance when a sovereign, which has a legitimate claim to jurisdiction, concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law. Comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. Comity concerns will operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign sovereign requires a defendant to act in a manner incompatible with the Sherman Act, [15 U.S.C.S. § 1 \(1994\)](#), or in which full compliance with both statutory schemes is impossible.

**Counsel:** Mark S. Popofsky, Attorney, Antitrust Division, U.S. Dep't of Justice, with whom Anne K. Bingaman, Assistant Attorney General, Joel I. Klein, Deputy Assistant Attorney General, John J. Powers, III, Robert B. Nicholson, David A. Blotner, Lisa M. Phelan, and Reginald K. Tom, Attorneys, Antitrust Division, were on brief, for the United States.

Richard G. Parker, with whom Geoffrey D. Oliver, Alan M. Cohen, O'Melveny & Myers LLP, William H. Kettlewell, and Dwyer & Collora were on brief, for Nippon Paper Industries Co., Ltd.

John G. Roberts, Jr., David G. Leitch, H. Christopher Bartolomucci, and Hogan & Hartson L.L.P. on brief for Government of Japan, *amicus curiae*.

**Judges:** Before Selya, Circuit Judge, Coffin, Senior Circuit Judge, and Lynch, Circuit Judge. LYNCH, Circuit Judge (concurring).

**Opinion by:** SELYA

## Opinion

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[\*2] **SELYA, Circuit Judge.** This case raises an important, hitherto unanswered question. In it, the United States attempts to convict a foreign corporation under the Sherman Act, a federal antitrust statute, alleging [\*2] that price-fixing activities which took place entirely in Japan are prosecutable because they were intended to have, and did in fact have, substantial effects in this country. The district court, declaring that a criminal antitrust prosecution could not be based on wholly extraterritorial conduct, dismissed the indictment. See [United States v. Nippon Paper Indus. Co., 944 F. Supp. 55 \(D. Mass. 1996\)](#). We reverse.

### I. JUST THE FAX

Since the district court granted the defendant's motion to dismiss for failure to state a prosecutable offense, we draw our account of the pertinent events from the well-pleaded facts in the indictment itself. See [United States v. National Dairy Prods. Corp., 372 U.S. 29, 33 n.2, 9 L. Ed. 2d 561, 83 S. Ct. 594 \(1963\)](#).

In 1995, a federal grand jury handed up an indictment naming as a defendant Nippon Paper Industries Co., Ltd. (NPI), a Japanese manufacturer of facsimile paper.<sup>1</sup> The indictment alleges that in 1990 NPI and certain unnamed coconspirators held a number of meetings in Japan which culminated in an agreement to fix the price of thermal fax paper throughout North America. NPI and other manufacturers who were privy to the scheme purportedly accomplished [\*3] their objective by selling the paper in Japan to unaffiliated trading houses on condition that the latter charge specified (inflated) prices for the paper when they resold it in North America. The trading houses then shipped and sold the paper to their subsidiaries in the United States who in turn sold it to American consumers at swollen prices. The indictment further relates that, in 1990 alone, NPI sold thermal fax paper worth approximately \$ 6,100,000 for eventual import into the United States; and that in order to ensure the success of the venture, NPI monitored the paper trail and confirmed that the prices charged to end users were those that it had arranged. These activities, the indictment posits, had a substantial adverse effect on commerce in the United States and unreasonably restrained trade in violation of Section One of the Sherman Act, [15 U.S.C. § 1 \(1994\)](#).

[\*\*4] NPI moved to dismiss because, *inter alia*, if the conduct attributed to NPI occurred at all, it took place entirely in Japan, and, thus, the indictment failed to limn an offense under Section One of the Sherman Act. The

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<sup>1</sup> The grand jury also named another Japanese manufacturer, Jujo Paper Co., Ltd. (Jujo), as a codefendant. Two years earlier, however, NPI had been formed and, the government alleges, had assumed Jujo's assets and liabilities. Because the issue of successor liability is not before us, we treat NPI as if it were the sole defendant and as if it, rather than Jujo, were alleged to have committed the acts described in the indictment.

government opposed this initiative on two grounds. First, it claimed that the law deserved a less grudging reading and that, properly read, Section One of the Sherman Act applied criminally to wholly foreign conduct as long as that conduct produced substantial and intended effects within the United States. Second, it claimed that the indictment, too, deserved a less grudging reading and that, properly read, the bill alleged a vertical conspiracy in restraint of trade that involved overt acts by certain coconspirators within the United States. Accepting a restrictive reading of both the [\*3] statute and the indictment, the district court dismissed the case. See [United States v. NPI, 944 F. Supp. 55 at 64-66](#). This appeal followed.

## II. ANALYSIS

We begin -- and end -- with the overriding legal question.<sup>2</sup> [HN1](#) Because this question is one of statutory construction, we review de novo the holding that Section One of the Sherman Act does not cover wholly extraterritorial [\*\*5] conduct in the criminal context. See [United States v. Gifford, 17 F.3d 462, 471-72 \(1st Cir. 1994\)](#).

Our analysis proceeds in moieties. We first present the historical context in which this important question arises. We move next to the specifics of the case.

### A. An Historical Perspective.

Our law has long presumed that [HN2](#) "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." [EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 \(1991\)](#) (citation omitted). In this context, the Supreme Court has charged inquiring [\*\*6] courts with determining whether Congress has clearly expressed an affirmative desire to apply particular laws to conduct that occurs beyond the borders of the United States. See *id.*

The earliest Supreme Court case which undertook a comparable task in respect to Section One of the Sherman Act determined that the presumption against extraterritoriality had not been overcome. In [American Banana Co. v. United Fruit Co., 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511 \(1909\)](#), the Court considered the application of the Sherman Act in a civil action concerning conduct which occurred entirely in Central America and which had no discernible effect on imports to the United States. Starting with what Justice Holmes termed "the general and almost universal rule" holding "that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," *id. at 356*, and the ancillary proposition that, in cases of doubt, a statute should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power," *id. at 357*, the Court held that the defendant's actions abroad were not proscribed by the Sherman Act. [\*\*7]

Our jurisprudence is precedent-based, but it is not static. By 1945, a different court saw a very similar problem in a somewhat softer light. In [United States v. Aluminum Co. of Am., 148 F.2d 416 \(2d Cir. 1945\)](#) (*Alcoa*), the Second Circuit, sitting as a court of last resort, see [15 U.S.C. § 29](#) (authorizing designation of a court of appeals as a court of last resort for certain antitrust cases), mulled a civil action brought under Section One against a Canadian corporation for acts committed entirely abroad which, the government averred, had produced substantial anticompetitive effects within the United States. The *Alcoa* court read *American Banana* narrowly; that case, Judge Learned Hand wrote, stood only for the principle that "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." [148 F.2d at 443](#). But a sovereign ordinarily can impose liability for conduct outside its borders that produces consequences within them,

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<sup>2</sup> Inasmuch as we hold that activities committed abroad which have a substantial and intended effect within the United States may form the basis for a criminal prosecution under Section One of the Sherman Act, we need not address the government's alternative argument that the indictment in this case alleges that some overt acts in furtherance of the conspiracy were perpetrated in the United States.

109 F.3d 1, \*3L<sup>A</sup> 1997 U.S. App. LEXIS 4939, \*\*7

and while considerations of comity argue against applying Section One to situations in which no effect within the United States has been shown -- the [\[\\*\\*8\]](#) *American Banana* scenario -- the statute, properly interpreted, does proscribe extraterritorial acts which were "intended to affect imports [to the United States] and did affect them." *Id. at 444*. On the facts of *Alcoa*, therefore, the presumption against extraterritoriality had been overcome, and the Sherman Act had been violated. See *id. at 444-45*.

[\[\\*4\]](#) Any perceived tension between *American Banana* and *Alcoa* was eased by the Supreme Court's most recent exploration of the Sherman Act's extraterritorial reach. In *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993), the Justices endorsed *Alcoa*'s core holding, permitting civil antitrust claims under Section One to go forward despite the fact that the actions which allegedly violated Section One occurred entirely on British soil. While noting *American Banana*'s initial disagreement with this proposition, the *Hartford Fire* Court deemed it "well established by now that [HN3](#)<sup>↑</sup> the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *509 U.S. 764 at 796, 113 S. Ct. 2891, 125 L. Ed. 2d 612*. The conduct alleged, a London-based conspiracy to alter the American insurance [\[\\*\\*9\]](#) market, met that benchmark.<sup>3</sup> See *id.*

[\[\\*10\]](#) To sum up, the case law now conclusively establishes that [HN4](#)<sup>↑</sup> civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One's jurisdictional reach. In arriving at this conclusion, we take no view of the government's asseveration that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), [15 U.S.C. § 6a \(1994\)](#), makes manifest Congress' intent to apply the Sherman Act extraterritorially. The FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it. See *Hartford Fire*, *509 U.S. at 796 n.23*. We emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA.

## B. The Merits.

Were this a civil case, our journey would be complete. But here the United States essays a criminal prosecution for solely extraterritorial conduct rather than a civil action. This is largely uncharted terrain; we are aware of no authority directly on point, and the parties have cited none.

Be that as it may, one datum sticks out like a sore thumb: in both criminal and civil cases, the claim that Section One applies extraterritorially [\[\\*\\*11\]](#) is based on the same language in the same section of the same statute: [HN5](#)<sup>↑</sup> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U.S.C. § 1](#). Words may sometimes be chameleons, possessing different shades of meaning in different contexts, see, e.g., *Hanover Ins. Co. v. United States*, 880 F.2d 1503, 1504 (1st Cir. 1989), cert. denied, 493 U.S. 1023, 107 L. Ed. 2d 745, 110 S. Ct. 726 (1990), but common sense suggests that [HN6](#)<sup>↑</sup> courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil.

Common sense is usually a good barometer of statutory meaning. Here, however, we need not rely on common sense alone; accepted canons of statutory construction point in the same direction. It is a fundamental interpretive principle that [HN7](#)<sup>↑</sup> identical words or terms used in different parts of the same act are intended to have the same

<sup>3</sup> As NPI reminds us, four Justices dissented in *Hartford Fire*. This is cold comfort, however, for the dissenters expressed complete agreement with the majority's view on extraterritoriality. See *Hartford Fire*, *509 U.S. at 814* (Scalia, J., dissenting). By the same token, NPI's attempt to distinguish *Hartford Fire* on the ground that the defendants there conceded the United States' jurisdiction over their conduct fails for two reasons.

In the first place, the assertion is no more than a play on words. The majority opinion in *Hartford Fire* stated that the district court "undoubtedly" had jurisdiction over the civil claims, "as the London reinsurers apparently concede." *Id. at 795*. It is obvious, therefore, that jurisdiction did not depend on the concession; to the contrary, jurisdiction would "undoubtedly" have existed in any event. In the second place, one of the London defendants did not join in this apparent concession, but the Court nonetheless held that defendant's foreign conduct to be within the Sherman Act's proscriptive ambit because it was part of a scheme which "was intended to and did in fact produce a substantial effect on the American insurance market." *Id. at 795 n.21*.

meaning. See [Commissioner of Internal Revenue v. Lundy](#), 133 L. Ed. 2d 611, 116 S. Ct. 647, 655 (1996); [\[\\*5\] Gustafson v. Alloyd Co.](#), 513 U.S. 561, 115 S. Ct. 1061, 1067, 131 L. Ed. 2d 1 (1995). [\[\\*\\*12\]](#) This principle -- which the Court recently called "the basic canon of statutory construction," [Estate of Cowart v. Nicklos Drilling Co.](#), 505 U.S. 469, 479, 120 L. Ed. 2d 379, 112 S. Ct. 2589 (1992) -- operates not only when particular phrases appear in different sections of the same act, but also when they appear in different paragraphs or sentences of a single section. See [Russo v. Texaco, Inc.](#), 808 F.2d 221, 227 (2d Cir. 1986) ("It is a settled principle of statutory construction that when the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.") (citations and internal quotation marks omitted); [United States v. Gertz](#), 249 F.2d 662, 665 (9th Cir. 1957) (similar). It follows, therefore, that if the language upon which the indictment rests were the same as the language upon which civil liability rests but appeared in a different section of the Sherman Act, or in a different part of the same section, we would be under great pressure to follow the lead of the *Hartford Fire* Court and construe the two iterations of the language identically. Where, as here, the tie [\[\\*\\*13\]](#) binds more tightly -- that is, the text under consideration is not merely a duplicate appearing somewhere else in the statute, but is the original phrase in the original setting -- the pressure escalates and the case for reading the language in a manner consonant with a prior Supreme Court interpretation is irresistible. See [United States v. Thompson/Center Arms Co.](#), 504 U.S. 505, 518 n.10, 119 L. Ed. 2d 308, 112 S. Ct. 2102 (1992) (plurality op.) (flatly rejecting the idea, while construing language from a statute with both civil and criminal implications, that a court should "refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation").

The Supreme Court confronted an analogous situation in [Ratzlaf v. United States](#), 510 U.S. 135, 126 L. Ed. 2d 615, 114 S. Ct. 655 (1994). There, the court dealt with a single criminal penalty clause, contained in [31 U.S.C. § 5322\(a\)](#) (1994), which authorized punishment for individuals "willfully violating" a number of separate statutory provisions. The defendant was charged under one of these provisions. After noting that identical terms appearing at multiple places within a single statute customarily have a consistent meaning, the Court [\[\\*\\*14\]](#) said: "We have even stronger cause to construe a *single* formulation, here [§ 5322\(a\)](#), the same way each time it is called into play." *Id. at 143*. The *Ratzlaf* Court proceeded to interpret the phrase "willfully violating" to incorporate the same mens rea requirement that had been read into the phrase when [section 5322\(a\)](#) was applied in other contexts. [510 U.S. 135 at 136-37, 141, 114 S. Ct. 655, 126 L. Ed. 2d 615](#). In so doing the Court quoted with approval our statement in [United States v. Aversa](#), 984 F.2d 493, 498 (1st Cir. 1993) (en banc): "Ascribing various meanings to a single iteration . . . -- reading the word differently for each code section to which it applies -- would open Pandora's jar. If courts can render meaning so malleable, the usefulness of a single penalty provision for a group of related code sections will be eviscerated."

*Ratzlaf* is not our only teaching aid. This court recently confronted a situation that, putting together its successive stages, throws light upon the problem at hand. Having found an ambiguity in the phrase "cost of producing self-employment income," [7 U.S.C. § 2014\(d\)\(9\)](#) (1994), we deferred to a reasonable administrative regulation interpreting it. See [Strickland](#) [\[\\*15\]](#) v. [Commissioner, Me. Dep't of Human Servs.](#), 48 F.3d 12, 21 (1st Cir.), cert. denied, 133 L. Ed. 2d 91, 116 S. Ct. 145 (1995). In a subsequent suit involving the same parties, we debunked the plaintiffs' contention, advanced in a somewhat different context and in connection with a neoteric legal theory, that the phrase in question had a plain meaning. We explained: "Statutory ambiguity does not flash on and off like a bank of strobe lights at a discotheque, shining brightly at the time of one lawsuit and then vanishing mysteriously in the interlude before the next suit appears." [Strickland v. Commissioner, Me. Dep't of Human Servs.](#), 96 F.3d 542, 547 (1st Cir. 1996). Read in the ensemble, the *Strickland* opinions stand for the proposition that [HN8](#) the same phrase, appearing in the same portion [\[\\*6\]](#) of the same statute, cannot bear divergent interpretations in different litigation contexts.

The shared rationale of the *Ratzlaf* and *Strickland* cases reinforces the basic canon of construction and gives us confidence that we should follow the canon here. The words of Section One have not changed since the *Hartford Fire* Court found that they clearly evince Congress' intent to apply the [\[\\*\\*16\]](#) Sherman Act extraterritorially in civil actions, and it would be disingenuous for us to pretend that the words had lost their clarity simply because this is a criminal proceeding. Thus, unless some special circumstance obtains in this case, there is no principled way in which we can uphold the order of dismissal.

NPI and its amicus, the Government of Japan, urge that special reasons exist for measuring Section One's reach differently in a criminal context. We have reviewed their exhortations and found them hollow. We discuss the five most promising theses below. The rest do not require comment.

**1. Lack of Precedent.** NPI and its amicus make much of the fact that this appears to be the first criminal case in which the United States endeavors to extend Section One to wholly foreign conduct. We are not impressed. There is a first time for everything, and the absence of earlier criminal actions is probably more a demonstration of the increasingly global nature of our economy than proof that Section One cannot cover wholly foreign conduct in the criminal milieu.

Moreover, this argument overstates the lack of precedent. There is, for example, solid authority for applying a state's [\[\\*\\*17\]](#) criminal statute to conduct occurring entirely outside the state's borders. See [Strassheim v. Daily, 221 U.S. 280, 285, 55 L. Ed. 735, 31 S. Ct. 558 \(1911\)](#) (Holmes, J.) [HN9](#) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."). It is not much of a stretch to apply this same principle internationally, especially in a shrinking world. See, e.g., [Chua Han Mow v. United States, 730 F.2d 1308, 1311-12 \(9th Cir. 1984\)](#) (applying *Strassheim* principle to conduct in Malaysia involving drugs intended for distribution in the United States), cert. denied, 470 U.S. 1031, 84 L. Ed. 2d 790, 105 S. Ct. 1403 (1985); [United States v. Hayes, 653 F.2d 8, 11 \(1st Cir. 1981\)](#) (similar); cf. John Donne, *Devotions Upon Emergent Occasions*, no. 17 (1624) (warning that "no man is an island, entire of itself; every man is a piece of the continent, a part of the main").

**2. Difference in Strength of Presumption.** The lower court and NPI both cite [United States v. Bowman, 260 U.S. 94, 67 L. Ed. 149, 43 S. Ct. 39 \(1922\)](#), for the proposition that [\[\\*\\*18\]](#) the presumption against extraterritoriality operates with greater force in the criminal arena than in civil litigation. This misreads the opinion. To be sure, the *Bowman* Court, dealing with a charged conspiracy to defraud, warned that if the criminal law "is to be extended to include those [crimes] committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." [Id. at 98](#). But this pronouncement merely restated the presumption against extraterritoriality previously established in civil cases like [American Banana, 213 U.S. at 357](#). The *Bowman* Court nowhere suggested that a different, more resilient presumption arises in criminal cases.<sup>4</sup>

[\[\\*\\*19\]](#) Nor does [United States v. United States Gypsum Co., 438 U.S. 422, 57 L. Ed. 2d 854, 98 S. Ct. 2864 \(1978\)](#), offer aid and succor to NPI. Recognizing that "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct," [id. at 440-41](#), the *Gypsum* Court held that [\[\\*7\] HN10](#) criminal intent generally is required to convict under the Act. See [id. at 443](#). Although this distinguishes some civil antitrust cases (in which intent need not be proven) from their criminal counterparts, the *Gypsum* Court made it plain that intent need not be shown to prosecute criminally "conduct regarded as per se illegal because of its unquestionably anticompetitive effects." [Id. at 440](#). This means, of course, that defendants can be convicted of participation in price-fixing conspiracies without any demonstration of a specific criminal intent to violate the antitrust laws. See, e.g., [United States v. Brown, 936 F.2d 1042, 1046 \(9th Cir. 1991\)](#); [United States v. Society of Indep. Gas. Marketers, 624 F.2d 461, 465 \(4th Cir. 1980\)](#), cert. denied, 449 U.S. 1078, 101 S. Ct. 859, 66 L. Ed. 2d 801 (1981); [United States v. Gillen, \[\\*20\] 599 F.2d 541, 544-45](#) (3d Cir.), cert. denied, 444 U.S. 866, 100 S. Ct. 137, 62 L. Ed. 2d 89 (1979). Because the instant case falls within that rubric, *Gypsum* does not help NPI.

We add that even if *Gypsum* had differentiated between civil and criminal price-fixing cases, NPI's reliance on it would still be problematic. Reduced to bare essence, *Gypsum* focuses on mens rea, noting that centuries of Anglo-

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<sup>4</sup> Indeed, the *Bowman* Court stated that it regarded *American Banana* as an appropriate analogy because the antitrust statute "is criminal as well as civil." [260 U.S. at 98](#). This seems to support the notion that the presumption is the same in both instances and leaves little room to argue that the *Bowman* Court was attempting to craft a special, more rigorous rule for criminal proceedings.

American legal tradition instruct that criminal liability ordinarily should be premised on malevolent intent, see [\*id. at 436-37\*](#), whereas civil liability, to which less stigma and milder consequences commonly attach, often requires a lesser showing of intent. There is simply no comparable tradition or rationale for drawing a criminal/civil distinction with regard to extraterritoriality, and neither NPI nor its amicus have alluded to any case which does so.

**3. The Restatement.** NPI and the district court, [\*944 F. Supp. at 65\*](#), both sing the praises of the Restatement (Third) of Foreign Relations Law (1987), claiming that it supports a distinction between civil and criminal cases on the issue of extraterritoriality. The passage to which they pin their hopes states:

**HN11** [↑] In the case of regulatory [\*\*21] statutes that may give rise to both civil and criminal liability, such as the United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

*Id. at § 403 cmt. f.* We believe that this statement merely reaffirms the classic presumption against extraterritoriality -- no more, no less. After all, nothing in the text of the Restatement proper contradicts the government's interpretation of Section One. See, e.g., *id. at § 402(1)(c)* (explaining that, subject only to a general requirement of reasonableness, a state has jurisdiction to proscribe "conduct outside its territory that has or is intended to have substantial effect within its territory");<sup>5</sup> *id. at § 415(2)* **HN12** [↑] ("Any agreement in restraint of United States trade that is made outside of the United States . . . [is] subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere [\*\*22] with the commerce of the United States, and the agreement or conduct has some effect on that commerce."). What is more, other comments indicate that a country's decision to prosecute wholly foreign conduct is discretionary. See, e.g., *id. at § 403* rep. n.8.

**4. The Rule of Lenity.** The next arrow which NPI yanks from its quiver is the rule of lenity. **HN13** [↑] The rule itself is venerable; it provides that, in the course of interpreting statutes in criminal cases, a reviewing court should resolve ambiguities affecting a statute's scope in the defendant's favor. See, e.g., [\*Hughey v. United States, 495 U.S. 411, 422, 109 L. Ed. 2d 408, 110 S. Ct. 1979 \(1990\)\*](#); [\*Crandon v. United States, 494 U.S. 152, 158, 108 L. Ed. 2d 132, 110 S. Ct. 997 \(1990\)\*](#); [\*United States v. Gibbens, 25 F.3d 28, 35 \(1st Cir. \[\\*\\*23\] 1994\)\*](#); [\*United States v. Ferryman, 897 F.2d 584, 591 \(1st Cir.\), cert. denied, 498 U.S. 830, 112 L. Ed. 2d 62, 111 S. Ct. 90 \(1990\)\*](#). But the rule of lenity is inapposite [\*8] unless a statutory ambiguity looms, and a statute is not ambiguous for this purpose simply because some courts or commentators have questioned its proper interpretation.<sup>6</sup> See [\*Reno v. Koray, 515 U.S. 50, 132 L. Ed. 2d 46, 115 S. Ct. 2021, 2029 \(1995\)\*](#); [\*Moskal v. United States, 498 U.S. 103, 108, 112 L. Ed. 2d 449, 111 S. Ct. 461 \(1990\)\*](#). Rather, "the rule of lenity applies only if, after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended." [\*Reno, 115 S. Ct. at 2029\*](#) (citations, internal quotation marks, and certain brackets omitted); accord [\*United States v. O'Neil, 11 F.3d 292, 301 n.10 \(1st Cir. 1993\)\*](#) (describing the rule of lenity as "a background principle that properly comes into play when, at the end of a thorough inquiry, the meaning of a criminal statute remains obscure"). Put bluntly, the rule of lenity cannot be used to create ambiguity when the meaning of a law, even if not readily apparent, is, upon inquiry, reasonably clear.

[\*\*24] That ends the matter of lenity. In view of the fact that the Supreme Court deems it "well established" that Section One of the Sherman Act applies to wholly foreign conduct, [\*Hartford Fire, 509 U.S. at 796\*](#), we effectively are foreclosed from trying to tease an ambiguity out of Section One relative to its extraterritorial application. Accordingly, the rule of lenity plays no part in the instant case.

<sup>5</sup> We note in passing that, by their use of the disjunctive in this section, the drafters of the Restatement seem to suggest a more permissive standard than we, and other American courts, see, e.g., *Alcoa, 148 F.2d at 444*, would deem meet.

<sup>6</sup> Leaving aside the lower court's decision in this case, no reported opinion has questioned the applicability of *Hartford Fire*'s exercise in statutory construction to the precincts patrolled by the criminal law. Nevertheless, *Hartford Fire*'s rendition of the statute has drawn criticism from the academy. See, e.g., Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 Sup. Ct. Rev. 289, 307-13 (1993).

**5. Comity.** [HN14](#)[] International comity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law. See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 A. J. Int'l L. 280, 281 n.1 (1982). Comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. In all events, its growth in the antitrust sphere has been stunted by *Hartford Fire*, in which the Court suggested that comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign [\*\*25] sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible. See [\*Hartford Fire\*, 509 U.S. at 798-99](#); see also Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 Sup. Ct. Rev. 289, 306-07 (1993). Accordingly, the *Hartford Fire* Court gave short shrift to the defendants' entreaty that the conduct leading to antitrust liability was perfectly legal in the United Kingdom. See [\*Hartford Fire\*, 509 U.S. at 798-99](#).

In this case the defendant's comity-based argument is even more attenuated. The conduct with which NPI is charged is illegal under both Japanese and American laws, thereby alleviating any founded concern about NPI being whipsawed between separate sovereigns. And, moreover, to the extent that comity is informed by general principles of reasonableness, see [\*Restatement \(Third\) of Foreign Relations Law\* § 403](#), the indictment lodged against NPI is well within the pale. In it, the government charges that the defendant orchestrated a conspiracy with the object of rigging prices in the United States. If the government can prove these [\*\*26] charges, we see no tenable reason why principles of comity should shield NPI from prosecution. We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale. Thus, a ruling in NPI's favor would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect.

[\*9] We need go no further. *Hartford Fire* definitively establishes that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States. We are bound to accept that holding. Under settled principles of statutory construction, we also are bound to apply it by interpreting Section One the same way in a criminal case. The combined force of these commitments requires that we accept the government's cardinal argument, reverse the order of the district court, reinstate the indictment, and remand for further proceedings.

**Reversed and remanded.**

**Concur by:** LYNCH

## Concur

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**LYNCH, Circuit Judge (concurring).** The [\*\*27] question presented in this case is whether Section One of the Sherman Act authorizes criminal prosecutions of defendants for their actions committed entirely outside the United States. Judicial precedents, culminating with the Supreme Court's decision in [\*Hartford Fire Insurance Co. v. California\*, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 \(1993\)](#), conclusively establish that Section One's jurisdictional reach extends, in civil actions, to foreign conduct that is meant to produce, and does in fact produce, substantial effects in the United States. The next question to be asked is whether there is any persuasive reason to believe that, with regard to wholly foreign conduct, Section One in the criminal context is not co-extensive with Section One in the civil context.

In answering this second question, courts must be careful to determine whether this construction of Section One's criminal reach conforms with principles of international law. "It has been a maxim of statutory construction since the decision in [\*Murray v. The Charming Betsy\*, 6 U.S. 64, 2 Cranch 64, 118, 2 L. Ed. 208 \(1804\)](#), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.'" [\*\*28] [\*Weinberger v. Rossi\*, 456 U.S. 25, 32, 71 L. Ed. 2d 715, 102 S. Ct. 1510 \(1982\)](#). In the *Alcoa* case, Judge

Learned Hand found this canon of construction relevant to determining the substantive reach of the Sherman Act, observing that "we are not to read general words [i.e., Section One] . . . without regard to the limitations customarily observed by nations upon the exercise of their powers." [United States v. Aluminum Co. of Am.](#), [148 F.2d 416, 443 \(2d Cir. 1945\)](#); see also [Hartford Fire](#), [509 U.S. at 814-15](#) (Scalia, J., dissenting).

The task of construing Section One in this context is not the usual one of determining congressional intent by parsing the language or legislative history of the statute. The broad, general language of the federal antitrust laws and their unilluminating legislative history place a special interpretive responsibility upon the judiciary. The Supreme Court has called the Sherman Act a "charter of freedom" for the courts, with "a generality and adaptability comparable to that found . . . in constitutional provisions." [Appalachian Coals, Inc. v. United States](#), [288 U.S. 344, 359-60, 77 L. Ed. 825, 53 S. Ct. 471 \(1933\)](#). As Professors Areeda and Turner have said, the federal courts have been [\*\*29] invested "with a jurisdiction to create and develop an **antitrust law** in the manner of the common law courts." I Areeda & Turner, **Antitrust Law** P 106, at 15 (1978).<sup>7</sup> The courts are aided in this task by canons of statutory construction, such as the presumption against violating international law, which serve as both guides and limits in the absence of more explicit indicia of congressional intent.

Here, we are asked to determine the substantive content of Section One's inexact jurisdictional provision, "commerce . . . with foreign nations." [15 U.S.C. § 1](#). Because of the "compunctions against the creation of crimes by judges rather than by legislators," II Areeda & Hovenkamp, **Antitrust Law** P 311b, at 33 (1995 rev. ed.), the constitution-like aspects of the antitrust laws must be handled particularly carefully in criminal prosecutions.

[\*\*30] As the antitrust laws give the federal enforcement agencies a relatively blank check, the development of **antitrust law** has been [\*10] largely shaped by the cases that the executive branch chooses - or does not choose - to bring. Accordingly it has been said that:

novel interpretations or great departures have seldom, if ever, occurred in criminal cases, which prosecutors have usually reserved for defendants whose knowing behavior would be generally recognized as appropriate for criminal sanctions.

*Id. at 34.* This case does present a new interpretation. We are told this is the first instance in which the executive branch has chosen to interpret the criminal provisions of the Sherman Act as reaching conduct wholly committed outside of this country's borders.

Changing economic conditions, as well as different political agendas, mean that antitrust policies may change from administration to administration. The present administration has promulgated new Antitrust Enforcement Guidelines for International Operations which "focus primarily on situations in which the Sherman Act will grant jurisdiction and when the United States will exercise that jurisdiction" internationally. [\*\*31] Brockbank, *The 1995 International Antitrust Guidelines: The Reach of U.S. **Antitrust Law** Continues to Expand*, [2 J. Int'l Legal Stud. 1, \\*22](#) (1996). The new Guidelines reflect a stronger enforcement stance than earlier versions of the Guidelines, and have been described as a "warning to foreign governments and enterprises that the [antitrust enforcement] Agencies intend to actively pursue restraints on trade occurring abroad that adversely affect American markets or damage American exporting opportunities." *Id.* at \*21. The instant case is likely a result of this policy.

It is with this context in mind that we must determine if the exercise of jurisdiction occasioned by the decision of the executive branch of the United States is proper in this case. While courts, including this one, speak of determining congressional intent when interpreting statutes, the meaning of the antitrust laws has emerged through the relationship among all three branches of government. In this criminal case, it is our responsibility to ensure that the executive's interpretation of the Sherman Act does not conflict with other legal principles, including principles of international law.

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<sup>7</sup> Professors Areeda and Turner also note that "judges sometimes talk as if Congress has already decided the question before them. This is usually a misconception." *Id.*

That question [\*\*32] requires examination beyond the language of Section One of the Sherman Act. It is, of course, generally true that, as a principle of statutory interpretation, the same language should be read the same way in all contexts to which the language applies. But this is not invariably true. New content is sometimes ascribed to statutory terms depending upon context. Cf. *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 847, 136 L. Ed. 2d 808 (1997) (depending on context, statutory term may have different meanings in different sections of single statute); 3 Sutherland, *Statutory Construction* § 60.04 (5th ed. 1995) (statutes with both remedial and penal provisions may be construed liberally in remedial context and strictly in penal context). As NPI and the Government of Japan point out, the Supreme Court has held that Section One of the Sherman Act, which defines both criminal and civil violations with one general phrase,<sup>8</sup> "should be construed as including intent as an element" of a criminal violation. *United States v. United States Gypsum Co.*, 438 U.S. 422, 443, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978). Where Congress intends that our laws conform with international law, and where international law suggests that criminal enforcement [\*\*33] and civil enforcement be viewed differently, it is at least conceivable that different content could be ascribed to the same language depending on whether the context is civil or criminal. It is then worth asking about the effect of the international law which Congress presumably also meant to respect.

The content of international law is determined "by reference 'to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators.'" *Hilao v. Marcos*, 103 F.3d 789, 794 (9th Cir. 1996) (quoting *The Paquete Habana*, 175 U.S. 677, 700, 44 L. Ed. 320, 20 S. Ct. 290 (1900)); see also *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). The Restatement (Third) of the Foreign Relations [\*11] Law of the United States restates international law, as derived from customary international law and from international agreements to [\*\*34] which the United States is a party, as it applies to the United States. See *Restatement (Third) of the Foreign Relations Law of the United States §§ 1, 101* (1987) [hereinafter Restatement]. The United States courts have treated the Restatement as an illuminating outline of central principles of international law. See *Hartford Fire*, 509 U.S. at 799 (citing Restatement); *Hartford Fire*, 509 U.S. at 818 (Scalia, J., dissenting) ("I shall rely on the Restatement (Third) of Foreign Relations Law for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles . . . and in the decisions of other federal courts . . . ."); *In re Maxwell Communications Corp.*, 93 F.3d 1036, 1047-48 (2d Cir. 1996).

The Restatement articulates principles, derived from international law, for determining when the United States may properly exercise regulatory (or prescriptive) jurisdiction over activities or persons connected with another state. It serves as a useful guide to evaluating the international interests at stake. Sections 402 and 403 articulate general principles. See Restatement [\*\*35] §§ 402, 403. Section 415 applies these principles to "Jurisdiction to Regulate Anti-Competitive Activities." *Id.* § 415.

Restatement Section 402(1)(c) states that "Subject to § 403," a state has jurisdiction to prescribe law to "conduct outside its territory that has or is intended to have substantial effect within its territory." *Id.* § 402(1)(c). Section 403(1) states that, even when Section 402 has been satisfied, jurisdiction may not be exercised if it is "unreasonable." *Id.* § 403(1). Section 403(2) lists factors to be evaluated in determining if jurisdiction is reasonable:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, [\*\*36] the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;

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<sup>8</sup> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . ." *15 U.S.C. § 1*.

- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

*Id.* § 403(2).<sup>9</sup>

Comment f to Section 403 states that the principles of Sections 402 and 403 "apply to criminal as well as to civil regulation." *Id.* § 403 cmt. f. But, specifically naming the United States antitrust laws, the comment also says that for statutes that give rise to both types of liability, "the presence [\*\*37] of substantial foreign elements will ordinarily weigh against application of criminal law." *Id.* The comment argues that legislative intent to apply these laws criminally should only be found on the basis of "express statement or clear implication." *Id.*

While the majority opinion accurately states that this comment is an expression of the clear statement rule, the comment also implies that there are special concerns associated with the imposition of criminal sanctions on foreign conduct. See also *id.* § 403 [\*12] n.8 ("In applying the principle of reasonableness, the exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive."). Indeed, most people recognize a distinction between civil and criminal liability; that the law of nations should do so as well is not surprising.<sup>10</sup> And while *Hartford Fire* and earlier judicial decisions have found that the antitrust laws do apply, in the civil context, to foreign conduct, this antitrust common law is not the express statement of legislative intent that the Restatement suggests may be appropriate in the criminal context.

[\*\*38] Also relevant to the present inquiry is section 415 (2), which states that:

Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States and the agreement or conduct has some effect on that commerce.

*Restatement* § 415(2). Comment a to Section 415 states that the reasonableness principles articulated in Section 403 must still be satisfied. See *id* cmt. a.

Application of these principles to the indictment at issue here leads to the conclusion that the exercise of jurisdiction is reasonable in this case. Here, raising prices in the United States and Canada was not only a purpose of the alleged conspiracy, it was *the* purpose, thus satisfying Section 415's "principal purpose" requirement. Moreover, Section 415's requirement of "some effect" on United States markets is amply met here. The indictment alleges that NPI sold \$ 6.1 million [\*\*39] of fax paper into the United States during 1990, approximately the period covered by the charged conspiracy. In 1990, total sales of fax paper in North America were approximately \$ 100 million. NPI's price increases thus affected a not insignificant share of the United States market.

These same factors weigh heavily in the Section 403 reasonableness analysis. Because only North American markets were targeted, the United States' interest in combatting this activity appears to be greater than the Japanese interest, which may only be the general interest of a state in having its industries comport with foreign legal norms. Japan has no interest in protecting Japanese consumers in this case as they were unaffected by the alleged conspiracy. The United States, in contrast, has a strong interest in protecting United States consumers, who were affected by the increase in prices. In this situation, it may be that only the United States has sufficient incentive to pursue the alleged wrongdoers, thereby providing the necessary deterrent to similar anticompetitive

<sup>9</sup> Section 403(3) is not applicable here. See *id.* § 403(3) cmt. e.

<sup>10</sup> Enforcement of criminal laws against foreign nationals for conduct on foreign soil may affect this country's relationship with the foreign country in somewhat different ways than would a civil action. Congress could choose to provide more explicit guidance to the executive and the courts in this area if it is concerned about such impacts on foreign relations.

behavior. In another case, where the consumers of the situs nation were injured as well, that state's interest in regulating anticompetitive **[\*\*40]** conduct might be stronger than it is here.

Other Section 403 factors also counsel in favor of the exercise of jurisdiction here. The effects on United States markets were foreseeable and direct. The Government of Japan acknowledges that antitrust regulation is part of the international legal system, and NPI does not really assert that it has justified expectations that were hurt by the regulation.<sup>11</sup> The only factor counseling against finding that the United States' antitrust laws apply to this conduct is the fact that the situs of the conduct was Japan and that the principals were Japanese corporations. This consideration is inherent in the nature of jurisdiction based on effects of conduct, where the situs of the conduct is, by definition, always a **[\*13]** foreign country. This alone does not tip the balance against jurisdiction.

**[\*\*41]** For these reasons, I agree with the majority that the district court erred in dismissing the indictment.

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<sup>11</sup> While criminal prosecution may come as a surprise, NPI should have known that civil antitrust liability could include treble damages. A corporation found guilty of a criminal violation of Section One is subject to a fine not exceeding \$ 10 million. See 15 U.S.C. § 2. Treble damages obviously do not include a similar cap.



## Natural Gas Clearinghouse v. FERC

United States Court of Appeals for the District of Columbia Circuit

January 24, 1997, Argued ; March 18, 1997, Decided

No. 96-1140

**Reporter**

108 F.3d 397 \*; 1997 U.S. App. LEXIS 4977 \*\*; 323 U.S. App. D.C. 343; 136 Oil & Gas Rep. 660

NATURAL GAS CLEARINGHOUSE, PETITIONER v. FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT; UNITED MUNICIPAL DISTRIBUTORS GROUP, ET AL., INTERVENORS

**Prior History:** [\*\*1] On Petition for Review of Orders of the Federal Energy Regulatory Commission.

**Disposition:** Denied.

### **Core Terms**

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transportation, natural gas, pipeline, fuel, fuel-gas, costs, regulated, shipper, transit service, customers, charges

### **LexisNexis® Headnotes**

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Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > US Federal Energy Regulatory Commission

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > Marketability

Energy & Utilities Law > Pipelines & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

**HN1** [P] **Pipelines & Transportation, Pipelines**

The Federal Energy Regulatory Commission has sought to assure that competition at the wellhead is carried downstream to customers, undistorted by regulation of the pipelines' natural monopolies in gas transportation. A series of rules and policies requires, among other things, that pipelines carry the gas of competing natural gas vendors on a non-discriminatory basis, separate their own gas marketing from their transportation functions, and, indeed, quit the business of making "bundled" sales of gas, that is, sales by the entity that provides the transportation.

[Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview](#)

[Energy & Utilities Law > Antitrust Issues > Monopolization](#)

[Real Property Law > Encumbrances > Adjoining Landowners > Oil & Gas](#)

[Energy & Utilities Law > Antitrust Issues > General Overview](#)

## **HN2** **Regulated Industries, Energy & Utilities**

A price-regulated monopoly's business activity upstream or downstream from the area it monopolizes carries a risk both of defeating the regulatory scheme by enabling the monopolist to inflate the costs that under cost-of-service principles are recoverable from captive customers, and of impairing competition in the adjacent activity by enabling the monopolist to use inflated cost recoveries in the regulated market to subsidize its competition in the adjacent competitive one.

[Administrative Law > Judicial Review > Standards of Review > Rule Interpretation](#)

[Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview](#)

[Administrative Law > Judicial Review > Standards of Review > General Overview](#)

[Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview](#)

[Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Hearings & Orders > Judicial Review](#)

## **HN3** **Standards of Review, Rule Interpretation**

A reviewing court must sustain the Federal Energy Regulatory Commission's interpretation of its order if it is reasonable.

[Energy & Utilities Law > Natural Gas Industry > Distribution & Sale](#)

[Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview](#)

[Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview](#)

## **HN4** **Natural Gas Industry, Distribution & Sale**

The Federal Energy Regulatory Commission (FERC) defines "transportation" to include storage, exchange, backhaul, displacement, or other methods of transportation. [18 C.F.R. § 284.1\(a\) \(1996\)](#). Nothing in the FERC definition suggests that energy used for transportation is not an aspect of transportation service.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

## [\*\*HN5\*\*](#) **Natural Gas Industry, Distribution & Sale**

The Federal Energy Regulatory Commission's regulations generally require for pipeline transportation service. [18 C.F.R. § 284.7\(c\)\(4\) \(1996\)](#).

**Counsel:** Peter G. Esposito argued the cause for petitioner. With him on the brief was Kenneth E. Randolph.

Katherine Waldbauer, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief were Jerome M. Feit, Solicitor, and Joseph S. Davies, Deputy Solicitor.

Michael E. McMahon argued the cause and filed the brief for intervenor Koch Gateway Pipeline Company. James H. Byrd and Pamela M. Silberstein entered appearances.

**Judges:** Before: WILLIAMS, HENDERSON and RANDOLPH, Circuit Judges. Opinion for the Court filed by Circuit Judge WILLIAMS

**Opinion by:** WILLIAMS

## **Opinion**

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[\*398] WILLIAMS, *Circuit Judge*: Moving natural gas through a pipeline requires energy, which is commonly, perhaps invariably, supplied by natural gas itself. Koch Gateway Pipeline Company has customarily used its shippers' own gas for these purposes, simply providing a little less gas (about two percent less) at the point of delivery than the shipper supplied at the point of receipt. In 1995 Koch filed tariff sheets under which it would give shippers an additional option--that of paying Koch in cash for [\*2] the requisite fuel, at a price that Koch would post on its electronic bulletin board. The Commission approved the tariff change, see [Koch Gateway Pipeline Co., 73 FERC P 61,375 \(1995\)](#) ("Koch I"), made some adjustments in response to a petition for rehearing, [Koch Gateway Pipeline Co., 74 P FERC 61,212 \(1996\)](#) ("Koch II"), and denied a final petition for rehearing, [Koch Gateway Pipeline Co., 75 FERC P 61,096 \(1996\)](#).

Petitioner Natural Gas Clearinghouse is an independent marketer buying and selling natural gas, unaffiliated with any pipeline. It views the orders as representing a Thermidor in the natural gas revolution that began in 1985, turning "the competitive clock back in the direction of a far darker age ... [when] vigorous competition among many different [natural gas] suppliers was a mere academic concept." Petitioner's Brief at 9. Even assuming we had authority to check such counter-revolutionary impulses in the Commission, which of course we don't, this case presents no such issue. Finding no violation of statutes, of the Commission's regulations, or of any precept of administrative law, we deny the petition for review.

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In its reshaping of [\*3] the regulatory environment [\*\*HN1\*\*](#) the Commission has sought to assure [\*399] that competition at the wellhead is carried downstream to customers, undistorted by regulation of the pipelines' natural

monopolies in gas transportation. A series of rules and policies requires, among other things, that pipelines carry the gas of competing natural gas vendors on a non-discriminatory basis, separate their own gas marketing from their transportation functions, and, indeed, quit the business of making "bundled" sales of gas (i.e., sales by the entity that provides the transportation). See Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13267, 13268-77 (1992), III FERC Stats. & Regs. P 30,939, *aff'd but remanded for consideration of certain issues, United Distribution Cos. v. FERC, 1996 U.S. App. LEXIS 17436, 88 F.3d 1105 (D.C. Cir. 1996)*; see *id. at 1122-25* for an overall background review and summary.

A major concern behind this unbundling was that otherwise the pipelines could use their transportation monopolies to secure illegitimate advantages in gas sales. For example, **[\*\*4]** they might undercharge for carrying their own gas, or provide better service for that gas, and, by burying the costs of such favoritism in higher charges to competing sellers of gas (or their vendees), could gain an artificial advantage in the gas market.<sup>1</sup> The Commission's actions have thus been based on the familiar proposition that **HN2**<sup>↑</sup> a price-regulated monopoly's business activity upstream or downstream from the area it monopolizes carries a risk both of defeating the regulatory scheme (by enabling the monopolist to inflate the costs that under cost-of-service principles are recoverable from captive customers), and of impairing competition in the adjacent activity (by enabling the monopolist to use inflated cost recoveries in the regulated market to subsidize its competition in the adjacent competitive one). See, e.g., 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* § 726e (1978).

**[\*\*5]** Natural Gas Clearinghouse's essential argument is that Koch's offer of a fuel-gas option is an attempted sale of natural gas and therefore, under Order No. 636, an offer that Koch could make only through its separate, merchant affiliate. Natural Gas Clearinghouse cites no specific language in Order No. 636 that the Commission's approval of the fuel-gas option might violate; its claim is that the approval contradicts the fundamental purposes of that Order. **HN3**<sup>↑</sup> We must sustain the Commission's interpretation of the Order if it is reasonable. See *Udall v. Tallman, 380 U.S. 1, 16, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965)*. But see John F. Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," *96 Colum. L. Rev. 612, 682 (1996)* (arguing for non-deferential review). The Commission concluded that Koch's proposed option was "not a marketing service, but is an extension of its transportation service." *Koch I*, 73 FERC at P 62,166.

As a matter of ordinary language FERC's approach seems unassailable. **HN4**<sup>↑</sup> FERC defines "transportation" to include "storage, exchange, backhaul, displacement, or other methods of transportation." *18 CFR § 284.1(a) (1996)*. Here the gas is used, by Koch itself, **[\*\*6]** to provide transportation service to Koch's transportation customers, and nothing in the FERC definition suggests that energy used for transportation is not an aspect of transportation service. We inquired at oral argument whether the Commission could not allow a pipeline simply to offer a transportation rate with the fuel cost embedded in the rate, just as a railroad charges for transportation without any separate "sale" of diesel fuel to the shippers. Counsel for Natural Gas Clearinghouse acknowledged (as we think was necessary) that there would be no legal impediment to such an arrangement, and could identify no way in which Koch's fuel-gas option could impose a more severe impact on gas marketers such as Natural Gas Clearinghouse.

**[\*400]** The reasonableness of classifying compensation for fuel gas with the provision of transportation service seems confirmed by an examination of whether Koch's proposal will in fact enable Koch to engage in the sort of manipulation that is traditionally feared from vertical integration by a price-regulated monopolist. Clearinghouse argues that Koch's staff, nominally dedicated to provision of pipeline transportation, is devoting some time and resources **[\*\*7]** to the various tasks associated with buying gas for "sale" into the fuel-gas submarket. Thus Koch might be seen as "inflating" the costs passed on to its captive transportation customers, and making a "sale" of gas subsidized by those customers.

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<sup>1</sup> Because regulation will presumably have been holding the firm's rates below the profit-maximizing level, the rate increases resulting from this artificial cost inflation will not reduce the firm's profit. Such rate increases presumably would reduce profit for an unregulated monopolist, which would have selected the profit-maximizing price and quantity on the basis of its real marginal revenue and real marginal cost, and any rate increase would lower its profit.

But in this context it seems impossible to speak meaningfully of "shifting" costs or of cross-subsidization. Koch offers the option on a non-discriminatory basis. If it slipped fuel-gas costs into its non-fuel transportation charges, the parties that *lost* by the inflated non-fuel charges would *gain* by reduced fuel costs. As Koch's competitors would be the beneficiaries of any "cross-subsidization" of fuel gas, the supposed cost-shifting would give Koch no net advantage in the natural gas market generally. Thus the incongruity of calling fuel gas something other than part of the transportation service is underscored by the complete mismatch with the standard depiction of the menaces posed by a regulated monopoly's integration into adjacent activities.

Even if the above were completely wrong, the opportunity for distortion seems rather trivial. Clearinghouse has not laid out a scenario that suggests much opportunity for Koch to manipulate **[\*\*8]** gas costs in any harmful way. The commodity is fungible and appears to be sold in rather "thick" markets in the producing areas, so that outsiders should not have great difficulty spotting any serious cost-shifting (assuming it were meaningful to talk of "shifting" costs from fuel gas to transportation service). Cf. *Koch I*, 73 FERC at P 62,167 (noting that the posting on Koch's electronic bulletin board will show not only the price but its basis, which, we were informed at oral argument, has been a three-day average of the price of natural gas futures in New York). Thus, any very material undercharge for Koch's fuel gas would be immediately noticeable. Finally, fuel-gas use seems rather steadily to account for only about 3.3 percent of total natural gas consumption, so that even if Koch acquired some unfair advantage in the "market" for fuel gas for Koch, it is hard to see much likelihood of impact on the gas market as a whole. See Energy Information Administration, Monthly Energy Review, Table 4-4 (January 1997) (giving figures from which one may calculate the fraction as 3.31% in 1994, 3.24% in 1995, and 3.25% in 1996).

Thus FERC appears to have been entirely reasonable in concluding **[\*\*9]** that Clearinghouse's concerns that Koch's offer of its fuel-gas option might lead to cross-subsidization are "unfounded." See *Koch II*, 74 FERC at 61,693.

As a fall-back position, Clearinghouse argues that even if the sale of fuel gas is a transportation function, FERC erred in not requiring that the price be set on the basis of cost, as **HN5**<sup>↑</sup> FERC's regulations generally require for pipeline transportation service. See [18 CFR § 284.7\(c\)\(4\) \(1996\)](#). Here the true concern seems the opposite of petitioner's cross-subsidization claim: Koch is pictured as possibly overcharging for fuel gas, whereas in the prior section the concern was that it might *underprice* its fuel-gas "sales." In any event, as FERC noted, Koch's tariff merely gives the shipper an additional choice, beyond the always available (and concededly legitimate) one of having Koch retain a specified percentage of the shipper's gas. See *Koch II*, 74 FERC at 61,693. Thus no fuel-gas "sale" will ever occur unless its price is below the shipper's opportunity cost for its gas, which for purposes of this issue seems a convenient, self-administering concept of "cost." The Commission seems to have been entirely reasonable **[\*\*10]** in rejecting Clearinghouse's demand for the imposition of stringent accounting requirements on Koch. *Id.* & n.5.

Accordingly, the petition for review is

Denied.



## United States v. GE

United States District Court for the District of Montana, Missoula Division

March 18, 1997, Decided ; March 18, 1997, FILED

CV 96-121-M-CCL

### **Reporter**

1997 U.S. Dist. LEXIS 5089 \*; 1997-1 Trade Cas. (CCH) P71,765

UNITED STATES OF AMERICA, Plaintiffs, vs. GENERAL ELECTRIC COMPANY, Defendant.

**Disposition:** [\*1] GE's motion to dismiss Count I of the complaint DENIED, and its motion to dismiss Count II GRANTED, and that Count II DISMISSED.

## **Core Terms**

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conspiracy, monopolize, licensing, detrimental effect, anticompetitive, pleaded, rule of reason, argues, motion to dismiss, relevant market, imaging, markets

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

### [HN1](#) [down arrow] **Defenses, Demurrsers & Objections, Motions to Dismiss**

In considering this motion to dismiss, the court must accept the facts pleaded as true and is required to construe them in the light most favorable to Plaintiff. A complaint should be dismissed only if it appears "beyond doubt" that Plaintiff can prove no set of facts to support its claim which will entitle it to relief.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

### [HN2](#) [down arrow] **Sherman Act, Scope**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

### [HN3](#) [down arrow] **Per Se Rule & Rule of Reason, Per Se Violations**

Most [15 U.S.C.S. § 1](#) allegations are examined under the "rule of reason" analysis, which is a case-by-case examination of market factors to determine whether conduct unreasonably restrains trade. Central to the analysis is the "relevant market" -- the product market and the geographic market in which the alleged effect on competition is judged. However, certain naked restraints on trade can be judged under a per se rule of illegality. Under the more limited per se analysis, injury to competition is presumed from the nature of the restraint without first inquiring into the particular relevant market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

#### [HN4](#) **Per Se Rule & Rule of Reason, Sherman Act**

The per se analysis of a [15 U.S.C.S. § 1](#) anti-trust violation is used sparingly, and only where experience has shown that anti-competitive consequences flow regularly from the challenged practice. Examples of those practices which are per se illegal include certain price-fixing, division or allocation of markets and certain tying arrangements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

#### [HN5](#) **Per Se Rule & Rule of Reason, Sherman Act**

Restraints which are ancillary to a legitimate transaction are exempt from the per se rule.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

#### [HN6](#) **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Ordinarily under the rule of reason analysis, a [15 U.S.C.S. § 1](#) claimant must adequately describe the relevant product and geographic markets where competition is restrained. However, a violation may be found without a definition of market if the government shows "actual detrimental effects on competition."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

#### [HN7](#) **Per Se Rule & Rule of Reason, Sherman Act**

Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effect, such as a reduction of output can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

#### [HN8](#) **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A 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 > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

### **HN9**[] **Regulated Practices, Monopolies & Monopolization**

See [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

### **HN10**[] **Conspiracy to Monopolize, Sherman Act**

Acquiescence in conduct with knowledge that it is anticompetitive is sufficient to establish a [15 U.S.C.S. § 1](#) conspiracy. But the court knows of no authority that a [§ 2](#) conspiracy may be established without some showing that more than one of the alleged co-conspirators had at least some awareness that the underlying conduct is anticompetitive or monopolistic.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

### **HN11**[] **Conspiracy to Monopolize, Sherman Act**

It is generally thought that the essence of conspiracy is the mutual understanding of the coconspirators to try to accomplish a common and unlawful plan.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

### **HN12**[] **Conspiracy to Monopolize, Elements**

Absent direct or circumstantial evidence of a meeting of the minds and a conscious commitment to a common scheme, [15 U.S.C.S. § 2](#) conspiracy claims fail.

**Counsel:** For UNITED STATES OF AMERICA, plaintiffs: Eugene Crew, Kenneth M. Dintzer, Alexander Verveer, Joan H. Hogan, U.S. DEPARTMENT OF JUSTICE - ANTITRUST DIVISION, Washington, DC.

For GENERAL ELECTRIC COMPANY, defendant: Randy J. Cox, BOONE, KARLBERG & HADDON, Missoula, MT. W. Gordon Dobie, David S. Eggert, Jonathan I. Gleklen, Richard L. Rosen, ARNOLD & PORTER, Washington, DC. Dan K. Webb, WINSTON & STRAWN, Chicago, IL.

**Judges:** CHARLES C. LOVELL, United States District Judge

**Opinion by:** CHARLES C. LOVELL

## **Opinion**

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## ORDER

\*\*\*\*

Before the court is Defendant's motion to dismiss both counts of the government's complaint. Attorneys John R. Read and Kenneth M. Dintzer represented the government at oral argument on the motion and attorneys Randy J. Cox and Dan K. Webb represented General Electric (GE). After considering the briefs and oral arguments of the parties, the court is prepared to rule.

### Background

The government filed an antitrust complaint alleging that GE has violated the Sherman Act by using illegal, restrictive licensing agreements to prevent [\*2] hospitals from competing to service high-tech medical equipment. The complaint for equitable relief contains two counts -- one alleging violation of [Section 1](#) (restraint of trade) of the Sherman Act and the other alleging a violation of [Section 2](#) (conspiracy to monopolize) of the Sherman Act. [15 U.S.C. § 1, 2](#).

The government claims that GE has entered into anti-competitive agreements with more than 500 hospitals that are among GE's most significant actual or potential competitors in the servicing of medical imaging equipment. The government alleges that these agreements are contained in licenses which authorize the hospitals to use advanced GE software to service their own GE medical imaging equipment. In exchange for the license, it is alleged that GE has required each hospital to agree not to compete with GE in servicing any other facilities' medical imaging equipment. The complaint states that the hospitals, including St. Patrick's Hospital in Missoula and Deaconess Hospital in Billings, have in-house service departments that would like to service other facilities' imaging equipment, but they cannot do so due to their licensing agreement with GE.

The complaint alleges that when [\*3] told that the government was going to file this action, GE amended its licensing agreements to limit competition only in the servicing of the same type (modality<sup>1</sup>) of GE equipment for which GE's advanced diagnostics are licensed.

### DISCUSSION

[HN1](#)[] In considering this motion to dismiss, the court must accept the facts pleaded as true and is required to construe them in the light most favorable to Plaintiff. [Smilecare Dental Group v. Delta Dental Plan, 88 F.3d 780, 782-83 \(9th Cir. 1996\)](#). A complaint should be dismissed only if it appears "beyond doubt" that Plaintiff can prove no set of facts to support its claim which will entitle it to relief. *Id.* citing [Everest & Jennings v. American Motorists Ins. Co., 23 F.3d 226, 228 \(9th Cir. 1994\)](#).

### Count I

Count I of the complaint alleges a violation of [HN2](#)[] [Section 1](#), which states that [\*4] "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade is illegal." [15 U.S.C. § 1](#). Ordinarily, [HN3](#)[] most [Section 1](#) allegations are examined under the "rule of reason" analysis, which is a case-by-case examination of market factors to determine whether conduct unreasonably restrains trade. [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). Central to the analysis is the "relevant

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<sup>1</sup> Medical imaging equipment includes different types, or modalities, of equipment such as x-rays, computed tomography, magnetic resonance, ultrasound, and others.

market" -- the product market and the geographic market in which the alleged effect on competition is judged. *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1373 (9th Cir. 1989). However, certain naked restraints on trade can be judged under a *per se* rule of illegality. *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996). Under the more limited *per se* analysis, injury to competition is presumed from the nature of the restraint without first inquiring into the particular relevant market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). After some initial confusion between the parties, the government notified the [\*5] court at oral argument that it intended to plead a *per se* theory of liability as well as a "rule of reason" theory in Count I of the complaint.

### "Per Se" Theory

**HN4** [↑] The *per se* analysis is used sparingly, and only where experience has shown that anti-competitive consequences flow regularly from the challenged practice. See *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 151 (9th Cir. 1989). Examples of those practices which are *per se* illegal include certain price-fixing, division or allocation of markets and certain tying arrangements. *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988). The government argues that the agreements between GE and the licensee hospitals not to compete in the servicing of other facilities' medical equipment are agreements to allocate customers. In the complaint, the government has adequately pleaded that the hospitals and GE are competitors or are potential competitors in the servicing of other medical facilities' medical imaging equipment and the agreements are agreements to allocate customers, which have been held to be *per se* illegal. See *Northern Pacific Ry. Co. v. United States*, 356 U.S. [\*6] 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). In that regard, the government pleaded that GE required the hospitals to agree not to compete with it when they bought the software. Complaint, Par. 5. Further, the government pleaded that the licensing agreements between the hospitals and GE are "horizontal" restraints. Complaint, Par. 3. While it is true that **HN5** [↑] restraints which are ancillary to a legitimate transaction are exempt from the *per se* rule, the government has alleged in the complaint that the agreements not to compete are not ancillary restraints. Complaint, Par. 8 ("the agreements GE has exacted from its licensees not to service other facilities' medical equipment are unrelated to any of GE's legitimate interests in licensing its software and manuals.") Of course, GE may offer evidence to refute the allegation later in this litigation, but for now the allegation is sufficient to withstand the motion to dismiss. Further, contrary to GE's argument, the existence of a vertical aspect to the relationship between the two companies does not foreclose *per se* treatment of agreements to eliminate competition between them. See *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 112 [\*7] L. Ed. 2d 349, 111 S. Ct. 401 (1990). The "dual distribution" cases GE relies upon are not applicable to this issue at hand.

Considering the presumptions afforded the non-moving party on a motion to dismiss, the court finds that the government has sufficiently alleged a *per se* theory of liability under its Section 1 claim.

### Rule of Reason

The government has also pleaded an alternate rule of reason theory of liability in Count I. GE argues that the rule of reason theory should be dismissed without prejudice because the government has failed to properly allege the relevant market. The government argues that it need not define relevant market because it has alleged that GE's agreement with the hospitals has had detrimental effects on competition. Alternatively, the government argues that it has indeed pleaded sufficient facts to satisfy the relevant market analysis.

**HN6** [↑] Ordinarily under the rule of reason analysis, a Section 1 claimant must adequately describe the relevant product and geographic markets where competition is restrained. However, a violation may be found without a definition of market if the government shows "actual detrimental effects on competition." *FTC v. [\*8] Indiana Federation of Dentists*, 476 U.S. 447, 460, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986). There, the court held:

**HN7** [↑] since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effect, such as a reduction of output can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 7 P. Areeda, Antitrust Law, 1511, p. 429 (1986).

*Id. at 461.* In *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988), a Ninth Circuit panel relied on the holding of *Indiana Federation* in upholding the district court's finding of a Section 1 violation without conducting an extended market analysis. *Id.* See also *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404 (9th Cir. 1991) ("If the plaintiff can make a showing of anticompetitive effects, a formal market analysis becomes unnecessary"); *Les Shockley Racing, Inc. v. National Hot Rod Ass'n.*, 884 F.2d 504, 508 (9th Cir. 1989) (requiring proof of "injury to competition within a framework of market analysis," where the plaintiffs [\*9] did not allege actual detrimental competitive effects.) Here, the government has alleged that GE's agreements with the hospitals have caused actual detrimental effects to competition by causing health care providers to pay higher prices, purchase less service, and have fewer options in various service and equipment markets. Complaint Pars. 40-45. Thus, if the government provides proof of the alleged detrimental effects, the court will not have to engage in a full-blown market analysis, and the allegation of these effects is sufficient at this time. In any event, the court finds that the allegation of the detrimental effects along with the markets the government has identified in the complaint have adequately put GE on notice of its claims. While the government's complaint is not a model of clarity in light of the complexity of this case, it adequately describes the markets where competition is restrained, and GE may begin to defend itself. **HN8** [↑] "The 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." *Home Box Office, Inc. v. Z. Channel Ltd. Partnership*, 502 U.S. 1033, 116 L. Ed. [\*10] 2d 780, 112 S. Ct. 875 (1992).

Consequently, accepting the facts as stated in the complaint and drawing all inferences in the government's favor, the court finds that the government has adequately pleaded its alternate theories of liability under Section 1.

## Count II

**HN9** [↑] Section 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...." 15 U.S.C. § 2. The complaint states that "GE has combined with those hospitals with the specific intent of excluding competition...." Complaint, Par. 47. GE argues that the complaint fails to make the required allegation that at least two of the alleged co-conspirators GE and one of its customers possessed specific intent to monopolize. The government argues that Ninth Circuit case law supports its contention that to show a conspiracy to monopolize it need only show that the hospitals agreed to cooperate with GE with some awareness of the anti-competitive effect. *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 1000 (9th Cir. 1986). In *Syufy*, the panel explained [\*11] the difference between the requirements of Section 1 and Section 2 claims:

In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948), the Supreme Court held that **HN10** [↑] acquiescence in conduct with knowledge that it was anticompetitive was sufficient to establish a Section 1 conspiracy. But we know of no authority that a Section 2 conspiracy may be established without some showing that more than one of the alleged co-conspirators had at least some awareness that the underlying conduct was anticompetitive or monopolistic.

*Id.*

The government seizes upon the second sentence to support its claim that the hospitals' mere knowledge of the anticompetitive result will support a Section 2 conspiracy. However, the court does not read *Syufy* as expansively as does the government. Although the "awareness" and "understanding" are a prerequisites to meet the specific intent element, the panel in *Syufy* also found that the Plaintiff in that case failed to demonstrate a "common purpose in monopolizing" among those accused of a Section 2 conspiracy. *Syufy at 1000*. This is supported by *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 [\*12] F.3d 1421, 1437 n.8. (9th Cir. 1995) (to establish a conspiracy to monopolize, "it is not enough to show that the [co-conspirators] merely agreed to go along with [the defendant]"); *Belfiore v. New York Times Co.*, 826 F.2d 177, 183 (2d Cir. 1987) ("even if the Times did possess the requisite intent to achieve a monopoly ... this claim would fail for lack of evidence that the intent was shared by agreement with another party"); *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1283 (8th Cir. 1981) (affirming JNOV because the plaintiff had failed as a matter of law to establish that "the defendant's alleged coconspirators--i.e. its customers ... shared its

specific intent to create a monopoly ...."). Similarly, the court is unpersuaded by the government's argument that its claim is supported by [Flintkote Co. v. Lysfjord, 246 F.2d 368 \(9th Cir. 1957\)](#), a case the government discussed at oral argument but not in the briefing of the motion. [HN11](#) It is generally thought that the essence of conspiracy is the mutual understanding of the coconspirators to try to accomplish a common and unlawful plan. The government's argument simply does not square with the bulk of the authorities, [\\*13](#) which agree that [HN12](#) "absent direct or circumstantial evidence of a meeting of the minds and a conscious commitment to a common scheme, [Section 2](#) conspiracy claims fail." William C. Holmes, [Antitrust Law Handbook](#), § 205[3] at 430 (1996 ed.) (and cases cited therein). The court concludes from the allegations of the complaint that the government has not met this requisite showing. The court, therefore, finds that the government's [Section 2](#) claim must be dismissed. Accordingly,

IT IS HEREBY ORDERED that GE's motion to dismiss Count I of the complaint is DENIED, and its motion to dismiss Count II is GRANTED, and that Count II is DISMISSED.

While it seems unlikely that the government can in good faith make such requisite allegation as to the victim-coconspirators, it should not be foreclosed from the attempt at this early stage. Accordingly, it shall have 20 days from date to file an amended complaint should it care to do so.

The clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this *18th* day of March, 1997.

CHARLES C. LOVELL

United States District Judge

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## **Holmes Prods. Corp. v. Dana Lighting**

United States District Court for the District of Massachusetts

March 19, 1997, Decided

Civil Action No. 94-40109-NMG

### **Reporter**

958 F. Supp. 27 \*; 1997 U.S. Dist. LEXIS 3317 \*\*; 1997-1 Trade Cas. (CCH) P71,827

Holmes Products Corp., Plaintiff v. Dana Lighting, Inc. and Nathan Katz, Defendants

**Disposition:** [\*\*1] Defendants' motion to strike testimony of Danny Lavy DENIED as moot; defendants' motion for summary judgment with respect to count for tortious interference with contractual relations DENIED and defendants' motion for summary judgment with respect to counts for violation of federal antitrust law, violation of Civil RICO statute, violation of M.G.L. c. 93A and for unjust enrichment ALLOWED.

## **Core Terms**

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lamps, defendants', manufacture, competitors, products, tortious interference, contractual relationship, suppliers, summary judgment motion, summary judgment, antitrust, motive, allegations, racketeering activity, unjust enrichment, extortion, foreclosed, Lighting, contends, profits, genuine issue of material fact, market power, vertical, orders, prices, unfair, buyer

## **LexisNexis® Headnotes**

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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 > Need for Trial

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

### **HN1[] Summary Judgment, Burdens of Proof**

The role of summary judgement is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The burden is upon the moving party to show, based upon the pleadings, discovery, and affidavits, that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must view the entire record in the light most hospitable to the non-moving parties and indulge all reasonable inferences in their favor. If the moving party demonstrates that there is an absence of evidence to support the non-moving party's case, the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## **HN2** [down arrow] **Private Actions, Racketeer Influenced & Corrupt Organizations**

To state a valid RICO claim under [18 U.S.C.S. § 1962\(c\)](#), a plaintiff must allege with respect to each defendant the four elements required by the statute, namely: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Banking Law > Federal Acts > General Overview

## **HN3** [down arrow] **Private Actions, Racketeer Influenced & Corrupt Organizations**

To avert dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute and (ii) a causal nexus between that activity and the harm alleged.

Banking Law > ... > Criminal Offenses > Money Laundering > Bank Secrecy Act

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > Penalties

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Bribery > Public Officials > General Overview

Criminal Law & Procedure > ... > Fraud > Securities Fraud > Penalties

Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

## **HN4** [down arrow] **Money Laundering, Bank Secrecy Act**

Racketeering activities are defined in the RICO statute as: (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under various specific provisions of title 18 of the U.S. Code, (C) any act which is indictable

under either of two sections of title 29, U.S. Code relating to labor unions, (D) any offense involving fraud connected with a case under title 11 bankruptcy, fraud in the sales of securities, or certain listed narcotics law violations, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act. [18 U.S.C.S. § 1961\(1\)](#).

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

## [HN5](#) Racketeering, Extortion

The four elements of extortion are: (1) a malicious threat (2) made to a named person (3) of personal injury to some one (4) with intent to extort money.

**Counsel:** For HOLMES PRODUCTS CORP, Holmes Products Corporation, Plaintiff: Dustin F. Hecker, Posternak, Blankstein & Lund, Boston, MA. Sibley P. Reppert, Samuels, Gauthier, Stevens & Reppert, Boston, MA.

For DANA LIGHTING, INC., Defendant: Bruce R. Parker, Michael B. Keating, Foley, Hoag & Eliot, Boston, MA. Janet P. Ailstock, Catalina Lighting, Miami, FL. For NATHAN KATZ, Defendant: Bruce R. Parker, (See above), Michael B. Keating, (See above).

**Judges:** Nathaniel M. Gorton, United States District Judge

**Opinion by:** Nathaniel M. Gorton

## Opinion

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### [\*29] MEMORANDUM AND ORDER

**Gorton, J.**

The above entitled action was filed on July 21, 1994, by the plaintiff, Holmes Products Corp. ("Holmes") against defendants Dana Lighting, Inc. ("Dana") and Nathan Katz ("Katz") (collectively, "the defendants"). The Complaint [\[\\*2\]](#) alleges tortious interference by the defendants with the contractual relationship between plaintiff and Go-Gro Industries, Ltd. ("Go-Gro"), a Hong Kong company which, prior to the alleged tortious interference of defendants, agreed to manufacture four models of lamps for Holmes. The plaintiff seeks restitution damages (Count VI) resulting from the alleged tortious interference of the defendants (Counts I and II) which conduct plaintiff further contends constitutes:

1. an unfair and deceptive act or practice in violation of M.G.L. c. 93A (Count III);
2. a violation of the Civil RICO statute, [18 U.S.C. § 1961 et seq](#) (Count IV); and
3. a violation of the federal [\*\*antitrust law\*\*](#), [15 U.S.C. § 1](#) "the Sherman Act" (Count V).

Plaintiff invokes this Court's jurisdiction pursuant to [28 U.S.C. § 1331](#).

Pending before this court are a) defendants' motion for judgment on the pleadings or, in the alternative, for partial summary judgment filed August 29, 1995, and b) defendants' motion to strike the testimony of Danny Lavy filed August 2, 1996.

I. *Background*

A. *The Parties*

Holmes is a Massachusetts corporation with a principal place of business in Milford, [\*\*3] Massachusetts which designs, manufactures and sells a wide variety of consumer items, such as air purifiers and lamps, predominantly to large retail outlets. Dana, a division of Catalina Lighting, Inc., is a Delaware corporation with a principal place of business in West Bridgewater, Massachusetts. Dana is a major supplier of lighting products and a direct competitor of Holmes in the lighting [\*30] business. Nathan Katz is the President of Dana.

Holmes established its "Lighting by Holmes" Division in 1992 for the purpose of developing and selling a full line of lamps. From July, 1992, until February, 1993, Holmes contracted with Go-Gro for the delivery of a number of specially designed lamps. Go-Gro also manufactured lighting products for Dana.<sup>1</sup>

#### *B. The Products at Issue*

The Dana and Holmes products at issue in this case are referred to in the industry as "functional", "commodity" or "low [\*\*4] end" lamps. They are competitively priced and relatively inexpensive. In 1993, Go-Gro sold such lamps to distributors, including Dana, at prices ranging from \$ 3 to \$ 10 per lamp for resale to large mass merchants and discount retailers which in turn sold them to consumers for prices ranging from \$ 10 to \$ 30.

#### *C. Dana's Alleged Interference With the Holmes-Go-Gro Relationship*

Holmes' claim for tortious interference depends heavily upon a letter dated February 12, 1993, from Richard Lau, president of Go-Gro, to Holmes. Go-Gro was the principal supplier of critical components of the new "low end" line of lamps that Holmes was then introducing to customers. Lau's letter stated, in relevant part:

We have just finished all the positive films yesterday so that printer now could proceed to make the printing mechanicals for your color boxes.

Unfortunately, I received a phone call from the President of Dana - Mr. Nathan Katz who warned me that if Go-Gro dared to ship one piece of lamp to Holmes, Dana would then cancel all the orders placed with Go-Gro.

Dana is our biggest customer and we do rely on their orders. We are extremely sorry that we cannot accept any of your planned orders.

[\*\*5] As a result of that letter, Holmes secured an alternative source to manufacture its new line of "low end" lamps, but asserts that the new manufacturer was no substitute for Go-Gro. Holmes contends that Go-Gro's cancellation, which it attributes to Dana's threat to withdraw its business, caused a measurable delay in the marketing of its new line of lamps and a substantial reduction in the quality of product that it eventually received from the manufacturer.

#### *D. Dana's Alleged Attempts to Interfere With Orders of Other Competitors*

In 1990, Dynasty Classics, Ltd. ("Dynasty") was also a competitor of Dana and bought lamps and other products from manufacturers in the Far East, including Go-Gro. David Lo worked for Dynasty and his contact at Go-Gro was Richard Lau. He negotiated with Mr. Lau about the manufacture of a particular lamp model which was never produced. After Mr. Lo left Dynasty in 1991, he went to work for another competitor, Spartus, and again met with Mr. Lau on behalf of Spartus. Lo contends in his affidavit that Lau apologized to him about Go-Gro's prior refusal to fill Dynasty's order and told him the reason was Dana's insistence that Go-Gro not do business with Dynasty.

[\*\*6] Dana and its parent, Catalina, have been pursuing separate legal action against a Mr. Danny Lavy and his employer, Elite Classics, Inc. ("Elite"), which also competes with Dana. Until the end of 1993, Lavy had been the President of a Dana affiliate in Canada. In early 1994, Lavy spoke, met and corresponded with Mr. Lau about the possible purchases by Elite of products to be produced by Go-Gro. According to the deposition testimony of Lavy, despite Lavy's persistent efforts, Go-Gro never produced the lamps that it agreed to produce and Lau made it clear to him that the source of the problem was Dana and Dana's parent, Catalina. Moreover, Lavy asserts, his negotiations with another Far East manufacturer, Handing Co. Ltd. ("Handing") were stalled when he was told by Handing that Catalina and/or [\*31] Dana had put pressure on it not to do business with Lavy or Elite. Lavy's deposition testimony is the subject of defendant's motion to strike discussed *infra*.

#### *II. Discussion*

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<sup>1</sup> In 1993 Go-Gro's annual sales throughout the world were \$ 37,200,000 of which Dana accounted for \$ 8,300,000 or 22.3%.

## A. Motion For Summary Judgment

### 1. Standard of Review

**HN1**[] The role of summary judgement is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." [\*\*7] [Mesnick v. General Elec. Co., 950 F.2d 816, 822 \(1st Cir.1991\)](#), cert. denied, 504 U.S. 985, 119 L. Ed. 2d 586, 112 S. Ct. 2965 (1992) (quoting [Garside v. Osco Drug, Inc., 895 F.2d 46, 50 \(1st Cir.1990\)](#)). The burden is upon the moving party to show, based upon the pleadings, discovery, and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Fed.R.Civ.P. 56\(c\)](#). The Court must view the entire record in the light most hospitable to the non-moving parties and indulge all reasonable inferences in their favor. [O'Connor v. Steeves, 994 F.2d 905, 907 \(1st Cir.1993\)](#).

If the moving party demonstrates that there is "an absence of evidence to support the non-moving party's case," the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact. [FDIC v. Municipality of Ponce, 904 F.2d 740, 742 \(1st Cir.1990\)](#) (quoting [Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#)).

### 2. Contractual Interference Claims

To prevail on a claim for tortious interference with contractual relations, Holmes [\*\*8] must prove that it had a contract with Go-Gro, that Dana and/or Katz knowingly induced Go-Gro to breach that contract, that defendants' interference, in addition to being intentional, was improper in motive or means, and that Holmes was harmed by defendants' action. [United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 812, 551 N.E.2d 20 \(1990\)](#).

Defendants assert that even if the alleged interference did take place, their motive and means were entirely proper. They argue that their letter threat of withdrawing business from Go-Gro was entirely proper and was not made to keep Holmes out of the lamp market for as long as possible. They contend that such a motive makes no economic sense because preventing Holmes (a subsidiary of a multinational giant) from dealing with Go-Gro would have had no significant impact on its entry into the highly competitive "commodity" lamp market. Holmes could have engaged any number of other suppliers or could have built its own factory (which apparently it has subsequently done).

Defendants argue that if Katz said what Lau says he said, Katz' only possible motivation would have been to keep Holmes from dealing with one of Dana's principal suppliers, [\*\*9] a supplier with access to Dana's plans, tooling, color boxes etc. Such motivation, defendants conclude, is perfectly permissible and commonplace.

Holmes responds that 1) defendants knew of the existence of its contract with Go-Gro 2) Dana's letter to Go-Gro is sufficient to raise a genuine issue of material fact on the interference issue and 3) a jury could reasonably infer from the letter alone that Katz and Dana knew enough of Holmes' relationship with Go-Gro to satisfy the elements of a claim for interference.<sup>2</sup> With respect to defendants' protection of economic self interest claim, Holmes argues that advancing one's economic self-interest, while broadly permitted, clearly is not unlimited by the law. It contends that the defendants were motivated to harm Holmes and for no other legitimate purpose. It cites [United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 817, 551 N.E.2d 20 \(1990\)](#) and [Schwanbeck v. Federal-Mogul Corp., 31 Mass. App. Ct. 390, 413, 578 N.E.2d 789 \(1991\)](#), for the proposition that a motive to harm or a desire to hurt qualifies as an improper motive.

[\*\*10] [\*32] To succeed on its claim, Holmes needs only to show an improper motive or improper means. [Draghetti v. Chmielewski, 416 Mass. 808, 816 n. 11, 626 N.E.2d 862](#). While "competing for the prize" is within the realm of permissible interference, the use of "leverage" to create a breach is not. [Schwanbeck, 31 Mass. App. Ct. at 413](#). Relying on Schwanbeck therefore, plaintiff alleges that Dana used its leverage as the single largest customer of Go-Gro to interfere with the Holmes/Go-Gro contract.

<sup>2</sup> Defendants' do not dispute, at least for the purposes of this motion, that a contract existed between Holmes and Go-Gro to supply lamps.

Holmes has also made a claim against defendants for interference with prospective economic relations. The same knowledge and improper means that are required to prove a claim for interference with an existing contract are also required to prove a claim for interference with a prospective or advantageous business relationship. [Dulgarian v. Stone, 420 Mass. 843, 851 n.8, 652 N.E.2d 603 \(1995\); Draghetti v. Chmielewski, 416 Mass. at 819 n.14, 626 N.E.2d 862 \(1994\); United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 816, 551 N.E.2d 20 \(1990\); American Private Line Services, Inc. v. Eastern Microwave, Inc., 980 F.2d 33, 36 \(1st Cir. 1992\).](#)

This Court concludes [\*\*11] that there is enough evidence of 1) both defendants' knowledge of a contractual relationship and an advantageous business relationship between Holmes and Go-Gro and 2) improper means and motive of defendants' alleged interference to raise a genuine issue of material fact. Defendants' summary judgement motion with respect to plaintiff's claim of tortious interference with contractual relations and interference with prospective economic relations will, therefore, be denied.

### 3. Antitrust Claim

Dana and Katz argue that plaintiff's allegations, even if true, do not constitute a violation of [§ 1](#) of the Sherman Act as a matter of law. To constitute such a violation, defendants assert, plaintiff must demonstrate both that Dana had market power and that Dana's actions to secure exclusive dealing arrangements, in effect, foreclosed available supply or outlet capacity such that existing competitors or new entrants were excluded. [U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 596 \(1st Cir. 1993\).](#)

At the outset, this Court works from the premise that [antitrust law](#) protects "competition, not competitors," [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, \[\\*\\*12\] 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#) and that "it is only when the market is being distorted by anticompetitive conduct that the antitrust laws should be invoked." [Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 \(11th Cir. 1991\).](#) Defendants contend that Holmes has not alleged, and cannot allege, given the nature of the products and markets at issue, facts that would suggest that their actions had any impact upon competition. Moreover, they assert, Holmes has not offered, and cannot offer, any evidence that their conduct caused it to be foreclosed from the market or resulted in higher prices to consumers.

Holmes claims that defendants procured agreements, or sought to procure agreements, from certain suppliers of lamps not to supply lamps to defendants' competitors. Even assuming such is the case, as is appropriate in consideration of this summary judgment motion, such a vertical restraint would, absent market power on defendant's part, be perfectly legal. [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-55, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\); Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 333-34, 5 L. Ed. 2d 580, \[\\*\\*13\] 81 S. Ct. 623 \(1961\).](#) Courts have consistently held that vertical, non-price restraints are not *per se* illegal, but instead are subject to the rule of reason. [Continental T.V., 433 U.S. at 57-59; Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1569 \(11th Cir. 1991\).](#)

To survive summary judgment in an exclusive dealing arrangement, Holmes must, therefore, present facts from which a jury could find sufficient market power to effect foreclosure of available supply or outlet capacity such that existing competitors or new entrants may be excluded. [U.S. Healthcare, Inc., 986 F.2d at 595-97.](#) Defendants argue that in order for plaintiff to prevail, it must [\*\*33] make "a compelling showing of [market] foreclosure of substantial dimensions" [Id. at 596.](#) They then explain that neither Dana nor any other player in the "low-end" lamp market has the market power necessary to have an impact on the market by virtue of an exclusive dealing agreement or any other vertical restraint.

The products at issue in this case are inexpensive lamps that generally retail for between \$ 10 and \$ 30 and are sold at high volume retailers like Walmart. This is a market, defendants contend, [\*\*14] with low brand recognition, simple technology, hundreds of existing manufacturers, no dominant players and low capital requirements. The products are extremely price-sensitive and there are no competitive barriers to entry. Dana asserts that if it (controlling, as it does, less than 10% of the particular market) attempted to raise prices by restricting output, the buyers of such lamps, who already purchase from Dana's competitors, would simply buy more lamps from other distributors or, like K-mart, would buy directly from one of the numerous Asian suppliers.

The Court agrees that Holmes has not set forth facts which support a claim that Dana either had market power or that Holmes was foreclosed from entering the market for "commodity" lamps at issue. Moreover, The plaintiff has not presented a theory as to how Dana's alleged "pressure" on suppliers has had an adverse impact on the competition in the lamp market and with respect to allegations of illegal vertical restraints, theorizing is not enough. [Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 29, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#) (upholding an exclusive dealing contract because the plaintiff had neither [\*\*15] properly defined the relevant product market nor proven that the contract actually restrained competition.)

Holmes urges this Court to adopt the "quick look" rule of reason analysis which applies to cases where "per se condemnation is inappropriate, but where 'no elaborate industry analysis is required to demonstrate [the] anti-competitive character' of an inherently suspect restraint." [U.S. v. Brown University, 5 F.3d 658, 669 \(3rd Cir. 1993\)](#) quoting [NCAA v. Board of Regents of the U. of Oklahoma, 468 U.S. 85, 109, 104 S. Ct. 2948, 82 L. Ed. 2d 70 \(1984\)](#). By imploring the application of the "quick look" doctrine, the plaintiff asks this Court to presume competitive harm and to place the burden on the defendants to come forward with a competitive justification for the restraint. The Court declines to do so because plaintiff has failed to allege any impact on competition (as opposed to an individual competitor) and the "quick look" rule of reason analysis is therefore inappropriate.

The Court concludes that there is no violation of the Sherman Act as a matter of law because an exclusive dealing contract (the nature of the alleged violation here) does not constitute an antitrust violation unless the [\*\*16] competition which is foreclosed constitutes a substantial share of the relevant market. [Tampa Electric Co. v. Nashville Coal Co., 365 U.S. at 327](#). Confronted with defendants' summary judgment motion, Holmes must present credible evidence from which a logical fact finder could conclude that Dana's acts had an anticompetitive impact. [Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). The plaintiff has not met its burden and summary judgment will, therefore, be entered for defendants on Holmes' antitrust claim.

#### 4. RICO Claim

[HN2](#) To state a valid RICO claim under [18 U.S.C. § 1962\(c\)](#), a plaintiff must allege with respect to each defendant the four elements required by the statute, namely: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. [Feinstein v. Resolution Trust Corp., 942 F.2d 34, 41](#) (1st Cir.), cert. denied, 483 U.S. 1021 (1987), quoting [Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 \(1985\)](#). The defendants assert that Holmes has failed to allege sufficiently any of the required elements. Because a failure to allege any one of [\*\*17] the four elements of a RICO claim renders it defective, this Court focuses on what is, in its opinion, the strongest of defendants' arguments made in its motion for summary judgment.

[\*34] Defendants assert that Holmes has not identified two or more predicate acts as is required of a RICO plaintiff. Only "racketeering activities" as enumerated by statute constitute predicate acts under RICO. [Miranda v. Ponce Federal Bank, 948 F.2d 41, 44 \(1st Cir. 1991\)](#) ("to [HN3](#) avert dismissal under [Rule 12\(b\)\(6\)](#), a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute and (ii) a causal nexus between that activity and the harm alleged.") [HN4](#) Racketeering activities are defined in the RICO statute as:

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

(B) any act which is indictable under [various specific provisions] of title 18, U.S. Code, [none of which has been alleged [\*\*18] nor could apply here],

(C) any act which is indictable under [either of two sections of] title 29, U.S. Code [relating to labor unions],

(D) any offense involving fraud connected with a case under title 11 [bankruptcy], fraud in the sales of securities, or [certain listed narcotics law violations], or

(E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

18 U.S.C. § 1961(1).

Defendants contend that Holmes has failed to identify any such "racketeering activity" in its Amended Complaint.

In their Interrogatory No. 3, defendants requested that plaintiff:

Describe in full detail the 'racketeering activity" referred to in paragraph 45 of the Amended Complaint and identify the criminal acts referred to in 18 U.S.C. § 1961(1) that Dana and/or Katz allegedly committed.

After objecting to the interrogatory as "overbroad and unduly burdensome", Holmes responded that the allegations

include acts or threats involving extortion chargeable under state law and punishable by imprisonment for more than one year pursuant to M.G.L. c. 271 § 39.

The defendants argue that the acts alleged by Holmes [\*\*19] could not, as a matter of law, constitute a violation of M.G.L. c. 271, § 39. They point out that subsection (a) of that statute criminalizes commercial bribery, which clearly has no application in this case, and subsection (b) is cited in only one case in the context of threats of economic injury. Commonwealth v. Schafer, 32 Mass. App. Ct. 682, 594 N.E.2d 875 (1992). In Schafer, the defendant (an attorney) and two banks held mortgages on property that Schafer had sold. The Buyer informed Schafer that, because of financial difficulties (i.e. money owed to the IRS), the buyer needed to refinance the loans. Schafer offered to help get a bank loan but shortly thereafter informed the buyer that a loan could be arranged for an additional \$ 9,000 in "points" to be paid to "somebody" outside the bank.

In upholding a conviction under M.G.L. c. 39, the Massachusetts Appeals Court described the HN5 four elements of extortion: "(1) a malicious threat (2) made to a named person (3) of personal injury to some one (4) with intent to extort money." The court further stated that:

the significant difference between [the traditional extortion statute, § 25 of Chapter 265, and subsection [\*\*20] 39(b) of Chapter 271] is the object of the threatened harm, § 25 aimed at personal injury and § 39(b) directed to economic injury, which may or may not include property in which the victim has an ownership or possessory interest.

Id. at 689.

Defendants distinguish Schafer and the case at bar with the relevant argument that in contrast to the buyer in Schafer, who had a legal right to obtain a loan without paying bribes to third parties, the vendors who manufacture lamps (such as Go-Gro) have no legal right to Dana's business. At most, Holmes has alleged that Dana threatened to refuse to buy goods from a vendor who offered to sell goods to a competitor. As discussed above, agreements by suppliers [\*\*35] not to sell to a purchaser's competitors which do not foreclose competition in a substantial portion of the relevant market, are legal vertical restraints.

Holmes responds to defendants' arguments by contending that it has alleged facts sufficient to raise a genuine issue of material fact on the RICO claim, but, in the process, relies upon a vague assertion that defendants' alleged warnings to manufacturers, such as Go-Gro, constitute extortion. The only allegation [\*\*21] remotely within the realm of extortion is the warning by Katz "that if Go-Gro dared to ship one piece of lamp to Holmes, Dana would then cancel all the orders placed with Go-Gro," but that statement is actionable, if at all, under the claim for tortious interference with contractual relations. Such conduct is not the kind of activity proscribed by Congress in the RICO statute and Holmes has not, therefore, alleged the required predicate acts.

Defendants have also argued persuasively that Holmes has failed to demonstrate any of the other three elements required under the RICO statute, but analysis of those arguments is unnecessary because summary judgment for defendants is appropriate on the aforementioned ground, i.e. failure to allege required predicate acts of "racketeering activity". This Court concludes that there is no genuine issue of material fact with respect to plaintiff's RICO claim, and summary judgment on that claim will, therefore, be entered for the defendants.

## 5. Consumer Protection Act (M.G.L. c. 93A) Claim

Defendants argue that Holmes' 93A claim should be dismissed because it lacks any independent basis and, upon dismissal of the other claims, the 93A claim [\*\*22] should expire accordingly. Defendants cite *PMP Associates, Inc., v. Globe Newspaper Co.*, 366 Mass. 593, 599, 321 N.E.2d 915 (1975) for the proposition that

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.

Holmes attempts to distinguish *PMP Associates* but then cites it in support of the proposition that a Chapter 93A claim can stand on its own. Acknowledging the stated proposition, plaintiff argues that *PMP Associates* did not involve interference with the plaintiff's contract with a third party, but rather a straightforward refusal by the defendant to do business with the plaintiff. It suggests that *PMP* would be analogous to our case only if Go-Gro had sued Dana for refusing to do business with Go-Gro.

Plaintiff contends, moreover, that even if summary judgment were granted on all of Holmes' other claims, it would not be foreclosed from pursuing its claim under Chapter 93A, citing *Schwanbeck v. Federal-Mogul Corp.*, 31 Mass. App. Ct. 390, 578 N.E.2d 789 (1991). In *Schwanbeck*, after entering judgment for defendants [\*\*23] notwithstanding the verdict on a contractual interference claim, the Massachusetts Appeals Court upheld judgment for plaintiff on the Chapter 93A claim:

Although we have concluded that Schwanbeck's common law claims are not soundly based, G.L. c. 93A, § 11 affords businessmen certain remedies that elude conventional definitions and categories.

*13 Mass. App. Ct. 408 at 413* (quoting *Doliner v. Brown*, 21 Mass. App. Ct. 692 at 697, 489 N.E.2d 1036). See also, M. Gilleran, *The Law of Chapter 93A*, p. 149 (1989) (Chapter 93A violation may be shown by "unfair business torts including ... interference with contractual relations and malicious but otherwise lawful conduct").

Notwithstanding the general rule that a Chapter 93A violation can stand on its own and despite this Court's denial of defendants' motion for summary judgment on the counts for tortious interference, this Court concludes that Holmes has not alleged facts sufficient to sustain a claim under M.G.L. c. 93A. In *Quaker State Oil Refining Corp. v. Garrity Oil Co. Inc.*, 884 F.2d 1510, 1513 (1st Cir.1989), the First Circuit Court of Appeals confirmed the "rascality standard" required to sustain such a claim. It held [\*\*24] that "the objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble world of commerce." (citing *Levings [\*361] v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 396 N.E.2d 149 (1979)). Here, even if Holmes were to succeed on its claim for tortious interference with contractual relations, there is no evidence (nor even allegations) that defendants have committed acts so unfair or deceptive as to warrant recovery under Chapter 93A.

This Court concludes that a reasonable jury could not find that the actions of the defendants were so unfair or deceptive as to rise to the level of rascality required to support a claim for violation of the Consumer Protection Act. Defendants' statements to Go-Gro, even if proved at trial, can not be found to "raise the eyebrows" of an experienced supplier of household fixtures, "inured to the rough and tumble of the world of commerce." See *Ahern v. Scholz*, 85 F.3d 774, 799 (1st Cir.1996)(overruling district court's award under Chapter 93A based upon a manager's "commercially unreasonable" deductions because, despite manager's knowing breach of contract, there was insufficient rascality [\*\*25] to rise to the level of a violation of Chapter 93A.) Defendants' motion for summary judgment on the Chapter 93A will, therefore, be allowed.

## 6. Unjust Enrichment Claim

Defendants argue that the remedy of unjust enrichment is not available to a party with an adequate remedy at law. *Ben Elfman & Son, Inc., v. Criterion Mills, Inc.*, 774 F. Supp. 683, 687 (D.Mass.1991). They also assert that the relief sought by plaintiff is both unprecedeted and illogical because the conventional measure of damages in interference claims is the plaintiff's lost profits. Defendants point out that in only one reported case involving a claim for interference with contractual relations were unjust enrichment damages awarded, *National Merchandising Corp. v. Leyden*, 370 Mass. 425, 348 N.E.2d 771 (1976). In that case defendant hired former employees of plaintiff to supervise and manage its telephone directory cover business in willful violation of noncompete agreements and a

consent decree for which the court awarded plaintiff 10% of the defendant's gross sales made by persons under the consent decree stressing that such sales were all "tainted".

Even assuming *arguendo* that Holmes [\*\*26] has no remedy at law, to obtain "unjust enrichment" damages from Dana based upon its profits for lamp sales, Holmes would have to establish that those profits resulted from the alleged interference as was the case in *National Merchandising*. Here Holmes cannot establish such a causal nexus. As the holding of *National Merchandising* suggests, in the "interference with contract" context, disgorgement has been awarded only with respect to profits that the defendant would not have earned but for the interference.

Although damages for unjust enrichment may be available in a case such as *National Merchandising*, they are not available here. If it were to prevail at trial on its claim of tortious interference with contractual relations, Holmes would have an adequate remedy at law, i.e. a claim for lost profits. Moreover, even if there were no such legal remedy available to plaintiff, it would be unable to establish that Dana's profits on the sale of commodity lamps (something Dana had done successfully for ten years before Holmes entered the market) resulted from the interference. Summary judgment will therefore be entered for defendants on plaintiff's claim for unjust enrichment.

#### [\*\*27] B. Defendants' Motion to Strike Testimony of Danny Lavy

Danny Lavy's testimony, submitted by Holmes in the form of Lavy's affidavit, dated November 6, 1995, and his deposition, taken on June 14, 1996, provides, in large part, the basis for Holmes' RICO and antitrust claims against defendants. Defendants allege that Lavy is the sole source of the allegations set forth in paragraphs 22 and 24 of Plaintiff's Amended Complaint, that "Dana and Katz had warned and threatened Lau and Go-Gro not to sell Go-Gro's products to Elite Classics [Lavy's company]" and that "Dana ... and Katz, exerted great pressure on Handing Co., Ltd. [another Asian manufacturer] not to sell its products to Elite." Defendants move to strike Lavy's testimony not only because he has no first-hand knowledge of any acts done by the defendants that pertain [\*37] to those allegations but also because Lavy's testimony is hearsay.

While acknowledging that Lavy's testimony may be suspect, this Court declines to rule on its admissibility. Even if Lavy's hearsay testimony regarding statements made by the defendants to third parties were admissible and fully considered by this Court, Holmes has failed to meet its burden [\*\*28] with respect to its antitrust and RICO claims to survive defendant's summary judgment motion and defendants' motion to strike will, therefore, be denied as moot.

#### ORDER

For the foregoing reasons,

1. defendants' motion to strike the testimony of Danny Lavy is **DENIED** as moot;
2. defendants' motion for summary judgment with respect to the count for tortious interference with contractual relations is **DENIED**; and
3. defendants' motion for summary judgment with respect to the counts for violation of the federal **antitrust law**, violation of the Civil RICO statute, violation of M.G.L. c. 93A and for unjust enrichment is **ALLOWED**.

So ordered.

Nathaniel M. Gorton

United States District Judge

Date: March 19, 1997

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## *In re Independent Serv. Orgs. Antitrust Litiq.*

United States District Court for the District of Kansas

March 19, 1997, Decided ; March 19, 1997, FILED

CIVIL ACTION No. MDL-1021

### **Reporter**

964 F. Supp. 1454 \*; 1997 U.S. Dist. LEXIS 6671 \*\*

IN RE: INDEPENDENT SERVICE ORGANIZATIONS ANTITRUST LITIGATION; This Document Applies To: CSU Holdings, Inc., et al. v. Xerox Corp. (D. Kan. No. 94-2102-EEO)

**Disposition:** [\*\*1] Defendant's motion for summary judgment on its willful patent infringement counterclaims (Doc. # 362) denied. Defendant's motion for summary judgment on plaintiffs' antitrust claims (Doc. # 410) denied.

## **Core Terms**

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patent, summary judgment, infringement, misuse, competitors, markets, patent misuse, counterclaims, monopoly, license, prices, geographic, copier, printer, antitrust, patent infringement, anti trust law, patent holder, products, contends, immunity, antitrust liability, sufficient evidence, settlement, customers, invention, domestic, rights, antitrust violation, antitrust claim

## **LexisNexis® Headnotes**

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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**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

964 F. Supp. 1454, \*1454L 1997 U.S. Dist. LEXIS 6671, \*\*1

Evidence > Weight & Sufficiency

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

## **HN2** [blue downward arrow] Entitlement as Matter of Law, Genuine Disputes

The moving party in a summary judgment motion bears the initial burden of showing that there is an absence of any genuine issue of material fact. The inquiry as to whether an issue is genuine is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law. An issue of fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. This inquiry necessarily implicates the substantive evidentiary standard of proof that would apply at trial. Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial as to those dispositive matters for which it carries the burden of proof. The nonmoving party may not rest on his pleadings but must set forth specific facts.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

## **HN3** [blue downward arrow] Summary Judgment, Entitlement as Matter of Law

The court must view the record in the light most favorable to the parties opposing the motion for summary judgment. In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Where the nonmoving party fails to properly respond to the motion for summary judgment, the facts as set forth by the moving party are deemed admitted for purposes of the summary judgment motion.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

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

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > Burdens of Proof

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

#### [\*\*HN4\*\*](#) [blue downward arrow] Inequitable Conduct, Anticompetitive Conduct

To prevail on a defense of patent misuse, an alleged infringer must establish that the patent holder has used its patent to secure an exclusive right or limited monopoly beyond the scope of the patent in contravention of public policy. A patent holder's conduct may constitute patent misuse without rising to the level of an antitrust violation. An antitrust violation generally will establish misuse.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

#### [\*\*HN5\*\*](#) [blue downward arrow] Ownership & Transfer of Rights, Licenses

A patent holder can refuse to license a patented product without being guilty of patent misuse. [35 U.S.C.S. § 271\(d\)\(4\)](#). Although the patent statute does not specify any exceptions to this general rule, courts traditionally have recognized that patent holders cannot use their patent to justify anticompetitive conduct beyond the limit or scope of the patent grant.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > Infringement Actions > Exclusive Rights > General Overview

#### [\*\*HN6\*\*](#) [blue downward arrow] Ownership & Transfer of Rights, Assignments

The right to refuse to sell a patented invention is not absolute even within the market of the patented work.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

#### [\*\*HN7\*\*](#) [blue downward arrow] Inequitable Conduct, Anticompetitive Conduct

Power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to antitrust liability if a seller exploits his dominant position in one market to expand his empire into the next market.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

#### [\*\*HN8\*\*](#) [blue downward arrow] Inequitable Conduct, Anticompetitive Conduct

964 F. Supp. 1454, \*1454L 1997 U.S. Dist. LEXIS 6671, \*\*1

Antitrust liability may arise when a patent or copyright holder uses its rights to expand its reach into other markets not within the scope of the patent or copyright.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

#### **HN9** [blue icon] **Ownership & Transfer of Rights, Assignments**

No patent owner shall be deemed guilty of misuse by reason of having refused to license or use any rights to the patent. [35 U.S.C.S. § 271\(d\)\(4\)](#).

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

#### **HN10** [blue icon] **Bad Faith, Fraud & Nonuse, Bad Faith**

A finding of misuse is precluded only if the patent infringement suit is brought in good faith.

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN11** [blue icon] **Antitrust & Trade Law, Sherman Act**

A natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of monopolizing in violation of the Sherman Act, and can therefore charge any price it wants.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Torts > Business Torts > General Overview

## **HN12** [blue icon] Regulated Practices, Market Definition

To establish damages for lost profits from other geographic markets, the alleged injured must establish that it both intended to and was prepared to expand its business. The "intent and preparedness" test was designed to permit excluded competitors to challenge their exclusion from a market without being first required needlessly to incur economic harm. Four factors should be considered in determining plaintiff's intention and preparedness to enter a new market: (1) plaintiff's background and experience in the proposed business, (2) affirmative action on plaintiff's part to engage in the proposed business, (3) ability to finance the business and purchase the necessary equipment and facilities, and (4) consummation of contracts. The court must determine whether standing (or injury-in-fact) is analyzed with respect to each geographic market or with respect to all geographic markets combined.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

## **HN13** [blue icon] Private Actions, Remedies

Before and after evidence of receipts and profits is a sufficient basis for a jury's computation of damages, particularly where the defendant's wrongful action prevented any more precise proof of damages.

**Counsel:** For CSU HOLDINGS INC, Case Number: 94-2102-EEO - USDC for the District of Kansas, plaintiff: Eric D. Braverman, Employers Reinsurance Corporation, Overland Park, KS. P. John Owen, Lori R. Schultz, Morrison & Hecker, Kansas City, MO. Michael C. Manning, Morrison & Hecker, Phoenix, AZ. For COPIER SERVICES UNLIMITED, INC., Case Number: 94-2102-EEO - USDC for the District of Kansas, plaintiff: Eric D. Braverman, (See above). P. John Owen, (See above), Lori R. Schultz, (See above). Michael C. Manning, (See above). For COPIER SERVICE UNLIMITED OF ST. LOUIS, INC., Case Number: 94-2102-EEO - USDC for the District of Kansas, plaintiff: Eric D. Braverman, (See above). P. John Owen, (See above), Lori R. Schultz, (See above). Michael C. Manning, (See above). For ACQUISITION SPECIALISTS, INC, Case Number: 94-1285 - USDC for the Northern District of California - USDC for the District of Kansas 94-2502, plaintiff: James A Hennefer, San Francisco, CA. Maxwell M Blecher. For TECSPEC, INC, a Texas **[\*\*2]** Corporation, Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas dba Atek, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For CONSOLIDATED PHOTO COPY, INC., a Virginia corporation. Case Number: 94-1285 - UDDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For COPIER REBUILD CENTER, INC., a Maryland corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For CPO LTD, a California corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District Court of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For GRADWELL COMPANY, INC., an Alabama corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District Court of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For GRAPHIC CORPORATION OF ALABAMA, an Alabama corporation. Case Number 94-1285 - USDC for the Northern District **[\*\*3]** of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For INTERNATIONAL BUSINESS EQUIPMENT, INC, a California corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District Court of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For LASER RESOURCES INC, an Iowa corporation, Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District Court of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For LASER RESOURCES OF MINNESOTA, INC., a Minnesota corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For LASER SOLUTIONS, INC, a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For LASER SUPPORT AND ENGINEERING, INC., a California corporation. Case Number: 94-1285 - USDC for the Northern District of

California. 94-2502 USDC for the [\*\*4] District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For MARATHON COPIER SERVICE, INC., a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For NATIONWIDE TECHNOLOGIES, INC., a Illinois corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For REPROGRAPHICS RESOURCES SYSTEMS, INC, an Iowa corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For RESOURCES SYSTEMS, INC, an Iowa corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). For SUNTONE INDUSTRIES, INC, a Florida corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. [\*\*5] For TECHNICAL DUPLICATION SERVICES, INC, a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For X-TECH SYSTEMS INC, a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For XER-DOX INC., a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For XEROGRAPHIC COPIES SERVICES, INC., a Texas corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher.

For XEROX CORPORATION, Case Number: 94-2102-EEO - USDC for the District of Kansas and Case Number: 94-1285 USDC for the Northern District of California, defendant: Peter K Bleakley, Arnold & Porter, Washington, DC. Peter W Marshall, Xerox Corporation, Stamford, CT. Michael G. Norris, Norris, [\*\*6] Keplinger & Logan, L.L.C., Overland Park, KS. C Larry O'Rourke, E Robert Yoches, Vincent P Kovalick, Leslie I Bookoff, Finnegan, Henderson, Farabow, Garrett & Dunner, Washington, DC.

For XEROX CORPORATION, counter-claimant: Peter K Bleakley, Arnold & Porter, Washington, DC. Peter W Marshall, Xerox Corporation, Stamford, CT. Michael G. Norris, Norris, Keplinger & Logan, L.L.C., Overland Park, KS. C Larry O'Rourke, E Robert Yoches, Vincent P Kovalick, Leslie I Bookoff, Finnegan, Henderson, Farabow, Garrett & Dunner, Washington, DC.

For CSU HOLDINGS INC, counter-defendant: Eric D. Braverman, Employers Reinsurance Corporation, Overland Park, KS. P. John Owen, Lori R. Schultz, Morrison & Hecker, Kansas City, MO. Michael C. Manning, Morrison & Hecker, Phoenix, AZ. For COPIER SERVICES UNLIMITED, INC., counter-defendant: Eric D. Braverman, (See above). P. John Owen, (See above), Lori R. Schultz, (See above). Michael C. Manning, (See above). For COPIER SERVICE UNLIMITED OF ST. LOUIS, INC., counter-defendant: Eric D. Braverman, (See above). P. John Owen, (See above), Lori R. Schultz, (See above). Michael C. Manning, (See above). For ACQUISITION SPECIALISTS, INC, counter-defendant: [\*\*7] James A Hennefer, San Francisco, CA. For TECSPEC, INC dba Atek, counter-defendant: James A Hennefer, (See above). For CONSOLIDATED PHOTO COPY, INC., counter-defendant: James A Hennefer, (See above). For COPIER REBUILD CENTER, INC., counter-defendant: James A Hennefer, (See above). For CPO LTD, counter-defendant: James A Hennefer, (See above). For CREATIVE COPIER SERVICES, INC, counter-defendant: Jack M Bernard, Philadelphia, PA. For GRADWELL COMPANY, INC., counter-defendant: James A Hennefer, (See above). For GRAPHIC CORPORATION OF ALABAMA, counter-defendant: James A Hennefer, (See above). For INTERNATIONAL BUSINESS EQUIPMENT, INC, counter-defendant: James A Hennefer, (See above). For LASER RESOURCES INC, counter-defendant: James A Hennefer, (See above). For LASER RESOURCES OF MINNESOTA, INC., counter-defendant: James A Hennefer, (See above). For LASER SOLUTIONS, INC, counter-defendant: James A Hennefer, (See above). For LASER SUPPORT AND ENGINEERING, INC., counter-defendant: James A Hennefer, (See above). For MARATHON COPIER SERVICE, INC., counter-defendant: James A Hennefer, (See above). For NATIONWIDE TECHNOLOGIES, INC., counter-defendant: James A Hennefer, (See above). For REPROGRAPHICS [\*\*8] RESOURCES SYSTEMS, INC, counter-defendant: James A Hennefer, (See above). For RESOURCES SYSTEMS, INC, counter-defendant: James A Hennefer, (See above). For SUNTONE INDUSTRIES, INC, counter-defendant: James A Hennefer, (See above). For TECHNICAL DUPLICATION SERVICES, INC, counter-defendant: James A Hennefer, (See above). For X-

TECH SYSTEMS INC, counter-defendant: James A Hennefer, (See above). For XER-DOX INC., counter-defendant: James A Hennefer, (See above). For XEROGRAPHIC COPIES SERVICES, INC., counter-defendant: James A Hennefer, (See above).

**Judges:** EARL E. O'CONNOR, United States District Judge

**Opinion by:** EARL E. O'CONNOR

## Opinion

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### [\*1456] MEMORANDUM AND ORDER

This matter is before the court on defendant's motion for summary judgment on its willful patent infringement counterclaims (Doc. # 362) and defendant's motion for summary judgment on plaintiffs' antitrust claims (Doc. # 410). After careful consideration of the parties' briefs and oral argument on defendant's motion for summary judgment on plaintiffs' antitrust claims, the court is prepared to rule. For the reasons set forth below, both motions are denied.

#### Summary Judgment Standards

**HN1** [↑] Summary judgment is appropriate "if the pleadings, [\*\*9] 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)*; accord *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248.

**HN2** [↑] The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991). Essentially, the inquiry as to whether an issue is genuine is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. An issue of fact is genuine if the evidence is sufficient for a reasonable jury to return [\*\*10] a verdict for the nonmoving party. *Id.* at 248. This inquiry necessarily implicates the substantive evidentiary standard of proof that would apply at trial. *Id.* at 252.

Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990); see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest on his pleadings but must set forth specific facts. *Applied Genetics*, 912 F.2d at 1241.

**HN3** [↑] "We must view the record in the light most favorable to the parties opposing the motion for summary judgment." *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991). "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere [\*\*11] hope [\*1457] that something will turn up at trial." *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson*, 477 U.S. at 256. Where the nonmoving party fails to properly respond to the motion for summary judgment, the facts as set forth by the moving party are deemed admitted for purposes of the summary judgment motion. D. Kan. Rule 56.1.

## Analysis

### **I. Defendant's Patent Infringement Counterclaims.**

Defendant contends that it is entitled to summary judgment on its willful patent infringement counterclaims because (1) plaintiff has infringed on Xerox's patents for certain copier and printer replacement parts and (2) plaintiff's affirmative defenses to defendant's patent infringement counterclaims are invalid as a matter of law.

#### A. Factual Background.

Among the patents asserted by Xerox in its patent infringement counterclaim against CSU are several key copier and printer replacement parts, including fuser heat and pressure rolls, dicrotrons, and document handler belts. CSU often replaces these parts during the **[\*\*12]** service and refurbishment of copiers and printers. In discovery, Xerox sought the production by CSU of representative copier and printer parts that CSU purchased from vendors other than Xerox. CSU produced seven parts, which are the subject of this motion. Each of the parts produced by CSU infringes Xerox's patents either literally or under the doctrine of equivalents.

The remaining facts presented in this section are uncontested by Xerox for purposes of this motion only.<sup>1</sup> In 1984, Xerox developed its first "parts policy," in which it declared it would not sell "parts which are unique to the "10" Series products in memory writers" to any Independent Service Organization ("ISO") unless the ISO also was an end-user of the product. In January 1987, the parts policy was expanded to apply to newer "9" Series models and all "10" Series copiers, plus all new Xerox products introduced after the effective date of the policy.

**[\*\*13]** Xerox did not enforce its parts policy until early 1989. At that time, Xerox representatives decided that the only way to stop the competitive threat posed by ISOs, such as CSU, was to cut off the parts availability to these parties. In January 1989, Xerox tightened enforcement of its existing policies and cut off CSU's direct purchase of restricted parts from Xerox. Xerox also implemented an "on-site end-user verification" procedure when certain ISOs or their customers ordered parts from Xerox. The policy, which was implemented in June 1989, initially applied solely to the six most successful ISOs, including CSU.

As a result of Xerox's parts policies, CSU did not have an assured source of supply of parts necessary to service Xerox copiers and printers. CSU used parts cannibalized from used Xerox equipment, parts obtained from other ISOs, and parts purchased through a limited number of customers. CSU also obtained parts from Rank Xerox, a majority-owned European affiliate of Xerox, for approximately one year until Xerox forced Rank Xerox to stop selling parts to CSU and other ISOs.

CSU claims that Xerox also decided to use its intellectual property rights as a weapon to defeat ISO **[\*\*14]** competition. Xerox made its legal counsel an integral part of this corporate strategy. CSU claims that Xerox used its legal counsel to threaten and/or bring patent and copyright infringement suits against ISO competitors.

In 1994, Xerox settled an antitrust lawsuit brought by a class of ISOs in the United States District Court for the Eastern District of Texas (the "R&D Litigation"). CSU **[\*1458]** opted out of the R&D settlement on the same day it filed the instant action against Xerox. Pursuant to the R&D settlement, Xerox agreed to suspend its restrictive parts policy for a period of six and one-half years. The settlement also compelled Xerox to license diagnostic software, an essential component for service, for four and one-half years.

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<sup>1</sup> Xerox claims that many of these facts are irrelevant to the instant motion because (1) Xerox has a lawful right to refuse to license or sell its patented parts and (2) some of the facts do not pertain specifically to the patents at issue in this motion. The court has resolved both issues against Xerox, see infra section I.C., and therefore finds that the facts outlined in this section are relevant to the instant motion.

After the R&D settlement, Xerox intensified its efforts to use price as a weapon to defeat ISO competition in the service market. Xerox knew that if it must sell parts and licensed software to ISOs, it could achieve the same effect as not selling the product by charging exorbitant prices for those products. Xerox intentionally set the prices of its patented parts at high levels to act as a weapon against ISOs and to maintain Xerox's monopoly **[\*\*15]** of the service market.

Xerox charges ISOs markups of as much as 2,000% or more on its parts. Xerox does not charge its customers who also service their own machines ("self-servicers") the same parts prices it charges ISOs. For example, ISOs are charged approximately four times as much as self-servicers for some parts.

Xerox explicitly set the price of its patented parts, not to recoup its development costs, but to force ISOs to raise the prices they charge customers. Xerox's goal of its pricing strategy was to eliminate ISO competition and capture 100% of the service market. Xerox used its control over the prices of parts and diagnostic software to exclude ISOs in the service market or to maintain its supra-competitive prices over its parts.

#### B. Xerox's Affirmative Case of Patent Infringement.

As noted above, Xerox has presented evidence that CSU has infringed Xerox's patents either literally or under the doctrine of equivalents. CSU conceded in its opposition brief that "Xerox has lawful patents" and that "CSU's use of certain parts constitutes a form of facial infringement." CSU confirmed at the pretrial hearing on March 13, 1997, that it did not contest that CSU's use of **[\*\*16]** certain parts constitutes infringement of Xerox's patents. In addition, CSU has offered no evidence to refute the evidence of infringement presented by Xerox in support of its summary judgment motion.

Pursuant to [Rule 56\(d\) of the Federal Rules of Civil Procedure](#), the court finds that the following facts exist without substantial controversy and thus will be deemed established at trial of this action:

CSU has infringed Xerox's patents either literally or under the doctrine of equivalents by CSU's use of the 97X0 fuser pressure roll, 97X0(w/ MOD V) fuser heat roll, 97X0(w/o MOD V) fuser heat roll, 1090 family fuser heat roll, 1090 family dicrotron w/ dag coating, 1090 family dicrotron w/o dag coating, and 1065 document handler belt. Xerox has lawful patents for each of these parts registered as U.S. Patent No. 4,149,797, No. 4,196,256, No. 4,272,179, No. 4,373,239, No. 4,314,006, No. 4,585,322, and No. 4,258,258.

Although CSU has conceded that its use of certain parts constitutes infringement of Xerox's lawful patents, CSU claims that it has valid defenses of patent misuse, estoppel, and laches, which preclude summary judgment. The above factual findings are subject **[\*\*17]** to CSU's defenses to be presented at trial.

#### C. CSU's Patent Misuse Affirmative Defense.

CSU claims that Xerox misused its patents by attempting to use its patents over certain copier and printer parts to create or maintain a monopoly in the copier and printer service market. In sum, CSU maintains that Xerox has attempted to thwart ISO competition in the service market by (1) refusing to license its patented products or setting the license fee at an exorbitant price, and (2) using its intellectual property rights, including its assertion of a counterclaim for patent infringement in the instant action.

**HN4** To prevail on a defense of patent misuse, an alleged infringer must establish that the patent holder has used its patent to secure an exclusive right or limited monopoly beyond the scope of the patent in contravention of public policy. See Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 492, 86 L. Ed. 363, 62 S. Ct. 402 (1944). A patent holder's **[\*1459]** conduct "may constitute patent misuse without rising to the level of an antitrust violation." Senza-Gel Corp. v. Seiffhart, 803 F.2d 661, 668 (Fed. Cir. 1986); see Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 140, **[\*\*181]** 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969). An antitrust violation, however, generally will establish misuse.<sup>2</sup>

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<sup>2</sup> An alleged infringer also must establish a sufficient nexus between the patent holder's alleged misconduct and the patents at issue in the litigation. See Kolene Corp. v. Motor City Metal Treating, Inc., 440 F.2d 77, 84-85 (6th Cir.), cert. denied, 404 U.S.

Although a firm generally can refuse to deal with its competitors, "such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal." [\*\*19] [Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#) (citing [Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597, 86 L. Ed. 2d 467, 105 S. Ct. 2847 \(1985\)](#)). On the other hand, the patent statute provides that [HN5](#) a patent holder can refuse to license a patented product without being guilty of patent misuse. [See 35 U.S.C. § 271\(d\)\(4\)](#). Although the patent statute does not specify any exceptions to this general rule, courts traditionally have recognized that patent holders cannot use their patent to justify anticompetitive conduct beyond the limit or scope of the patent grant. [See Zenith, 395 U.S. at 136](#) ("But there are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee."); [Brulotte v. Thys Co., 379 U.S. 29, 33, 13 L. Ed. 2d 99, 85 S. Ct. 176 \(1964\)](#) ("Absent any overriding unlawful conduct, 'a patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly.'") (emphasis added); [Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230, 11 L. Ed. 2d 1\\*\\*201 661, 84 S. Ct. 784 \(1964\)](#) ("The patent monopoly may not be used in disregard of the antitrust laws."); [United States v. Line Material Co., 333 U.S. 287, 308, 92 L. Ed. 701, 68 S. Ct. 550 \(1948\)](#) ("Possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly."); [see also](#) 3 P. Areeda & D. Turner, [Antitrust Law](#) P 704 (1978) ("a patent is a species of property whose use and disposition are no more immune from antitrust scrutiny than other property"). "Surely, a § 2 violation will have occurred where, for example, the dominant competitor in a market acquires a patent covering a substantial share of the same market that he knows when added to his existing share will afford him monopoly power." [See SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1208 \(2d Cir. 1981\)](#), [cert. denied](#), 455 U.S. 1016, 72 L. Ed. 2d 132, 102 S. Ct. 1708 (1982). Thus, [HN6](#) the right to refuse to sell a patented invention is not absolute even within the market of the patented work.

In this case, CSU alleges that Xerox used its various patents for copier and printer parts to exclude competitors in the service [\*\*21] market, which CSU contends is beyond the scope of the patented inventions. The Supreme Court "has held many times that [HNT](#) power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to [antitrust] liability if 'a seller exploits his dominant position in one market to expand his empire into the next [market]'." [Eastman Kodak, 504 U.S. at 479 n.29](#) (quoting [Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 611, 97 L. Ed. 1277, 73 S. Ct. 872 \(1953\)](#)). The Supreme Court's statement in [Eastman Kodak](#) immediately followed the Court's rejection of a proposal to grant per se antitrust immunity to manufacturers competing in the service market. The Supreme Court consistently has found that:

the public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right or limited [\*1460] monopoly not granted by the Patent Office and which it is contrary to public policy to grant.

[Morton, 314 U.S. at 492](#). Courts emphasize that [HN8](#) antitrust liability may arise when a patent or copyright holder [\*\*22] uses its rights to expand its reach into other markets not within the scope of the patent or copyright. [See Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 \(Fed. Cir. 1990\)](#) (patent); [Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 \(1st Cir. 1994\)](#) (copyright); [see also Edward B. Marks Music Corp. v. Colorado Magnetics, Inc., 497 F.2d 285, 290-91 \(10th Cir. 1974\)](#) (finding by negative implication that a bad faith effort, contrary to the spirit of copyright and [antitrust law](#), to enforce one's copyright is condemned by the Sherman Act), [cert. denied](#), 419 U.S. 1120, 42 L. Ed. 2d 819, 95 S. Ct. 801 (1975).<sup>3</sup> "When a patent owner uses his patent rights not only as a shield to protect his invention, but as a sword to eviscerate competition unfairly, that owner may be found to have abused the grant and may become liable for antitrust violations when sufficient power

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[886, 30 L. Ed. 2d 169, 92 S. Ct. 203 \(1971\)](#). Xerox's parts policies applied to "10" Series products in memory writers, "9" Series models, "10" Series copiers, plus all new Xerox products introduced after January 1987. Further, CSU has offered evidence that many of Xerox's policies applied to all patented and copyrighted products. CSU's evidence of patent misuse certainly is related to the specific patents that are the subject of Xerox's infringement counterclaim.

<sup>3</sup> Indeed, this court previously found that "an exercise of rights under a copyright can lead to antitrust liability." [In re Independent Serv. Orgs. Antitrust Litig., 910 F. Supp. 1537, 1543 \(D. Kan. 1995\)](#).

964 F. Supp. 1454, \*1460-997 U.S. Dist. LEXIS 6671, \*\*22

in the relevant market is present." [Atari, 897 F.2d at 1576](#). A finding of antitrust liability against Xerox would support CSU's patent misuse defense, which in turn would preclude Xerox's recovery on its patent infringement counterclaims. See [Senza-Gel, 803 F.2d at 668 n.10](#); [\*\*23] [Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 422-24](#) (10th Cir.), cert. denied, 344 U.S. 837, 97 L. Ed. 651, 73 S. Ct. 46 (1952).

Xerox, relying on [section 271\(d\)\(4\)](#) of the patent statute, maintains that it has an absolute right to refuse to license or sell patented works to its competitors, regardless of its intent or the anticompetitive effects in other markets. The Patent Reform Act of 1988 added subsection 271(d)(4), which provides that [Hn9](#) no patent owner shall be deemed guilty of misuse by reason of having "refused to license or use any rights to the patent." [35 U.S.C. § 271\(d\)\(4\)](#). The Supreme Court traditionally has interpreted the language of [section 271](#) in light of the relevant doctrines "as they had developed prior to Congress' attempt to codify the governing principles." [Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 187, 65 L. Ed. 2d 696, 100 S. Ct. 2601](#) (1980). The Supreme Court also has emphasized that any exceptions to the patent misuse doctrine codified in [section 271](#) should be construed "in light of this nation's historical antipathy to monopoly and of repeated congressional efforts to preserve and foster competition." [Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530, 32 L. Ed. 2d 273, 92 S. Ct. 1700](#) (1972).

A close look at the legislative history of [section 271\(d\)\(4\)](#) reveals that this exception merely codified existing case law regarding patent misuse and did not grant patent holders absolute immunity from the antitrust laws. Representative Kastenmeier stated that "codification of the 'refusal to use or license' as not constituting patent misuse is consistent with the current caselaw and makes sense as a matter of public policy." 134 Cong. Rec. H10646, H10648 (Oct. 20, 1988). Representative Kastenmeier cited two cases in the legislative history as support for the amendment. Neither case supports the proposition that a patent holder may use its patent to create or enforce a monopoly in a market separate from the patented invention. [\*\*25] See [SCM, 695 F.2d at 1203-06](#); [Continental Paper Bag Co. v. Eastern Paper Bag. Co., 210 U.S. 405, 426-30, 52 L. Ed. 1122, 28 S. Ct. 748](#) (1908). Both cases at most stand for the general principle that a patent holder can exclude competitors within the market of the patented invention (i.e. horizontal competitors). Indeed, Representative Kastenmeier stated that "the underlying policy for this [misuse] doctrine has been an effort by the courts to prevent a person who has obtained a Government granted right to exclude competition from overreaching the scope of the patent." 134 Cong. Rec. at H10647. The amendment adding [section 271\(d\)\(4\)](#) apparently only reaffirmed this policy. The statutory amendment did not alter the traditional principle that a patent holder cannot use its patent to acquire or maintain a [\*1461] monopoly in a market separate from the patented invention. Courts also continue, even after passage of [section 271\(d\)\(4\)](#), to follow the same general policy underlying the patent misuse doctrine. Most importantly, courts have not granted patent holders per se immunity from the antitrust laws based on their right to refuse to license a product. See [Eastman Kodak, 504 U.S. at \[\\*\\*26\] 479 n.29](#); see also [Servicetrends, Inc. v. Siemens Medical Sys., Inc., 870 F. Supp. 1042, 1056 \(N.D. Ga. 1994\)](#) ("As a general proposition, Siemens AG's lawful patent does give it the right to refuse to sell or license the patented device.") (emphasis added).

This court simply cannot accept Xerox's proposition that patent and copyright holders can never be guilty of misuse based on their unilateral refusal to sell or license a product. There are limited circumstances where such conduct may give rise to an antitrust violation and accordingly provide the basis for a patent or copyright misuse defense. See [Image Technical Servs., Inc. v. Eastman Kodak Co., 1996 U.S. Dist. LEXIS 2386, 1996 WL 101173](#), at \*2 (N.D. Cal. Feb. 28, 1996) (although "caselaw supports the general proposition that patent or copyright holders are not required to sell their protected products in order to avoid antitrust liability," that principle is not applicable because "Kodak's [lawful] refusal to sell its protected parts is connected with an illegal parts policy adopted to further monopolistic ends"); see also [Data General, 36 F.3d at 1187](#) ("exclusionary conduct can include a monopolist's unilateral refusal to license a [\*\*27] copyright"); [Bell Atlantic Bus. Sys. Servs., Inc. v. Hitachi Data Sys. Corp., 1995 U.S. Dist. LEXIS 15531, 1995-2](#) (CCH) Trade Cases P 71,258, 1995 WL 798935 (N.D. Cal. Mar. 10, 1995) ("a material factual dispute exists over whether Hitachi Data's refusal to sell or license its copyrighted diagnostics and manuals constitutes unlawful exclusionary conduct"); [United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465](#) (1919) ("in the absence of any purpose to create or maintain a monopoly," the Sherman Act does not restrict a firm's right to refuse to sell its product).

The history of the Eastman Kodak case also supports the proposition that a firm's unilateral refusal to sell or license its products may give rise to antitrust liability in certain circumstances. There, the district court originally granted Kodak's motion for summary judgment on plaintiff's section 2 Sherman Act claim, finding that "Kodak's unilateral refusal to sell its parts to plaintiffs does not violate § 2." Image Technical Servs., Inc. v. Eastman Kodak Co., 1988 U.S. Dist. LEXIS 17218, 1988 WL 156332, at \*4 (E.D. Cal. Apr. 18, 1988). The Ninth Circuit reversed the district court, stating that

the district court found that Kodak [\*\*28] had no duty to deal with its competitors. We agree with the district court's statement of this general rule; however, we believe that there are material issues of fact concerning whether Kodak falls within one of the exceptions to it. A monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason. In the same spirit, a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications.

Image Technical Servs., Inc. v. Eastman Kodak Co., 903 F.2d 612, 620 (9th Cir. 1990) (citations omitted). The Supreme Court affirmed the Ninth Circuit's ruling, again stating that the right to refuse to sell to competitors is not absolute. See Eastman Kodak, 504 U.S. at 483 n.32.

Xerox requests this court to read the patent statute (section 271(d)(4)) in a vacuum, without reference to prior caselaw that it codifies and without reference to the antitrust laws. In essence, Xerox suggests that an unlawful end (monopolization of the service market) cannot be accomplished by lawful means (refusal to sell [\*\*29] or license its patented and copyrighted products). This proposition has been rejected in almost every area of the law, including antitrust law. See Eastman Kodak, 1996 U.S. Dist. LEXIS 2386, 1996 WL 101173, at \*2; Kobe, 198 F.2d at 424 (although defendant's actions standing alone were not in themselves unlawful, these actions may be considered as giving effect to an unlawful scheme to monopolize).

[\*1462] The court finds that there are genuine issues of material fact regarding CSU's patent misuse defense to Xerox's infringement counterclaims precluding summary judgment in favor of Xerox. CSU has presented evidence that Xerox has used its patent rights for equipment and parts to acquire and/or maintain its monopoly power in the service market. Xerox maintains that all of its alleged practices were reasonably within the patent grant and, therefore, cannot constitute misuse. For purposes of this motion, Xerox does not even address whether there are separate markets for parts and service. Xerox, in effect, has conceded that its policies regarding its patented parts have helped it exclude competitors in the service market. Assuming that there are separate markets for parts and service, which the court must assume [\*\*30] for purposes of this motion, there is sufficient record evidence for a fact finder to conclude that Xerox improperly attempted to expand the scope of its patent grant for parts to exclude competitors in the service market.<sup>4</sup>

Xerox also contends that prosecution of its infringement counterclaims cannot constitute patent misuse. Again, Xerox relies on the patent statute, which precludes a finding of misuse when the patent holder seeks "to enforce his patent rights against infringement." 35 U.S.C. § 271(d)(3). HN10 A finding of misuse is precluded only if the patent infringement suit is brought in good faith. See Glaverbel Societe Anonyme v. Northlake Marketing & Supply, Inc. 45 F.3d 1550, 1558 (Fed. Cir. 1995) (a lawsuit brought in bad faith and with an improper purpose may constitute patent misuse or a violation [\*\*31] of the antitrust laws); W. L. Gore & Assocs. v. Carlisle Corp., 529 F.2d 614, 625 (3d Cir. 1976) ("an infringement suit brought in good faith does not constitute patent misuse"); Kobe, 198 F.2d at 425 (patent holder may be guilty of misuse if the real purpose of the infringement action is to further an existing monopoly); Conceptual Eng'g Assocs., Inc. v. Aelectronic Bonding, Inc., 714 F. Supp. 1262, 1269 (D.R.I. 1989) (although section 271 provides that a patent owner has the right to enforce his patent, section 271 does not condone bad faith conduct).

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<sup>4</sup> Of course, if there is only one market for parts and service, Xerox has a much stronger argument that it may exclude competitors for service without improperly expanding the scope of its patent protection.

Xerox, relying on the Noerr-Pennington doctrine,<sup>5</sup> argues that its prosecution of its patent and copyright infringement counterclaims against CSU is immune from antitrust liability. See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56-60, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993) ("PRE"). Xerox claims that its subjective intent in bringing its infringement counterclaims is irrelevant. In PRE, the Supreme Court held that a copyright infringement suit was immune from antitrust liability unless the defendant could establish that the suit was objectively baseless. The [\*\*32] Supreme Court stated that

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.

Id. at 60.

In this case, CSU relies on Xerox's subjective intent in bringing its infringement counterclaims against CSU as a basis for its misuse defense. CSU has presented evidence that Xerox's prosecution of its infringement counterclaims in this action is a logical extension of its alleged scheme [\*\*33] to monopolize the service market. Based on the present record, the court cannot find that evidence of Xerox's intent in prosecuting its infringement counterclaims in this action is precluded as a matter of law. First, the Noerr-Pennington doctrine provides *antitrust* immunity, not patent or copyright misuse [\*1463] immunity. As noted before, a party's actions may rise to the level of patent or copyright misuse without constituting an antitrust violation. See Zenith, 395 U.S. at 140; Senza-Gel, 803 F.2d at 668. Second, CSU argues that Xerox's filing of its infringement counterclaims is only one part of its alleged scheme to exclude ISOs such as CSU from the service market. Although the filing of Xerox's infringement counterclaims alone may be insufficient to sustain a finding of misuse, CSU has presented sufficient additional evidence of an unlawful scheme to monopolize the service market to preclude summary judgment on CSU's misuse defense. See generally W.L. Gore, 529 F.2d at 625 (viewing both isolated acts and totality of acts before determining validity of patent misuse defense).

Xerox also claims that, to the extent a refusal to sell constitutes misuse, such misuse [\*\*34] was purged by Xerox's termination of its parts policy in April of 1994 pursuant to a settlement agreement in the R&D litigation. See Senza-Gel, 803 F.2d at 668 n.10 ("The successful patent misuse defense results in rendering the patent unenforceable until the misuse period is purged."). CSU argues that Xerox's agreement in the R&D settlement does not purge its misuse because (1) Xerox agreed only to make parts available temporarily, until the year 2000, (2) Xerox continues to charge ISOs prices that are astronomical and intentionally designed to eliminate or reduce ISO competition in the service market while Xerox charges its other customers much lower prices, and (3) Xerox continues to use its intellectual property rights over its patented products and copyrighted materials, such as pursuing its counterclaims in the instant action, as leverage to eliminate ISO competition in the service market. The court finds that CSU has presented sufficient evidence to raise issues of material fact as to whether Xerox has purged its alleged misuse. The record evidence at this point indicates at most that Xerox purged one of its alleged misuses in April 1994.<sup>6</sup>

## [\*\*35] II. Plaintiffs' Antitrust Claims.

Xerox moves for summary judgment on CSU's antitrust claims alleging that (1) CSU has not suffered antitrust injury because its alleged injury is due to Xerox's lawful refusal to sell patented parts and copyrighted software, and (2)

<sup>5</sup> 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, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965).

<sup>6</sup> Xerox also seeks a ruling that CSU's infringement of Xerox's patent was willful. The court need not address this issue or the validity of CSU's defenses of estoppel and laches based on the court's finding above that CSU's patent misuse defense cannot be resolved as a matter of law.

CSU cannot prove any damage for lost profits because it cannot show that it intended to and was prepared to expand to new geographic markets.

A. Factual Background.

From 1984 through 1987, CSU was a competitor of Xerox for the sale and service of Xerox copiers and printers in Kansas City, Missouri. On October 15, 1987, CSU was purchased by The Lyon Group, Inc., a venture capital investment group. CSU sought to expand its base from Kansas City. In 1988, CSU expanded to Lawrence, Kansas. On August 11, 1988, CSU decided to expand to two major cities in 1989 -- St. Louis as the first expansion city, followed by either Dallas/Fort Worth or Chicago. CSU began discussions with several Chicago based ISOs, but it decided to defer expansion to Chicago until 1990. In 1988, CSU also considered Indianapolis and Pittsburgh as expansion cities but ultimately rejected both cities as candidates. On October 19, 1988, CSU [\*\*36] refined its expansion plan to include both St. Louis and Dallas in 1989 and Chicago in 1990. By the end of 1988, CSU's expansion plan was as follows:

Calendar Year	Expansion City
1989	Two - St. Louis and Dallas/Fort Worth
1990	Two - Chicago plus another city
1991	Two or three cities
1992	Three or more cities
1993	Three or more cities
1994	Three or more cities
1995	Three or more cities

On January 23, 1989, CSU opened operations in St. Louis.

With respect to Dallas, in 1988, CSU negotiated with an individual regarding opening [\*1464] an office, but the negotiations terminated because the individual's operation was not entirely copiers. In early 1989, CSU negotiated with a potential customer that had a substantial volume of previously leased high volume Xerox copiers in Dallas. CSU also contacted a Xerox service technician and agreed to hire the individual as a service manager for CSU's proposed office in Dallas.

On March 30, 1989, Xerox announced that it would not sell CSU parts for products restricted under Xerox's parts policy. On April 4, 1989, Xerox cancelled CSU's subscriptions to service manuals. Shortly thereafter, CSU abandoned its plans to [\*\*37] expand to Dallas. CSU did not expand to any other domestic markets until 1994.

In May 1994, as the result of a settlement of a class action brought by a number of ISOs (CSU opted out of the settlement of that action) against Xerox, Xerox agreed to begin selling parts once again to ISOs, including CSU. CSU expanded to three cities in 1994, four cities in 1995, and one in 1997.

CSU contends that Xerox's parts policy thwarted or delayed its efforts to expand to a number of cities between 1989 and 1995. The following is a summary of CSU's damage calculations:

City	Estimated Expansion Date	Actual Expansion Date
Chicago	Oct. 1990	None
Milwaukee	Apr. 1993	None
Minneapolis	Oct. 1993	None
Louisville	Apr. 1994	None
Memphis	Aug. 1994	None
Cincinnati	Dec. 1994	None
Nashville	Aug. 1995	None

City	Estimated Expansion Date	Actual Expansion Date
Charlotte	Dec. 1995	None
Dallas	Oct. 1989	June 1994
Wichita	Apr. 1990	Oct. 1994
Houston	Oct. 1991	Dec. 1994
Oklahoma City	Apr. 1991	Apr. 1995
Atlanta	Apr. 1995	Nov. 1995
Austin	Apr. 1992	Dec. 1995
San Antonio	Aug. 1992	Dec. 1995
Denver	Dec. 1992	Feb. 1997

#### B. A Refusal To Sell Patented Parts And Copyrighted Software May Give Rise To **[\*\*38]** An Antitrust Violation.

Xerox first contends that CSU has not suffered antitrust injury because its alleged injury is attributable to Xerox's lawful refusal to sell patented parts and copyrighted software. The court essentially has addressed this argument above with respect to CSU's patent misuse affirmative defense. The court incorporates that discussion by reference here.

#### C. Antitrust Liability Based on Pricing Of Parts.

Xerox seeks partial summary judgment on CSU's claim for antitrust damages arising from Xerox's alleged use of parts overcharges as an exclusionary device. Xerox contends that it has the right to charge as high a price as it sees fit. This argument is closely related to Xerox's argument that it can refuse to license a patented or copyrighted work because a patent or copyright holder could set the license fee so high that the fee effectively amounts to a refusal to sell. The court therefore incorporates by reference its discussion above of CSU's patent misuse affirmative defense.

Again, Xerox is correct that as a general principle [HN11](#) "[a] natural monopolist that acquired and maintained its monopoly *without excluding competitors by improper means* is **[\*\*39]** not guilty of 'monopolizing' in violation of the Sherman Act, and can therefore charge any price it wants." [\*Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic\*, 65 F.3d 1406, 1413 \(7th Cir. 1995\)](#) (emphasis added, citations omitted), cert. denied, 134 L. Ed. 2d 233, 116 S. Ct. 1288 (1996). Pricing strategies, however, can be subject to antitrust scrutiny in certain circumstances. For example, in [\*Eastman Kodak Co. of New York v. Southern Photo Materials Co.\*, 273 U.S. 359, 71 L. Ed. 684, 47 S. Ct. 400 \(1927\)](#), Kodak unsuccessfully attempted to purchase plaintiff's business which competed with various Kodak-owned dealers in the same geographic area. [\*Id. at 368-69\*](#). Kodak then refused to sell its goods to plaintiff at a dealers' discount and instead charged plaintiff the retail prices at which the goods were sold by other Kodak-owned dealers. The Court held that the issue of whether Kodak's pricing of goods was in furtherance of a purpose to monopolize was **[\*1465]** properly submitted to the jury. [\*Id. at 375\*](#).

In addition, Xerox's alleged discriminatory pricing pattern against ISOs alone may be sufficient to support an antitrust violation. See [\*Peelers Co. v. Wendt\*, \*\*\[\\*\\*40\]\*\* 260 F. Supp. 193 \(W.D. Wash. 1966\)](#). In [\*Peelers\*](#), the court found that

food packers who are required by a patentee owner of processing machinery to pay substantially higher lease rates for use of such machinery than are paid for the use of identical machinery by their competitors selling food processed by the machinery in the same relevant market, necessarily have greater expense for machinery rental than their competitors and in that particular the ability of the disfavored food packer lessees to compete in the relevant market may be diminished.

[\*Id. at 197\*](#).

Xerox cannot single out the pricing of its parts to CSU from CSU's other antitrust allegations. Rather, Xerox's pricing scheme must be viewed in light of all of CSU's allegations of Xerox's anticompetitive conduct and attempt to monopolize the copier and printer service markets. Xerox, for the most part, has ignored CSU's contention that

Xerox has used the price of its patented parts and copyrighted software as a weapon to acquire and/or maintain a monopoly over service. Xerox simply responds that it has an absolute right to price its products as it sees fit. On the other hand, CSU argues that Xerox's pricing **[\*\*41]** policy in effect amounted to a refusal to sell, which is illegal when the refusal is used to expand a monopoly from one market to another. CSU also alleges that Xerox charged ISOs significantly higher prices for parts than other customers in an attempt to eliminate ISO competition in the service market. Finally, CSU alleges that the actual licensing agreements entered into by Xerox excluded many competitors (ISOs) in the service market. CSU has presented sufficient evidence on all these points to preclude summary judgment in favor of Xerox.

#### D. Proof That CSU Intended To And Was Prepared To Expand To New Markets.

Xerox also moves for summary judgment on CSU's antitrust claims arguing that CSU has failed to establish standing to bring its claims. In particular, Xerox contends that CSU cannot prove that it intended to and was prepared to expand to new geographic markets, an essential element of plaintiff's case for lost profits.

CSU claims that Xerox's anticompetitive conduct thwarted expansion of its business to a number of metropolitan areas in the United States. [HN12](#)<sup>7</sup> To establish damages for lost profits from these other geographic markets, CSU must establish that it both intended **[\*\*42]** to and was prepared to expand its business. See [\*Great Western Directories, Inc. v. Southwestern Bell Tel. Co.\*, 63 F.3d 1378, 1389 \(5th Cir. 1995\)](#), superseded in part on other grounds, [\*74 F.3d 613 \(5th Cir. 1996\)\*](#); [\*Curtis v. Campbell-Taggart, Inc.\*, 687 F.2d 336, 338 \(10th Cir.\), cert. denied, 459 U.S. 1090, 74 L. Ed. 2d 937, 103 S. Ct. 576 \(1982\)](#); [\*Martin v. Phillips Petro. Co.\*, 365 F.2d 629, 633 \(5th Cir.\), cert. denied, 385 U.S. 991, 17 L. Ed. 2d 451, 87 S. Ct. 600 \(1966\)](#). The "intent and preparedness" test was "designed to permit excluded competitors to challenge their exclusion [from a market] without being first required needlessly to incur economic harm." [\*Fleer Corp. v. Topps Chewing Gum, Inc.\*, 501 F. Supp. 485, 504 \(E.D. Pa. 1980\)](#), rev'd on other grounds, [\*658 F.2d 139 \(3d Cir. 1981\)\*](#), cert. denied, 455 U.S. 1019, 72 L. Ed. 2d 137, 102 S. Ct. 1715 (1982). The Tenth Circuit has identified four factors to consider in determining plaintiff's intention and preparedness to enter a new market: (1) plaintiff's background and experience in the proposed business, (2) affirmative action on plaintiff's part to engage in the proposed business, (3) ability **[\*\*43]** to finance the business and purchase the necessary equipment and facilities, and (4) consummation of contracts. [\*Curtis\*, 687 F.2d at 338](#); see [\*Martin\*, 365 F.2d at 633-34](#).

The court must determine first whether standing (or injury-in-fact) is analyzed with respect to each geographic market or with **[\*1466]** respect to all geographic markets combined.<sup>7</sup> In most cases discussing the antitrust standing issue, the defendant's alleged exclusionary conduct is related to a specific product or geographic market. For example, in the Supreme Court case of [\*Zenith\*, 395 U.S. 100, 23 L. Ed. 2d 129, 89 S. Ct. 1562 \(1969\)](#), the Court analyzed the standing issue separately for three geographic markets, apparently because there was different alleged exclusionary conduct (patent pools in that case) in each of the various markets. Here, CSU does not claim that Xerox's conduct in a specific geographic market prevented expansion. Rather, CSU alleges that Xerox's conduct prevented all domestic expansion of its business. Xerox's alleged conduct is the same for each geographic market. In these circumstances, the appropriate inquiry for purposes of standing is whether CSU intended to and was prepared to expand **[\*\*44]** its domestic operation. The precise number of cities CSU would have expanded to and the profits for each city are questions of the amount of damages, not the fact of injury.

CSU's burden to establish compensable injury under the antitrust laws "is satisfied by its proof of **[\*\*45]** some damage flowing from [defendant's actions]; inquiry beyond this minimum point goes only to the amount and not the fact of damage." [\*Zenith\*, 395 U.S. at 114 n.9](#). CSU must establish only that the illegality is "a material cause of the

<sup>7</sup> In resolving the standing issue, some courts have drawn the distinction between "expansion of a present business into a new market" and "growth in an ongoing business." [\*Heattransfer Corp. v. Volkswagenwerk, A.G.\*, 553 F.2d 964, 986 \(5th Cir. 1977\)](#), cert. denied, [\*434 U.S. 1087, 55 L. Ed. 2d 792, 98 S. Ct. 1282 \(1978\)\*](#). "The line to be drawn between expansion into new areas and growth in established ones is not easily defined and one that must be determined from the facts of each case." *Id.* Even if the court applied this standard and accepted Xerox's contention that CSU is truly expanding into a "new" area, the court still must address whether the "new" area is all domestic expansion or expansion into 16 different geographic areas.

injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." *Id.*

CSU certainly has presented sufficient evidence that it intended to and was prepared to expand to a number of domestic markets from 1989 through 1995. CSU had adequate background and experience in the copier and printer service business to support expansion into new geographic markets. In addition, there is record evidence that plaintiff had the ability to finance expansion of its business into other geographic markets. Further, CSU has presented evidence of its expansion plans before Xerox's alleged anticompetitive conduct and CSU's record of expansion after most of Xerox's conduct ended. On the other hand, CSU has presented very little evidence of affirmative steps it took or contracts it consummated for a number of specific geographic markets.

Although CSU has been rather inarticulate in **[\*\*46]** stating its damage theory, the court concludes that CSU, in effect, is arguing that Xerox's alleged conduct precluded CSU from further expansion within the domestic copier and printer service market. Under this theory, CSU need only show that it intended to and was prepared to expand its business in the domestic market, but was precluded from doing so because of Xerox's conduct. Although at this point the court has some concerns regarding CSU's evidence and theory of lost profits,<sup>8</sup> the court finds that there is sufficient evidence for a jury to infer that CSU intended to and was prepared to expand **[\*1467]** its business in the domestic market by opening new locations in various cities. *See Zenith, 395 U.S. at 114-25* (where defendant was an established organization with a long history of successfully excluding competitors, "the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the [defendant's] conduct and the claimed damage existed."); *Neumann v. Vidal, 228 U.S. App. D.C. 345, 710 F.2d [\*\*47] 856, 858-60 (D.C. Cir. 1983)* (factors relating to plaintiff's intention and preparedness to enter the market should have been submitted to the jury); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014, 1051 (9th Cir. 1981)* (jury may infer that plaintiff's antitrust injury was caused by defendant), *cert. denied, 459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 57, 103 S. Ct. 58 (1982); Cable Holdings of Georgia, Inc. v. Home Video, Inc., 572 F. Supp. 482, 491-92 (N.D. Ga. 1983)* (whether plaintiff was prepared to expand to a new geographic market is a jury issue).

**[\*\*48]** CSU requests the jury to infer that expansion to the various metropolitan areas would have been consistent with its corporate philosophy and historical expansion efforts both before and after Xerox's alleged anticompetitive conduct. Although the actual names of a number of the cities may be speculative, the fact of injury is reasonably certain. CSU has presented evidence that Xerox specifically sought to exclude CSU from the entire domestic copier and printer service market by Xerox's enforcement of its parts policy, along with other related conduct. This evidence strongly suggests that CSU indeed has suffered some injury as a result of Xerox's alleged conduct. *See D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245, 1249 (9th Cir. 1982)* ("Where, as here, defendants have acted with intent to eliminate competition, the proof of resulting injury need not be overwhelming."). Xerox's stated goal to capture 100% of the service market by eliminating ISOs is precisely the injury CSU alleges in this case.

Xerox claims that CSU's decision not to enter the various markets may have been motivated by a number of other factors unrelated to Xerox's conduct (such as the availability **[\*\*49]** of competent management employees and the presence of other ISOs in the geographic market) and thus Xerox's conduct cannot be the proximate cause of CSU's injuries. CSU has presented sufficient evidence to preclude summary judgment on this issue. Although there may have been several factors which impacted CSU's decision to expand, it is for a jury to determine if Xerox's

<sup>8</sup> For example, CSU has presented no direct evidence that it intended to enter the Charlotte, Louisville, Memphis, and Nashville markets. CSU took no affirmative steps towards expansion into these markets and has not yet expanded to any of these cities. According to CSU's damage calculation, CSU projected to expand to Louisville in April 1994, Memphis in August 1994, Atlanta in April 1995, Nashville in August 1995, and Charlotte in December 1995. CSU claims that it considered Charlotte, Louisville, Memphis, and Nashville as expansion candidates (as "spoke" cities) from its Atlanta hub office. CSU actually expanded to Atlanta in October 1995 but it has not expanded to any of the other four cities. CSU's actual practice of expansion appears to be inconsistent with its projected expansion dates for each market and CSU's "hub and spoke" theory of expansion.

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conduct was the proximate cause of CSU's failure or delay in expanding to new markets. See [Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 566, 75 L. Ed. 544, 51 S. Ct. 248 \(1931\)](#).

Many of Xerox's arguments as to CSU's expansion plans to particular geographic markets are more properly raised at trial as to the proximate cause and amount of CSU's damages, not the fact of injury. CSU certainly has presented sufficient evidence at this point as to the amount of damages to preclude summary judgment. "There is a clear distinction between the measure of proof necessary to establish the fact that [plaintiff has] sustained some damage and the measure of proof necessary to enable the jury to fix the amount." [Story, 282 U.S. at 562](#); see [Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 1\\*\\*501 90 L. Ed. 652, 66 S. Ct. 574 \(1946\)](#). In addition, the Supreme Court repeatedly has accepted a lesser degree of certainty as to the amount of damages in antitrust cases because of the uncertainties of the marketplace compared to other types of injuries such as property damage or personal injuries. See [J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566, 68 L. Ed. 2d 442, 101 S. Ct. 1923 \(1981\)](#); [Zenith, 395 U.S. at 123](#). This rule is based primarily on the principle that a wrongdoer should not be able to insist that the amount of damages be measured with exactness and precision when he is responsible for the damages. [J. Truett, 451 U.S. at 1\\*\\*1468 566-67](#); [Bigelow, 327 U.S. at 264](#); [Story, 282 U.S. at 563](#). "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." [Bigelow, 327 U.S. at 264](#). Although a jury cannot rely on pure speculation and guesswork in determining the amount of damages, a jury is allowed to act upon probabilities and inferences as well as direct proof. See [Story, 282 U.S. at 564](#) (citation omitted). "It will be enough if the evidence shows [\*\*51] the extent of damages as a matter of just and reasonable inference, although the result be only approximate." [Id. at 563](#).

A jury could infer from the record evidence that CSU would have expanded to a city of the size and profit potential as the cities identified in CSU's damage calculation. CSU has presented evidence of its expansion plan in 1989, its corporate philosophy regarding expansion, and its record of expansion both before and after Xerox enforced its parts policies. The Supreme Court has held that such [HN13](#) before and after evidence of receipts and profits is a sufficient basis for a jury's computation of damages, particularly where the defendant's wrongful action prevented any more precise proof of damages. See [Bigelow, 327 U.S. at 266](#); [Eastman Kodak, 273 U.S. at 376-77](#); [Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 330 \(7th Cir. 1982\)](#), rev'd on other grounds, [467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#); [Heattransfer, 553 F.2d at 986](#). Although CSU's claim of lost profits rests on several assumptions, resolution of the reasonableness of the assumptions underlying a plaintiff's damage theory is the traditional responsibility of the [\[\\*52\]](#) jury. See [Lehrman v. Gulf Oil Corp., 500 F.2d 659, 668 \(5th Cir. 1974\)](#), cert. denied, [420 U.S. 929, 43 L. Ed. 2d 400, 95 S. Ct. 1128 \(1975\)](#); [Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 566-67 \(2d Cir. 1970\)](#). CSU has presented sufficient evidence in support of its assumptions, which form the basis of its lost profits claim to preclude summary judgment.

#### E. CSU's Losses Attributable To Exdos.

In May 1991, CSU purchased Exdos in part to take advantage of an order of the Canadian Competition Tribunal requiring Xerox Canada to sell parts to Exdos. CSU contends that Xerox's enforcement of its parts policy forced CSU to acquire Exdos in an attempt to secure a reliable parts source. CSU lost approximately \$ 1,000,000 through its operation of Exdos. CSU sold Exdos in 1995.

Xerox contends that CSU cannot prove as a matter of law that Xerox's conduct caused Exdos' losses. CSU concedes that Exdos had managerial and operating weaknesses which may have contributed to Exdos' losses. Yet, CSU claims that it never would have been exposed to those managerial and operating weaknesses but for Xerox's failure to make parts available in the United States. CSU's chain of causation is [\[\\*53\]](#) somewhat attenuated and does seem to mix inappropriately the concepts of a "but for" cause and a proximate cause. Despite these concerns, the court finds that CSU has presented sufficient evidence at this stage for a jury to conclude that Xerox's conduct was the proximate cause of at least some of Exdos' losses.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment on its willful patent infringement counterclaims (Doc. # 362) is denied.

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IT IS FURTHER ORDERED that defendant's motion for summary judgment on plaintiffs' antitrust claims (Doc. # 410) is denied.

Dated this 19th day of March, 1997, at Kansas City, Kansas.

EARL E. O'CONNOR

United States District Judge

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End of Document



## *Anti-Monopoly v. Hasbro, Inc.*

United States District Court for the Southern District of New York

March 26, 1997, Decided ; March 31, 1997, FILED

94 Civ. 2120(LMM)

### **Reporter**

958 F. Supp. 895 \*; 1997 U.S. Dist. LEXIS 3775 \*\*; 1997-1 Trade Cas. (CCH) P71,849

ANTI-MONOPOLY, INC., Plaintiff, - against- HASBRO, INC., TOYS "R" US, INC. and K MART CORPORATION, Defendants.

**Disposition:** [\*\*1] Hasbro's motion for summary judgment dismissing AMI's Second Amended Complaint granted. Hasbro's motion for judgment on pleadings dismissing AMI's secondary-line Robinson-Patman Act claims granted. Other pending motions dismissed as moot.

## **Core Terms**

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retailers, board game, games, prices, market power, antitrust, manufacturer, relevant market, discounts, smaller, Monopoly, volume, toy, sales, products, factual support, summary judgment, anti trust law, market share, competitor, consumer, purposes, state law claim, anticompetitive, possesses, practices, predatory, antitrust claim, instant motion, profit margin

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

***HN1*** [] **Summary Judgment, Opposing Materials**

958 F. Supp. 895, \*895L<sup>1997 U.S. Dist. LEXIS 3775, \*\*1</sup>

Summary judgment should be granted only where 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)*. All facts, inferences, and ambiguities must be viewed in a light most favorable to the nonmovant. The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."

Antitrust & Trade Law > Sherman Act > General Overview

## **[HN2](#)[] Antitrust & Trade Law, Sherman Act**

Market power is not a prerequisite to all § 1 Sherman Act claims.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

## **[HN3](#)[] Regulated Practices, Market Definition**

Market power is the ability to raise price significantly higher than the competitive level by restricting output. Market share is frequently reflective of market power, and thus a showing that a defendant possesses a large share of a well-defined market is usually sufficient to demonstrate market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Merger Guidelines

## **[HN4](#)[] Regulated Practices, Market Definition**

The relevant inquiry for market definition is whether a hypothetical union of all producers of the product or products in the putative market would possess significant power over price. If so, then the product or products comprise a relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

## **[HN5](#)[] Market Definition, Relevant Market**

The relevant market for antitrust purposes is determined by the choices available to the consumer. The rule for market definition is that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

## **[HN6](#)[] Regulated Practices, Market Definition**

958 F. Supp. 895, \*895L<sup>¶</sup> 1997 U.S. Dist. LEXIS 3775, \*\*1

Market power comes from the ability to cut back the market's total output and so raise price.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Environmental Law > Solid Wastes > Disposal Standards

#### **HN7** [down] **Regulated Practices, Market Definition**

Where barriers to entry into the relevant market are low, a defendant's large market share may not accurately reflect market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

#### **HN8** [down] **Regulated Practices, Market Definition**

A determination of whether a defendant lacks market power in the relevant market is usually a question of fact, not law.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

#### **HN9** [down] **Regulated Practices, Market Definition**

Experts are not always essential to defining the relevant market.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

#### **HN10** [down] **Standing, Clayton Act**

To recover damages under § 4 of the Clayton Act, an antitrust plaintiff must show that it has antitrust standing. To determine whether the plaintiff has antitrust standing, a court must evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. A number of factors are relevant to a determination of antitrust standing, including the nature of the plaintiff's injury.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

## [\*\*HN11\*\*](#) [blue document icon] **Private Actions, Standing**

A plaintiff's theory which lacks factual support, and is indirect, speculative, and tenuous fails to support antitrust standing.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

## [\*\*HN12\*\*](#) [blue document icon] **Private Actions, Standing**

Antitrust injury, a necessary component of antitrust standing, is injury of the type the antitrust laws are intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

## [\*\*HN13\*\*](#) [blue document icon] **Regulated Practices, Private Actions**

Absent predatory pricing, an antitrust plaintiff cannot complain that its competitor's prices are too low.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

## [\*\*HN14\*\*](#) [blue document icon] **Robinson-Patman Act, Claims**

To sustain a claim for predatory pricing, a plaintiff must prove (1) that a defendant's prices are below an appropriate measure of the defendant's costs; and (2) that the defendant had a dangerous probability (or a reasonable prospect under the Robinson-Patman Act) of recouping its investment in below-cost prices.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

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 > General Overview

## [\*\*HN15\*\*](#) [blue document icon] **Conspiracy to Monopolize, Elements**

The element of conspiracy to monopolize under § 2 of the Sherman Act requires concerted action. Concerted action means a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

#### **HN16**[] **Antitrust & Trade Law, Sherman Act**

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 > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Evidence > ... > Hearsay > Rule Components > Nonverbal Conduct

#### **HN17**[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A lack of factual support is fatal to an antitrust plaintiff's conspiracy claims.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

#### **HN18**[] **Removal, Specific Cases Removed**

When all bases for federal jurisdiction are eliminated from a case so that only pendent state claims remain, a federal court should ordinarily dismiss the state claims.

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > Business Torts > General Overview

#### **HN19**[] **Commercial Interference, Contracts**

To state a claim for tortious interference with business advantage, a plaintiff must show: (1) business relations with a third party; (2) defendants' interference with those business relations; (3) defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the relationship.

**Counsel:** For ANTI-MONOPOLY, INC., plaintiff: Carl E. Person, New York, NY.

For HASBRO, INC., defendant: Dennis P. Orr, Shearman & Sterling, NY, NY. Gary L. Reback, Susan Abouchar Creighton, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA. Steven A. Maddox, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA.

**Judges:** LAWRENCE M. McKENNA, U.S.D.J.

**Opinion by:** LAWRENCE M. McKENNA

## Opinion

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### [\*897] MEMORANDUM AND ORDER

MCKENNA, D.J.

Family board game manufacturer Anti-Monopoly, Inc. ("AMI") commenced this antitrust action against its competitor, Hasbro, Inc. ("Hasbro"), alleging, among other things, violations of §§ 1 and 2 of the Sherman Act, §§ 3 and 7 of the Clayton Act, the Robinson-Patman Act, and state law.<sup>1</sup> Hasbro [\*898] moves for summary judgment, pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#), to dismiss AMI's Second Amended Complaint. Hasbro also moves for partial judgment on the pleadings to dismiss AMI's secondary-line Robinson-Patman Act claims.<sup>2</sup> [\*\*3] [\*\*2] For the reasons set forth below, Hasbro's motions are granted and AMI's Second Amended Complaint is dismissed in its entirety. The other motions pending before the Court are either disposed of in this Memorandum and Order or are dismissed as moot.<sup>3</sup>

### I. Factual Background

#### A. The Rise and Fall of Anti-Monopoly

In 1973, AMI introduced Anti-Monopoly into the marketplace, a board game in which "players broke up monopolies by bringing antitrust suits against monopolists." (Anspach Decl., 7-15-96, PP 1, 16.) AMI sold over 400,000 Anti-Monopoly games in the United States between 1973 and 1976, despite the concession of AMI's founder and president, Ralph Anspach, that the subject matter of the game was not well understood by the public. (*Id.* at PP 16, 16a; Person Decl., 7-15-96, Ex. C6.)

In 1976, AMI was temporarily enjoined from using the word "Monopoly" in the title of its game on the ground that it infringed the mark owned by Parker Brothers for its popular board game, Monopoly. [\*\*4]<sup>4</sup> In 1982, the Ninth Circuit Court of Appeals concluded that the word "Monopoly" as applied to board games had become generic and invalidated Parker Brothers' trademark registration. [\*Anti-Monopoly v. General Mills Fun Group, Inc.\*, 684 F.2d 1316, 1326 \(9th Cir. 1982\)](#), cert. denied, 459 U.S. 1227, 103 S. Ct. 1234, 75 L. Ed. 2d 468 (1983). During the period of the injunction, AMI continued to sell Anti-Monopoly under a different name.

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<sup>1</sup> Toys "R" Us, Inc. ("TRU") and K Mart Corporation ("Kmart") have settled their dispute with AMI and are no longer defendants in the action. AMI alleged other violations of the antitrust laws that were dismissed in an earlier Memorandum and Order of the Court. See [\*Anti-Monopoly, Inc. v. Hasbro, Inc.\*, 1995 U.S. Dist. LEXIS 16355, 1995 WL 380300 \(S.D.N.Y. 1995\)](#).

<sup>2</sup> Prior to the completion of discovery, Magistrate Judge Peck, who oversaw discovery in this action, stayed AMI's apparently onerous discovery requests relating to AMI's secondary-line Robinson-Patman Act claims to allow Hasbro to move before this Court for judgment on the pleadings to dismiss those claims. See Opinion and Order of Magistrate Judge Peck, dated March 6, 1996. Because the Court grants Hasbro's motion, the issue of discovery relating to those claims is now moot. The remainder of discovery is complete.

<sup>3</sup> In addition to the above motions, AMI moves for summary judgment as to liability on certain of its antitrust claims and Hasbro moves for sanctions claiming that AMI's motion is frivolous. Because the Court grants Hasbro's motion dismissing AMI's Second Amended Complaint in its entirety, AMI's motion is denied. Hasbro's motion for sanctions is also denied.

<sup>4</sup> For a brief history of the board game Monopoly and the trademark litigation, see [\*Anti-Monopoly v. General Mills Fun Group, 611 F.2d 296, 299-300 \(9th Cir. 1979\)\*](#).

In 1977, before the Ninth Circuit's decision was rendered, AMI introduced a second board game, which Anspach describes as an "upgrade" of the board game Monopoly. (Anspach Decl., 7-15-96, P 16b.). Precluded from using "Monopoly" in the board game's title, AMI called the game "Choice." (*Id.*) In 1983, after Parker Brothers' trademark was invalidated and the injunction against using "Monopoly" was lifted, AMI changed the name of Choice to Anti-Monopoly [\*\*5] II. (*Id.* at P 16c.) In 1987, believing that consumer confusion between Anti-Monopoly and Anti-Monopoly II was harming sales of the latter, "completely different," game, Anspach caused AMI to cease the production of the original game and remove the "II" from the name of the latter game. (*Id.* at P 17; Person Decl., 7-15-96, Ex. C6.) It is sales of the second Anti-Monopoly game which AMI claims have been harmed by Hasbro's allegedly anticompetitive conduct.<sup>5</sup>

According to AMI's records, Choice sold 2,557 units in the United States in 1980 and 1,939 units in 1981. After Choice's name was changed to Anti-Monopoly II, the game's United States sales increased from 1,416 units in 1983 to 12,648 units in 1986 to its peak of 42,218 units in 1989. (Person Decl., 7-15-96, Ex. C6.) In 1990, the year Anti-Monopoly (formerly Anti-Monopoly II) was [\*899] dropped by the mass retailers, including TRU and Kmart, AMI sold only 3,400 units of Anti-Monopoly, and has since not [\*\*6] sold more than 3,000 units in any year. (*Id.*; Anspach Decl., 7-15-96, P 51.) TRU and Kmart stopped selling Anti-Monopoly because, in the opinion of their game buyers, it lacked consumer appeal. (Boyle Decl. P 2; Christensen Decl. P 5.) In 1995, the most recent statistic available, AMI sold only 460 units of Anti-Monopoly in the United States.

Parker Brothers, presently a subsidiary of Hasbro, bought the trademark to Anti-Monopoly, and licensed it back to AMI. (See Person Decl., 7-15-96, Ex. Q5.) After AMI's prior distributorship agreement with Elite Games Group expired, AMI approached Hasbro with a "proposition" for Hasbro to market Anti-Monopoly through its subsidiary, Milton Bradley, which Hasbro refused. (Anspach Decl., 7-15-96, PP 57, 59-60.) Perhaps the explanation for this lawsuit is Hasbro's refusal to market Anti-Monopoly. Anspach claims that "the present market share (and power) of Hasbro gives it a better chance of success than if a board game were marketed by another manufacturer. Accordingly, from a business standpoint, there is an element of guarantee inherent in Hasbro's monopolistic position." (*Id.* at P 48.) After Hasbro rejected AMI's "proposition," AMI [\*\*7] commenced this antitrust action. (*Id.* at P 60.)

## B. The Board Game Industry

A picture of the board game industry in the United States is difficult to discern from the parties' papers. AMI's papers are replete with conclusory statements and lack organization and coherence. Hasbro's papers, in contrast, strategically omit any comprehensive discussion of the board game industry apparently because Hasbro contends that the relevant market in this case consists of portions of the "toy and game" industry in which Hasbro's market share is far more limited. Despite this difficulty, for the purposes of the instant motions, the Court is able to conclude the following when the facts are viewed in the light most favorable to AMI.

Hasbro possesses approximately 70% of the games and puzzles market, which constitutes approximately 14% of the total toy industry. (Person Decl., 7-15-96, Ex. L2.) Family board games, the putative relevant market in this case, is a subset of those products included in the games and puzzles market.

AMI defines family board games as "non-strategy board games, in which players move tokens on a board surface, and the games are suitable for players at least 7-8 [\*\*8] years old and are targeted for group play which does not exclude the 7 or 8 to 18 year age group." (Second Am. Compl. PP 12, 15.) AMI has not supplied facts to show that the market statistics on which it relies are based on this narrow definition. The president of NPD Group, Inc. ("NPD"), which compiled the market data, confirmed that NPD "provides no formal definitions for the categories contained in its reports." (Roth Decl. P 5.) Because Hasbro's own documents relate its large share of the non-electronic game industry, and because the Court can resolve the pending motions without defining the precise

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<sup>5</sup> AMI also produces a third board game, Star Peace.

contours of the relevant market, the Court will assume for the purposes of the instant motions that family board games refer to a discrete class of products.<sup>6</sup>

[\*\*9] According to a toy industry report, five mass retailers -- TRU, Wal-Mart, Kmart, Target, and Kay Bee/Toy Works -- accounted for more than 50% of the dollar sales in the toy and game industry in 1994. TRU possessed the largest retail share of toy and game sales with approximately 20% of 1994 sales. (Harrington Decl. Ex. 13, at 23; Ordover Decl., 6-12-96, PP 45-49; see also Anspach Decl., 2-28-96, P 13.) Regarding games, the record indicates that Hasbro "owns" almost 55% of the items sold in Kmart and TRU, and over 70% of the items sold in Wal-Mart and Target. The percentage [\*900] of Hasbro games sold in Kay Bee/Toy Works is not apparent from the record.

Hasbro, which includes such well-known manufacturers as Milton Bradley and Parker Brothers, is the dominant producer of family board games in the United States based on NPD-compiled statistics. Some of the historically more popular board games distributed by Hasbro include: Monopoly, Life, Risk, Scrabble, Outburst, Pictionary, and Trivial Pursuit. (See Hasbro, Inc. 1994 Annual Report, Harrington Decl. Ex. 5.) NPD statistics indicate that Hasbro sells 70.3 percent of the family board games sold in the United States, and sold the five [\*\*10] best-selling games in the first half of 1993. (Person Decl., 7-15-96, Exs. I2 & B6.) As of June 1993, Tyco was apparently the next largest family board game manufacturer in the United States with less than 10 percent of the market. (*Id.* Ex. I2.) Other market participants include Pressman Games and a number of smaller manufacturers.

The parties agree that it is neither difficult nor expensive to manufacture a new board game, but disagree as to whether it is easy to enter the board game market. (Second Am. Compl. P 15(D); Harrington Decl. Ex. 6, at 2; Orbannes Decl. P 26; Wilson Decl. P 4.) Hasbro concedes that the mere ability to manufacture a board game does not guarantee its success. Of 42 games introduced by Parker Brothers and Milton Bradley in 1991 only 21 were still being offered for sale by 1994. (Orbanes Decl. P 31.) Moreover, board games sold by the mass merchants are much more likely to garner large volumes of sales in the short term than those sold only in regional department stores or individual toy and game stores.

An independent manufacturer has a number of choices when it decides to introduce a new game. The most common method is to license the game to one of the [\*\*11] major manufacturers, such as Hasbro. (Hersch Decl. P 6.) An independent manufacturer may also choose to market its game directly to retailers, bearing the attendant costs and risks. (Hersch Decl. P 7.) The mass retailers are less likely to accept a game for sale if it doesn't promise substantial sales in a short period of time. (Orbanes Decl. P 26; Christensen Decl. P 2.) This reluctance makes it more difficult for smaller manufacturers, with less capital for national advertising, to place their games in the mass retailers. However, a manufacturer can successfully launch a game through smaller retail stores, such as local department stores and independent game stores. Examples of games that achieved national success by first approaching smaller retail stores include Pictionary, Scruples, and Mindtrap. (Orbanes Decl. P 27.)

### C. Hasbro's Purported Anti-Competitive Acts

AMI's various antitrust claims are premised on the same facts, which the Court concludes fall into two general categories.<sup>7</sup> First AMI claims that certain Hasbro discounts and promotions available to mass retailers, such as

<sup>6</sup> In addition, AMI proposes a relevant submarket, which it coins "monopoly-type family board games" and defines as "family board games based on some of the monopolistic features of real estate and/or public utilities, including the payment of rents to owners or users thereof." (Second Am. Compl. P 12.) Because AMI has failed to provide factual support for this alleged submarket, the Court will not consider it.

<sup>7</sup> In addition to the facts based on deposition testimony and sworn declarations, AMI has submitted purported expert opinions based on a long litany of "assumed" facts, which were prepared by AMI's counsel. (See Person Decl. Exs. C, D, E, F, G, I.) In these assumed facts, AMI asked its experts to accept as true, among other things: (1) AMI's alleged market definition; (2) the allegations of Hasbro's illegal pricing practices and their anticompetitive effects contained in AMI's complaint; (3) the "fact" that Hasbro's prices are predatory; and (4) the "fact" that Hasbro and TRU conspired to refuse to deal with Anti-Monopoly in

TRU, are purportedly not available to smaller retailers, and are thus discriminatory. Second, [\*\*12] AMI claims that certain Hasbro practices, including volume discounts that benefit the mass retailers, discourage those retailers from purchasing non-Hasbro games, such as Anti-Monopoly, and thus harm competition. Much of AMI's alleged evidence focuses on innuendo based on communications between Hasbro and TRU, and/or vague inferences from ambiguous documents and testimony.

### [\*\*13] 1. Retailer Discrimination

AMI claims that Hasbro discriminates against smaller retailers in favor of the mass retailers, such as TRU. According to AMI, it is harmed by this discrimination because [\*901] smaller retailers cannot compete with the mass retailers, which causes them to go out of business and provides fewer stores in which to sell Anti-Monopoly.

The nature of this alleged discrimination includes offering the mass retailers promotional and advertising discounts of which smaller retailers are unaware (see, e.g. Person Decl., 7-15-96, Exs. M3, U3, I4, J4; Person Decl., 3-1-96, PP 5-7, 11-19; Canfield Decl. PP 3-12; Goldstein Decl. PP 4-12); supplying only the mass retailers with personnel to stock their shelves (Hall Dep. 150-54; see also Person Decl., 4-5-96, Ex. AA; Goldstein Decl., 2-15-96, P 11); and providing the mass retailers with a preview of Hasbro's product line before it is introduced to the other retailers (see Hall Dep. 38-45; Canfield Dep., 1-4-96, PP 13, 15-16).

Although AMI has supplied the Court with numerous documents referring to Hasbro discounts or promotions, the Court notes that AMI has failed to provide context to the documents by explaining [\*\*14] the nature or conditions of the discounts. Thus, although AMI claims that Hasbro's discounts are discriminatory, it is difficult for the Court to conclude that they are, based on the inadequate information before it. However, some small retailers have indicated in sworn declarations that discounts available to the mass retailers are not available to them. Liberally construing the evidence in AMI's favor, the Court will assume for the purposes of the instant motions that some of Hasbro's discounts and promotions discriminate against smaller retailers in favor of the mass retailers.

### 2. Other Hasbro Practices

In addition to Hasbro's allegedly discriminatory policies outlined above, AMI complains about a number of other Hasbro practices. AMI claims that Hasbro refuses to sell only its "hot" games to retailers, instead conditioning the sale of such "hot" items on the purchase of more poorly performing items. (Hosea Dep. 89-92; Wilson Dep. 73.) According to E. David Wilson, president of Hasbro's Games Group, allowing a retailer to purchase only the "cream of the crop" would be "harmful for our business." (Wilson Dep. 72.)

AMI also claims that Hasbro has conspired with certain mass [\*\*15] retailers to fix the prices of Hasbro's board games by negotiating TRU's profit margin. (Person Decl., 3-1-96, P 3, Person Decl., 4-5-96, PP 11-13, 22.) AMI's alleged evidence of this price fixing scheme includes the testimony of Jill Hall, a board game buyer for TRU. According to Hall, TRU approaches Hasbro when TRU has excess inventory of games in order to negotiate a markdown, or discount price, which allows TRU to sell its remaining inventory on the unpopular product at a lower price while still turning a profit. (Hall Dep. 73-75, 218-21.) Although some smaller board game manufacturers did not receive similar markdowns from Hasbro for their remaining inventories, apparently some did. (See Canfield Decl., 1-4-96, P 3; Person Decl., 4-5-96, Exs. S, U, & V.) Other than these negotiated markdowns, there is no evidence suggesting that TRU and Hasbro negotiated TRU's profit margins. Hasbro was apparently aware of TRU's profit margins, however, because it notified TRU that it thought TRU's prices were too high in correspondence referring to those profit margins. (Person Decl., 4-5-96, Ex. BB.)

AMI also complains about Hasbro's volume discounts on the ground that they discourage the [\*\*16] mass retailers from purchasing Anti-Monopoly. (See Person Decl., 3-1-96, P 5; Person Decl., 3-1-96, Exs. E, M.) The percentage

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exchange for discriminatory discounts. Needless to say, the Court does not accept these unsupported and assumed facts as true for the purposes of the instant motions.

of Hasbro's volume discount increases as the quantity of Hasbro items purchased increases. AMI offers a hypothetical example to explain how it has been harmed by Hasbro's volume discounts. TRU, AMI theoretically explains, forgoes the purchase of Anti-Monopoly for fear that profitable sales of Anti-Monopoly will cut into TRU's sales of Hasbro products, which will reduce the percentage of TRU's volume discount. Because, according to AMI, the loss of even a small percentage increase in volume discount on the entire line of Hasbro's products carried by TRU far exceeds TRU's potential profit on Anti-Monopoly, it would not make economic sense for TRU to carry Anti-Monopoly. (Person Decl., 3-1-96, P 5.) For similar reasons, AMI claims that a number of Hasbro discounts are anticompetitive. (See Person Decl., 3-1-96, PP 12-17; Person Decl., 4-5-96, [\*902] PP 30-38.) AMI has provided no factual support for its theory.

## II. Discussion

### A. Standard of Review

**HN1** Summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, [\*\*17] 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. Proc. 56(c); Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). All facts, inferences, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). "The mere existence of some alleged factual dispute . . . will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

### B. Market Power

Although market power is not an essential element of all of AMI's claims -- see *K.M.B. Warehouse Dist., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) **HN2** (market power is not a prerequisite to all § 1 Sherman Act claims) -- to sustain most of its claims, AMI must show that Hasbro possesses market power in the putative relevant [\*\*18] market, family board **HN3** games. Market power is "the ability to raise price significantly higher than the competitive level by restricting output." *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1331 (7th Cir. 1988) (Easterbrook, J.); see also Phillip E. Areeda et al., *Antitrust Law*, Volume IIA, P 501 (1995) [hereinafter "**Antitrust Law**"]. Market share is frequently reflective of market power, and thus a showing that a defendant possesses a large share of a well-defined market is usually sufficient to demonstrate market power. See *K.M.B. Warehouse*, 61 F.3d at 129 ("market share may be a proxy for market power"); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 452, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (Kodak's possession of "nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes," was sufficient to withstand Kodak's summary judgment motion).

#### 1. Market Definition

**HN4** The relevant inquiry for market definition is whether a hypothetical union of all producers of the product or products in the putative market would possess significant power over price. If so, then the [\*\*19] product or products comprise a relevant market. See *Antitrust Law*, Volume IIA, P 533c; Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, at 10-11 (April 2, 1992). In the instant case, the question is whether a hypothetical union of all producers of family board games would possess significant power over the price of family board games. If so, then family board games is the relevant market. If a hypothetical union of all producers of family board games would not possess significant power over price, that is, if consumers would purchase alternate products rather than pay the inflated price for family board games, then family board games defines the

market too narrowly. The products to which the consumer would turn in light of the more expensive games would also be part of the relevant market.

The Supreme Court has recognized that [HNS<sup>15</sup>](#) "the relevant market for antitrust purposes is determined by the choices available" to the consumer. [Kodak, 504 U.S. at 481-82](#) (citing [Jefferson Parish, 466 U.S. 2 at 19](#)); [Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#). The Court set the standard for market definition [\[\\*\\*20\]](#) in [United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#). "No more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal." [Id. at 395](#).

In the instant case, the parties have submitted various analyses to support their respective [\[\\*903\]](#) definitions of the relevant market. The reason is clear. If family board games were accepted as the relevant market, then, because there is some evidence that Hasbro possesses approximately 70% of that putative market, Hasbro's market share would evidence market power. In contrast, if Hasbro were correct that family board games compete with a "cluster" of toys and games, then the relevant market would include products manufactured by toy powerhouse Mattel, Inc., among others, and Hasbro's share of the relevant market, according to Hasbro's expert, would be less than 25%, too low to evidence market power. See [Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 920 F. Supp. 455, 473-74 \(S.D.N.Y. 1996\)](#) (citing [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, \[\\*\\*21\] 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#)).

To satisfy its burden relating to market definition, AMI has submitted the expert declarations and cross-elasticity reports of Ralph Anspach, AMI's president, and that of economist C. Daniel Vencill.<sup>8</sup> In these reports, Anspach and Vencill conclude, based on their respective analyses of NPD data, that family board games comprise a relevant antitrust market because they have "low interchangeability with other games such as adult games, puzzle games, standard games, family action games, and strategy games." (Vencill Report, 7-14-96, at 4; Anspach Decl., 7-15-96, at P 66.) Hasbro's expert, Janusz A. Ordover, finds numerous computational and conceptual flaws with AMI's experts' analyses, leading him to comment that they "would receive a failing grade if submitted by a graduate student in my industrial organization classes at NYU." (Ordover Report, 8-7-96, at P 1.) Ordover's analysis concludes that the relevant market consists of toy and game "clusters," which are based on the price of the item and certain demographic characteristics of the intended user.

## [\[\\*\\*22\] 2. Barriers To Entry](#)

Even were AMI's market definition accepted for the purposes of the instant motions, large market share is not dispositive of a determination of market power. [HNG<sup>16</sup>](#) "Market power comes from the ability to cut back the market's total output and so raise price." [Ball Memorial Hospital, 784 F.2d at 1335](#). In other words, even if family board games constituted the relevant market, and even if Hasbro possessed 70% of that market, Hasbro would not have market power if it could not significantly raise price by restricting output.

<sup>8</sup> Hasbro objects to these documents on two grounds: (1) they violate Rule 26 because they were first submitted in response to Hasbro's summary judgment motion; (2) Magistrate Judge Peck precluded Vencill and Anspach from offering any opinions in this case other than those based on the assumed facts they relied on in their initial Rule 26(a)(2) expert reports. (Hasbro Reply Mem. 8-9.)

Hasbro is simply incorrect that AMI's expert submissions violate Magistrate Judge Peck's order. The substance of that order was to preclude AMI's experts from using certain information produced by Hasbro to supplement their expert analyses. (Harrington Decl. Ex. 1, at 26-29.) However, the Vencill and Anspach declarations explicitly indicate that they are based on independently acquired information; not information produced by Hasbro. (Vencill Decl., 7-14-96, P 14; Anspach Decl., 7-15-96, P 13.) While Hasbro may be correct that these expert analyses violate Rule 26, Hasbro has not shown that it is prejudiced by their submission because it admittedly possessed the information upon which AMI relied for its own reports.

**HN7** [↑] Where barriers to entry into the relevant market are low, a defendant's large market share may not accurately reflect market power. See *United States v. Waste Management, Inc.* 743 F.2d 976, 983 (2d Cir. 1984); *Ball Memorial*, 784 F.2d at 1335. In *Waste Management*, the government challenged the acquisition by Waste Management, Inc. ("WMI"), a solid waste disposal company, of a competitor in the Dallas area. If allowed, the merger would have resulted in WMI controlling 48.8% of a certain category of the waste disposal business in the Dallas area, sufficient to constitute *prima facie* evidence that the merger was illegal. *Waste* [\*\*23] *Management*, 743 F.2d at 976. Declining to find that the merged company would possess market power, the Second Circuit recognized that "entry into the relevant product and geographic market by new firms or by existing firms in the Fort Worth area is so easy that any anti-competitive effect of the merger [\*904] before us would be eliminated more quickly by such competition than by litigation." *Id. at 983*; see also *Antitrust Law*, Volume IIA, Section 4C.

Hasbro, relying on recent market participants, claims that barriers to entry into the family board game market are low, precluding a finding that it has market power. Hasbro points out that a common trade magazine publishes the names of companies and individuals who can assist in the development, production, and marketing of a new game, indicating that even a manufacturer with little experience in the industry could introduce a game. (Orbanes Decl. P 26.) In addition, the president of Hasbro's Games Group, E. David Wilson, claims, and AMI does not dispute, that most successful games in recent years were introduced by small independent game manufacturers. (Wilson Decl., 6-12-96, PP 3-4.) Wilson cites as examples, Mindtrap, Advertising, [\*\*24] *Where in the World is Carmen San Diego?*, Brain Quest, Pictionary, and Trivial Pursuit. (*Id.*; see also Angel Decl. PP 5-9 (development of Pictionary); Hesch Decl. P 8 (development of Out of Context); Ware Decl. PP 3-13 (development of Trivial Pursuit).)<sup>9</sup>

[\*\*25] AMI does not refute Hasbro's historical data, but contends in conclusory fashion that "the current board game market is rigged against potential non-Hasbro-developed staples getting a foothold in the market. Therefore, the frequency of success of new games becoming staples cannot be determined on the basis of past history." (Anspach Decl., 7-15-96, at P 45). It further claims that a successful competitor must be able to place its games in the mass retailers, which requires substantial capital investment for marketing and advertising. (AMI Oppos. Mem. 10; Second Am. Compl. P 15(D); Harrington Decl. Ex. 6, at 2; Anspach Decl., 7-15-96, PP 32-33.) AMI also points out that the attendant risk associated with introducing a new game discourages new entrants.

The Court notes that AMI's evidence relating to barriers to entry is nonspecific and largely speculative, while Hasbro's evidence is based on actual market participants. Unrebutted evidence that actual competitors have entered the market is a strong indicator that Hasbro lacks market power. See *Antitrust Law*, Volume IIA, PP 420b, 422c. This follows because these new entrants provide a check on Hasbro's ability to charge monopoly [\*\*26] prices or otherwise exercise market power. In the face of Hasbro's evidence that most of the recent, successful board games have been introduced by small, independent game manufacturers, AMI has failed to set forth facts to show that barriers to entry into the putative family board game market are high.

Nevertheless, the Court need not resolve the pending motions **HN8** [↑] by finding that Hasbro lacks market power in the relevant market, which in any event is usually a question of fact, not law. *Sunshine Cellular v. Vanguard Cellular Sys.*, 810 F. Supp. 486, 493 (S.D.N.Y. 1992) (citing *Jennings Oil Co. v. Mobil Oil Corp.*, 539 F. Supp. 1349, 1352 (S.D.N.Y. 1982)). Indeed, **HN9** [↑] experts are not always essential to defining the relevant market. See

<sup>9</sup> Hasbro also claims that the nature of the competition among toy and game retailers negates a finding of market power. Hasbro explains that the top five retailers in the toy and game industry in the United States sell approximately 50% of all toys and games. TRU, the largest of these retailers, sells approximately 20% of all toys and games. (Harrington Decl. Ex. 13.) According to Hasbro, TRU is so powerful that the Federal Trade Commission ("FTC") claims TRU was able to stop Hasbro from selling its products to various customers, including warehouse clubs. (Hasbro Mem. 8; Harrington Decl. Ex. 14, PP 4-7.)

The record does not allow the Court to draw the inferences necessary to conclude that competition in the retail business for games restricts Hasbro's ability to control prices in the putative family board game market. First, Hasbro cites to information for the broader toy and game industry. Thus, the record does not sufficiently establish who the retail players are in the family board game market nor their effect on Hasbro. Second, even if the FTC complaint upon which Hasbro relies for its claim, were sufficient to show that TRU was able to restrain the quantity of Hasbro sales to TRU's retail competitors -- which it is not -- it still would not show that TRU sufficiently restrains Hasbro's ability to control prices on the games sold to TRU or other retailers.

United States v. Pabst Brewing Co., 384 U.S. 546, 549, 16 L. Ed. 2d 765, 86 S. Ct. 1665 (1966) (government need not prove "by an army of expert witnesses what [\*905] constitutes a relevant 'economic' or 'geographic' market"). Thus, the Court assumes, for the purposes of the instant motions, that Hasbro has market power in the family board game market.

### C. Antitrust Standing

**HN10** [↑] To recover damages under § 4 of the Clayton Act an antitrust plaintiff [\*\*27] must show that it has antitrust standing. 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). To determine whether AMI has antitrust standing, the Court must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." Id. at 535. In Associated General, the Supreme Court recognized a number of factors relevant to a determination of antitrust standing, including the nature of plaintiff's alleged injury. Id. at 538.

#### 1. Alleged Discrimination

AMI has not clearly articulated how it is injured by Hasbro's allegedly discriminatory practices. To the extent that Hasbro charges smaller retailers more for Hasbro games than it charges the mass retailers, AMI is benefitted because it can more easily place Anti-Monopoly in these smaller retailers. To the extent AMI claims that Hasbro charges the mass retailers too little, its claim is simply one for predatory pricing and not for discrimination. (See Anspach Decl., 2-28-96, PP 15-23.)

AMI's argument appears to rely on the fact that the retail market for family board games is [\*\*28] being consolidated by a few mass retailers. Because this consolidation is causing the smaller retailers to go out of business, AMI allegedly cannot succeed by selling to only the smaller retailers. The Court notes that if AMI's theory of injury to small retailers based on Hasbro's allegedly unjustified discriminatory conduct were correct, it is somewhat curious that the small retailers have not instituted an action on their own behalf. Moreover, AMI has not provided factual support for its claim that the purported retailer consolidation is related to the Hasbro practices about which AMI complains.

The Court finds that **HN11** [↑] AMI's theory lacks factual support, and in any event is too indirect, speculative, and tenuous to support antitrust standing. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 230-31, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (affirming summary judgment where facts do not support plaintiff's theory); Associated General, 459 U.S. at 545-46 (recognizing that the tenuous and speculative nature of the relationship between alleged antitrust violation and injury, and the existence of more direct victims, weigh heavily against a finding of antitrust [\*\*29] standing).<sup>10</sup>

Because AMI lacks antitrust standing to pursue its discrimination claims, the Court grants Hasbro's motion for summary judgment as to all of AMI's claims to the extent they allege that Hasbro discriminated against smaller retailers in favor of the mass retailers.

#### 2. Pricing Practices

<sup>10</sup> Hasbro correctly points out that, under the Robinson-Patman Act, a secondary-line violation would occur if game retailers, that is, Hasbro's customers, suffered antitrust injury because of Hasbro's alleged price discrimination. See Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 583-84 (2d Cir. 1987). In contrast, a primary-line injury refers to injury to Hasbro's competitors, such as AMI. *Id.* AMI does not have antitrust standing to pursue the alleged secondary-line claims of Hasbro's customers. For that reason, Hasbro's motion for judgment on the pleadings to dismiss AMI's secondary-line Robinson-Patman Act claims is granted.

**HN12**[] Antitrust injury, a necessary component of antitrust [\*\*30] standing, is "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); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986). **HN13**[] Absent predatory pricing, an antitrust plaintiff cannot complain that its competitor's prices are too low. In *Atlantic Richfield*, the Court explained:

[\*906] 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 from nonpredatory price competition "is really claiming that it [is] unable to raise prices." . . . This is not antitrust injury; indeed, "cutting prices in order to increase business is the very essence of competition."

*Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337-38, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990) (citations omitted).

**HN14**[] To sustain its claim for predatory [\*\*31] pricing, AMI must prove (1) that Hasbro's prices are below an appropriate measure of Hasbro's costs; and (2) that Hasbro had a dangerous probability (or a reasonable prospect under the Robinson-Patman Act) of recouping its investment in below-cost prices. *Brooke Group*, 509 U.S. at 222-24. AMI has not provided factual support for either element of a below-cost pricing antitrust claim. Instead, AMI theorizes that Hasbro can achieve instant recoupment by pricing Monopoly below cost. Hasbro allegedly achieves this instant recoupment when the consumer enters TRU to buy Monopoly, but then decides to buy another Hasbro product. (Anspach Decl., 4-3-96, PP 19, 27-31.) AMI's factually unsupported theory is not sufficient to support a claim. *Id. at 230-43.*

To the extent that AMI claims that Hasbro's discounts and other promotional allowances cause its prices to be too low, AMI has failed to show that it has suffered antitrust injury. This is true regardless of the statute under which AMI's antitrust claims are based. *Atlantic Richfield*, 495 U.S. at 340; see also *Cargill*, 479 U.S. at 116 (holding that plaintiff must show predatory pricing under § 7 of the Clayton Act); *Brooke* [\*\*32] *Group*, 113 S. Ct. at 2587 (holding that predatory pricing claim under both § 2 of Sherman Act and under the Robinson-Patman Act require plaintiff to show that its competitor's prices are below an appropriate measure of the competitor's costs).

#### D. Hasbro Has Not Violated the Antitrust Laws

To the extent that AMI might have antitrust standing, it has failed to provide factual support for its allegations of anticompetitive conduct. For example, AMI has failed to support its § 2 claim for conspiracy to monopolize or its § 1 claim alleging a "contract, combination . . . or conspiracy" in restraint of trade with evidence of concerted action. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (recognizing that independent action is not proscribed under § 1); *Volvo North America Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988) (recognizing that **HN15**[] element of conspiracy to monopolize under § 2 requires concerted action). Concerted action means "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*, [\*\*33] 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946).

AMI apparently claims that, because TRU discusses its profit margin with Hasbro when it negotiates certain wholesale discounts, including post-sale markdowns to reduce inventory, there is evidence of concerted action. The Court does not agree. In *Monsanto*, the Supreme Court recognized that **HN16**[] "[a] manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market." *Monsanto Co.*, 465 U.S. at 762. The Court cautioned against drawing an inference of a price fixing agreement from ambiguous evidence. *Id. at 763.*

Calling the evidence ambiguous would be generous. AMI has not pointed to any exhibits or non-hearsay testimony to support its claim that Hasbro had an express or implied agreement to fix prices with TRU or any other retailer. **HN17**[] A lack of factual support is fatal to AMI's conspiracy claims. See *Schwimmer v. Sony Corp. of America*, [677 F.2d 946, 953-54](#) (2d Cir.) (plaintiff failed to introduce sufficient facts from which an inference of agreement to discourage transshipping [\*907] could be drawn), cert. denied, [459 U.S. 1007, 74 L. Ed. 2d 398, \[\\*\\*34\] 103 S. Ct. 362 \(1982\)](#).

The distinct and significant problem with all of AMI's antitrust claims is that they lack factual support in the record. Accordingly, all of AMI's antitrust claims are dismissed.

#### E. State Law Claim

**HN18**[] "When all bases for federal jurisdiction have been eliminated from a case so that only pendent state claims remain, the federal court should ordinarily dismiss the state claims." *Baylis v. Marriott Corp.*, [843 F.2d 658, 665 \(2d Cir. 1988\)](#) (citing *United Mine Workers of America v. Gibbs*, [383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 \(1966\)](#)). The Court is not convinced that all bases for federal jurisdiction relating to AMI's state law claim have been eliminated. On the face of the complaint it appears that there is complete diversity between AMI and Hasbro, and thus the Court may still have federal jurisdiction over AMI's state law claim. (Second Am. Compl. PP 4, 5.)

In any event, the Court believes that in this case, in which AMI has entirely failed to provide factual support for both its federal and state law claims, allowing AMI to pursue its state law claim in state court would be a waste of the resources expended to resolve the [\*35] parties' dispute. Discovery is complete, and Hasbro has properly moved for summary judgment to dismiss AMI's one state law claim for tortious interference with business advantage. The Court will also resolve this aspect of Hasbro's motion.

**HN19**[] To state a claim for tortious interference with business advantage, "a plaintiff must show (1) business relations with a third party; (2) defendants' interference with those business relations; (3) defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the relationship." *Purgess v. Sharrock*, [33 F.3d 134, 141 \(2d Cir. 1994\)](#). AMI has not set forth any particular business relation with which Hasbro interfered; nor has it set forth any facts that Hasbro intended to harm AMI; nor has it set forth facts to show that Hasbro used dishonest, unfair, or improper methods to compete with AMI. Accordingly, AMI's state law claim is dismissed with prejudice.<sup>11</sup>

#### [\*\*36] III. Conclusion

For the reasons set forth above, Hasbro's motion for summary judgment dismissing AMI's Second Amended Complaint is granted. The Court also grants Hasbro's motion for judgment on the pleadings dismissing AMI's secondary-line Robinson-Patman Act claims. The other pending motions are disposed of in the above Memorandum and Order or are dismissed as moot. The Clerk is directed to enter judgment dismissing the Second Amended Complaint.

SO ORDERED

Dated: New York, New York

<sup>11</sup> The Court also notes that, under New York state law, the failure to provide argument on a point at issue constitutes abandonment of the issue. See *Bombard v. Central Hudson Gas & Electric*, [205 A.D.2d 1018, 614 N.Y.S.2d 577, 580](#) (3d Dep't 1994); see also *Ortho Pharmaceutical Corp. v. Cosprophar, Inc.*, [828 F. Supp. 1114, 1129 \(S.D.N.Y. 1993\)](#) (recognizing that parties failure to address claim raised in adversary's papers may indicate abandonment), aff'd, [32 F.3d 690 \(2d Cir. 1994\)](#). AMI failed to provide any argument opposing Hasbro's motion relating to AMI's state law claim, which provides an independent basis for dismissal.

March 26, 1997

LAWRENCE M. McKENNA

U.S.D.J.

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## Rossi v. Standard Roofing

United States District Court for the District of New Jersey

March 26, 1997, Decided ; March 26, 1997, FILED

Civil Action No. 92-5377 (NHP)

**Reporter**

958 F. Supp. 976 \*; 1997 U.S. Dist. LEXIS 3630 \*\*; 1997-1 Trade Cas. (CCH) P71,846

JOSEPH ROSSI, et al., Plaintiffs, v. STANDARD ROOFING, INC., et al, Defendants.

**Disposition:** [\*\*1] Defendants' motions for summary judgment GRANTED; plaintiffs' Complaint DISMISSED WITH PREJUDICE.

### **Core Terms**

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Roofing, products, manufacturers, distributors, conspiracy, alleges, prices, siding, competitors, conversations, antitrust violation, dealers, buying, northern, summary judgment, Sherman Act, horizontal, anti trust law, anticompetitive, concerted, rule of reason, own business, no evidence, complaints, unilateral, damages, per se violation, distributorship, antitrust, customers

### **LexisNexis® Headnotes**

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Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

#### **HN1[**

The standard governing summary judgment motions is set forth in [Fed. R. Civ. P. 56\(c\)](#), which provides in part: 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 a judgment as a matter of law. A fact is material if it might affect the outcome of the suit under the governing substantive law.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

958 F. Supp. 976, \*976L<sup>1997 U.S. Dist. LEXIS 3630, \*\*1</sup>

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 > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

## **HN2** **Summary Judgment, Evidentiary Considerations**

The movant for summary judgment has the initial burden of identifying evidence that it believes shows an absence of genuine issues of material fact. When the nonmovant will bear the burden of proof at trial, the movant's burden can be discharged by showing that there is an absence of evidence to support the nonmovant's case. If the movant establishes the absence of a genuine issue of material fact, the burden shifts to the nonmovant to do more than simply show that there is some metaphysical doubt as to material facts. A party opposing summary judgment may not rest merely upon bare assertions, conclusory allegations or suspicions. The proof must amount to more than a scintilla of factual support for the plaintiff's theory of legal recovery.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

## **HN3** **Antitrust & Trade Law, Sherman Act**

Summary judgment is no longer looked upon as a disfavored procedural shortcut; rather, it presents the district court with the first opportunity to dispose of meritless cases. This is true even in antitrust cases, where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Antitrust & Trade Law > Sherman Act > General Overview

## **HN4** **Antitrust & Trade Law, Sherman Act**

Although it is not necessary that a Sherman Act plaintiff eliminate every possible independent justification by the manufacturer/distributor so that only evidence of concerted action remains in the record, plaintiff must at least produce evidence that tends to exclude the possibility of independent action by the manufacturer and distributor.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > Inferences

Evidence > Inferences & Presumptions > General Overview

## **HN5** **Antitrust & Trade Law, Sherman Act**

**Antitrust law** limits the range of permissible inferences from ambiguous evidence in a [§ 1](#) Sherman Act case. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. This is because mistaken inferences in such a context are especially costly and chill the very conduct the antitrust laws are designed to protect. The evidence must be analyzed as a whole, and not taken piecemeal, in determining whether an inference of concerted action is supported. Plaintiffs in antitrust cases must be afforded the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

International Trade Law > 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

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Burdens of Proof > General Overview

## [\*\*HN6\*\*](#) **Conspiracy to Monopolize, 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 declared to be illegal. [15 U.S.C.S. § 1](#). Whether conduct violates the Act is determined on a case-by-case application of the Rule of Reason if it is not a per se case. In order to prove a claim brought under [§ 1](#) of the Sherman Act, a plaintiff must prove: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and conduct pursuant to the contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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 > 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

958 F. Supp. 976, \*976L<sup>A</sup> 1997 U.S. Dist. LEXIS 3630, \*\*1

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

## **HN7** Vertical Restraints, Price Fixing

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use, and group boycotts are of this character. A per se case can also be established where there is a horizontal or vertical price fixing agreement. Although explicit agreement is not necessary to prove a Sherman Act conspiracy, a conspiracy is evident where there is joint and collaborative action which is pervasive in the initiation, execution, and fulfillment of the plan.

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 > 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

## **HN8** Practices Governed by Per Se Rule, Boycotts

The per se approach in a Sherman Act case is limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.

Antitrust & Trade Law > Sherman Act > General Overview

## **HN9** Antitrust & Trade Law, Sherman Act

A manufacturer may sell its product to whomever it chooses. This, of course, is the touchstone of our free market economy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

## **HN10** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Where a manufacturer acts in response to dealer complaints, not in concert with them, that is unilateral action and is not a per se violation of the Sherman Act.

958 F. Supp. 976, \*976L<sup>A</sup> 1997 U.S. Dist. LEXIS 3630, \*\*1

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

**HN11**[] **Antitrust & Trade Law, Sherman Act**

An explicit agreement is not necessary to prove a Sherman Act conspiracy. An agreement can be implied from the totality of the circumstances after considering the evidence as a whole. The evidence must reasonably tend to prove that the defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Assignments & Transfers

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

**HN12**[] **Antitrust & Trade Law, Sherman Act**

A unilateral decision of a single manufacturer to rearrange its distribution structure by limiting or increasing the number of its dealers or transferring the number of its dealers or transferring its business to different dealers does not violate the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

**HN13**[] **Antitrust & Trade Law, Sherman Act**

Conduct that is 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

**HN14**[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws are to be used as a shield against clearly anticompetitive activity, not as a rapier to avenge every hurt feeling a businessperson may feel that he has suffered at the hands of his competitors.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

**HN15**[] **Antitrust & Trade Law, Sherman Act**

958 F. Supp. 976, \*976L<sup>A</sup> 1997 U.S. Dist. LEXIS 3630, \*\*1

Whether an unlawful conspiracy or combination is demonstrated should be judged by what the parties actually did rather than by the words they used.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

#### **HN16[] Summary Judgment, Burdens of Proof**

A party may not rest upon bare assertions, conclusory allegations or suspicions to overcome a motion for summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Burdens of Proof > General Overview

#### **HN17[] Antitrust & Trade Law, Sherman Act**

A jousting match in the commercial arena is not sufficient to compel a finding of an antitrust violation.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > 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 > Sherman Act

#### **HN18[] Antitrust & Trade Law, Sherman Act**

There is a presumption in favor of a rule of reason standard. A judicial gloss on § 1 of the Sherman Act, 15 U.S.C.S. § 1 establishes the rule of reason as the prevailing standard of analysis. Under this standard of analysis, the finder of fact must weigh all of the given circumstances of a case in determining whether a restrictive practice must be prohibited as imposing an unreasonable restraint on competition. The touchstone of the rule of reason test is proof of anticompetitive effect, and the goal of antitrust law is the protection of interbrand, not intrabrand, competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

#### **HN19[] Regulated Practices, Market Definition**

A relevant product market is defined as those commodities reasonably interchangeable by consumers for the same purposes.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

## [\*\*HN20\*\*](#) Antitrust & Trade Law, Sherman Act

To prove that a conspiracy or an agreement produced adverse, anticompetitive effects within the relevant product and geographic market, the impact on the market is the key focus, rather than on the individual participants in the market. The antitrust laws were enacted for the protection of competition, not competitors.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Burdens of Proof > General Overview

## [\*\*HN21\*\*](#) Antitrust & Trade Law, Sherman Act

The plaintiff in a Sherman Act case 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.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

## [\*\*HN22\*\*](#) Private Actions, Remedies

Damage claims in an antitrust case must be presented in a manner that is not based on guesswork or speculation.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

## [\*\*HN23\*\*](#) Private Actions, Remedies

Where a plaintiff in an antitrust case fails to present evidence that provides a sufficient basis for an award of damages, it cannot recover. An award of damages must be proved to the point where they can be determined by reasonable inference, not by speculation or guess. A court must be able to connect any damages to the conduct of the defendant.

**Counsel:** For Joseph Rossi, Rossi-Florence Corporation, Rossi Roofing, Inc., Plaintiffs: Joseph A. Dickson, Esq., CLEMENTE, DICKSON & MUELLER, P.A., Morristown, NJ. Harold E. Kohn, Joanne Zack, Michael J. Boni, KOHN, SWIFT & GRAF, P.C., Philadelphia, PA.

For Wood Fiber Industries, Defendant: Steven Richman, Esq., HERRICK, FEINSTEIN, Princeton, NJ. For Standard Roofing, Inc., William Higginson, The Estate of Robert Higginson, Joseph Licciardello, Defendants: Joel N. Kreizman, Esq., EVANS, OSBORNE, KREIZMAN & BONNEY, Little Silver, NJ. For Arzee Supply Corporation, Alvin Roth, Cary Roth, Defendants: Stuart Kuritsky, Esq., BURSIK, KURITSKY & GIASULLO, West Orange, NJ. For GAF Building Materials Corporation, Defendant: Sheldon M. Finkelstein, Esq., Shirley L. Berger, Esq., HANNOCH WEISMAN, Roseland, NJ. For Servistar Corporation, Defendant: Stephen F. Ban, Esq., Laurel S. Gleason, Esq., SPRINGER, BUSH & PERRY, Pittsburgh, PA.

**Judges:** NICHOLAS H. POLITAN, U.S.D.J.

**Opinion by:** NICHOLAS H. POLITAN

## **Opinion**

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**[\*977] LETTER OPINION****ORIGINAL ON FILE WITH CLERK OF THE COURT**

Re: *Joseph Rossi, Rossi [\*2] Florence Corp., and Rossi Roofing, Inc. v. Standard Roofing, Inc., et al.*

Civil Action No. 92-5377 (NHP)

Dear Counsel:

This matter comes before the Court on motions by defendants -- Standard Roofings, Inc., Arzee Roofing Supply Corp., GAF Corporation, Allied Roofing, Inc., Servistar Corp., Robert Higginson (deceased), William Higginson, Alvin Roth, Cary Roth, Joseph Licciardello, and Wood Fibre Industries, Inc. -- for summary judgment dismissing the Complaint of plaintiffs, Joseph Rossi, Rossi Florence Corp., and Rossi Roofing, Inc. Oral argument was heard on the motion on October 23, 1996, and the parties thereafter provided the Court with additional submissions. For the reasons outlined herein, defendants' motions are **GRANTED**.

**STATEMENT OF FACTS**

Notwithstanding the voluminous nature of the parties' submissions in this case, the factual basis of the dispute is fairly straightforward, if somewhat lengthy.

Plaintiff Joseph Rossi ("Rossi") has been working in the roofing and siding distribution market in northern New Jersey ("North Jersey") since 1972. Plaintiffs Rossi-Florence Corp. ("Rossi-Florence") and Rossi Roofing, Inc., ("Rossi Roofing") are siding [\*3] and roofing distributors that Joseph Rossi formed in North Jersey. They are no longer in business. [\*978] For ease of reference, the entities that are plaintiffs in this action will be referenced as either "Rossi" or "plaintiff."

Defendants Standard Roofings, Inc., ("Standard") and Arzee Supply Corporation ("Arzee") are distributors of roofing and siding materials in North Jersey. Defendants GAF Corporation <sup>1</sup> ("GAF") and Wood Fiber Industries, Inc., ("Wood Fiber") are suppliers of roofing products in North Jersey. Defendant Servistar Corp. ("Servistar") is a buying group, with some roofing and siding distributors as members, doing business in northern New Jersey.

Defendant William Higginson is currently [\*4] a shareholder and President of Standard; defendant Joseph Licciardello is Vice President of Standard; defendant Alvin Roth is a shareholder and the President of Arzee; defendant Cary Roth is Alvin's son and a branch manager at Arzee.

Standard employed Rossi from 1972 until he was terminated in September of 1988, at which time he was the manager of Standard's Cedar Knoll branch. The reasons for his discharge are in dispute. Rossi alleges that Standard fired him because he refused to obey Standard's request to cooperate with Arzee in setting prices. Standard claims that Rossi was fired because of his poor work performance, Standard's high payroll expense (which it attributed to Rossi), Rossi's personal expenses charged to Standard, his concentration on his extraneous business ventures to the detriment of Standard, and the failure of the Cedar Knolls branch to achieve profits commensurate with its sales.

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<sup>1</sup> GAF was Standard's major supplier of roofing products in the 1980s. Standard was also GAF's major customer in New Jersey and one of its top five customers nationwide. Standard bought over \$ 7.7 million worth of GAF product from GAF in New Jersey in 1989, substantially more than any other customer in New Jersey.

Immediately after Standard fired Rossi, he began planning to open his own roofing and siding distributorship at a building he owned, which was located adjacent to Standard and on the same block as Arzee. Because of his employment at Standard, Rossi had knowledge about off-invoice, volume **[\*\*5]** and nonvolume confidential rebates that some distributors get from many of the manufacturers in the roofing and siding industry. These rebates are periodic credits against purchases that the manufacturer issued to the distributors. Rossi alleges that distributors and suppliers feared that he would pass these rebates on to his customers, thereby lowering the prices of roofing and siding products in northern New Jersey.

Rossi believes that because of his past refusal to participate in price fixing, his aggressive pricing, and his potency as a competitor, Standard and Arzee, together with Allied, agreed to prevent Rossi from succeeding as a competitor in the northern New Jersey roofing and siding market. Additionally, Rossi contends that those defendants caused suppliers, including manufacturers, other distributors and buying groups to refuse to deal with Rossi-Florence, Rossi Roofing, and Joseph Rossi.

Rossi asserts that in late 1988 or 1989, representatives of various manufacturers informed him that distributors Standard, Allied, and/or Arzee pressured manufacturers not to deal with Rossi. Rossi alleges that he entered into a joint business venture with Richard Drosch, President **[\*\*6]** of the Florence Corporation (a roofing, siding, and window distributorship located at Huntington, Long Island), because Florence Corporation already had product lines. Jon Bieselin, an employee of Drosch, also entered into the business arrangement. On December 1, 1988, the three incorporated the Rossi-Florence Corporation in the State of New Jersey.

Rossi proffers several statements by various persons to support his contention that defendants conspired to keep him out of business. Specifically, Rossi claims that Licciardello, Vice-President of Standard, visited him in December of 1988 at the new business location and informed him that, if he went into business, Standard and Arzee "would do anything they could . . . to keep him out of business." Additionally, a Standard employee testified that he heard Higginson state that Higginson intended to stop Rossi from competing against him.

**[\*979]** Moreover, plaintiff contends that sometime in January of 1989, Bud Krusa of GAF called Drosch and told him that GAF would not sell to Rossi-Florence in New Jersey because GAF had sufficient distribution in the area. Plaintiff purports that Drosch responded to Krusa's statement by stating that he would **[\*\*7]** sell GAF product from Florence Corporation to Rossi-Florence. Plaintiff maintains that Krusa then threatened Drosch by stating that GAF would no longer sell to Florence in Long Island if he sold GAF products to Rossi-Florence.

Plaintiff asserts that subsequent to Krusa's threat, a similar incident occurred in 1988 in connection with Certainteed, a major siding supplier to both Drosch's Long Island corporation and Arzee. Plaintiff alleges that Drosch received a call from Al Roth of Arzee in December of 1988. During that conversation, Roth allegedly asked Drosch if he was opening a distributorship with Joe Rossi in North Jersey. When Drosch responded affirmatively to that question, Al Roth then stated that he was not happy about it and threatened to open a distributorship in Long Island if Drosch followed through with the Rossi-Florence distributorship.

In January of 1989, Drosch informed Rossi that he wanted to withdraw from Rossi-Florence because he believed that their corporation would not have the necessary product lines to succeed and that the available substitute products would not suffice. He also told Rossi that he was worried that if he moved forward with their joint **[\*\*8]** venture, his own business in Long Island would be endangered. Joe Rossi and Drosch then reached an agreement whereby Rossi would return \$ 65,000 to Drosch and Bieselin and discontinue use of the Florence name.

After the breakup of Rossi-Florence, Rossi Roofing was incorporated in New Jersey on February 2, 1989, with Joe Rossi and Georgia Rossi as the corporate directors. Rossi Roofing obtained a \$ 900,000 bank credit line, which was guaranteed by Joe and Georgia Rossi. In March of that same year, Anthony Lipari invested in Rossi Roofing with the intention that he would be a 50% shareholder.

Rossi Roofing was able to buy vinyl siding and roofing products from the Bird Corporation, a manufacturer. However, Rossi contends that he was unable to buy roofing product from Celotex, another manufacturer that

supplied Standard, Arzee, and Allied. The representative of Celotex said that he could not sell to Rossi because it would not be allowed by his boss.

Though Rossi Roofing was able to directly secure products from some manufacturers, for example, Gold Bond and Bird, it was unable to get products from some other manufacturers. Manufacturers including Certainteed, Wolverine and Wood Fiber [\*\*9] refused to sell their products to Rossi Roofing. Rossi contends that the manufacturers refused to deal with him because of pressure exerted on them by defendant distributors. Because Rossi Roofing was unable to purchase the products it wanted directly from manufacturers, it attempted and actually succeeded in buying some of them through other distributors.

In March of 1989, Rossi Roofing purchased GAF product from Passaic Metals, a roofing and siding distributor in North Jersey. After learning this, Bill Higginson of Standard called his competitor, Frank Gurtman, the President of Passaic Metals, and threatened to open a branch near Passaic Metals and put him out of business if Gurtman continued to sell to Rossi. Shortly thereafter, Gurtman explained to Rossi that he could not sell him product because he feared retaliation. However, Gurtman did sell some products to Rossi Roofing after Rossi convinced him to do so.<sup>2</sup>

Rossi also bought GAF [\*\*10] product from DiNaso & Sons, a roofing and siding distributor located in Staten Island. Plaintiff purports that DiNaso's GAF salesmen visited DiNaso & Sons during 1989 and asked them not to sell to Rossi. Despite their request, DiNaso sold GAF product to Rossi.

During the Spring of 1989, Rossi Roofing obtained GAF slatelines from DiNaso & Sons for a job that both Rossi Roofing and Standard [\*980] were competing for on the James Street Commons Condominium project. Rossi Roofing sold the GAF slatelines roofing product to roofing applicator John Feher for the job. A Standard salesperson apparently learned from John Feher that he purchased GAF product through Rossi Roofing.

When Rossi Roofing attempted to purchase more slatelines for the James Street Common Condominium project from DiNaso, DiNaso told Rossi Roofing there would be a \$ 1.00/sq increase in the price, as GAF had increased DiNaso's price for slateline. Thus, Rossi Roofing was unable to supply James Street Commons with the additional GAF slatelines it needed for subsequent buildings because of the increased price.

In July of 1989, Rossi Roofing entered into a Membership Agreement with the buying group Hardware Wholesalers, Inc. ("HWI"). [\*\*11] Rossi Roofing joined HWI because it could not get the products Rossi Roofing needed directly from manufacturers.

On July 26, 1989, Rossi Roofing placed an order for GAF product with David Heine, Division Manager of Commodities at HWI. Part of the order was scheduled to be picked up the next day. When a Rossi Roofing employee went to pick up the partial order, he was advised by GAF Shipping Department employee Ken Rupert that his superior, District Sales Manager Bud Krusa, had decided that GAF would not release the order to Rossi Roofing.

Joe Rossi went with his attorney, Joseph Gioia, to the South Bound Brook Facility where the order was being held. After speaking with several HWI and GAF employees, Rossi then spoke to Krusa by the telephone. Krusa told Rossi, "I am not selling to you. The distribution is filled. GAF requires no other distributors." Rossi Roofing never obtained GAF product directly through GAF or through HWI. Instead it had to resort to buying the shingles from Strober Supply<sup>3</sup> at a marked-up price.

[\*\*12] On August 4, 1989, Rossi Roofing went to the Celotex plant to pick up an order placed through HWI. Celotex failed to supply the order, stating that it was a mistake.<sup>4</sup>

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<sup>2</sup> Passaic did not sell Rossi any GAF products until September of 1989.

<sup>3</sup> Strober had already been called by GAF instructing them not to sell the shingles to Rossi Roofing.

<sup>4</sup> It is not clear whether plaintiffs are contending that this incident was caused by any of the defendants.

Another company of which Joe Rossi was a principal, Far Hills Lumber and Hardware Corporation, also known as L.V. Ludlow & Co. ("Far Hills"), joined the buying group Servistar on July 31, 1989. Rossi attempted to buy GAF product for Rossi Roofing through Far Hills and Servistar.

On August 2 and 3, 1989, Far Hills placed orders for GAF Timberlines through Servistar's Building Materials Department. Rossi had Far Hills place the GAF orders for the purpose of reselling the GAF product to Rossi Roofing. These orders were filled by GAF and resold by Far Hills to Rossi Roofing. After this transaction was completed, GAF employee Mary Lou Sperr heard that Rossi Roofing was connected to Far Hills.

Standard's Cedar Knolls/Morristown Branch Manager, [\*\*13] Joseph Licciardello, also learned that Rossi Roofing had purchased GAF product from Far Hills. Jorge Esteves, a Standard employee, heard Licciardello state that "That's the last time we're going to be seeing any GAF across the street. They got the -- they were getting the loads through Ludlow [Far Hills], which is American Hardware [the prior name of Servistar]. That's how Joe Rossi was getting GAF and he's going to put an end to that. 'Never going to see another GAF load across the street.'"

On August 11, 1989, Far Hills placed another order of GAF product through Servistar. On August 14, 1989, a Servistar employee informed Far Hills that the GAF order would not be filled, and that GAF had cut Far Hills off from getting GAF product because of Joe Rossi's involvement with Far Hills.

Defendant Wood Fiber manufactures Structodek FS. Structodek FS is a product with a membrane attached which commercial roofers use to eliminate the need to lay a separate underlayment before applying a built-up bitumen-type roof over a rough surface. [\*981] Joe Rossi asked Carl Loser of Wood Fiber to sell their products to Rossi Roofing. Loser told Rossi there was pressure from Allied and Standard not to [\*\*14] sell to Rossi and that he did not think he could sell to Rossi Roofing.

Despite Loser's negative response to Rossi's request, Rossi Roofing ordered a trailer load of Structodek FS in June of 1989. Structodek gave Rossi Roofing a ship date of July 5th. On June 27, 1989, Carl Loser informed Rossi Roofing that they could not ship the material to him because it was in a difficult position.

At the end of Rossi Roofing's fiscal year, September 30, 1989, Rossi Roofing had lost approximately \$ 350,000. Having been unable to buy GAF and other products, Rossi saw no possibilities of getting the products he needed to allow Rossi Roofing to succeed.

On December 18, 1989, Joseph Rossi, Rossi Roofing, and American Builders & Contractors Supply Co., Inc., ("ABC Supply") entered into an Asset Purchase Agreement pursuant to which ABC Supply agreed to purchase the assets of Rossi Roofing. The sale of Rossi Roofing's assets to ABC Supply occurred on January 8, 1990.

Joseph and Georgia Rossi were also sued on their personal guarantees for uncollected accounts receivables of Rossi Roofing by a number of Rossi Roofing's creditors. Joseph Rossi is still personally paying off the debt owed to the bank [\*\*15] on the Rossi Roofing's line of credit.

On January 8, 1990, ABC opened its doors to the public and hired Joseph Rossi to manage the branch. The Morristown/Cedar Knolls location which Rossi managed for ABC did over \$ 5.5 million in sales in 1990, its first year of operation. During 1993, the fourth and final year Rossi managed that location, the sales had increased to over \$ 11 million.

On January 31, 1994, Jim Murray, ABC's District Manager, came to the Morristown/Cedar Knolls location and announced that ABC was selling that location to Bradco Supply. Consequently, Rossi later negotiated an agreement with Allied Building Supply. Allied opened a location on Rossi's property in 1994, committed to a lease, and employed Rossi as a manager of that location.

## **DISCUSSION**

### Summary Judgment

**HN1** [↑] The standard governing summary judgment motions is set forth in [Fed. R. Civ. P. 56\(c\)](#), which provides in pertinent part:

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 [\*\*16] to a judgment as a matter of law.

[Fed. R. Civ. P. 56\(c\)](#). A fact is material if it might affect the outcome of the suit under the governing substantive law. [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#).

**HN2** [↑] The movant has the initial burden of identifying evidence that it believes shows an absence of genuine issues of material fact. [Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#). When the nonmovant will bear the burden of proof at trial, the movant's burden can be discharged by showing that there is an absence of evidence to support the nonmovant's case. *Id. at 325*. If the movant establishes the absence of a genuine issue of material fact, the burden shifts to the nonmovant to do more than "simply show that there is some metaphysical doubt as to material facts." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#). A party opposing summary judgment may not rest merely upon "bare assertions, conclusory allegations or suspicions." [Ness v. Marshall, 660 F.2d 517, 519 \(3d Cir. 1981\)](#). The proof must amount to more than a [\*\*17] "scintilla" of factual support for the plaintiff's theory of legal recovery. [Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1197 \(3d Cir. 1995\)](#).

**HN3** [↑] Summary judgment is no longer looked upon as a disfavored procedural "shortcut"; rather, it presents the district court "with the first opportunity to dispose of meritless [\*\*982] cases." [Big Apple BMW, Inc. v. BMW of North Amer., Inc., 974 F.2d 1358, 1362 \(3d Cir. 1992\)](#), cert. denied, 507 U.S. 912, 122 L. Ed. 2d 659, 113 S. Ct. 1262 (1993). "This is true even in antitrust cases, 'where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.'" *Id.* (quoting [Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 \(1962\)](#)).

After oral argument in this matter, the Court requested that the plaintiff marshal the facts he maintains support his contention that there was an antitrust violation by the defendants in this case. The plaintiff was, in effect, given the opportunity to present what Judge Fullam, and subsequently Judge Mansmann, referred to in *Big Apple* as those "19 bits" of evidence tending [\*\*18] to support an antitrust violation. See [Big Apple, 974 F.2d at 1374 n.11](#).

Even after this opportunity, however, the plaintiff has failed to provide any evidence from which a reasonable inference may be drawn that defendants engaged in an antitrust violation. Plaintiff's evidence consists primarily of conclusory allegations or suspicions. **HN4** [↑] Although it is not necessary that the plaintiff eliminate every possible independent justification by the manufacturer/distributor so that only evidence of concerted action remains in the record, plaintiff must at least produce "evidence that tends to exclude the possibility of independent action by the manufacturer and distributor." See [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464, reh'g denied, 466 U.S. 994, 80 L. Ed. 2d 850, 104 S. Ct. 2378 \(1984\)](#).

**HN5** [↑] Antitrust law limits the "range of permissible inferences from ambiguous evidence in a § 1 case." [Matsushita, 475 U.S. at 588](#). More particularly, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* This is because "mistaken inferences [\*\*19] in such a context 'are especially costly'" and "'chill the very conduct the antitrust laws are designed to protect.'" [Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1001 \(3d Cir. 1994\)](#) (quoting [Matsushita, 475 U.S. at 594](#)), cert. denied, 131 L. Ed. 2d 556, 115 S. Ct. 1691 (1995).

The evidence must be analyzed as a whole, and not taken piecemeal, in determining whether an inference of concerted action is supported. See [Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 \(1962\)](#). Plaintiffs in antitrust cases must be afforded the "full benefit of their proof without

tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." [\*Id.\*](#) at [699](#).

### Sherman Act Claims

**HN6** [↑] [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 declared to be illegal." [15 U.S.C. § 1](#). Whether conduct violates the Act is determined on a case-by-case application of the Rule of Reason if it is not a *per se* case. [Business Elecs. Corp. I](#)<sup>\*\*201</sup> [v. Sharp Elecs. Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515](#), cert. denied, [486 U.S. 1005, 100 L. Ed. 2d 192, 108 S. Ct. 1727 \(1988\)](#).

In order to prove a claim brought under [section 1](#) of the Sherman Act, a plaintiff must prove:

- (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and conduct pursuant to the contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

[Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 \(3d Cir. 1991\)](#) (quoting [Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1489 \(3d Cir. 1985\)](#)). At the outset, the Court notes that there is some confusion regarding plaintiff's contention as to whether he is alleging that there was a horizontal or vertical restraint of trade. In plaintiff's motion papers, the contention is that the case is purely [\[\\*983\]](#) one of horizontal refusal to deal with plaintiff. At oral argument, however, plaintiff's counsel conceded that there were various levels of parties [\[\\*\\*21\]](#) involved in the case, but still contended that this case is a group boycott that was generated at the horizontal level.

The allegations here are similar to those addressed in *Big Apple*, where it was held that the agreement between the dealers, even though the agreement included the manufacturer, was enough to make it a horizontal restraint. [Big Apple, 974 F.2d at 1376](#). Because the Third Circuit has determined that a similar factual scenario represents a horizontal restraint, this Court will analyze the case *sub judice* in that vein.

The distinction is important, because plaintiff alleges that this case presents a *per se* violation of [section 1](#) of the Sherman Act. The Supreme Court has stated:

**HN7** [↑] "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," and . . . group boycotts are of this character.

[United States v. General Motors Corp., 384 U.S. 127, 146, 16 L. Ed. 2d 415, 86 S. Ct. 1321 \(1966\)](#) (quoting *Northern* [\[\\*\\*22\]](#) [Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#)). A *per se* case can also be established where there is a horizontal or vertical price fixing agreement.<sup>5</sup> See, e.g., [Business Elecs., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515](#). Although explicit agreement is not necessary to prove a Sherman Act conspiracy, a conspiracy is evident where there is "joint and collaborative action" which is "pervasive in the initiation, execution, and fulfillment of the plan." [384 U.S. at 143](#).

For example, in *General Motors*, a group of automobile [\[\\*\\*23\]](#) dealers had banded together to complain and force General Motors to put a stop to the practice of some dealers, who would resell their automobiles to discounters. General Motors was successful in persuading those dealers who were doing the selling to discounters to cease the

<sup>5</sup> There is no evidence that this case presents a price fixing *per se* case, and the Court finds that it is not a price fixing case. Although plaintiff alleges that he was present at a lunch where the conversation involved setting prices, there is no evidence that price fixing ever occurred with regard to the two defendants against whom this allegation is made. Such an allegation, standing alone, is not enough to propel this case into the range of a *per se* violation.

practice. [\*Id. at 132-38\*](#). The Supreme Court held that this concerted action by the group of dealers and General Motors was a *per se* violation of the Sherman Act. [\*Id. at 145\*](#).

Similarly, in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, the Supreme Court found a *per se* violation of the Act where "manufacturers and distributors of electrical appliances had conspired among themselves and with a major retailer . . . 'not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms.'" [359 U.S. 207, 211, 3 L. Ed. 2d 741, 79 S. Ct. 705 \(1959\)](#).

The Supreme Court did, however, limit the application of the *per se* rule in a 1986 case. [\*Federal Trade Comm'n v. Indiana Federation of Dentists, 476 U.S. 447, 90 L. Ed. 2d 445, 106 S. Ct. 2009 \(1986\)\*](#). Although it acknowledged its holdings in General Motors and *Klor's*, the Court determined that [HN8](#) the *per se* approach should be "limited to cases [\*\*24] in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." [\*Id. at 458\*](#). See also [\*Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 298, 86 L. Ed. 2d 202, 105 S. Ct. 2613 \(1985\)\*](#) (holding that the "mere allegation of a concerted refusal to deal does not suffice [as a *per se* violation] because not all concerted refusals to deal are predominantly anticompetitive").

In this matter, there is no evidence that GAF determined not to sell to plaintiff on the basis of complaints received from the defendants, either individually or in concert. Although it is clear (and defendants Arzee and Standard admit) that they often complained about plaintiff's propensity to offer lower prices to his customers, plaintiff presents no [\*984] proof that GAF was approached by a group of the defendant distributors regarding plaintiff's pricing. Nor is there any proof in the record from which an inference can be drawn that this occurred.

More importantly, there is no proof that GAF made its determination not to sell to plaintiff based on anything but a valid business decision. The evidence is [\*\*25] clear that GAF felt that it had adequate distribution. [HN9](#) A manufacturer may sell its product to whomever it chooses. See, e.g., [\*Monsanto, 465 U.S. at 761; Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 374 \(3d Cir. 1985\); Inter-City Tire & Auto Ctr. v. Uniroyal Inc., 701 F. Supp. 1120, 1124 \(D.N.J. 1988\)\*](#), aff'd without opinion, 888 F.2d 1380 (3d Cir. 1989). This, of course, is the touchstone of our free market economy.

Additionally, complaints about pricing by competitors to a manufacturer are normal; such is the nature of the beast of commerce.<sup>6</sup> Such complaints "are natural -- and from the manufacturer's perspective, unavoidable -- reactions by distributors to the activities of their rivals." [\*Monsanto, 465 U.S. at 763\*](#). Even [HN10](#) where a manufacturer acts in response to dealer complaints, not in concert with them, that is unilateral action and is not a *per se* violation of the Sherman Act. See, e.g., [\*Regency Oldsmobile, Inc. v. General Motors Corp., 723 F. Supp. 250, 263 \(D.N.J.\), aff'd, 888 F.2d 1380 \(3d Cir. 1989\)\*](#).

[\*\*26] As stated *supra*, [HN11](#) an explicit agreement is not necessary to prove a Sherman Act conspiracy. An agreement can be implied from the totality of the circumstances after considering the evidence as a whole. The copious amount of documents filed in this matter do not contain any circumstantial or direct evidence, as set forth more fully below, that "reasonably tends to prove that the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective." [\*Monsanto, 465 U.S. at 764\*](#).

Many of plaintiff's allegations of a conspiracy that are supported by deposition testimony are centered around several of the defendants discussing plaintiff's chances of success as a competitor. There are also comments by

<sup>6</sup> As Bud Krusa from GAF testified:

Q. And you don't recall whether or not any of those conversations Mr. Roth complained to you about Mr. -- any price that Mr. Rossi had on any particular job?

A. No different than anybody else complaining about the same thing, or Mr. Rossi calling about somebody else's prices. Everybody complained about everybody . . . .

competitors to plaintiff to the effect that he would "never make it" in his new business. Plaintiff also alleges that certain of the defendants would ask a GAF representative whether GAF was selling to plaintiff after he started his own business.

These allegations clearly do not allow this Court to infer that these conversations rose to the level of a conspiracy amongst any of the defendants. The inference to be drawn from the facts alleged by plaintiff [\*\*27] in this matter is that certain of the defendants, particularly Standard and Arzee, had a strong aversion to Rossi and would protest anything that he did. But the missing link in the alleged conspiratorial chain is GAF. The conspiracy alleged is as to *all* defendants, yet no evidence has been adduced to allow this Court to draw the inference that GAF acted in concert with the other defendants.

Plaintiff has stated, both in his submissions to the Court and during oral argument, that *Big Apple* is directly on point in determining this matter. However, the factual scenario in *Big Apple* is completely different.<sup>7</sup> In *Big Apple*, there was "consistent evidence that BMW NA encouraged the Potamkins to acquire BMW dealerships, that the New York and Philadelphia dealers subsequently complained to BMW NA about the Potamkins, and that BMW NA later denied the Potamkins franchises giving allegedly pretextual reasons." [974 F.2d at 1365](#). There was evidence in that case of various meetings [\*\*985] between representatives of BMW North America and the Potamkins.

[\*\*28] Equally distinguishable is the *Arnold Pontiac-GMC* case. [\*Arnold Pontiac-GMC, Inc. v. General Motors Corp.\*, 786 F.2d 564 \(3d Cir. 1986\)](#). In that case, the plaintiff had an established business and there were a series of identifiable meetings and documents involving serious discussions with the defendant. [\*Id. at 568-71\*](#). The dealer disapprovals arose after an initial meeting with the plaintiff and defendant to discuss whether the plaintiff had fulfilled all of the defendant's conditions for the new franchise. [\*Id. at 573-74\*](#).

Here, GAF never promised or even made any overtures to Rossi that it would use him as a distributor of GAF products. It told him time and time again that distribution was filled. None of plaintiff's entities was ever an existing distributor of GAF products or products of the other manufacturer defendants. After leaving Standard, which did carry GAF products, Rossi attempted to start his own business. It was at that point that GAF maintained that it had adequate distribution in the area.

According to plaintiff, GAF supplied its roofing products to over twenty-five different distributors in New Jersey. [HN12](#) A "unilateral decision of a single manufacturer [\*\*29] to rearrange its distribution structure by limiting or increasing the number of its dealers or transferring the number of its dealers or transferring its business to different dealers does not violate the Sherman Act." [\*Seaboard\*, 770 F.2d at 374](#).

Plaintiff can point to no evidence that would support its assertion that this was pretextual. Plaintiff had just started his business directly adjacent to Standard, an existing GAF distributor. An inference can certainly be drawn that because plaintiff was a start-up operation, with no "track record," GAF validly determined that it would not want to jeopardize its relationship with Standard.

Plaintiff does maintain that GAF began supplying ABC after he was told that GAF had adequate distribution, but the fact remains that ABC was an *existing, national* distributor of GAF products which opened in the area where plaintiff had his business. This [HN13](#) conduct is 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](#). Such a business decision to continue working with a nationally competitive distributor fails to rise to the [\*\*30] level of an antitrust violation. [HN14](#) The antitrust laws are to be used as a shield against clearly anticompetitive activity, not as a rapier to avenge every hurt feeling a businessperson may feel that he has suffered at the hands of his competitors.

<sup>7</sup> Perhaps the most important distinction between the case *sub judice* and *Big Apple* is that, in *Big Apple*, the denial of the franchise to the plaintiff meant that the plaintiff could not even open its business. Here, plaintiff was in business and was able to obtain alternate products from other manufacturers.

Parenthetically, GAF knew of Rossi's involvement with ABC during the time it continued to do business with ABC. If GAF and the other distributors had such a venomous animosity towards Rossi, it defies common sense that GAF, if it was participating in some sort of conspiracy, would sell to ABC's Cedar Knolls office if Rossi continued to be employed there. GAF certainly could have asserted its power and urged ABC to dismiss Rossi.

The Court therefore finds that there is no *per se* violation in this case. Moreover, the Court finds that there can be no inference drawn, looking at the evidence as a whole, that there was a conspiracy or agreement to prevent plaintiff from obtaining certain roofing products. It should be noted that although plaintiff alleges that "many manufacturers" refused to sell directly to plaintiff,<sup>8</sup> most of the proofs adduced by plaintiff are directed towards GAF. Such a bald allegation is clearly not enough for this [\[\\*\\*31\]](#) Court to infer that all of the referenced manufacturers were involved in any agreement with any other party or parties not to sell to Rossi.

[\[\\*986\]](#) In concluding its analysis of the "agreement" prong of the test, the Court should note and address at this point the specific allegations made by plaintiff with regard to the defendants other than GAF. Many of the allegations are of unilateral comments made by one defendant to Rossi. [HN15](#)<sup>↑</sup> "Whether an unlawful conspiracy or combination is demonstrated should be judged by what the parties actually did rather than by the words they used." *Nichols Motorcycle Supply, Inc. v. Dunlop Tire Corp.*, 913 F. Supp. 1088, 1100 (N.D. Ill. 1995).

Although the Court will point out plaintiff's allegations separately as to each defendant for purposes of addressing them, the evidence is not being pigeonholed or "compartmentalized."<sup>9</sup> Rather, this method of dealing with the facts will alleviate any potential obfuscation of the issues. The Court has painstakingly reviewed this record, and the supplemental submissions, and has considered all allegations together.

### **Wood Fiber**

Plaintiff alleges that Wood Fiber refused to sell to him because of pressure from distributors in the area, particularly Standard and Allied. What plaintiff actually testified to at his deposition was that from his conversations with Carl Loser, the Wood Fiber representative, he would "have to assume [\[\\*\\*33\]](#) by what he said to me that they were getting pressure, but he didn't say, hey, we are not going to sell you right at the first go round." Rossi Dep., T368-69, attached as Exhibit EE to Certification of Steven M. Richman ("Richman Cert.").

Plaintiff states that he has proffered evidence that the distributor defendants interfered with potential suppliers, including Wood Fiber. With respect to Wood Fiber, however, plaintiff testified that he did not know for a fact whether Licciardello or Higginson called Loser at Wood Fiber, nor did Loser specify what pressure was being exerted on him.

It is clear that plaintiff's suppositions are not enough to allow an inference that Wood Fiber was engaged in some sort of agreement or conspiracy with the other defendants to deny plaintiff the products he sought. It must be remembered that [HN16](#)<sup>↑</sup> a party may not rest upon "bare assertions, conclusory allegations or suspicions" to overcome a motion for summary judgment. *Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir. 1981).

Plaintiff has not presented any evidence which shows that Wood Fiber met, or otherwise conversed, with any of the other defendants in this matter. Plaintiff had not applied for credit [\[\\*\\*34\]](#) with Wood Fiber, a prerequisite to obtaining products directly from the company. Plaintiff merely speculates that some defendants were putting "pressure" on Wood Fiber, without ever particularizing what he means. Such "evidence" is woefully inadequate.

<sup>8</sup> In plaintiff's opposition brief, it is alleged that GAF, Wood Fiber, Celotex, Certainteed, Wolverine, Atlas, Johns Manville, Suprador, Hastings Aluminum, US Intec, Tamko, Karnak, Owens Corning, Vipco, and Nailite refused to sell product directly to plaintiff. Plaintiff only sued GAF, Certainteed, Wolverine, Nailite, and Wood Fibre. GAF and Wood Fiber are the only manufacturer defendants still remaining in the case.

<sup>9</sup> This is to lessen plaintiff's concerns that defendants, in filing separate summary judgment motions, are in effect asking this Court to review in isolation plaintiff's evidence with respect to each defendant.

Even if Wood Fiber determined not to sell to plaintiff based on other distributors' complaints about him, that reaction to criticism is not an antitrust violation.

### **Servistar**

There is a substantial lack of evidence adduced by plaintiff with regard to his allegations that Servistar "joined the conspiracy" when it refused to compel GAF to provide materials to it for purchase by Ludlow/Far Hills, a member of its purchasing cooperative. Servistar has maintained that the reason it did not order a second load of GAF product for Ludlow/Far Hills (after having ordered a large first load, which plaintiff's trucking company picked up directly from GAF's facility) was because Ludlow/Far Hills had failed to submit all of the promised personal guarantees from the partners. Therefore, in connection with the "shelf stocking" order Ludlow/Far Hills was to place, this second GAF shipment would have exceeded the credit limit set by Servistar.

[\*\*35] Even assuming as true plaintiff's assertion that Servistar was "pressured" by GAF not to sell to Ludlow/Far Hills because of Rossi's connection, such pressure or refusal by GAF does not allow an inference that Servistar joined any conspiracy, which the Court has found does not exist in this matter. Rossi [\*987] has testified that he was told by an unidentified Servistar employee that GAF would not ship the product because it was for Rossi and because GAF had adequate distribution. Rossi also speculates that it was a Servistar decision not to sell him the product. Servistar, however, would be unable to override GAF's decision because GAF was the manufacturer and GAF had the roofing products. Servistar was, in effect, the alter ego of its members.

Plaintiff has adduced no evidence that Servistar had conversations with any of the distributor defendants in this matter; therefore, any involvement in the "horizontal" conspiracy alleged by plaintiff is nonexistent.

### ***Standard Roofing, the Estate of Robert Higginson, William Higginson, and Joseph Licciardello***

The evidence with regard to Standard is clearly the most particularized, perhaps due in large part to Rossi's previous employment [\*\*36] relationship with Standard. Plaintiff alleges that he was terminated by Standard because of his refusal to "cooperate with his neighbors" in keeping prices level.<sup>10</sup> This termination occurred some two years before Rossi attempted to start his own business. The allegation of price fixing, moreover, makes very little economic sense, as plaintiff alleges only that Arzee and Standard were involved in the conversation. The roofing and siding market in northern New Jersey was very large. Common sense dictates that absent an agreement between most or all of the distributors, such an agreement to fix prices would be futile.

Furthermore, there is no proof as to actual price fixing. There is merely proof of conversations by and between certain competitors regarding prices. Plaintiff has testified that the market was [\*\*37] incredibly competitive. It is axiomatic that this competition stimulates the urge to discover the prices being charged by one's competitors. Absent more tangible proof, this Court will not, and can not, make the vault to a conclusion of price fixing.

Plaintiff also points to statements made by Licciardello to the effect that he and Arzee would do anything they could to see Rossi's business fail. This unilateral statement by Licciardello does nothing to implicate any of the other defendants. Licciardello testified that he merely made the statement based on what he knew as the personal animosity felt by Arzee and Allied towards Rossi. HN17 A jousting match in the commercial arena is not sufficient to compel a finding of an antitrust violation. It is more than natural for competitors to discuss a third party's attempt to go into business. There is no proof presented of any concerted activity amongst Standard, Arzee and Allied.

Plaintiff next asserts that Standard tried to block his attempts at getting products from certain manufacturers. The evidence presented by plaintiff points to completely unilateral conduct by Standard. This Court requested that

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<sup>10</sup> Although it appears that plaintiff testified in another proceeding that he did not know why he was terminated from Standard, this Court will not engage in a credibility determination on summary judgment.

plaintiff marshal all of the facts revealing **[\*\*38]** the concerted activity in this matter. Even the conversations between Standard and certain manufacturers, which did not rise to the level of concerted activity, were merely complaints by Standard with regard to Rossi's pricing strategies. Plaintiff points to evidence of conversations between Licciardello and representatives of Bird and Gold Bond where Licciardello complained about Rossi. Yet, these are two of the manufacturers who *did* sell to Rossi.

Plaintiff also alleges that Standard stopped purchasing from HiFinn after learning that HiFinn may have sold to Rossi. However, a distributor's decision to stop buying from a particular manufacturer is hardly evidence of a concerted activity. This is as far from concerted activity as one can get.

There is also evidence that Bill Higginson spoke with Francis Gurtman at Passaic Metals and threatened that if Passaic Metals sold to Rossi, Standard would open a business "right around the corner" and take all of Passaic Metal's customers. Licciardello called back shortly thereafter to apologize for Higginson, and Passaic Metals continued to do business with Rossi.

**[\*988]** With regard to evidence of an agreement between GAF and Standard, the most **[\*\*39]** that plaintiff can produce is conversations between Licciardello and Bud Krusa, GAF's representative, or some other person at GAF. These unilateral conversations are not evidence of a horizontal conspiracy, nor are they even evidence of a vertical conspiracy, because there is no evidence of price fixing.

One such conversation, related through supposition by a Standard employee, was a query as to where Rossi was getting GAF materials. Other testimony to which plaintiff points involves conversations between distributors as to Rossi's discounting. Licciardello admitted that he had discussions with Bob Schaab at Standard about whether Rossi was going to open up his own business, because they were concerned that Rossi would affect the pricing in the area and might take business away from Standard.

The Court fails to see the significance in plaintiff's reliance on this testimony and other testimony like it. Common sense dictates that Standard would be an ineffective business venture if it were not concerned with the pricing of its competitors. Such a concern is commonplace, and evidence of conversations regarding that concern are simply not at the level of an antitrust violation.

Plaintiff **[\*\*40]** also points to testimony regarding certain rebate programs utilized by GAF and other manufacturers. There is no inference which can be drawn that these programs are in any way linked to some sort of horizontal boycott or conspiracy. There are also allegations that individuals from Standard and Arzee used to sit in cars near Rossi's business to "spy" on him, but the testimony upon which plaintiff relies only mentions Arzee employees. The three businesses were in the same general location on the same street. It is only natural that one or more of his competitors might have been observing his business to identify Rossi's customers. It is not proof of any antitrust violation.

Finally, plaintiff alleges that his bid for an expansion was opposed by Standard and Arzee. There is testimony regarding Licciardello and Cary Roth being at the planning board meeting, and Cary Roth questioning why his similar request for an expansion had previously been denied. Licciardello did not even speak at the meeting. Such an interest in an expansion of a neighboring property is natural, and no inference can be drawn that such opposition is violative of the antitrust laws.

Taking into account the entirety **[\*\*41]** of the preceding evidence, it is clear that any unilateral activity in which Standard might have been involved did not rise to the level of an antitrust violation. Business is just that: business. The fact that Standard may have complained about Rossi's pricing or the way in which he did business is a natural occurrence in the world of commerce. If such complaints, even if made on a daily basis, were antitrust violations, no doubt the federal courts would be faced with a maelstrom of lawsuits.

**Arzee, Alvin Roth, and Cary Roth**

Plaintiff maintains that Arzee complained to GAF about plaintiff's pricing and that Alvin Roth was present at the lunch where Rossi alleges pricing was discussed while he was employed by Standard. In his allegations regarding Arzee, plaintiff cites to deposition testimony of Licciardello, which states that they were "going to be competitors and fight for every order." This testimony does nothing to implicate Arzee in any agreement.

Also, plaintiff alleges that Arzee and Standard fixed prices after he was "driven out of business." There is little of substance in these allegations, as much of the testimony amounts to supposition.

There is testimony [\*\*42] that Arzee and Standard were "a nickel apart" on pricing for certain jobs. In a competitive industry, that nickel could very well mean the difference between getting a job and not getting a job. This "nickel" difference allows no inference of any agreement on prices. In fact, the same deponent said that Standard subsequently raised its prices.

Denise LeMattey, a Standard employee, testified that Licciardello called Cary Roth at Arzee to see why Arzee had quoted such a cheap price on a job. She also said that Arzee's prices were "around the same price" [\*989] as Standard's. Later in her testimony, she said that, when asked whether she had ever discussed prices with a competitor: "Sometimes after a job is given out, if I run into a salesperson I would ask him, how could you quote that price?" LeMattey Dep., T23:14-21. Such curiosity is not an antitrust violation.

#### *Rule of Reason Analysis*

Having found no evidence from which a conspiracy or agreement can be inferred as to any of the defendants, this Court's inquiry could be halted at this point, as the first element of proving a [Section 1](#) claim is lacking. More importantly, the Court's inquiry at this point is finished because plaintiff [\*\*43] has pled only a *per se* case, and summary judgment on the antitrust claims could be granted for that reason alone.

For the sake of completeness, however, the Court will liberally construe plaintiff's pleadings and analyze the facts presented by plaintiff under the rule of reason because [HN18](#) [↑] "there is a presumption in favor of a rule of reason standard." [Business Elecs., 485 U.S. at 726](#) (stating that "departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions").

From the beginning of this century, "a judicial gloss on [Section 1](#) has established the 'rule of reason' as the prevailing standard of analysis." [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). Under this standard of analysis, the finder of fact must weigh all of the given circumstances of a case in determining whether a restrictive practice must be prohibited as imposing an unreasonable restraint on competition. *Id.* The touchstone of the rule of reason test is proof of anticompetitive effect, and the goal of [antitrust law](#) is the protection of interbrand, not [\*\*44] intrabrand, competition. [Id. at 52](#).

The Court has already found that no agreement or conspiracy existed in this matter. Consequently, the next issue to be addressed under the rule of reason is the relevant product and geographic market. [HN19](#) [↑] A relevant product market is defined as "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 \(1956\)](#). The relevant product market in this matter is the entire market of roofing and siding materials. Plaintiff contends that GAF may be a "preferred" brand, but consumer preference is just that: a preference, and not a market. GAF is not so unique as to comprise its own "market." See, e.g., *id.*; [Mogul v. General Motors Corp., 391 F. Supp. 1305, 1313 \(E.D. Pa. 1975\)](#), aff'd without opinion, [527 F.2d 645 \(3d Cir. 1976\)](#); see also [R.D. Imports Ryno Indus., Inc. v. Mazda Distrib. \(Gulf\), Inc., 807 F.2d 1222, 1225 n.2](#) (5th Cir.), cert. denied, 484 U.S. 818, 98 L. Ed. 2d 38, 108 S. Ct. 75 (1987); [Kingsport Motors, Inc. v. Chrysler Motors Corp., 644 F.2d 566, 571 \(6th Cir. 1981\)](#).

Plaintiff testified at his deposition [\*\*45] that "there were approximately 30 roofing and siding distributors in North Jersey, not including the mass merchandisers, small lumberyards, you name it, hardware stores that might have roofing." J. Rossi Dep., Vol. I, T14:4-24. Additionally, it is agreed that the market in the "New Jersey/New York metropolitan area is probably one of the toughest, most competitive marketplaces in the country." See J. Rossi

Dep., *American Builders & Contractors Supply Co., Inc. v. Rossi*, T16:23-T17:1, attached as Exhibit 15 to Berger Cert.

The relevant market, to which the parties seemingly agree, is clearly the Northern New Jersey roofing and siding distributors market, and the relevant product market was the totality of the products in the roofing and siding line. The manufacturers of these products were numerous, as plaintiff readily admits. See J. Rossi Dep., Vol. I, T30:17-T31:1, T32:20-23; T33:17-18; T35:19-22; T37:8-11; T37:21-T38:5; T40:15-T44:5. The other manufacturers included Owens-Corning, Manville, Bird, Iko, Elk, Celotex, Tamko, US Intec, Georgia Pacific, CertainTeed, Genstar, Nord Bitumi, and Tarmac. See Expert Report of Dr. Adam B. Jaffe, attached **[\*990]** as Exhibit A to Certification **[\*\*46]** of Dr. Adam B. Jaffe, Exhibits 3 and 5.

**HN20**<sup>↑</sup> To prove that a conspiracy or an agreement produced adverse, anticompetitive effects within the relevant product and geographic market, the impact on the market is the key focus, rather than on the individual participants in the market. "The antitrust laws were enacted for the protection of competition, not competitors." *Brown Shoe v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). Plaintiff has not shown what exactly were the adverse anticompetitive effects to the northern New Jersey product market.

In a recent Second Circuit case, the court had before it a plaintiff who filed suit alleging that various distributors had complained to the defendant about its plan to sell exhaust systems to the plaintiff. *K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co.*, 61 F.3d 123 (2d Cir. 1995).

The court affirmed the district court's granting of summary judgment for the defendants, stating that **HN21**<sup>↑</sup> the 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." *Id. at 127*.

The Second Circuit found that there was no **[\*\*47]** appreciable effect on either interbrand or intrabrand competition by Walker's refusal to supply the plaintiff. The plaintiff could not, therefore, shoulder its initial requirement of proof. Although in *K.M.B.* the court determined that the restriction was a vertical one, the court's analysis under the rule of reason is instructive. Where, as here, the plaintiff is unable to establish that any adverse effect on competition occurred, the antitrust laws are not violated. Even though plaintiff alleges that GAF was a preferred product in the roofing market, such "isolated statements of preference are not a sufficient 'empirical demonstration concerning the [adverse] effect of the [defendants'] arrangement on price or quality.'" *K.M.B.*, 61 F.3d at 128 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 30 n.49, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)).

In *K.M.B.*, as here, there were many distributors of Walker (in this case GAF) products in the relevant geographic market. This provided for a fiercely competitive intrabrand market, and the GAF market in northern New Jersey also continues to be competitive. The fact that plaintiff was not permitted to compete **[\*\*48]** in the market is not, alone, sufficient to show an adverse effect on intrabrand competition. More importantly, even though plaintiff was unable to get GAF products from GAF, he was able to carry, and indeed did carry, alternate products. The impact on the total interbrand market was therefore unaffected.

Plaintiff was able to get Wood Fiber products from sources other than the manufacturer, and did so on several occasions, reselling the product to its customer at a higher price. See Plaintiff's Admissions Nos. 1, 4, 10, 11, 12, 13, 15, attached as Exhibit L to Richman Cert. Rossi also obtained GAF products from other sources, albeit at prices slightly higher than what he purchased them for when he was at Standard. Plaintiff was also able to acquire products directly from Bird and Gold Bond, two manufacturers.

There is, looking at a totality of the evidence presented by plaintiff, no inference which can be drawn that there was any adverse, anticompetitive effect in the relevant geographic and product markets. The market continues to be one of the most competitive in the country with regard to roofing and siding products. The fact that one competitor may not have been able to carry **[\*\*49]** products from a few manufacturers does not, absent proof of some illicit agreement or conspiracy, equal the harm against which the antitrust laws were designed to prevent. Plaintiff was able to acquire products necessary to engage himself in the competitive atmosphere of the northern New Jersey roofing and siding market. Plaintiff points to no evidence that the availability of other brands of products or the price

of those products were affected negatively. Builders and other craftspersons were able to purchase the materials they wished from any number of distributors, and plaintiff has not alleged that the prices of those products were affected. Because comparable goods at competitive prices were [\*991] available in the market, there is no showing here of any anticompetitive effect. See, e.g., [Tunis, 952 F.2d at 728](#).

The third part of the test -- that the object of and the conduct pursuant to any agreement or conspiracy was illegal -- is not met. Because the Court has determined, based upon a review of all of plaintiff's proffered evidence, that there was no agreement or conspiracy between or amongst any defendants in this matter, an analysis of this prong of the test would be repetitious.

[\*\*50] The final question that need be answered is whether plaintiff was injured as a proximate result of any conspiracy. Even assuming, for this prong of the test only, that a conspiracy or agreement existed, plaintiff has pointed to nothing which would suggest that any business losses he sustained was related to any such agreement or conspiracy.

Plaintiff contends that he was injured in several ways.<sup>11</sup> First, he alleges that the defendants' actions prevented him from beginning operations of Rossi-Florence. Second, he alleges that Rossi Roofing suffered injuries because, during its entire time of operation, it was unable to obtain the roofing and siding materials it needed to compete.

[\*\*51] These arguments are unsupported by the record. [HN22](#) [↑] Damage claims must be presented in a manner that is not based on guesswork or speculation. See [Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 734 F.2d 133, 148](#) (3d Cir.), cert. denied, 469 U.S. 1072, 83 L. Ed. 2d 505, 105 S. Ct. 564 (1984). Plaintiff's damages expert, Regan R. Rockhill, CPA, based his damages estimates on a host of assumptions, the most basic assumption being that "the most appropriate way to look at what Mr. Rossi would have done in operating his own business is that he would have essentially followed the business practices he had followed the prior 14 years while at Standard Roofings." Report of Regan R. Rockhill, attached as Exhibit P to Richman Cert., at 2.

The paradigm utilized by Rockhill amounts to nothing more than a "but for" damage model. Rossi had no experience in his own business. Rockhill never analyzed what products were needed to assure a successful distributorship, and there is no proof as to causation. Perhaps most importantly, Rockhill failed to engage in any analysis regarding the impact of any defendants in the case to determine what harm, if any, was caused by the alleged antitrust actions as opposed to other factors, [\*\*52] such as Rossi's management style or general business conditions. Rockhill does not specify any products in his report, and he did not separate any damages attributable to Rossi-Florence and Rossi Roofing.

[HN23](#) [↑] Where a plaintiff fails to present evidence which provides a sufficient basis for an award of damages, it cannot recover. An award of damages must be proved to the point where they can be determined by reasonable inference, not by speculation or guess. A court must be able to connect any damages to the conduct of the defendant. See [Van Dyk Research Corp. v. Xerox Corp., 478 F. Supp. 1268, 1327-28 \(D.N.J. 1979\)](#), cert. denied, 452 U.S. 905, 69 L. Ed. 2d 405, 101 S. Ct. 3029 (1981). See also [Southern Pac. Com. Co. v. American Tel. & Tele. Co., 556 F. Supp. 825, 1090 \(D.D.C. 1983\)](#), cert. denied, 470 U.S. 1005, 84 L. Ed. 2d 380, 105 S. Ct. 1359 (1985) (holding that a "but for" damage model is "fatally deficient" where it provides "no basis for the Court to determine without speculation the amount of damage, if any, caused by any of the particular actions of the defendants").

For the reasons above, the Court finds that plaintiff's damages model is deficient as a matter [\*\*53] of law.

<sup>11</sup> Although defendants have raised an issue regarding Joseph Rossi's individual standing as a plaintiff, the Court need not reach that issue. He acted at all times through his corporation, and he alleges that he was damaged by the inability of Rossi Roofing to get product. He also was allegedly damaged by his inability to utilize his own funds or obtain alternative financing after the failure of Rossi-Florence/Rossi Roofing. Because the Court has found that no antitrust violation exists, it will not engage in the standing analysis described by the Third Circuit in [In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1165-66 \(3d Cir. 1993\)](#).

## **CONCLUSION**

Based upon the foregoing, the motions made by defendants -- Standard Roofings, [\*992] Inc., Arzee Roofing Supply Corp., GAF Corporation, Allied Roofing, Inc., Servistar Corp., Robert Higginson (deceased), William Higginson, Alvin Roth, Cary Roth, Joseph Licciardello, and Wood Fibre Industries, Inc. -- for summary judgment dismissing plaintiff's Complaint are **GRANTED**. Plaintiff's Complaint is therefore **DISMISSED WITH PREJUDICE**.

An appropriate Order accompanies this Letter Opinion.

NICHOLAS H. POLITAN

U.S.D.J.

## **ORDER**

This matter, having come before the Court on motions by defendants -- Standard Roofings, Inc., Arzee Roofing Supply Corp., GAF Corporation, Allied Roofing, Inc., Servistar Corp., Robert Higginson (deceased), William Higginson, Alvin Roth, Cary Roth, Joseph Licciardello, and Wood Fibre Industries, Inc. -- for summary judgment dismissing the Complaint of plaintiffs, Joseph Rossi, Rossi Florence Corp., and Rossi Roofing, Inc.; and oral argument having been heard on the motion on October 23, 1996; and the parties thereafter having provided the Court with additional submissions; and for good cause shown, as more fully set forth [\*\*54] in the accompanying Letter Opinion;

IT IS on this 26th day of March, 1997,

**ORDERED** that plaintiffs' Complaint be and is hereby **GRANTED**; and it is further

**ORDERED** that plaintiff's Complaint be and is hereby **DISMISSED WITH PREJUDICE**.

NICHOLAS H. POLITAN

U.S.D.J.

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End of Document

## Rohlfing v. Manor Care

United States District Court for the Northern District of Illinois, Eastern Division

March 27, 1997, Decided ; March 28, 1997, DOCKETED

Case No. 96 C 3935

**Reporter**

172 F.R.D. 330 \*; 1997 U.S. Dist. LEXIS 3779 \*\*; 1997-2 Trade Cas. (CCH) P71,875

JOHN ARNOLD ROHLFING, as executor of the estate of SAMUEL ROGERS TAYLOR, and all others similarly situated, Plaintiff, v. MANOR CARE, INC., MANOR HEALTHCARE CORP., and VITALINK PHARMACY SERVICES, INC., Defendants.

**Disposition:** [\*\*1] Defendant's motion to dismiss (15-1 & 43-1) granted in part and denied in part. Plaintiff's motion for class certification (38-1) granted in part and denied in part.

## **Core Terms**

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residents, pharmaceutical, subsidiary, predominate, enterprise, nursing home, facilities, defendants', fiduciary duty, conspiracy, prices, cases, Sherman Act, relevant market, common issue, plaintiffs', antitrust, Pharmacy, class certification, class action, misrepresentations, allegations, deceptive, omissions, products, purposes, fiduciary duty claim, member of the class, unity of interest, class member

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

## **HN1[] Responses, Defenses, Demurrsers & Objections**

Fed. R. Civ. P. 23(a) specifies four preliminary requirements that any proposed class must meet: One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

## **HN2** **Class Actions, Certification of Classes**

Plaintiff bears the burden of showing that the proposed class meets the requirements for certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## **HN3** **Class Actions, Prerequisites for Class Action**

In evaluating a motion for class certification the court does not examine the merits of the case.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## **HN4** **Class Actions, Prerequisites for Class Action**

To meet the typicality requirement, the named plaintiff acting on behalf of the class must show that his claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. This requirement is not particularly strict: it may be met even if there are factual distinctions between the claims of the named plaintiffs and those of other class members. Thus similarity of legal theory may control even in the face of differences of fact.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Class Members > Named Members

## **HN5** **Class Actions, Prerequisites for Class Action**

The requirement that the named plaintiff be able to fairly and adequately protect the interests of the class, Fed. R. Civ. P. 23(a)(4), has two distinct elements: (1) the named plaintiff cannot have antagonistic or conflicting claims with other members of the class; and (2) the named plaintiff and his attorneys must be able to prosecute the action vigorously.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

## **HN6** **Prerequisites for Class Action, Predominance**

The first requirement of [Fed. R. Civ. P. 23\(b\)\(3\)](#) is that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

#### [HN7](#) Sherman Act, Claims

In order to prevail on a claim under the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must prove three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in a relevant market; and (3) injury.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

#### [HN8](#) Antitrust & Trade Law, Sherman Act

The theory of liability under the Sherman Act, [15 U.S.C.S. § 2](#) requires plaintiffs to prove: (1) (defendants') 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 > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

#### [HN9](#) Claims, Fraud

To state a civil Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1961 et seq.](#), claim based upon mail fraud, a plaintiff must show: (1) an enterprise; (2) engaged in a pattern; (3) of racketeering activity; (4) which constituted a scheme to defraud; (5) involving use of the mails in furtherance of the scheme; and (6) the scheme proximately caused injury to plaintiff.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

#### [HN10](#) [ ] Claims, Fraud

Courts have adopted two different approaches to the reliance requirement in Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1961 et seq.](#), class action suits based on fraud. When the fraud was perpetrated in a uniform manner against every member of the class, such as when all plaintiffs received virtually identical written materials from defendants, courts typically hold that individual reliance questions do not predominate.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

#### [HN11](#) [ ] Private Actions, Racketeer Influenced & Corrupt Organizations

When the fraudulent conduct was not uniform with respect to all plaintiffs, such as when numerous oral misrepresentations are alleged or when claims are based on advertisements that may not have been seen by every plaintiff, courts treat individual reliance questions as predominating over the common Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1961 et seq.](#), issues.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### [HN12](#) [ ] Public Enforcement, State Civil Actions

To state a claim under the Illinois Consumer Fraud Act, [815 Ill. Comp. Stat. 505/1 et seq.](#), plaintiffs must show: (1) that defendants engaged in a deceptive act or practice; (2) intent on defendants' part that plaintiffs rely on the deception; and (3) that the deception occurred in the course of conduct involving trade or commerce.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

#### [HN13](#) [ ] Contract Interpretation, Fiduciary Responsibilities

A fiduciary duty exists in relationships where there is confidence reposed on one side and a resulting superiority and influence on the other.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

#### [HN14](#) [ ] Class Actions, Prerequisites for Class Action

The final requirement imposed on class proponents by [Fed. R. Civ. P. 23\(b\)\(3\)](#) is a showing that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

#### [HN15](#) [] **Defenses, Demurrsers & Objections, Motions to Dismiss**

Dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#) is improper unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. For purposes of this motion, the court must take all of the well-pleaded factual allegations in the complaint as true, and construe them in the light most favorable to plaintiff.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

#### [HN16](#) [] **Attempts to Monopolize, Elements**

In order to state a claim for monopolization or attempted monopolization under the Sherman Act, [15 U.S.C.S. § 2](#), plaintiff must show that defendant possessed, or had a reasonable possibility of gaining possession of, monopoly power in a relevant market.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

#### [HN17](#) [] **Sherman Act, Claims**

Plaintiff presenting a Sherman Act claim under [15 U.S.C.S. § 2](#) bears the burden of alleging a relevant market.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

#### [HN18](#) [] **Heightened Pleading Requirements, Fraud Claims**

[Fed. R. Civ. P. 9\(b\)](#) provides that in all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

## [\*\*HN19\*\*](#) [L] Heightened Pleading Requirements, Fraud Claims

In Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1961 et seq.](#), cases based on fraud, the plaintiff must, within reason, describe the time, place, and content of the mail and wire communications, and it must identify the parties to these communications.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

## [\*\*HN20\*\*](#) [L] Pleadings, Heightened Pleading Requirements

In evaluating the sufficiency of the pleadings, we bear in mind the purposes of [Fed. R. Civ. P. 9\(b\)](#): (1) protecting defendants' reputations; (2) preventing fishing expeditions; and (3) providing adequate notice to defendants.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## [\*\*HN21\*\*](#) [L] Racketeering, Racketeer Influenced & Corrupt Organizations Act

After an enterprise has been identified, a [18 U.S.C.S. § 1962\(c\)](#) plaintiff must also allege that a "person" associated with the enterprise conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

## [\*\*HN22\*\*](#) [L] Racketeer Influenced & Corrupt Organizations Act, Elements

It is clear that the continuity element of the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. § 1961 et seq.](#), is satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business or of conducting or participating in an ongoing and legitimate RICO enterprise.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Criminal Law & Procedure > ... > Fraud > False Pretenses > Elements

## [\*\*HN23\*\*](#) [L] Public Enforcement, State Civil Actions

To assert a claim under the Illinois Consumer Fraud Act, [815 Ill. Comp. Stat. 505/2](#), plaintiff must allege that defendants have committed "unfair or deceptive acts or practices." The statute indicates that such acts include, but are not limited to, any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

#### **HN24** **Contract Interpretation, Fiduciary Responsibilities**

In determining whether a fiduciary relation exists, a court must consider factors such as kinship, age disparity, health, mental condition, education, business experience, and the extent of reliance.

Contracts Law > Breach > General Overview

Governments > Fiduciaries

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

#### **HN25** **Contracts Law, Breach**

A fiduciary duty exists independently of any contract between parties, and so the economic loss doctrine is inapplicable to claims for breaches of fiduciary duties.

**Counsel:** For JOHN ARNOLD ROHLFING est Samuel Rogers Taylor, executor, plaintiff: Cathleen M. Combs, Daniel A. Edelman, James O. Lattner, Rick D. Young, Edelman & Combs, Chicago, IL.

For MANOR CARE INC, MANOR HEALTHCARE CORP, VITALINK PHARMACY SERVICES INC, defendants: James J. Casey, Amy Beth Manning, Scott Steven Becvar, Ross & Hardies, P.C., Chicago, IL. William O Bittman, Reed, Smith, Shaw & McClay, Washington, DC.

**Judges:** MARVIN E. ASPEN, United States District Judge

**Opinion by:** MARVIN E. ASPEN

## **Opinion**

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### **[\*333] MEMORANDUM OPINION AND ORDER**

MARVIN E. ASPEN, Chief Judge:

Plaintiff John Rohlfing<sup>1</sup> has filed a five count complaint against Defendants<sup>2</sup> Manor Care, Inc., Manor Healthcare Corp., and Vitalink Pharmacy Services, Inc., alleging claims for antitrust violations, fraud, and breach of fiduciary duty. Rohlfing has filed a motion for class certification. The defendants, in addition to lodging objections to the class motion, have filed a motion to dismiss directed at every count of the complaint. For the reasons set forth below, [\*\*2] each motion is granted in part and denied in part.

## I. Background

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[\*\*3] Manor Care, Inc., owns a large network of nursing homes which provide a variety of services to their residents, ranging from "high acuity" (intensive) nursing care to custodial care and assisted living arrangements. See Compl. P 4. There are 179 Manor Care facilities located in 28 different states. See *id.* PP 4-5. Manor Care operates through a handful of subsidiary corporations. Manor Healthcare Corp. is a wholly-owned subsidiary which is responsible for operating the Manor Care facilities. See *id.* P4. Eighteen of these facilities, spread across 13 different states, obtain their pharmaceutical services from Vitalink Pharmacy Services, Inc. ("Vitalink"), in which Manor Care holds an 82.3% ownership interest. See *id.* PP 6-8. In addition to supplying residents with necessary pharmaceuticals, Vitalink also performs a number of consulting services for Manor Care residents, such as monitoring potential drug interaction problems and reviewing patients' drug administration records. See *id.* PP 9-10. Vitalink also provides similar services to nursing homes outside the Manor Care network, see *id.* PP 12-13, but despite this alternative source of revenue the company [\*334] remains [\*\*4] closely connected to Manor Care, on which it depends for a number of essential services, including tax services, legal services, accounting services, insurance, preparation of SEC filings, and access to credit. See *id.* PP 11, 14.

On June 2, 1995, Samuel Taylor entered the Manor Care facility located in Hinsdale, Illinois. See *id.* P 16. In order to gain entry, Taylor signed Manor Care's "Admission Agreement," which is a form contract provided by Manor Care to all prospective residents. See *id.* P 18. Among the many provisions in this contract is one pertaining to pharmaceutical services: it indicates that the facility has developed a number of policies and procedures regarding drug therapy, and that it has selected a "Designated Pharmacy" that is equipped to meet these requirements. See *id.* P 21. The prospective resident has the right to select a different pharmacy of his own provided that his choice is capable of complying with Manor Care's policies and procedures. See *id.* PP 21-22. The Manor Care pharmaceutical policy requires, among other things, that medications be individually sealed in a manner that is difficult, if not impossible, for most retail pharmacies [\*\*5] to emulate. See *id.* PP 23-27.

For the Manor Care facility Taylor entered, the Designated Pharmacy was a Vitalink franchise. In an effort to persuade residents entering its facilities to select Vitalink as their pharmaceutical services provider, Manor Care provided them with a Vitalink brochure touting Vitalink's array of services. See *id.* PP 28-30. This brochure

<sup>1</sup> Rohlfing brings this case as the executor of the estate of Samuel Taylor, the individual who was the victim of the defendants' allegedly unlawful conduct. As it would be cumbersome to continually refer to "Taylor's estate" as the plaintiff, this opinion will frequently refer to Rohlfing as if he himself were the plaintiff in this action.

<sup>2</sup> This opinion will refer to the "defendants" (in the plural) because they are separate corporations, even though this usage is somewhat at odds with the fact that they are under common ownership. This stylistic decision should not be taken as a prejudgment of the question of whether these companies should be viewed as a single entity under the law. This question is critical to the antitrust and RICO claims, and is discussed in Part III, *infra*.

<sup>3</sup> With respect to both the motion for class certification and the motion to dismiss we are required to assume the truth of the allegations in the complaint. See *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) (motions to dismiss); *Hardin v. Harshbarger*, 814 F. Supp. 703, 706 (N.D. Ill. 1993) (motions for class certification). In accordance with this principle, this opinion will generally dispense with qualifying terms such as "allegedly" when describing the facts, but this should not be understood as indicating that we have made factual findings. Also, Rohlfing has filed an amended complaint in this case. Consequently, any references to "the Complaint" in this opinion are to the amended complaint.

represented that Vitalink's services would meet residents' needs at lower cost than other retail pharmacies. See *id.* In fact, the goods and services provided by Vitalink cost Manor Care residents substantially more than the prevailing retail price. See *id.* P 41. But notwithstanding the high prices, Taylor, like most other Manor Care residents, selected Vitalink as his Designated Pharmacy because he had no practical alternative: no other pharmacy was able and willing to comply with the strict packaging rules enforced at Manor Care facilities. See *id.* PP 32, 37-39. Taylor resided at Manor Care and received pharmaceutical services from Vitalink for a time, but is now deceased.<sup>4</sup>

[\*\*6] Rohlfing, on behalf of Taylor's estate, now seeks to recover the excessive pharmaceutical fees Taylor was forced to pay as a result of the defendants' policies, plus damages and attorney's fees. Rohlfing claims that the defendants violated: (1) the Sherman Act, [15 U.S.C. §§ 1-2](#); (2) the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C. § 1961 et seq.](#); (3) the Illinois Consumer Fraud Act (ICFA), [815 ILCS 505/1 et seq.](#); and (4) the common law fiduciary duty owed by Manor Care to Taylor.

In addition to the claims on behalf of Taylor alone, Rohlfing has moved to certify a class of similarly situated persons who satisfy the following criteria: "(a) they signed an agreement with a Manor Care nursing home facility the same as or similar to [Taylor's]; (b) they chose the 'designated pharmacy' for provision of pharmaceutical services to them during their residency at the Manor Care nursing home facility; (c) the 'designated pharmacy' was Vitalink; and (d) the resident was charged by Manor Care and/or Vitalink for pharmaceutical goods and/or services provided by Vitalink." See Pl.'s Motion at 1. In accordance with [Rule 23\(c\)\(1\) of the Federal Rules of Civil Procedure](#), [\*\*7] we will first rule on this motion for class certification. Once we have determined whether a class should be certified on any or all of the claims, we will address the defendants' motion to dismiss.

## II. Motion for Class Certification

### A. [Rule 23 Standard](#)

**HN1**[] [Federal Rule of Civil Procedure 23\(a\)](#) specifies four preliminary requirements that any proposed class must meet: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses [\*335] of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." [Fed. R. Civ. P. 23\(a\)](#). If the numerosity, commonality, typicality, and adequacy requirements are satisfied, then we must also decide whether the class qualifies under one of the three subsections of [Rule 23\(b\)](#). In the instant case, the plaintiff seeks certification under [Rule 23\(b\)\(3\)](#), which authorizes class actions where the "questions of law or fact common to the members [\*\*8] of the class predominate over any questions affecting individual members, and [] a class action is superior to other available methods for the fair and efficient adjudication of the controversy." [Fed. R. Civ. P. 23\(b\)\(3\)](#). **HN2**[] The plaintiff bears the burden of showing that the proposed class meets the requirements for certification. [Retired Chicago Police Ass'n v. City of Chicago](#), 7 F.3d 584, 596 (7th Cir. 1993). **HN3**[] In evaluating a motion for class certification we do not examine the merits of the case. [Id. at 598](#).

### B. Specific Elements

The defendants do not contend that Rohlfing's proposed class is insufficiently numerous, which is understandable given that the class would include many thousands of current and former residents at Manor Care's various

<sup>4</sup> The Complaint neglects to allege the date of Taylor's death or the duration of his stay at Manor Care. Although this deficiency is not fatal given the requirement that pleadings be liberally construed, see [Fed. R. Civ. P. 8\(f\)](#), it should be corrected as soon as possible.

facilities. Nor does Manor Care assert that Rohlfing has failed to allege "questions of law or fact common to the class." See [Rosario v. Livaditis, 963 F.2d 1013, 1017-18 \(7th Cir. 1992\)](#) (stating that a common nucleus of operative fact is sufficient to satisfy the commonality requirement); [Arenson v. Whitehall Convalescent & Nursing Home, 164 F.R.D. 659, 663-64 \(N.D. Ill. 1996\)](#) (observing that claims arising out of standard [\*\*9] documents or contracts present "a classic case for treatment as a class action" (quoting [Haroco, Inc. v. American Nat'l Bank & Trust Co., 121 F.R.D. 664, 669 \(N.D. Ill. 1988\)](#)). The other elements, however, are contested by the defendants and we will discuss each in turn.

#### 1. Rule 23(a)(3) -- Typicality

**HN4**[] To meet the typicality requirement, the named plaintiff acting on behalf of the class must show that his claims "arise from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." [Rosario, 963 F.2d at 1018](#) (quoting [De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 \(7th Cir. 1983\)](#)). This requirement is not particularly strict: it may be met "even if there are factual distinctions between the claims of the named plaintiffs and those of other class members. Thus similarity of legal theory may control even in the face of differences of fact." [De La Fuente, 713 F.2d at 232](#).

It is clear from Rohlfing's complaint that he is seeking relief under the same legal theories both for himself and for the class. The defendants contend, however, that there are two factual [\*\*10] distinctions between Rohlfing's claims and those of many members of his proposed class. First, they argue that with respect to the fraud claims an individualized inquiry will be required in order to determine what oral representations were made to each class member regarding pharmaceutical purchases. See Def.'s Br. at 8. This argument is simply wrong: the plaintiffs' fraud claims are based upon identical written misrepresentations and omissions made by Manor Care in its Admission Agreement and in the Vitalink brochure. Any fraudulent statements made to Taylor were also made to all other class members. See Pl.'s Motion at 1. Second, the defendants contend that the varying prices for different pharmaceutical products in different parts of the country, in combination with the different pricing schedules of the various Manor Care facilities, will require individual analysis of each plaintiff's claim to determine (a) if they were damaged at all by the inflated prices, and (b) the extent of the damage. See Def.'s Br. at 8. But even if Rohlfing's injuries are quantitatively different from those of other members of the class, this does not mean that his claims are atypical. [\*\*11] See [De La Fuente, 713 F.2d at 232-33](#) (refusing "to require that each member of a class suffer precisely the same injury as the named class representatives" because "all members of the class were subject to the same allegedly unlawful practices"); [United Nat'l Records, Inc. v. MCA, Inc., 99 F.R.D. 178, 181 \(N.D. Ill. 1983\)](#) (finding typicality in an antitrust case even though the named plaintiffs' [\*336] damages might differ quantitatively from those of other class members); see also [Rosario, 963 F.2d at 1017](#) (certifying a class even though some class members may have suffered no damages at all). If and when this litigation reaches the stage of calculating damages, it may be impossible for the plaintiffs to continue proceeding as a class, but for liability purposes Rohlfing's claims clearly "have the same essential characteristics as the claims of the class at large." [Retired Chicago Police Ass'n, 7 F.3d at 597](#) (quoting [De La Fuente, 713 F.2d at 232](#)).

#### 2. Rule 23(a)(4)--Adequacy of Representation

**HN5**[] The requirement that the named plaintiff be able to "fairly and adequately protect the interests of the class," [Fed. R. Civ. P. 23\(a\)\(4\)](#), has two distinct elements: (1) the [\*\*12] named plaintiff cannot have antagonistic or conflicting claims with other members of the class; and (2) the named plaintiff and his attorneys must be able to prosecute the action vigorously. See [General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 \(1982\)](#); [Retired Chicago Police Ass'n, 7 F.3d at 598](#). Manor Care argues that Rohlfing cannot meet the first requirement because "there is an inherent conflict between plaintiff's duty as executor of Mr. Taylor's estate . . . [and his] obligations to the class, including the obligation to spend estate assets to pay the costs of representation." See Def.'s Br. at 9. We do not discern any conflict here--the beneficiaries of Taylor's estate presumably want to prevail in this litigation just as much as the living class members--but even if we did, we think the alleged conflict is eliminated by the fact that plaintiffs' counsel is handling this case on a contingent fee basis, eliminating the need for Rohlfing to spend estate assets. See Pl.'s Reply Br. at 9.

The defendants also challenge the ability of the plaintiff and his attorney to prosecute this case vigorously because of the fact that Samuel [\*\*13] Taylor, whose estate Rohlfing represents, has died. See Def.'s Br. at 9. They suggest that "the difficulties inherent in presenting a claim on behalf of a decedent"--such as proof problems regarding the existence of a fiduciary relationship or establishing what factual representations or omissions were made by the defendant--render Rohlfing an unfit representative. See *id.* We disagree. As discussed *supra* in Part II.B.1, Rohlfing proposes to prove his fraud claims by objective, written evidence, and we see no reason why the existence of a fiduciary duty between Taylor and Manor Care cannot be established despite his death. Thus, we find the defendants' concern to be unfounded, and conclude that Rohlfing and his attorneys are adequate representatives of the class they seek to certify.

### 3. [Rule 23\(b\)\(3\)](#)

#### a. predominance of common issues

**HN6** [↑] The first requirement of [Rule 23\(b\)\(3\)](#) is that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Manor Care contends that none of Rohlfing's four claims satisfy this requirement.

##### i. antitrust claims

Rohlfing's complaint seeks relief under both [§ \[\\*\\*14\]](#) 1 and [§ 2](#) of the Sherman Act. See Compl. P 60. **HN7** [↑] In order to prevail on a claim under [§ 1](#) of the Sherman Act, a plaintiff must prove three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in a relevant market; and (3) injury. See [Denny's Marina, Inc. v. Renfro Productions, Inc.](#), 8 F.3d 1217, 1220 (7th Cir. 1993). The defendants' belief that common issues will not predominate with respect to Rohlfing's [§ 1](#) claim is based on its assumption that "the market . . . is different in every state and within each area where Vitalink provides pharmaceutical services to Manor Care facilities." Def.'s Br. at 11. According to Manor Care, this means that individual issues will predominate because the questions of whether the various class members were damaged by the conspiracy must be determined locality-by-locality. See *id.* at 10-11.

We do not find Manor Care's argument persuasive. The weight of authority in antitrust cases indicates that the question of the existence of a conspiracy in restraint of trade is one that is common to all potential plaintiffs, and the importance of this question [\*337] usually warrants treating them as a class. [\*\*15] See, e.g., [In re Infant Formula Antitrust Litig.](#), 1992 U.S. Dist. LEXIS 21981, No. MDL 878, [1992 WL 503465](#), at \*6 (N.D. Fla. Jan. 13, 1992); [Rios v. Marshall](#), 100 F.R.D. 395, 407 (S.D.N.Y. 1983); [United Nat'l Records, Inc. v. MCA, Inc.](#), 99 F.R.D. 178, 182 (N.D. Ill. 1983) ("As in virtually all national horizontal price fixing cases, the conspiracy here will predominate over individual issues such as damages."); [Thillens v. Community Currency Exch. Assoc.](#), 97 F.R.D. 668, 682 (N.D. Ill. 1983) ("The primary common issue is . . . the existence of a conspiracy . . . . Clearly that issue will predominate the litigation."). The fact that particular individuals may have suffered varying degrees of injury does not overcome this general proposition. See [Arenson](#), 164 F.R.D. at 666; [Rios](#), 100 F.R.D. at 408. If it is feasible to prove that the plaintiff class as a whole has been injured by the defendants' conspiracy, then the class may be certified even though individual damage questions remain to be resolved at a later stage of the proceedings. See [De La Fuente](#), 713 F.2d at 232-33; [Martino v. McDonald's System, Inc.](#), 86 F.R.D. 145, 147-48 (N.D. Ill. 1980).

Our review of the plaintiffs' allegations [\*\*16] leads us to believe that the question of fact of injury is susceptible of class treatment in this case. The conspiracy alleged here is a uniform, nationwide course of conduct by Manor Care and Vitalink toward all class members. See Compl. PP 58-62. The pharmaceuticals being supplied to Manor Care's patients are standardized products, the prices of which can easily be compared to those sold by competitors. See Pl.'s Reply Br. at 4 (suggesting statistical sampling). If Rohlfing can show that this conspiracy raised the prices of these products above a competitive level, injury to the whole class of purchasers may be presumed for purposes of class certification. See [In re Workers' Compensation](#), 130 F.R.D. 99, 109 (D. Minn. 1990) (stating that a showing of injury "may be made on a class basis if the evidence demonstrates that the conspiracy succeeded in raising prices above the competitive level"); [In re Alcoholic Beverages Litig.](#), 95 F.R.D. 321, 327 (E.D.N.Y. 1982); [In re Folding Carton Antitrust Litig.](#), 88 F.R.D. 211, 215 (N.D. Ill. 1980) (collecting cases). On these facts, we find that it will be

feasible for this court to determine if the plaintiff class was the [\*\*17] victim of a conspiracy, and if its members collectively were injured thereby, and conclude that these common issues predominate over individual issues that may arise with respect to the Sherman Act § 1 claim.

Similar reasoning applies to plaintiffs' claim under § 2 of the Sherman Act. [HN8](#)[<sup>5</sup>] This theory of liability requires the plaintiffs to prove: "(1) the [defendants'] possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#). The question of whether Manor Care engaged in a "willful acquisition" of monopoly power is, like the question of whether it engaged in a conspiracy in restraint of trade, common to all members of the class because of its susceptibility to common proof or disproof. And even if Manor Care plans to introduce evidence that its market power varies from region to region, see Def.'s Br. at 12, at most this implies that it may become necessary to break the class into subclasses after the common [\*\*18] question of "willful acquisition" has been resolved.<sup>5</sup> Cf. [Martino, 86 F.R.D. at 148](#) (noting that factual variations by region may justify regional subclasses).

[\*\*19] [\*338] ii. RICO claims

[HN9](#)[<sup>6</sup>] To state a civil RICO claim based upon mail fraud, a plaintiff must show: (1) an enterprise; (2) engaged in a pattern; (3) of racketeering activity; (4) which constituted a scheme to defraud; (5) involving use of the mails in furtherance of the scheme; and (6) the scheme proximately caused injury to the plaintiff. See [McDonald v. Schencker, 18 F.3d 491, 494 \(7th Cir. 1994\)](#); see also [Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 \(1992\)](#) (requiring proximate cause with respect to injury). The issues regarding the behavior of the defendants are obviously common to all plaintiffs, but the defendants argue that individual issues will predominate with respect to (1) the existence of a scheme to defraud, because it will be necessary to determine what misrepresentations or omissions were made to each plaintiff, and (2) whether each plaintiff was proximately injured by relying on such misrepresentations.<sup>6</sup> See Def.'s Br. at 13. The very definition of the proposed class refutes the first part of defendants' argument: the class is expressly limited to persons who received or signed specific documents, Pl.'s [\*\*20] Motion at 1, so no individualized proof will be needed regarding which misrepresentations were made to whom.<sup>7</sup>

With respect to the reliance argument, we agree with the defendants that plaintiffs presenting a RICO claim must prove that they relied on the defendants' fraudulent statements. See, e.g., [Caviness \[\\*\\*21\] v. Derand Res. Corp., 983 F.2d 1295, 1305 \(4th Cir. 1993\)](#); [In re EDC, Inc., 930 F.2d 1275, 1280 \(7th Cir. 1991\)](#) (requiring reasonable reliance in a civil RICO case). This principle, however, derives from RICO's requirement of proximately caused injury, not from the predicate offense of mail fraud. See 2 ARTHUR F. MATHEWS ET AL., CIVIL RICO LITIGATION § 8.04[B][1] (2d ed. 1992). [HN10](#)[<sup>8</sup>] Courts have adopted two different approaches to the reliance requirement in RICO class action suits based on fraud. When the fraud was perpetrated in a uniform manner against every

<sup>5</sup> In a similar vein, the defendants also contend that it will have localized defenses to the plaintiffs' antitrust claims because many of its allegedly anticompetitive practices are required by particular state regulations. Conceivably such state law variations may eventually require the formation of subclasses as well, but not necessarily. The state regulations issue is intertwined with the central questions of whether Manor Care engaged in an illegal conspiracy or a "willfull acquisition" of monopoly power: to the extent Manor Care can prove that its practices arose from state regulatory schemes rather than an intent to achieve an anticompetitive objective, this tends to disprove the existence of a Sherman Act violation. Thus, the defendants' contentions regarding state law regulations are critical to the all the potential class members, regardless of the laws of their particular state.

<sup>6</sup> Manor Care also argues that individual issues will predominate with respect to the question of the degree of injury suffered by each plaintiff because of the scheme to defraud, but even if so, this does not preclude class certification on the question of liability for the same reasons set forth *supra* with respect to the antitrust claims.

<sup>7</sup> The complaint alleges no oral misrepresentations, which distinguishes this case from those cited by the defendants for the proposition that individualized proof of fraud is necessary. See Def.'s Br. at 13-14; cf. [Arenson, 164 F.R.D. at 665](#) (finding that common questions predominated where written rather than oral misrepresentations were alleged).

member of the class, such as when all plaintiffs received virtually identical written materials from the defendants, courts typically hold that individual reliance questions do not predominate. See, e.g., *Heastie v. Community Bank*, 125 F.R.D. 669, 675 (N.D. Ill. 1989) (Aspen, J.); *Smith v. MCI Telecomm. Corp.*, 124 F.R.D. 665, 679 (D. Kan. 1989); *McMahon Books, Inc. v. Willow Grove Assocs.*, 108 F.R.D. 32, 38 (E.D. Pa. 1985); see also 2 MATHEWS ET AL., *supra*, § 8.04[B][1][a]. But [HN11](#)<sup>11</sup> when the fraudulent conduct was not uniform with respect to all plaintiffs, such as when numerous oral misrepresentations<sup>12</sup> are alleged or when claims are based on advertisements that may not have been seen by every plaintiff, courts treat individual reliance questions as predominating over the common RICO issues. See, e.g., *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207, 215-16 (N.D. Cal. 1994) ("The lack of evidence of the existence of a fixed set of written materials . . . prevents this Court from engaging in the kind of analysis which allowed the courts in cases such as *Heastie* . . . to find that individual issues of reliance did not predominate."); *Elliott v. ITT Corp.*, 150 F.R.D. 569, 584-85 (N.D. Ill. 1992); *Strain v. Nutri/System, Inc.*, 1990 U.S. Dist. LEXIS 17031, Civ. A. No. 90-2772, 1990 WL 209325, at \*7-8 (E.D. Pa. Dec. 12, 1990).

In this case, the proposed class would only include persons who signed the Manor Care contract and who also received specific written statements regarding pricing at Vitalink pharmacies.<sup>8</sup> See Pl.'s Motion at 1. Thus, the [\[\\*339\]](#) complaint here falls squarely into the 'common documents' category of cases where reliance questions do not predominate. In cases like this one, where the common documents include a contract to which every plaintiff is signatory, it is particularly sensible to<sup>13</sup> view reliance questions as secondary: by definition, parties to a contract are aware of and rely on the representations or omissions in the contract. Thus, we conclude that common questions predominate with respect to the RICO claim.

### iii. ICFA claims

[HN12](#)<sup>14</sup> To state a claim under the ICFA, plaintiffs must show: (1) that the defendants engaged in a deceptive act or practice; (2) intent on the defendants' part that the plaintiffs rely on the deception; and (3) that the deception occurred in the course of conduct involving trade or commerce. See *Adler v. William Blair & Co.*, 271 Ill. App. 3d 117, 648 N.E.2d 226, 233, 207 Ill. Dec. 770 (Ill. App. Ct. 1995). The plaintiffs<sup>15</sup> need not show that they actually relied upon the deception. See *id.*

Before we can decide whether common issues predominate with respect to the plaintiffs' ICFA claims, we must first resolve the threshold question of whether the ICFA even applies to the plaintiff class as a whole. There is a split of authority regarding the applicability of the ICFA to consumers who are not Illinois citizens. The defendants direct our attention to a line of cases holding that only Illinois consumers have standing to assert claims under the ICFA. See *Endo v. Albertine*, 1995 U.S. Dist. LEXIS 4517, No. 88 C 1815, 1995 WL 170030, at \*6 (N.D. Ill. Apr. 7, 1995); *Swartz v. Schaub*, 818 F. Supp. 1214, 1214 (N.D. Ill. 1993) (Shadur, J.). Rohlfing refers to contrary authority indicating that the ICFA may apply to non-resident plaintiffs who are injured by deceptive acts perpetrated in Illinois. See *Martin v. Heinold Commodities, Inc.*, 117 Ill. 2d 67, 510 N.E.2d 840, 846-47, 109 Ill. Dec. 772 (Ill. 1987) (applying the ICFA to a class that included non-Illinois residents); see also *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 1993 U.S. Dist. LEXIS 8744, No. 92 C 2379, 1993 WL 239051, at \*7 (N.D. Ill. June 28, 1993) (applying<sup>16</sup> ICFA when there was "conduct committed in Illinois or directed at Illinois residents"), aff'd, 61 F.3d 1250 (7th Cir. 1995); *Fry v. UAL Corp.*, 136 F.R.D. 626, 637 (N.D. Ill. 1991).

Even if we were to side with the authorities cited by Rohlfing, however, this would not lead us to conclude that the ICFA should have extraterritorial application in this case because the claims of the non-Illinois plaintiffs have little or no connection to Illinois. The facts here are meaningfully different from those in *Martin*, upon which the plaintiffs principally rely, see Pl.'s Reply Br. at 13. In *Martin*, a plaintiff class consisting of both Illinois and non-Illinois residents brought suit against an Illinois company that had served as broker for the plaintiffs in commodities transactions. See *Martin*, 109 Ill. Dec. at 773. The broker relationship had been established by a contract which

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<sup>8</sup>The Complaint alleges that all parties entering Manor Care facilities received these brochures, but the definition of the proposed class does not include receipt of the brochure as an element. For the sake of clarity--and because of the importance of the brochures to the fraud claims--receipt of the brochure should be added to the class definition.

allegedly contained deceptive statements. The Illinois Supreme Court elected to permit certification of the plaintiffs' claims under the ICFA, even with respect to the non-Illinois plaintiffs, but specifically predicated its decision on the following facts: (1) the contracts containing the deceptive **[\*\*26]** statements were all executed in Illinois; (2) the defendant's principal place of business was in Illinois; (3) the contract contained express choice of law and forum selection clauses specifying that any litigation would be conducted in Illinois under Illinois law; (4) complaints regarding the defendant's performance were to be directed to its Chicago office; and (5) payments for the defendant's services were to be sent to its Chicago office. [510 N.E.2d at 847](#). In light of the overwhelming connection between Illinois and the claims of all the plaintiffs, the court concluded that the ICFA could apply to the whole class. See *id.*

In contrast to *Martin*, in this case there is virtually no connection to Illinois for those plaintiffs who are not Illinois residents.<sup>9</sup> **[\*\*28]** The complaint contains no allegations **[\*340]** regarding where the various "Admission Agreement" contracts were executed, but it seems reasonable to assume that they were executed at the various Manor Care facilities where each plaintiff planned to reside. The defendants are incorporated in Delaware; Manor Care's principal place of business is in Silver Spring, Maryland, while Vitalink's is in Naperville, Illinois. See **[\*\*27]** Compl. P 89 & Ex. D. The contracts all contain an express choice of law provision indicating that the agreement shall be governed by "the laws and regulations of the state where the [Manor Care] facility is located." See Compl. Ex. A (clause 25). There are no indications in the contracts that persons seeking to enter a Manor Care facility outside of Illinois will have any contact whatsoever with the state of Illinois. On these facts, where the only connection with Illinois is the headquarters of one defendant, we conclude that the ICFA does not apply to the claims of the non-Illinois plaintiffs even under the broad application of the ICFA endorsed by *Martin* and other similar cases.<sup>10</sup> **[\*\*29]** Thus, since the ICFA applies to just a small subset of the proposed class--those who were injured by conduct committed in Illinois, or whose injuries occurred there--common issues clearly do not predominate, and we decline to certify a nationwide class with respect to this claim.<sup>11</sup>

#### *iv. fiduciary duty claims*

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<sup>9</sup> Though we need not reach this question given our interpretation of the ICFA, the near-complete lack of contact between the claims of the non-Illinois plaintiffs and Illinois might render it impossible for us to apply Illinois law to the claims of non-Illinois plaintiffs without violating the constitutional requirements of procedural due process. See [Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821, 86 L. Ed. 2d 628, 105 S. Ct. 2965 \(1985\)](#) (holding that the Due Process Clause forbids a forum state from applying its own law to every member of a class unless the state has a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts 'creating state interests'" (quoting [Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13, 66 L. Ed. 2d 521, 101 S. Ct. 633 \(1981\)](#))).

<sup>10</sup> Perhaps in recognition of the fact that there is no other reason to apply the ICFA to the claims of the non-Illinois plaintiffs, the plaintiffs suggest that the defendants' fraud scheme "emanated" from Illinois. See Compl. P 76; Pl.'s Reply Br. at 11. We are not sure exactly what the import of this cryptic assertion is: the plaintiffs have not provided any justification for applying the ICFA to claims by non-Illinois parties merely because a scheme "emanated" from the minds of persons in Illinois. Even giving the broadest possible reading to *Martin* and its progeny, we think the ICFA cannot apply to claims by out-of-state parties unless the "deceptive act or practice" of which they complain was perpetrated in Illinois. We draw support for this view from an article on the applicability of the ICFA authored by Rohlfing's counsel. See Daniel A. Edelman, Applicability of the Illinois Consumer Fraud Act in Favor of Out-of-State Consumers, 8 LOY. CONSUMER L. REP. 27, 34 (1996) (concluding that the ICFA should apply to transactions in which an Illinois business injures consumers located in other states because it is "the fact that prohibited conduct takes place [in] Illinois [that] establishes that the state officials have an interest in regulating such conduct"). Here, the non-Illinois plaintiffs were injured by misrepresentations or omissions made outside of Illinois, so Illinois officials have no interest in regulating the conduct that injured them.

<sup>11</sup> For the Illinois residents included in the plaintiffs' proposed class, common issues clearly predominate with respect to the ICFA claim. The elements of an ICFA claim, as discussed *supra*, are all related to the conduct and intent of the defendants, and individual reliance on the deceptive acts is irrelevant. In the instant motion, however, plaintiffs have not requested certification of a class limited to Illinois residents for purposes of their ICFA claim.

As with the ICFA claims, the question of whether common issues predominate for the plaintiffs' fiduciary duty claims depends, at least in part, on the law applicable to the claims. Illinois applies the 'most significant relationship' test from the Restatement (Second) of Conflict of Laws in determining what law will apply to a fiduciary duty claim. See *Koutsoubos v. Casanave*, 816 F. Supp. 472, 475 (N.D. Ill. 1993) (Aspen, J.); see also *Marberg v. Chancellor*, 1994 U.S. Dist. LEXIS 1558, No. 93 C 6739, 1994 WL 48600, at \*3 (N.D. Ill. Feb. 16, 1994).<sup>12</sup> This test requires us to consider: [\*341] (a) the place where the injury occurred; [\*30] (b) the place where the conduct causing the injury occurred; (c) the parties' domiciles and places of business; and (d) the place where the parties' relationship is centered. See *Miller v. Long-Airdox Co.*, 914 F.2d 976, 978 (7th Cir. 1990). In most cases, "the two most important [factors] are the place where the injury occurred and the place where the conduct causing the injury occurred." *Id.* In this case, the injury and the conduct causing it occurred in the state where each plaintiff resided and purchased pharmaceuticals during his or her time with Manor Care, and their respective relationships are centered in these various states. Thus, we conclude that each plaintiff's claim for breach of fiduciary duty will be governed by the law of the state of the Manor Care facility in which that plaintiff resided.

[\*\*31] The application of 13 different states' laws<sup>13</sup> to the plaintiffs' fiduciary duty claims does not automatically mean that common issues will not predominate with respect to these claims, but it does place a burden on the plaintiffs to show that these laws are either identical in all relevant respects or capable of being categorized into a limited number of subgroups. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *Georgine v. Amchem Prods.*, 83 F.3d 610, 618 (3d Cir.), cert. granted, 136 L. Ed. 2d 297, 117 S. Ct. 379 (1996); *Walsh v. Ford Motor Co.*, 257 U.S. App. D.C. 85, 807 F.2d 1000, 1016-17 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.) (class proponents must prove the absence of relevant variations in applicable state laws). Rohlfing has completely failed to carry this burden, providing us only with the conclusory assertion that the facts of the various plaintiffs' cases "satisfy the basic test for a fiduciary relationship under the law of all states." See Pl.'s Reply Br. at 12. But even if we assume that fiduciary duty law, in its broad outlines, [\*32] is similar from state to state, it may be meaningfully different with respect to its nuances. Cf. *In re American Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (decertifying a class because of possible differences in the law of negligence from jurisdiction to jurisdiction); *n re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (same).<sup>14</sup> Rohlfing has given us no reason to believe that fiduciary duty law has fewer relevant nuances than the law of negligence. Moreover, the difficulty of applying 13 different states' laws is particularly great with respect to an issue like the fiduciary status of a nursing home vis-a-vis its patients, which most of the states have not yet addressed, see Pl.'s Reply Br. at 11 (conceding that "this is a relatively new issue").

[\*\*33] In addition to the variety of applicable laws, the relative importance of common issues is further diminished by the fact that each plaintiff's fiduciary duty claim will turn on a crucial, individualized question of fact: his or her mental competence and degree of dependence during residence at a Manor Care facility. Cf. *Georgine*, 83 F.3d at 618 ("[Factual] differences, when exponentially magnified by choice of law considerations, eclipse any common issues in this case."). **HN13**<sup>↑</sup> A fiduciary duty exists in relationships where "there is confidence reposed on one

<sup>12</sup> We note that some of our colleagues have disagreed with our view in *Koutsoubos* that a breach of fiduciary duty should be viewed as a tort claim rather than a contract claim for choice of law purposes. See, e.g., *Bankard v. First Carolina Communications, Inc.*, 1991 U.S. Dist. LEXIS 17916, No. 89 C 8571, 1991 WL 268652, at \*11 (N.D. Ill. Dec. 5, 1991) (applying contract choice of law principles to a fiduciary duty claim); *T-Bill Option Club v. Brown & Co. Sec. Corp.*, 1990 U.S. Dist. LEXIS 8028, No. 88 C 8461, 1990 WL 103584, at \*1 (N.D. Ill. July 2, 1990) (same). The application of contract or tort choice of law principles makes no difference in this case, however: both lead to the conclusion that the claims of the plaintiffs should be governed by the laws of the various states in which their Manor Care residences are located.

<sup>13</sup> We derive the number 13 from the fact that Vitalink operates at Manor Care facilities in 13 states. See Compl. P 7.

<sup>14</sup> To pick just one example of a potentially important nuance, Illinois law provides that a plaintiff making a fiduciary duty claim that does not rest on one of the traditional "per se" fiduciary relationships must establish the existence of a fiduciary relationship by "clear and convincing" evidence. See *Burdett v. Miller*, 957 F.2d 1375, 1382 (7th Cir. 1992). Do any of the other 12 states involved in this case impose a similar burden on plaintiffs? Rohlfing gives us no indication.

side and a resulting superiority and influence on the other." *Davis v. Brickey*, 397 Ill. 556, 74 N.E.2d 710, 715 (Ill. 1947); see also *Swenson v. Wintercorn*, 92 Ill. App. 2d 88, 234 N.E.2d 91, 97 (Ill. App. Ct. 1968) (a fiduciary must "act in good conscience and good faith and with due regard to the interests of the person reposing [] [\*342] confidence").<sup>15</sup> It is certainly true that "many, if not most nursing home residents are in a vulnerable physical and/or mental state," *Schenck v. Living Centers-East, Inc.*, 917 F. Supp. 432, 438 (E.D. La. 1996), which could place their caregivers in a position of confidence and [\*\*34] influence. Like the other courts that have addressed this question, however, we are reluctant to stretch this generalization to the point of concluding that *all* nursing home residents are necessarily subject to the "superiority and influence" of their caregivers. See *id.* (concluding that despite the typical vulnerability of nursing home patients, it "requires factual development to determine if in this case [a] fiduciary duty was created"); *Gordon v. Bialystoker Ctr.*, 45 N.Y.2d 692, 385 N.E.2d 285, 288, 412 N.Y.S.2d 593 (N.Y. 1978) (finding that a nursing home was a fiduciary for a resident based on testimony that the residents of that home were "dependent on the home 'to take care . . . of their very livelihood, their existence'"); *Davis*, 74 N.E.2d at 715 (finding that a nursing home was a fiduciary for a resident only after finding that she was "unable to serve herself in any way"). The potential variation in nursing home patients' competence and degree of dependence is especially significant for a massive operation like Manor Care, which services the entire spectrum of patient needs, from patients requiring round-the-clock skilled nursing care to those who require [\*\*35] minimal assistance. See Compl. Ex. D at 3 (Manor Care's 10-K filing, describing its operations). Given this variety, we cannot assume that Manor Care had a relationship of "superiority and influence" with every member of the proposed class, and we conclude that an individualized inquiry will be required.

In sum, it appears that plaintiffs' fiduciary duty claims will be governed by a myriad of different laws, and their resolution will depend largely on the determination of an individualized inquiry into their degree of competence and dependence during their residency at Manor Care's facility. On these facts, we find that common issues do not predominate with respect to this claim, and plaintiffs' motion for class certification is denied.<sup>16</sup>

#### [\*\*36] b. Superiority

**HN14** [F] The final requirement imposed on class proponents by [Rule 23\(b\)\(3\)](#) is a showing that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." [Fed. R. Civ. P. 23\(b\)\(3\)](#). [Rule 23](#) lists a number of factors that might support a finding that a class could not meet this standard, but in this case the defendants focus on just one: whether "difficulties [are] likely to be encountered in the management of [the] class action." [Fed. R. Civ. P. 23\(b\)\(3\)\(D\)](#). The defendants assert that this case will be unmanageable as a class action, see Def.'s Br. at 15-16, but they provide practically no explanation for this view other than the fact that the case may potentially involve "hundreds of thousands" of past and present Manor Care residents.<sup>17</sup> It is clear, however, that large class size alone is not an impediment to class certification. Cf. *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 127 (7th Cir. 1974) (certifying a plaintiff class of "several million shippers"). A large class may actually militate *in favor* of class certification in some cases, since there may be fewer manageable "alternative" [\*\*37] methods for the fair and efficient adjudication of the controversy.<sup>18</sup> See 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.33 (3d ed. 1992) ("Ironically, as a class increases in size, the alternative [\*343] methods for adjudicating the controversy become fewer.").

<sup>15</sup> This is the formulation employed by Illinois courts; obviously the 12 other states involved in this case may use different language.

<sup>16</sup> In contrast to plaintiffs' ICFA claim, the commonality problem is not eliminated by limiting the class to parties from Illinois: the key individualized fact question (degree of influence and superiority) still remains even if Illinois law applies to every plaintiff. Thus, the fiduciary duty claim will survive only with respect to the named plaintiff.

<sup>17</sup> The defendants' observation that "courts have frequently found nationwide classes inappropriate and unmanageable," see Def.'s Br. at 16, is both true and irrelevant; courts also frequently find nationwide classes to be appropriate, efficient, and manageable. The defendants make no attempt to explain why this case is more similar to the unmanageable cases than the manageable ones.

At this stage of the litigation, it appears that a class action would be manageable. There is no reason to believe that identifying and providing notice to potential class members will be unduly difficult or that intolerably large amounts of individual testimony will be required at trial.<sup>18</sup> Moreover, we do not see any realistic alternatives to class proceedings [\*\*38] in this case. See *In re Folding Carton Antitrust Litig.*, 88 F.R.D. 211, 216 (N.D. Ill. 1980) ("Manageability problems are significant only if they create a situation that is less fair and efficient than other available [alternatives]." (internal quotation marks omitted)). For a group this numerous, joinder or intervention by tens of thousands of individual claimants is likely to be more burdensome for the court than treating them as a class. See 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1779 (2d ed. 1986) ("If the interested parties are so numerous that their joinder or intervention would burden the court . . . a *Rule 23(b)(3)* action should be allowed."). And it is not reasonable to expect the individual plaintiffs in this case to bring their claims against the defendants independently: for many of them, especially those who resided at a Manor Care facility for a short period, the dollar value of their claims is likely to be very small, giving them little incentive to sue on their own. See *id.* ("Individual actions . . . may be an inferior alternative to the class action when the economics of the situation make it impossible for the aggrieved members [\*\*39] to vindicate their rights by separate actions . . ."). Thus, for those claims where common issues predominate, we conclude that a class action will be manageable, and that a class is clearly the superior method in which to proceed.

### C. Summary

Rohlfing's motion for class certification is granted with respect to the antitrust and RICO claims. For these claims, the class shall be limited to those persons meeting the criteria specified in Rohlfing's motion, with the additional requirement that the class include only those persons who received: (1) the Vitalink brochure identified in Exhibit D to the Complaint; or (2) a similar written representation that use of [\*\*40] Vitalink's services would result in lower pharmaceutical costs. Rohlfing's motion for class certification is denied with respect to his ICFA claim and his fiduciary duty claim.

## III. Motion to Dismiss

### A. *Rule 12(b)(6)* Standard

**HN15** [+] Dismissal under *Rule 12(b)(6)* is improper "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). For purposes of this motion, we must take all of the well-pleaded factual allegations in the complaint as true, and construe them in the light most favorable to the plaintiff. See *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995).

### B. Specific Claims

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#### [\*\*41] 1. Antitrust Claims

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<sup>18</sup> Individual testimony and evidence are likely to be necessary if the plaintiffs prevail on the liability issues and we are required to calculate damages. As we have already discussed, however, the potential need for individualized damages inquiries does not prevent class certification on the common questions of liability at this stage of the game.

<sup>19</sup> The disposition of the various claims addressed below will be binding on the classes certified *supra* in Part II. Thus, the disposition on the antitrust and RICO claims will affect all members of Rohlfing's proposed class who do not opt-out. The disposition of the ICFA and fiduciary duty claims affects only Rohlfing, since no class has been certified with respect to these claims.

a. *Sherman Act § 1*

The defendants argue that Rohlfing's claim alleging a conspiracy in violation of § 1 of the Sherman Act must be dismissed because the defendants are legally incapable of engaging in a conspiracy. See Def.'s Br. at 6.<sup>20</sup> We agree. The seminal case on this [\*344] topic is *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984), which held that because "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," *id. at 771*, these entities are legally incapable of "conspiring" together in violation of § 1, *id. at 777*. The Court reasoned as follows:

A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent . . . . If a parent [\*42] and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

*Id. at 771*. The Court refused, however, to consider whether and how this reasoning would apply to alleged conspiracies between a parent and a non-wholly-owned subsidiary, or between "sister" subsidiaries of a common parent corporation. See *id. at 767*.

Despite the limited nature of Copperweld's holding, lower courts have applied its "unity of interest" reasoning in other contexts. It is now clear that if a unity of interest exists between related corporations, such as parents and majority-owned subsidiaries or "sister" subsidiaries of a common parent, they are incapable of conspiring for [\*43] purposes of § 1 of the Sherman Act. See *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1135 (3d Cir. 1995); *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447 (9th Cir. 1993); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 276-77 (8th Cir. 1988); *Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984). Such a unity of interest is very likely to be found when the parent owns a substantial majority of the subsidiary's stock. See 7 PHILLIP E. AREEDA, **ANTITRUST LAW** P 1467a (1986) (concluding that "majority ownership with its centralized power to control, whether or not apparently exercised in detail on a day-to-day basis, presumptively creates a single entity for antitrust purposes"). Even in cases where the parent's ownership interest is not strong, unity of interest may be established if the economic objectives of the corporations are interdependent or if the management of one company exerts almost complete control over the other. See, e.g., *Siegel*, 54 F.3d at 1135 (finding unity of interest where one corporation was an "inseparable part" of the other's management); *Williams*, 999 F.2d at 447 (finding unity [\*44] of interest between a franchisor and franchisee).

In this case, we believe that Manor Care, Manor Healthcare, and Vitalink share a unity of interest. Manor Care owns 100% of Manor Healthcare, and also owns 82.3% of Vitalink. A number of courts have found a unity of interest based on very similar ownership arrangements. See, e.g., *Coast Cities Truck Sales v. Navistar Int'l Transp. Co.*, 912 F. Supp. 747, 765 (D.N.J. 1995) (conspiracy impossible where parent owned 100% of one subsidiary and 70% of another); *Bell Atlantic Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 705 (N.D. Cal. 1994) (parent owned 100% of one subsidiary and 80% of another); *Total Benefit Servs., Inc. v. Group Ins. Admin., Inc.*, 1993 U.S. Dist. LEXIS 49, Civ. A. No. 92-2386, 1993 WL 15671, at \*1-2 (E.D. La. Jan. 7, 1993) (parent owned 100% of one subsidiary and 85% of another); *Viacom Int'l, Inc. v. Time, Inc.*, 785 F. Supp. 371, 374 n.6 (S.D.N.Y. 1992) (parent owned 100% of one subsidiary and 82% of another).<sup>21</sup> Rohlfing [\*345] does not suggest, and we

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<sup>20</sup> The defendants also present several other reasons for dismissing plaintiffs' § 1 claims, see Def.'s Br. at 2-5, but we need not address these given our resolution of the *Copperweld* argument.

<sup>21</sup> We are not persuaded by the two contrary cases cited by Rohlfing. First, in *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985), vacated on other grounds, 475 U.S. 1105, 89 L. Ed. 2d 909, 106 S. Ct. 1509 (1986), the Third Circuit found that a parent could conspire with a subsidiary in which it owned 79% of the equity stock, see *id. at 1495 n.20*. The court provided no explanation for this outcome, which seems particularly questionable given that the parent owned 100% of the subsidiary's

cannot discern, any manner in which the interests of Manor Care and its subsidiaries might diverge. Even aside from the ownership relationship, Manor Care and Vitalink [\*\*45] are to a certain extent interdependent: as discussed in the *Background* section *supra*, Manor Care provides a number of essential services for Vitalink. Consequently, we conclude that the defendants are legally incapable of conspiring with one another, and we will dismiss Rohlfing's claims under § 1 of the Sherman Act.

[\*\*46] b. Sherman Act § 2

HN16 [↑] In order to state a claim for monopolization or attempted monopolization under § 2 of the Sherman Act, a plaintiff must show that the defendant possessed, or had a reasonable possibility of gaining possession of, monopoly power in a relevant market. See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 457-459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993); United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). Thus, HN17 [↑] a plaintiff presenting a § 2 claim bears the burden of alleging a relevant market. See TV Communications Network v. Turner Network, 964 F.2d 1022, 1025 (10th Cir. 1992). Rohlfing's view is that the relevant market in this case is "the sale of pharmaceutical products to residents of Manor Care nursing home facilities." Compl. P 61; see also Pl.'s Br. at 5. At the motion to dismiss stage, our task is not to determine whether the facts support this market definition, but only to ascertain whether the law will permit a class definition of this sort. The defendants argue that the proposed market definition is legally inadequate because it is improper to define a market in terms of a single class [\*\*47] of customers. See Def.'s Br. at 4. We agree.

A market is "composed of products that have reasonable interchangeability for the purposes for which they are produced." 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 2A PHILLIP A. AREEDA ET AL., ANTITRUST LAW P 530a (rev. ed. 1995) (defining a market as "an arena within which significant substitution in consumption or production occurs"). A relevant market has two components: a product and a geographic region in which competition occurs. See Brown Shoe Co. v. United States, 370 U.S. 294, 320-21, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). "In defining a market, one must consider [possible] substitution both by buyers and by sellers." See Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406, 1410 (7th Cir. 1995). Professor Areeda elaborates on these themes as follows: "A properly defined market excludes other potential suppliers (1) whose product is too different . . . or too far away . . . and (2) who are not likely to shift promptly to offer defendant's customers a suitably proximate (in both product and geographic terms) alternative." [\*\*48] 2A AREEDA ET AL., at P 530a. The defendants are therefore correct in their view that it is improper to define a market simply by identifying a group of consumers who have purchased a given product; rather, the market consists of the array of "interchangeable" products that those consumers confronted when making their product selection, plus those products which could quickly be supplied as interchangeable alternatives.

Given this background, for "the sale of pharmaceutical products to residents of Manor Care nursing home facilities" to constitute a legally cognizable market, plaintiff will eventually be required to prove--though for now he must merely allege--that there were no proximately available substitutes for Manor Care residents who were dissatisfied with the pharmaceutical services there. The complaint tries to allege a lack of available substitutes from the supply side, by suggesting that the defendants have conspired to establish [\*346] "artificial barriers and restraints which prevent any competitor besides Vitalink from providing pharmaceutical services to residents of Manor Care nursing home facilities." Compl. P 62. But the complaint fails to address the demand side: from the [\*\*49] face of the complaint, it is clear that a Manor Care resident who was dissatisfied with the service or prices provided by Vitalink could obtain a substitute by transferring to a different nursing home which did not utilize Vitalink.<sup>22</sup> See Compl. PP

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voting stock, see id. at 1486. Moreover, we think that Tunis's precedential value is limited in light of the Third Circuit's recent opinion in *Siegel*, a case cited *supra* in the text, which endorses a liberal application of the unity of interest test. Second, in Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477 (D. Or. 1987), the court found that a parent could conspire with subsidiaries in which it held 60% and 75% interests, see id. at 1486. Like *Tunis*, *Aspen* provides no explanation for why there was no unity of interest between the parent and the subsidiaries, and, also like *Tunis*, the value of *Aspen* has been undercut by a subsequent opinion of the same court. See Leaco Enters., Inc. v. General Elec. Co., 737 F. Supp. 605, 609 (D. Or. 1990) (precluding a conspiracy claim where a parent owned 91.9% of a subsidiary).

4-7 (indicating that Vitalink only operates at 18 out of 179 Manor Care facilities); see also Ex. A at 1 (admission agreement indicating that a resident may terminate residency without penalty on five days notice). There are many suppliers of skilled nursing care and pharmaceutical services besides Manor Care. See Compl. P 12 (approximately half of Vitalink's revenues come from non-Manor Care facilities); see also Compl. Ex. D at 8 (Manor Care's 10-K filing, noting that it "meet[s] competition in each locality" where it operates). Rohlfing does not suggest that there is anything unique about Manor Care facilities that would shield them from price competition with other "interchangeable" nursing facilities. Thus, the relevant market in this case cannot be limited to Manor Care facilities alone: it must be broad enough to encompass all nursing facilities whose services are "reasonably interchangeable" with those provided **[\*\*50]** by Manor Care.

Rohlfing's attempt to avoid this conclusion by relying on *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992), is unavailing. Kodak was a **[\*\*51]** controversy related to the sale of service and replacement parts for Kodak copiers and micrographic equipment. Independent service organizations (ISOs) brought antitrust claims against Kodak, alleging that by refusing to sell replacement parts to the ISOs Kodak was attempting to monopolize the "market" of repair service for Kodak copiers. See *id.* 504 U.S. at 455-56. Kodak argued that "as a matter of law, a single brand of a product or service can never be a relevant market." *Id. at 481*. The Court disagreed with this view:

The relevant 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.

*Id. at 481-82* (emphasis added) (citation omitted).

Rohlfing argues that the situation here is identical, and that from a Manor Care resident's perspective, the relevant market for pharmaceutical services is composed only of those companies that service Manor Care residents. See Pl.'s Br. at **[\*\*52]** 5. There is a fundamental problem with this analogy, however: the owners of Kodak equipment were "locked in" to their relationship with Kodak, which is not true of Manor Care residents. The Court noted that Kodak equipment is expensive, requiring a "heavy initial outlay," see *id. at 477*, but once acquired it has little resale value, see *id. at 457*. Consequently, Kodak equipment owners dissatisfied with the services or prices offered by Kodak's repair personnel could not terminate their relationship with Kodak without sacrificing their substantial investment in Kodak equipment. See *id. at 476* ("If the cost of switching is high, consumers who already have purchased the equipment, and are thus 'locked in,' will tolerate some level of service-price increases before changing equipment brands."). But any dissatisfied Manor Care **[\*347]** resident can terminate his or her relationship with Manor Care on five days notice without any apparent pecuniary loss. See Compl. Ex. A at 1. Hence, Manor Care residents are not "locked in" to their relationship with Manor Care, and are free to seek interchangeable substitutes for Manor Care's services in a way that Kodak equipment owners are not.

**[\*\*53]** In sum, Rohlfing has failed to allege a relevant market because his proposed market--the sale of pharmaceutical products to residents of Manor Care nursing home facilities--improperly excludes interchangeable substitutes.<sup>23</sup> Because this is the only market that Rohlfing accuses the defendants of monopolizing or attempting

<sup>22</sup> The plaintiff's only attempt to address demand-side substitutability is its argument that Manor Care patients were unable to find an interchangeable substitute *at Manor Care*. See Compl. P 64 (alleging that the defendants have "precluded plaintiff and other residents of Manor Care facilities from purchasing or obtaining medication at a competitive price"). Even if true, this argument is like a consumer going to McDonald's and complaining that the only hamburgers available for purchase are those prepared by McDonald's. This is perfectly true, *at McDonald's*. But any consumer who is not content with a McDonald's hamburger may leave and choose from a myriad of available alternatives. McDonald's refusal to sell Whoppers does not mean that it has monopolized a relevant market for hamburgers.

<sup>23</sup> We emphasize that for purposes of this motion to dismiss we are expressing no view on what the relevant market actually is: we are constrained by the principle that "proper market definition . . . can be determined only after a factual inquiry into the

to monopolize, see Compl. P 61, Rohlfing has failed to state a claim upon which relief can be granted. Accordingly, Rohlfing's claims under [§ 2](#) of the Sherman Act will be dismissed.

#### [\*\*54] 2. RICO claims

The defendants have moved to dismiss Rohlfing's RICO claims on three separate grounds: (1) failure to comply with [Rule 9\(b\) of the Federal Rules of Civil Procedure](#); (2) failure to allege a RICO "enterprise;" and (3) failure to allege a "pattern" of racketeering activity. See Def.'s Br. at 8-15. We consider each argument in turn.

##### a. the particularity requirement

Rohlfing's RICO claims are predicated on acts of mail and wire fraud. See Compl. P 70. [HN18](#)<sup>18</sup> [Rule 9\(b\)](#) provides that "in all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity." [Fed. R. Civ. P. 9\(b\)](#). [HN19](#)<sup>19</sup> In RICO cases based on fraud, "the plaintiff must, within reason, describe the time, place, and content of the mail and wire communications, and it must identify the parties to these communications." [Jepson, Inc. v. Makita Corp.](#), 34 F.3d 1321, 1328 (7th Cir. 1994); [Graue Mill Dev. Corp. v. Colonial Bank & Trust Co.](#), 927 F.2d 988, 992 (7th Cir. 1991). The allegations must be specific enough to provide the defendants with a general outline of how the alleged fraud scheme operated and of their purported role in the scheme. See [\*\*55] [Midwest Grinding Co. v. Spitz](#), 976 F.2d 1016, 1020 (7th Cir. 1992); [Koulouris v. Estate of Chalmers](#), 790 F. Supp. 1372, 1374 (N.D. Ill. 1992) (Aspen, J.) (defendants need not be given a "pretrial memorandum containing all the evidentiary support for the plaintiff's case," but only "a brief sketch of how the fraudulent scheme operated, when and how it occurred, and the participants"). [HN20](#)<sup>20</sup> In evaluating the sufficiency of the pleadings, we bear in mind the purposes of [Rule 9\(b\)](#): (1) protecting the defendants' reputations; (2) preventing fishing expeditions; and (3) providing adequate notice to the defendants. See [Vicom, Inc. v. Harbridge Merchant Servs., Inc.](#), 20 F.3d 771, 777 (7th Cir. 1994).

Rohlfing's complaint undoubtedly meets the [Rule 9\(b\)](#) standard of specificity with respect to its allegations regarding the "time, place, and content of the mail and wire communications." The complaint alleges that Taylor, like all other members of the class, was given the allegedly fraudulent Vitalink brochure "immediately prior to" his admission to Manor Care. See Compl. P 30. The content of this brochure is set forth in the complaint, see [id. P 28](#) & Ex. B, and the alleged misrepresentations [\*\*56] and omissions in this document are clearly indicated, see [id. PP 28, 40](#). The complaint explains that the U.S. mails were used in furtherance of this scheme because the allegedly inflated invoices for pharmaceuticals purchases were [\*348] sent to Manor Care residents through the mail. See [id. P 42](#).

The defendants' best argument that the complaint fails to meet [Rule 9\(b\)](#)'s specificity standard is that it fails to identify precisely which individuals made the misrepresentations and omissions to the various plaintiffs. Cf. [Vicom](#), 20 F.3d at 777-78 (noting that because fair notice is the "most basic consideration" underlying [Rule 9\(b\)](#) . . . the plaintiff who pleads fraud must 'reasonably notify the defendants of their purported role in the scheme'). Although the defendants' argument has some force, we believe the complaint is sufficiently specific because the role of each corporate defendant in the scheme is reasonably clear. The allegedly fraudulent statements are contained in the corporate brochure authored by Vitalink, which was given to the plaintiffs by Manor Care along with their residence contract. These identical documents were given to every member of the plaintiff class, [\*\*57] so we need not be concerned about the possibility of uncertainty regarding which employees said what to whom. At this stage of the game, we do not believe that the failure to identify particular employee participants<sup>24</sup> has denied the defendants

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'commercial realities' faced by consumers." [Kodak](#), 504 U.S. at 482. At the same time, the burden is on antitrust plaintiffs to allege a legally sufficient relevant market. Where the relevant market proposed by the plaintiff is not even *alleged* to encompass all interchangeable substitute products, the market is legally (rather than factually) insufficient, and a motion to dismiss is appropriate. See [Lee v. Life Ins. Co.](#), 23 F.3d 14, 18-19 (1st Cir. 1994) (indicating that inadequate allegations regarding the scope of the relevant market were a proper ground for dismissal under [Rule 12\(b\)\(6\)](#)); [TV Communications Network v. Turner Network](#), 964 F.2d 1022, 1025 (10th Cir. 1992); [Queen City Pizza, Inc. v. Domino's Pizza, Inc.](#), 922 F. Supp. 1055, 1062 (E.D. Pa. 1996) (dismissing a [§ 2](#) claim for failure to allege a legally sufficient relevant market).

their right to be reasonably "appraised of the roles they each played in the scheme," [34 F.3d at 1329](#), so we conclude that Rohlfing's complaint passes muster under [Rule 9\(b\)](#).<sup>25</sup>

[\*\*58] *b. the "enterprise" and "person" requirements*

The defendants' second objection to Rohlfing's RICO claims is that he has failed to allege an "enterprise" as the statute requires. See [18 U.S.C. §§ 1962\(a\), \(b\), \(c\); Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 645 \(7th Cir. 1995\)](#) ("A RICO complaint must identify the enterprise."). To this objection, the defendants append the related argument that Rohlfing has failed to allege a "person" distinct from the enterprise. See [Haroco v. American Nat'l Bank & Trust Co., 747 F.2d 384, 402 \(7th Cir. 1984\)](#) (§ 1962(c) requires "some separate and distinct existence for the person and the enterprise"), aff'd, [473 U.S. 606, 87 L. Ed. 2d 437, 105 S. Ct. 3291 \(1985\)](#). We disagree.

The statute defines an "enterprise" as any "individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact . . ." [18 U.S.C. § 1961\(4\)](#). In elaborating on this statutory theme, the Seventh Circuit has characterized an enterprise as an "ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making."

[\*\*59] [Richmond, 52 F.3d at 644](#) (quoting [Jennings v. Emry, 910 F.2d 1434, 1440 \(7th Cir. 1990\)](#)). Rohlfing proposes a number of different enterprises, consisting of various combinations of the members of the "Manor Care corporate group consisting of Manor Care and all its subsidiaries." Compl. PP 66, 77. Under the plain language of the statute as well as the characterization in *Richmond*, these ongoing, structured, corporate entities clearly qualify as "enterprises."

The defendants focus most of their energies on arguing that plaintiffs have failed to allege a "person" engaged in "a pattern of racketeering" that is separate and distinct from the enterprise itself. See Def.'s Br. at 11-12. Even [HN21](#) [↑] after an enterprise has been identified, a [§ 1962\(c\)](#) plaintiff must also allege that a "person" associated with the enterprise conducted or participated, 'directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.' [Richmond, 52 F.3d at 646](#) (quoting [§ 1962\(c\)](#)). The alleged "person" must be distinct from the enterprise itself, see [Haroco, 747 F.2d at 402](#), and must participate in the conduct of the enterprise's affairs, [\*349] not [\[\\*\\*60\]](#) just its own, see [Reves v. Ernst & Young, 507 U.S. 170, 113 S. Ct. 1163, 1173, 122 L. Ed. 2d 525 \(1993\)](#). But Rohlfing's Complaint presents a number of legally sufficient persons under this standard: the Manor Care subsidiaries, and a number of individual (though as yet unidentified) executives in the Manor Care hierarchy. To pick just one possible permutation,<sup>26</sup> if the "enterprise" is defined as the "Manor Care corporate group," the Vitalink subsidiary would be a sufficient "person," since the Seventh Circuit has clearly indicated that subsidiary corporations are separate entities that "conduct the affairs" of their parent corporations. See [Haroco, 747 F.2d at 402-03](#) ("[A] subsidiary corporation is certainly a legal entity distinct from its parent. . . . We think it virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation."); [Richmond, 52 F.3d at 646-47](#) (discussing *Haroco*); see also [United States v. Robinson, 8 F.3d 398, 407 \(7th Cir. 1993\)](#) (criminal RICO case holding that the owner of a corporation and the corporation itself are separate entities). Accordingly, we find that Rohlfing has adequately [\[\\*\\*61\]](#) alleged both an enterprise and a person.

<sup>24</sup> For the time being, Rohlfing has simply identified these employee defendants as "John Does 1-10." See Compl. P 75. Because the particular identities of these employees is a matter peculiarly within the knowledge of the corporate defendants, and because the allegedly fraudulent acts committed by these employees are clearly described, we believe this form of pleading is acceptable. Needless to say, after Rohlfing has had an opportunity to conduct discovery he will need to identify these individuals and their roles in the alleged fraud scheme with particularity.

<sup>25</sup> The defendants have also asserted [Rule 9\(b\)](#) as a reason to dismiss the ICFA claims in the complaint. For the reasons set forth above, we reject this argument.

<sup>26</sup> Understandably, Rohlfing elected not to commit itself to one particular enterprise/person combination in its complaint. Indeed, based on the allegations, a number of satisfactory enterprise/person combinations appear possible. There is no need for us to set forth more than one of these possibilities in the context of this motion to dismiss.

*c. the pattern requirement*

The defendants' final challenge to Rohlfing's RICO claims is that he has failed to allege a "pattern" of racketeering activity. The statutory definition of "pattern" is not of much assistance here: it merely indicates that a pattern "requires at least two acts of racketeering activity." [18 U.S.C. § 1961\(5\)](#). A more fruitful source of guidance on this question is the Supreme Court's discussion in [H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 \(1989\)](#). The Court stated that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show [\*\*62] that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." [Id. at 239](#). With respect to the continuity element,<sup>27</sup> the Court describes it as "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](#). [HN22](#)[ It is clear that the continuity element is satisfied "where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" [Id. at 243](#). In light of *H.J. Inc.*, the Seventh Circuit has applied a four-factor test to determine continuity, looking at: (1) the number and variety of the predicate acts and the length of time over which they were committed; (2) the number of victims; (3) the presence of separate schemes; and (4) the occurrence of distinct injuries. See [J.D. Marshall Int'l, Inc. v. Redstart, Inc., 935 F.2d 815, 820 \(7th Cir. 1991\)](#); [United States Textiles, Inc. v. Anheuser-Busch Cos., 911 F.2d 1261, 1267-68 \(7th Cir. 1990\)](#); [\*\*63] [Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co., 883 F.2d 48 \(7th Cir. 1989\)](#).

Under these principles, Rohlfing has certainly alleged a continuous program of racketeering activity by the defendants. The complaint indicates that the defendants' scheme to defraud Manor Care residents has been in place for at least four years, see Compl. P 69, perhaps going back as far as the date of Manor Care's acquisition of Vitalink in 1981, see *id.* PP 8, 36, and further alleges that the scheme will continue into the future absent judicial intervention, see *id. P 69*. As discussed *supra* with respect to the motion for class certification, the alleged number of victims is in the tens of thousands, perhaps several hundred thousand. Each of these victims suffered a distinct injury, depending on the amount they were [\*\*64] overcharged for [\*350] pharmaceutical services. Each resident was the victim of a separate act of fraud, since the fraudulent misrepresentations and omissions were made to each victim individually, immediately prior to their entry into a Manor Care facility. See *id. P 30*. A fair reading of the Complaint as a whole indicates that the practice of "coercing" residents to select Vitalink for their pharmaceutical services is a part of the "regular way of conducting defendant[s'] ongoing legitimate business[es]," [H.J. Inc., 492 U.S. at 243](#). Even though all of the predicate acts appear to be related to one general "scheme," the other factors overwhelmingly indicate that the defendants' racketeering activity has been continuous. We conclude that a pattern has been alleged.

*d. summary*

Rohlfing's complaint meets the particularity requirements of [Rule 9\(b\)](#), and has adequately alleged a "pattern" and an "enterprise." As the defendants do not contend that Rohlfing's RICO pleadings were defective in any other way, the defendants' motion to dismiss the RICO claims is denied.

*3. ICFA claims*

[HN23](#)[ To assert a claim under the ICFA, Rohlfing must allege that the defendants have committed [\*\*65] "unfair or deceptive acts or practices." [815 ILCS 505/2](#). The statute indicates that such acts include, but are not limited to, "any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission." *Id.* The defendants contend that Rohlfing has failed to allege an ICFA violation because merely charging excessive prices for products or services does not amount to an "unfair or deceptive act or practice." See Def.'s Br. at 15. This argument misses the target by a wide margin. Rohlfing's allegation is not merely that he has been overcharged for

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<sup>27</sup> The defendants do not argue that the alleged acts of racketeering activity are unrelated, so we need not discuss this element. See Def.'s Br. at 12-15 (discussing only continuity).

pharmaceutical services, but that the defendants misrepresented the prices he would be charged by falsely claiming that their prices were lower than those of alternative suppliers. See Compl. PP 28-29, 41, 88a. The Complaint explicitly alleges that the omissions and misrepresentations made regarding relative prices were material, see *id.* P 88a, which is sufficient to state a claim under the ICFA. See [Brown v. C.I.L., Inc., 1996 U.S. Dist. LEXIS 4053](#), No. 94 C 1479, [1996 WL 164294](#), at \*8 (N.D. Ill. Apr. 1, 1996); [\*\*66] [Dwyer v. American Express Co., 273 Ill. App. 3d 742, 652 N.E.2d 1351, 1356, 210 Ill. Dec. 375 \(Ill. App. Ct. 1995\)](#).<sup>28</sup>

#### 4. fiduciary duty claims

As discussed *supra* in Part II.B.3.a.iv, we believe that a fiduciary duty could exist between nursing homes and their residents under certain circumstances. To be specific, a fiduciary relationship would exist if: (1) the resident reposed confidence in the nursing home; and (2) the nursing home were found to be in a position of "superiority and influence" with respect to the resident as a result of this confidence. See [Kolze v. Fordtran, 412 Ill. 461, 107 N.E.2d 686, 690 \(Ill. 1952\)](#); [Davis v. Brickey, 397 Ill. 556, 74 N.E.2d 710, 715 \(Ill. 1947\)](#); see also [Pommier v. Peoples Bank Marycrest, 967 F.2d 1115, 1119 \(7th Cir. 1992\)](#) (applying Illinois law and stating that "the essence of a fiduciary relationship is that one party is dominated by the other"). [HN24](#)[<sup>↑</sup>] In determining whether a fiduciary relation exists, a court must consider factors such as: "kinship, age disparity, health, mental condition, education, business experience, and the extent of reliance." [Pommier, 967 F.2d at 1119](#); [Noah v. Enesco Corp., 911 F. Supp. 299, 303 \(N.D. Ill. 1995\)](#). Rohlfing's pleadings clearly allege the required elements of confidence and influence. See Compl. PP 95-96.<sup>29</sup> [\*\*68] Rohlfing also [\*351] alleges that the defendants have breached their fiduciary duties by charging him excessive prices for pharmaceuticals. Cf. [Quist v. Dorn, 301 Ill. App. 264, 22 N.E.2d 729, 732 \(Ill. 1939\)](#) ("Courts of Equity will scrutinize with jealous vigilance the transactions between parties occupying fiduciary relations toward each other . . . ."). Thus, Rohlfing has properly alleged a claim for breach of fiduciary duty.<sup>30</sup>

The defendants argue that Rohlfing's claim is barred as a matter of law by the economic loss doctrine. See Def.'s Br. at 16. This doctrine generally holds that where the duty of a seller of goods or services arises under a contract, the seller may not sue for purely economic damages under a tort theory. See [Congregation of the Passion v. Touche Ross & Co., 159 Ill. 2d 137, 636 N.E.2d 503, 513-14, 201 Ill. Dec. 71 \(Ill. 1994\)](#) (collecting cases). The defendants [\*\*69] argue that this rule precludes Rohlfing's fiduciary duty claim--which sounds in tort--because the relationship between Rohlfing, Manor Care, and Vitalink arose under a contract, and the complaint alleges only economic damages. This argument ignores an important limitation on the scope of the economic loss doctrine: "The economic loss doctrine does not bar recovery in tort for the breach of a duty that exists independently of a contract." [Congregation of the Passion, 636 N.E.2d at 515](#); see also [RTC v. KPMG Peat Marwick, 844 F. Supp. 431, 435 \(N.D. Ill. 1994\)](#). [HN25](#)[<sup>↑</sup>] A fiduciary duty exists independently of any contract between parties, and so the economic loss doctrine is inapplicable to claims for breaches of fiduciary duties. See [FDIC v. Miller, 781 F. Supp. 1271, 1277 \(N.D. Ill. 1991\)](#) (holding the economic loss doctrine inapplicable to a claim for breach of fiduciary duty because fiduciary and contractual duties "are distinct and impose separate, independent obligations").

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<sup>28</sup> The defendants also contend that their failure to disclose the relationship between Manor Care and Vitalink does not violate the ICFA because this fact is a matter of public record. See Def.'s Br. at 16. But even if so, this does not warrant dismissal of Rohlfing's ICFA claims; as discussed in the text, Rohlfing has properly alleged other deceptive statements and omissions.

<sup>29</sup> The defendants correctly observe that a party claiming the existence of a fiduciary duty where such a relationship does not exist as a matter of law (such as lawyer-client or principal-agent) must prove the existence of the relationship by clear and convincing evidence. See [Pommier, 967 F.2d at 1119](#); [Kolze, 107 N.E.2d at 690](#). This point will no doubt be highly relevant at trial or on a motion for summary judgment, but it is irrelevant with respect to this motion to dismiss: for now, Rohlfing must merely allege the fiduciary relationship, not prove it.

<sup>30</sup> We agree with the defendants' suggestion that Rohlfing cannot allege a breach of fiduciary duty based on the events surrounding the signing of the residency agreement and his selection of Vitalink as his provider of pharmaceuticals services. See Def.'s Reply Br. at 22. At the time of these events, prior to Taylor's residency at Manor Care, no confidence or influence could have been present since the parties were still dealing at arm's length. This has no impact, however, on Rohlfing's claim that after he took up residency at Manor Care he was overcharged for pharmaceuticals in violation of the defendants' fiduciary duty.

#### **IV. Conclusion**

For the reasons set forth above, we will certify the class requested by the plaintiff (with changes as noted) for purposes of bringing a RICO claim against the defendants. Rohlfing's [\***70**] antitrust claims are dismissed with respect to all members of the class who do not opt-out. We decline to dismiss Rohlfing's ICFA and fiduciary duty claims, though these claims will proceed only on behalf of Rohlfing alone. It is so ordered.

MARVIN E. ASPEN

United States District Judge

Dated 3/27/97

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## **Credit Counseling Ctrs. of Am. v. National Found. for Consumer Credit**

United States District Court for the Northern District of Texas, Dallas Division

April 1, 1997, Decided ; April 1, 1997, FILED; April 2, 1997, ENTERED ON DOCKET

Civil Action No. 3:94-CV-1855-D

### **Reporter**

1997 U.S. Dist. LEXIS 4957 \*; 1997 WL 160180

CREDIT COUNSELING CENTERS OF AMERICA, Plaintiff-Counterdefendant, VS. NATIONAL FOUNDATION FOR CONSUMER CREDIT, INC., Defendant-Counterplaintiff, VS. CONSUMER CREDIT SERVICE OF SAN FRANCISCO, INC., et al., Intervenors-Counterplaintiffs.

**Prior History:** *Credit Counseling v. National Found.*, 62 F.3d 395, 1995 U.S. App. LEXIS 21284 (5th Cir. Tex., 1995)

**Disposition:** [\*1] One motion for summary judgment denied and the other motion for summary judgment granted in part and denied in part.

## **Core Terms**

trademark, consumer credit, summary judgment, counseling services, Counseling, antitrust claim, Counterplaintiffs, discovery, summary judgment motion, generic, genuine issue of material fact, preliminary injunction, unfair competition, continuance, requests, sham, infringement, Register, fanciful

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**Judges:** SIDNEY A. FITZWATER, UNITED STATES DISTRICT JUDGE

**Opinion by:** SIDNEY A. FITZWATER

## **Opinion**

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**MEMORANDUM OPINION AND ORDER**

In this action involving trademark infringement, unfair competition, and antitrust claims, the court denies one motion for summary judgment and grants in part and denies in part the other motion for summary judgment. The court also defers consideration of part of one motion pursuant to *Fed. R. Civ. P. 56(f)*.

I

Plaintiff-counterdefendant Credit Counseling Centers of America ("CCCA") sued defendant-counterplaintiff National Foundation for Consumer Credit, Inc. ("NFCC") to obtain a declaratory judgment that NFCC's licensed name--CONSUMER [\*7] CREDIT COUNSELING SERVICE--is a generic expression and therefore unprotectable. NFCC counterclaimed on theories of federal trademark infringement, federal unfair competition, false representation, and false designation of origin, and a Texas-law claim for injury to business reputation and trade name.<sup>1</sup> CCCA and NFCC are competitors in the business of providing nonprofit credit counseling to individual consumers. CCCA began providing such services in 1988. NFCC has engaged in credit counseling since approximately 1963. NFCC has always identified its debt management services under the name and mark of CONSUMER CREDIT COUNSELING SERVICE. NFCC has obtained registration on the Supplemental Register for the service mark CONSUMER CREDIT COUNSELING SERVICE, and a trademark registration has been approved in the Principal Register.

[\*8] Intervenors-counterplaintiffs ("Intervenors") are members in NFCC. They are licensed by NFCC to provide debt management advice and financial counseling services using NFCC's federally registered trademarks. Intervenors assert substantially similar claims against CCCA. In turn, CCCA alleges that Intervenors' trademark abuse and other activities violate §§ 1 and 2 of the Sherman Act.

CCCA began advertising its services in telephone books and with directory assistance throughout the United States. CCCA's advertisements include the words "Consumer Credit Counseling" just prior to the name CCCA. NFCC and Intervenors argue that this use infringes their trademark rights because it confuses consumers who know NFCC's members by name as the CONSUMER CREDIT COUNSELING SERVICE, and has resulted in a decline in business in some offices.

The court issued a preliminary injunction preventing CCCA from using the term "Consumer Credit Counseling" in this manner. The court entered the preliminary injunction based on the application and supporting materials filed by NFCC; CCCA did not file opposition materials. Based on the available evidence, the court determined that the term "Consumer Credit Counseling" [\*9] was descriptive to suggestive and protectable because it had acquired secondary meaning. Mem. Op. at 4-7. The court held that NFCC had demonstrated a substantial likelihood of success on the merits and that a preliminary injunction should issue. The Fifth Circuit affirmed. *Credit Counseling Ctrs. of Am. v. National Found. for Consumer Credit, Inc.*, 62 F.3d 395 (5th Cir. 1995) (per curiam) (affirmed on basis of district court opinion).

NFCC and Intervenors move for summary judgment on the issue of CCCA's liability for trademark infringement. Intervenors also move for summary judgment dismissing CCCA's antitrust counterclaim against them. CCCA requests that the court defer ruling on Intervenors' motion until they adequately respond to prior discovery requests. CCCA also requests that the court open a new discovery period.

II

To grant summary judgment on counterplaintiffs' trademark infringement claim, there cannot be a genuine issue of material fact regarding whether CONSUMER CREDIT COUNSELING SERVICE is eligible for protection, whether counterplaintiffs are the senior users, or whether there is a likelihood of confusion between the mark and CCCA's

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<sup>1</sup> Counter-plaintiffs have requested summary judgment only on their trademark and unfair competition claims. The court need not address, therefore, whether summary judgment might be appropriate on their remaining claims.

use. See [Brandtjen \[\\*10\] & Kluge, Inc. v. Prudhomme](#), 765 F. Supp. 1551, 1564 (N.D. Tex. 1991) (Fitzwater, J.) (citing [Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex.](#), 909 F.2d 839, 844 (5th Cir. 1990)).

To determine whether NFCC's mark is protectable, the court must analyze the strength of the mark. "The strength and distinctiveness of the mark adopted is a key consideration in deciding how much protection should be afforded to the mark." [Minturn Advertising v. Hermsen Design Assocs., Inc.](#), 728 F. Supp. 430, 432 (N.D. Tex. 1990) (Fitzwater, J.) (citing [Amstar Corp. v. Domino's Pizza, Inc.](#), 615 F.2d 252, 259 (5th Cir.), cert. denied, 449 U.S. 899, 66 L. Ed. 2d 129, 101 S. Ct. 268 (1980)).

Marks are categorized as generic, descriptive, suggestive, or arbitrary or fanciful. [Union Nat'l Bank, 909 F.2d at 844](#). "These categories are not discrete, however, but instead describe points on a spectrum ranging from strong to weak." [Worthington Foods, Inc. v. Kellogg Co.](#), 732 F. Supp. 1417, 1433 (S.D. Ohio 1990). "[A] mark may fall within the hazy area between two categories." *Id.*

Fanciful and arbitrary marks are the strongest types of marks. [Little \[\\*11\] Caesar Enters., Inc. v. Pizza Caesar, Inc.](#), 834 F.2d 568, 571 (6th Cir. 1987). "Arbitrary and fanciful terms or phrases are those which are either coined words or words which are not suggestive of the product or service." [Union Nat'l Bank, 909 F.2d at 845](#). "A 'fanciful' mark is a combination of letters or other symbols signifying nothing other than the product or service to which the mark has been assigned. . . ." [Worthington Foods, 732 F. Supp. at 1433](#) (quoting [Little Caesar Enters.](#), 834 F.2d at 571). Arbitrary "refers to ordinary words which do not suggest or describe the services involved." [Union Nat'l Bank, 909 F.2d at 845](#). "The greatest protection extends to marks that are purely arbitrary or fanciful and bear no relation to the products or services sold under the mark." [Minturn Advertising, 728 F. Supp. at 432](#).

A suggestive mark suggests, rather than describes, some particular characteristic of a good or service but requires the consumer to draw a conclusion as to the nature of the goods and services. [Union Nat'l Bank, 909 F.2d at 845](#). It is entitled to a narrower range of protection than is an arbitrary mark. [Minturn Advertising, 728 F. Supp. at \[\\*121\] 432](#). A descriptive term "identifies a characteristic or quality of the article or service." [Union Nat'l Bank, 909 F.2d at 845](#). It is entitled to even less protection. See [Soweco, Inc. v. Shell Oil Co.](#), 617 F.2d 1178, 1183 (5th Cir. 1980), cert. denied, 450 U.S. 981, 67 L. Ed. 2d 816, 101 S. Ct. 1516 (1981). A generic mark is the weakest type on the spectrum. [Worthington Foods, 732 F. Supp. at 1433](#). It is a term commonly used as the name or description of a kind of goods, and cannot be trademarked. *Id.*

Counterplaintiffs urge that CONSUMER CREDIT COUNSELING SERVICE is protectable as a descriptive mark that has acquired secondary meaning. CCCA disputes this characterization, maintaining that the mark is instead generic and unprotectable.

The proper characterization of a mark is a question of fact. [Zartanis v. Oak Grove Smokehouse](#), 698 F.2d 786, 793 (5th Cir. 1983). Although a statutory presumption is accorded counterplaintiffs' mark by reason of registration, "this presumption is rebuttable and may be overcome by establishing the generic or descriptive nature of the mark." <sup>2</sup> *Id.* (citations omitted). The appropriate test for genericness is whether the public [\*13] perceives the term primarily as the designation of the article. [Society of Financial Examiners v. National Ass'n of Certified Fraud Examiners](#), 41 F.3d 223, 227 (5th Cir. 1995) (citing [Veterans Ass'n v. Blinded Veterans Found.](#), 872 F.2d 1035, 1041 (D.C. Cir. 1989)).

CCCA has offered sufficient evidence that CONSUMER CREDIT COUNSELING SERVICE is a generic term for a class of services to preclude summary judgment. CCCA presents a study conducted by Common Knowledge, Inc. for CCCA. The study concludes that the phrase "Consumer Credit Counseling" is commonly understood to be a generic term rather than a brand name. CCCA has also shown that the same or similar phrases are used generically by New Jersey, North Dakota, and Maryland in their public laws and by thirteen different telephone directory books. Although counterplaintiffs dispute the accuracy of the survey and the relevance of use of similar

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<sup>2</sup> Counterplaintiffs do not assert that their mark has obtained incontestible status.

terms by other parties, [\*14] the weight to be accorded this evidence is a matter for the trier of fact, not for the court in the context of summary judgment.

This decision is not inconsistent with the court's earlier opinion granting a preliminary judgment, or the Fifth Circuit's opinion affirming on the basis of this court's opinion. The preliminary injunction is interlocutory and does not preclude the trier of fact from making other findings at a trial.<sup>3</sup> [\*15] At the preliminary injunction stage, moreover, the court acts as trier of fact and is permitted to resolve disputed fact issues. In the context of a summary judgment motion, of course, the court is precluded from decided fact issues.<sup>4</sup>

### III

Counterplaintiffs also request summary judgment on their unfair competition claim. "Unfair Competition is almost universally regarded as a question of whether the defendant is passing his goods or services as those of the plaintiff by virtue of substantial similarity between the two, leading to confusion on the part of potential customers." *Boston Professional Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg. Inc.*, 510 F.2d 1004, 1010 (5th Cir. 1975) (quoting *Volkswagen Aktiengesellschaft v. Rickard*, 492 F.2d 474, 478 (5th Cir. 1974)). Counterplaintiffs do not identify acts of unfair competition separate from CCCA's use of the term "Consumer Credit Counseling." In light of this court's determination that there is a genuine issue of material fact whether this term is generic, counterplaintiffs' motion for summary judgment on their unfair competition claim is denied.

### IV

Intervenors move for summary judgment on CCCA's [\*16] antitrust claims against them. CCCA asserts that Intervenors maintain their preeminent position in the "consumer credit counseling industry" by claiming trademark protection of the generic term CONSUMER CREDIT COUNSELING SERVICE. CCCA avers that they did this to force smaller competitors to refrain from using a generic term that describes their activities.

#### A

Intervenors maintain that CCCA's antitrust claims must be dismissed under the *Noerr-Pennington* doctrine. In the *antitrust law* context, the Supreme Court, in *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 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), established the constitutional immunity flowing from the right of petition. The Court later extended petitioning immunity to attempts to influence the judicial branch of government by way of litigation activities. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972). Litigation activities include threats of litigation. *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983).

[\*17] *Noerr-Pennington* applies to efforts to use the judicial process to protect trademarks. See *Matrix Essentials v. Emporium Drug Mart*, 988 F.2d 587, 594 (5th Cir. 1993). CCCA asserts, however, that *Noerr-Pennington* does not bar its claims because its allegations are not limited to trademark abuse and because the "sham litigation" exception applies.

*Noerr-Pennington* does not protect "sham litigation." See *Professional Real Estate Investors, Inc. v. Columbia Pictures Inds, Inc.*, 508 U.S. 49, 56, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993). In *Professional Real Estate Investors* the Supreme Court announced a two-part definition of "sham litigation." 508 U.S. at 60-61.

<sup>3</sup> See *Credit Counseling Ctrs. of Am. v. National Found. for Consumer Credit, Inc.*, 62 F.3d 395 (5th Cir. 1995) (per curiam) ("[CCCA] must seek a hearing on the merits in which they may be able to convince the trier of fact that in truth and in fact what is being argued about is a generic terms and not protectable, and if it is protectable, that they have a right to use it under the fair use defense to the Lanham Act.").

<sup>4</sup> Because there is a genuine issue of material fact as to the mark's protectability, the court need not address the other elements of counterplaintiffs' trademark claim.

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 [\*18] 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."

*Id.* (internal citations omitted).

CCCA argues that Intervenors' trademark claims were objectively baseless because the mark was not federally registered until after Intervenors filed suit, previous attempts to register CONSUMER CREDIT COUNSELING SERVICE in the 1960's had resulted in the examiner's finding the term generic, others had accused Intervenors of trademark abuse, and the issue of the mark's protectability had never been fully litigated. While some of this evidence may call into question the ultimate merits of Intervenors' counterclaim, there is no genuine issue of material fact whether their trademark suit is "objectively basis." This court has issued an opinion granting NFCC's motion for a preliminary injunction on nearly identical trademark claims. The opinion was based, in part, on a determination that NFCC was likely to succeed upon its claims for trademark violations. The Fifth Circuit [\*19] affirmed the decision based on this court's opinion. Although this court issued the opinion without benefit of an opposition response, the reasoning and evidence relied upon evince a sufficient level of objective merit to accord *Noerr-Pennington* insulation to the claims.

For the reasons set forth in the court's prior opinion and from the evidence presented in conjunction with this motion, it is clear that Intervenors' claims have some objective basis. A proper probable cause determination irrefutably demonstrates that an antitrust claimant has not proved the objective prong of the sham exception. *Id. at 63*. Summary judgment is therefore warranted on all of CCCA's antitrust claims based upon Intervenors' litigation efforts and threats of litigation to protect the mark CONSUMER CREDIT COUNSELING SERVICE.<sup>5</sup>

#### [\*20] B

The court nevertheless agrees that CCCA's antitrust claim is not in all respects barred by the *Noerr-Pennington* doctrine. CCCA's antitrust claim against Intervenors is based upon alleged trademark abuse and "other activities in restraint of trade." See plaintiff-counterdefendant's Ans. and Counterclaim against Intervenors at P 55. Intervenors maintain that the summary judgment evidence is too speculative to support antitrust claims aside from those precluded by *Noerr-Pennington*.

The court preterms decides whether CCCA's evidence is sufficient to withstand summary judgment. CCCA requests a [Rule 56\(f\)](#) continuance until Intervenors respond to interrogatories and document production requests served on them on July 15, 1996. The request is granted.

[Rule 56\(f\)](#) authorizes a continuance "should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition. . . . The Rule is

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<sup>5</sup> CCCA seeks leave to conduct additional discovery based on Intervenors' introduction of *Noerr-Pennington* issues into this case after the completion of the discovery period. The purpose of additional discovery would be to permit CCCA to obtain additional information about "the objective knowledge" of Intervenors as to the likelihood of success on the merits of their trademark claim and their "subjective intent" in filing this claim. See Decl. of Kenneth R. Matticks, Esq. at P 3. The court denies the request.

Evidence of the type requested would be unavailing. This court's ruling on the inapplicability of the sham exception depends neither on Intervenors' opinion of the strength of their claim nor on their subjective intent in bringing it. Instead, the court's opinion rests on an independent evaluation of the merit of Intervenors' trademark claim, as required by [Professional Real Estate Investors, 508 U.S. at 60-61](#). Additional discovery on these issues would therefore serve no purpose and CCCA's request is denied.

an essential ingredient of the federal summary judgment scheme, and provides a mechanism for dealing with the problem of premature summary judgment motions." *Celotex Corp. v. Catrett*, 477 [\*21] U.S. 317, 326, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The continuance authorized by *Rule 56(f)* is a safe harbor built into the rules so that summary judgment is not granted prematurely. *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 136 (5th Cir. 1987). To comply with the Rule, the party opposing summary judgment need only file the specified non-evidentiary affidavit, explaining why she cannot oppose the summary judgment motion on the merits. *Id.* A claim that further discovery or a trial might reveal facts of which the nonmovant is currently unaware is insufficient. *Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121, 1123 (5th Cir. 1988). The party may not rely on vague assertions that additional discovery will produce needed, but unspecified facts, *Union City*, 823 F.2d at 137, but instead must identify a genuine issue of material fact that justifies the continuance pending further discovery. See *Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1415 (5th Cir. 1987), cert. denied, 485 U.S. 959, 99 L. Ed. 2d 422, 108 S. Ct. 1221 (1988). A party seeking a continuance of a motion for summary judgment must demonstrate why he needs [\*22] additional discovery and how the additional discovery will create a genuine issue of material fact. *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993). He must show a genuine issue of material fact that requires postponement for discovery, see *McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991), and must present specific facts explaining its inability to make the substantive response required by *Rule 56(e)*, see *Solo Serve Corp. v. Westowne Assocs.*, 929 F.2d 160, 167 n.25 (5th Cir. 1991).

CCCA seeks time to gather evidence of monopolization and conspiracy, including accounting and tax information relevant to geographic markets and market share, license agreements, and the names of the members of the various governing boards of Intervenors. CCCA requested this evidence in interrogatories and requests propounded on July 15, 1996. Three months later, CCCA informed Intervenors in writing that their compliance was deficient. On February 12, 1996 the magistrate judge issued an order compelling the noncomplying Intervenors to respond fully, without objection, to CCCA's requests for information within 30 days. Because Intervenors have been dilatory in [\*23] producing this relevant evidence of monopolization and conspiracy, CCCA's motion for a continuance is granted. Its summary judgment response shall be due 30 days after Intervenors comply with the magistrate judge's order, or 30 days from the date of this memorandum opinion, whichever is later. CCCA shall advise the court by letter once the due date for its response is calculable so that the court may internally calendar the remainder of the motion for decision.

**SO ORDERED.**

April 1, 1997.

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE



## In re Circuit Breaker Litig.

United States District Court for the Central District of California

April 1, 1997, Decided ; April 1, 1997, Filed

No. CV 88-3012 CBM

### **Reporter**

984 F. Supp. 1267 \*; 1997 U.S. Dist. LEXIS 14232 \*\*; 1997-2 Trade Cas. (CCH) P71,878

### **IN RE CIRCUIT BREAKER LITIGATION**

**Disposition:** [\*\*1] Plaintiffs' motions for partial summary judgment against Defendants' antitrust and intentional interference counterclaims GRANTED. UL's motion to strike declarations of Richard Smith and Roy Weinstein DENIED.

## **Core Terms**

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circuit breaker, rebuilt, antitrust, present evidence, Sherman Act, reconditioned, claimant, certification, molded, manufacturing, no evidence, conspiracy, intentional interference, counterclaims, anti-competitive, lawsuits, summary judgment, customers, contacts, do business, indicates, Electric, testing, immune, induce, distributors, entities, products, prospective economic advantage, partial summary judgment

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Timing of Motions & Responses

## [\*\*HN1\*\*](#) [] Supporting Materials, Affidavits

A party against whom a counterclaim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof. [Fed. R. Civ. P. 56\(b\)](#). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to 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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

## [\*\*HN2\*\*](#) [] Summary Judgment, Entitlement as Matter of Law

In moving for summary judgment, the movant assumes no obligation to negate or disprove matters on which the opponent will have the burden of proof at trial. In order to demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the moving party need only show the court that there is an absence of evidence to support an essential element of the nonmoving party's case. A failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

## [\*\*HN3\*\*](#) [] Summary Judgment, Opposing Materials

Once the moving party has demonstrated the complete absence of proof on an essential element of the other party's case, the burden shifts to the opponent to come forward with sufficient evidence for a reasonable jury to find in its favor on that element. In response, the opposing party must set forth specific facts showing that there is a genuine issue for trial. [Fed. R. Civ. P. 56\(e\)](#). The mere existence of a scintilla of evidence in support of the opponent's position will be insufficient.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

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Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > 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](#) [↓] Remedies, Damages**

In order to withstand a motion for summary judgment, claimants seeking damages under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), must establish that there is a genuine issue of material fact as to whether the opposing party entered into an illegal conspiracy that caused the claimants to suffer a cognizable injury. In addition, the claimants must also show more than a conspiracy in violation of the antitrust laws; they must also show an injury to them resulting from the illegal conduct.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

#### **[HN5](#) [↓] Antitrust & Trade Law, Sherman Act**

Plaintiffs may discharge their initial summary judgment burden by proffering a plausible and justifiable alternative interpretation of its conduct that rebuts defendants' allegations of a conspiracy. If plaintiffs meet this initial burden, defendants must come forward with evidence that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that plaintiffs acted independently.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

#### **[HN6](#) [↓] Summary Judgment, Entitlement as Matter of Law**

While the inferences to be drawn from the underlying facts must generally be viewed in the light most favorable to the party opposing a motion for summary judgment, [antitrust law](#) limits the range of permissible inferences from ambiguous evidence in a [15 U.S.C.S. § 1](#) case. Thus, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. In other words, claimants 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 them.

Antitrust & Trade Law > Sherman Act > Claims

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Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN7** Sherman Act, Claims

To prove a violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a party must show the existence of a contract, combination or conspiracy, in restraint of trade or commerce. [15 U.S.C.S. § 1](#). A violation of the Sherman Act consists of three elements: (1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the person or entities intend to harm or restrain competition; and (3) which actually restrains competition. Even if a claimant can establish illegal conduct, a claimant must further show that it suffered injury as the result of that illegal conduct.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

#### **HN8** Noerr-Pennington Doctrine, Right to Petition Immunity

The Noerr-Pennington doctrine provides broad protection from the Sherman Act, [15 U.S.C.S. § 1](#), for concerted efforts to influence the decisions of public officials. This protection extends to lobbying both the executive and legislative branch and to petitioning of administrative agencies and courts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

#### **HN9** Exemptions & Immunities, Noerr-Pennington Doctrine

A party's immunity for its efforts to influence public officials is lost only if the party engages in "sham" petitioning. "Sham" petitioning is that which both: (1) is objectively baseless in the sense that no reasonable petitioner could realistically expect success on the merits; and (2) 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 anti-competitive weapon. When reviewing a claim of "sham" petitioning, a court must apply the two parts in succession. Only if a suit or petitioning activity is found to be objectively baseless, does the court proceed to examine the litigant's subjective intent.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

#### **HN10** Noerr-Pennington Doctrine, Sham Exception

The Noerr-Pennington doctrine shields all communications with the government. A party's immunity for its efforts to influence public officials is lost only if it engages in "sham" petitioning. In order to deprive plaintiffs of immunity for their contacts with government entities, plaintiffs' contacts must be objectively baseless in the sense that no

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reasonable petitioner could realistically expect success on the merits. Noerr-Pennington even precludes antitrust liability based on the use of false statements to persuade the government to act.

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 > ... > 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 > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

#### **HN11** [] Horizontal Refusals to Deal, Boycotts

Group boycotts are treated as per se violations of the Sherman Act, [15 U.S.C.S. § 1](#), only when the challenged activity would almost always tend to be predominantly anticompetitive.

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 > General Overview

#### **HN12** [] Practices Governed by Per Se Rule, Boycotts

Activities that can constitute per se violations include price-fixing, group boycotts, tying arrangements, and horizontal territorial divisions.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > 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

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

### [\*\*HN13\*\*](#) [blue document icon] Per Se Rule & Rule of Reason, Per Se Violations

To prevail on a [§ 1](#) violation under the Sherman Act, [15 U.S.C.S. § 1](#), using the "rule of reason" test, a claimant must prove: (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; 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." In addition, a claimant must show more than simply parallel behavior.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

### [\*\*HN14\*\*](#) [blue document icon] Summary Judgment, Burdens of Proof

Plaintiffs may discharge their initial summary judgment burden by proffering a plausible and justifiable alternative interpretation of its conduct that rebuts defendants' allegations of a conspiracy. If plaintiffs meet this initial burden, defendants must come forward with evidence that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that plaintiffs acted independently. However, [antitrust law](#) limits the range of permissible inferences from ambiguous evidence in a [15 U.S.C.S. § 1](#) case. Thus, 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

### [\*\*HN15\*\*](#) [blue document icon] Antitrust & Trade Law, Sherman Act

Internally coordinated conduct between a corporation and an unincorporated division does not violate [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

### [\*\*HN16\*\*](#) [blue document icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A standards-setting organization does not per se violate the antitrust laws by refusing to certify a product. Rather, the "rule of reason" test applies to such conduct. Under this test, the question is whether an antitrust defendant's conduct promotes competition or suppresses competition.

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN17\*\*](#) [blue document icon] Antitrust & Trade Law, Sherman Act

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To state a claim against a standard-making organization, a claimant must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anti-competitive and unreasonable.

Antitrust & Trade Law > Sherman Act > Claims

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

Business & Corporate Compliance > ... > Energy & Utilities Law > Regulators > US Nuclear Regulatory Commission

#### **HN18** [L] Sherman Act, Claims

Under the "rule of reason" test, to establish a [§ 1](#) violation under the Sherman Act, [15 U.S.C.S. § 1](#), a claimant must show: (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; 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." A claimant must prove that each antitrust defendant had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

#### **HN19** [L] Antitrust & Trade Law, Exemptions & Immunities

Attendance at trade association meetings and participation in trade association activities are not, in and of themselves, condemned or even discouraged by the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

#### **HN20** [L] Sherman Act, Claims

Proving antitrust injury is important in a [15 U.S.C.S. § 1](#) case. "Antitrust injury" is injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged. To establish antitrust injury, a claimant must show not merely injury to himself as a competitor, but rather injury to competition.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

## **HN21** [blue icon] Intentional Interference, Elements

To prevail on a claim of intentional interference with prospective economic advantage, a claimant must provide evidence of: (1) an economic relationship between itself and third parties containing the probability of future economic benefit; (2) the defendant's knowledge of these relationships; (3) intentional, wrongful conduct on the part of the defendant designed to interfere with or disrupt the relationships; (4) actual disruption; and (5) resulting damage. The allegedly tortious conduct must be wrongful by some legal measure other than the fact of interference itself.

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For MCCB INC dba Molded Case Circuit Breakers, RICARDO CONTRERAS aka Rick Contreras, counter-claimants: Ronald J Nessim, Bird Marella Boxer Wolpert & Matz, Los Angeles, CA.

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**Judges:** CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE.

**Opinion by:** CONSUELO B. MARSHALL

## **Opinion**

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[\*1270] ORDER RE: PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANTS' ANTITRUST AND INTENTIONAL INTERFERENCE COUNTERCLAIMS, AND UL'S MOTION TO STRIKE THE DECLARATIONS OF SMITH AND WEINSTEIN

The matters before the Court, the Honorable Consuelo B. Marshall, United States [\*1271] District Judge, presiding, are Plaintiffs' Motions for Partial Summary Judgment on Defendants' Antitrust and Intentional Interference for Prospective Economic Advantage Counterclaims, and UL's Motion [\*5] to Strike the Declarations of Richard L. Smith and Roy Weinstein.<sup>1</sup> Upon consideration of the record, papers, and oral argument, the Court

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<sup>1</sup>This Order encompasses the antitrust and intentional interference portions of the following motions: (1) Square D's Motion for Partial Summary Judgment of Defendants' Antitrust and Interference Counterclaims (filed 9/16/96); (2) UL's Motion for Partial Summary Judgment on Defendants' Antitrust Claims (filed 9/16/96); (3) GE's Motion for Partial Summary Judgment on Defendants' Antitrust Counterclaims (filed 9/16/96); (4) GE's Motion for Partial Summary Judgment Against GMEW, GCB, and PBS (trade libel, defamation, and intentional interference with prospective economic advantage counterclaims) (filed 9/16/96); (5) Westinghouse's Motion for Partial Summary Judgment or, in the Alternative, for Summary Adjudication on Defendants' Antitrust Counterclaims and for Summary Adjudication of Issues on Defendants' Tortious Interference with Economic Advantage (filed 9/16/96); (6) UL's Motion for Partial Summary Judgment against PBS (*Noerr-Pennington* immunity) (filed 9/22/95); and (7) Plaintiffs' Motion to Strike the Declarations of Dr. Richard L. Smith and Roy Weinstein (filed 10/28/96).

issues the following Order, GRANTING partial summary judgment in favor of Plaintiffs' on Defendants' antitrust and intentional interference with prospective economic advantage counterclaims, and DENYING UL's Motion to Strike.

## [\*\*6] Background

Plaintiffs are Square D Company ("Square D"), General Electric Company ("GE"), Westinghouse Electric Corporation ("Westinghouse"), and Underwriters Laboratories, Inc. ("UL"). Defendants are Panelboard Specialties and Wholesale Electric, Inc., and Jaime Contreras ("PBS"), Pencon International d/b/a General Magnetics & Electric Wholesale, Inc., and the Estate of Charley Contreras ("Pencon/GMEW"), and General Circuit Breaker & Electric Supply, Inc., and Xavier Contreras ("GCB").

This litigation commenced in 1988, when Plaintiffs, three circuit breaker manufacturers and a certification agency, separately sued eleven circuit breaker reconditioning companies for trademark infringement and unfair competition. Since then, many of the cases have settled, and one case went to trial.<sup>2</sup> Defendants, the remaining circuit breaker reconditioners, have raised a number of affirmative defenses, and counterclaimed for, *inter alia*, antitrust violations under the Sherman Act and intentional interference with prospective economic advantage.

[\*\*7] Plaintiffs brought motions for partial summary judgment against all three remaining Defendants on Defendants' antitrust and intentional interference counterclaims. The Court heard arguments on these motions on January 6, 1997.<sup>3</sup>

## ANTITRUST DISCUSSION

Defendants allege that Plaintiffs violated the Sherman Act, [15 U.S.C. § 1](#) by "engaging in a continuing combination and conspiracy to unreasonably restrain trade and commerce in the sale and distribution of molded case circuit breakers and to eliminate secondary distributors of reconditioned molded case circuit breakers." (See, e.g., GCB 2d Am. Countercls. PP 9-19; PBS 2d Am. Countercls. PP 9-24; Pencon/GMEW 1st Am. Countercls. PP 11-25.)

According to Defendants, Plaintiffs conspired to suppress [\*\*8] and eliminate competition of entities engaged in the sale and distribution of reconditioned molded case circuit breakers by:

- (1) filing in bad faith the lawsuits that constitute *In re Circuit Breaker Litigation*;
- (2) falsely disparaging Defendants and misrepresenting facts (including issues of safety) to government agencies in an effort to induce governmental entities to commence investigations into the sale of reconditioned molded case circuit breakers;
- [\*1272]** (3) forming, through the National Electrical Manufacturers Association ("NEMA"), a "Task Force on Rebuilt Circuit Breakers," to formulate means to eliminate competition in the reconditioned circuit breaker market;
- (4) preparing, distributing, and developing false or misleading ads, statements, press releases, and media articles about Defendants;
- (5) through NEMA, withdrawing a test standard applicable to molded case circuit breakers;
- (6) refusing to implement a UL standard for reconditioned circuit breakers; and
- (7) inducing third parties to cease doing business with Defendants.<sup>4</sup>

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<sup>2</sup> See *In re Circuit Breaker Litigation*, 852 F. Supp. 883 (C.D. Cal. 1994) (*Circuit Breaker I*), aff'd, [106 F.3d 894, 41 U.S.P.Q.2D \(BNA\) 1741 \(9th Cir. 1997\)](#); *In re Circuit Breaker Litigation*, 860 F. Supp. 1453 (C.D. Cal. 1994) (*Circuit Breaker II*), aff'd, [106 F.3d 894, 41 U.S.P.Q.2D \(BNA\) 1741 \(9th Cir. 1997\)](#).

<sup>3</sup> On July 10, 1996, the Court heard arguments on UL's September 22, 1995, motion for partial summary judgment against PBS on *Noerr-Pennington* immunity. The Court took that motion under submission, and incorporates its decision as to that motion in this Order.

## [\*\*9] I. Summary Judgment Law

**HN1** [↑] "A party against whom a . . . counterclaim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." [Fed. R. Civ. P. 56\(b\)](#). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#).

**HN2** [↑] In moving for summary judgment, the movant assumes no obligation to negate or disprove matters on which the opponent will have the burden of proof at trial. In order to demonstrate that "there is no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law," the moving party need only show the Court that there is an absence of evidence to support an essential element of the nonmoving party's case. [Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#). "A failure of proof concerning an essential element of the nonmoving party's case necessarily renders [\*\*10] all other facts immaterial." [Id. at 323](#).

**HN3** [↑] Once the moving party has demonstrated the complete absence of proof on an essential element of the other party's case, the burden shifts to the opponent to come forward with sufficient evidence for a reasonable jury to find in its favor on that element. [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). In response, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." [Fed. R. Civ. P. 56\(e\)](#). "The mere existence of a scintilla of evidence in support of [the opponent's] position will be insufficient . . ." [Anderson, 477 U.S. at 252](#).

## II. Summary Judgment in Sherman Act Cases

In [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#), the Supreme Court held that, **HN4** [↑] in order to withstand a motion for summary judgment, claimants seeking damages under § 1 of the Sherman Act "must establish that there is a genuine issue of material fact as to whether [the opposing party] entered into an illegal conspiracy that caused [the claimants] to suffer a cognizable injury. In addition, the claimants "must also show [\*\*11] more than a conspiracy in violation of the antitrust laws; they must [also] show an injury to them resulting from the illegal conduct." [Id. at 586](#).

**HN5** [↑] Plaintiffs may discharge their initial summary judgment burden by "proffering a 'plausible and justifiable' alternative interpretation of its conduct that rebuts [Defendants'] allegation[s] of a conspiracy." [T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 632 \(9th Cir. 1987\)](#). If Plaintiffs meet this initial burden, Defendants must come forward with evidence that is capable of sustaining a rational inference of conspiracy and that tends to exclude the possibility that Plaintiffs acted independently. [American Ad Mgmt. v. GTE Corp., 92 F.3d 781 \(9th Cir. 1996\)](#); [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, \[\\*1273\] 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#).

**HN6** [↑] While the inferences to be drawn from the underlying facts must generally be viewed in the light most favorable to the party opposing a motion for summary judgment, **antitrust law** limits the range of permissible inferences from ambiguous evidence in a § 1 case. [Matsushita, 475 U.S. at 587-88](#). Thus, "conduct as consistent with permissible competition as [\*\*12] with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." [Id. at 588](#) (citing [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#)). In other words, claimants "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 [them]." [Id.](#)

<sup>4</sup>None of Defendants alleges all of these bases of liability. For instance, GCB does not allege that Plaintiffs developed and circulated false and misleading ads and press statements, and Pencon/GMEW does not include an abuse of process allegation. However, the Court addresses each of these bases as if pleaded by each Defendant against each Plaintiff.

### **III. Substantive Antitrust Law**

**HN7** To prove a violation of § 1 of the Sherman Act, Defendants must show the existence of a "contract, combination or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. A violation of the Sherman Act consists of three elements: "(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the person or entities intend to harm or restrain competition; and (3) which actually restrains competition." Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 854 (9th Cir.), cert. denied, 516 U.S. 861, 133 L. Ed. 2d 111, 116 S. Ct. 170 (1995); City of Vernon v. Southern Cal. Edison Co., 955 F.2d 1361, 1365 (9th Cir.), cert. denied, 506 U.S. 908, 121 L. Ed. 2d 228, 113 S. Ct. 305 (1992); [\*\*13] Eichman v. Fotomat Corp., 880 F.2d 149, 161 (9th Cir. 1989) (stating that restraint of trade evaluated under either *per se* or rule of reason test). Even if a claimant can establish illegal conduct, a claimant must further show that it suffered injury as the result of that illegal conduct. Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1443-44 (9th Cir.), cert. denied, 516 U.S. 987, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1996).

### **IV. Noerr-Pennington Immunity From Antitrust Liability**

**HN8** The *Noerr-Pennington* doctrine provides broad protection from the Sherman Act for concerted efforts to influence the decisions of public officials. United Mine Workers v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965). This protection extends to lobbying both the executive and legislative branch. Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127, 137-38, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961), and to petitioning of administrative agencies and courts, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972).

**HN9** A party's immunity for its efforts to influence public officials [\*\*14] is lost only if the party engages in "sham" petitioning. USS-Posco Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 810 (9th Cir. 1994). "Sham" petitioning is that which *both*: (1) is objectively baseless in the sense that no reasonable petitioner could realistically expect success on the merits; and (2) 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 anti-competitive weapon. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993). When reviewing a claim of "sham" petitioning, a court must apply the two parts in succession. Only if a suit or petitioning activity is found to be objectively baseless, does the court proceed to examine the litigant's subjective intent. *Id.*; USS-Posco Indus., 31 F.3d at 811.

Defendants base part of their Sherman Act counterclaims upon (1) the filing of these lawsuits and (2) Plaintiffs' contacts with various government agencies that investigated Defendants in the late 1980s. (See GCB 2d Am. Countercls. [\*\*15] P 15(c)-(d); PBS 2d Am. Countercls. P 19(c)-(d); Pencon/GMEW 1st Am. Countercls. P 21(3).) Both sets of activities are protected by *Noerr-Pennington* immunity.

#### **A. Plaintiffs' Lawsuits**

Defendants allege that Plaintiffs instituted in bad faith the lawsuits constituting *In re Circuit Breaker Litigation* for the "sole and exclusive purpose of restricting and eliminating [\*1274] [Defendants'] ability to compete with the manufacturing [Plaintiffs] and causing prospective purchasers to boycott [Defendants'] products." (GCB 2d Am. Countercls. P 15(d); PBS 2d Am. Countercls. P 19(d).)

Plaintiffs demonstrate that the filing of the lawsuits constituting *In re Circuit Breaker Litigation* is immune from antitrust liability under the *Noerr-Pennington* doctrine. Plaintiffs demonstrate that the lawsuits do not constitute "sham" litigation in that they are not "objectively baseless in the sense that no reasonable petitioner could realistically expect success on the merits." See *Professional Real Estate Investors*, [\*1275] Inc., 508 U.S. at 60-61. Plaintiffs present evidence that:

1. Defendants admit to photocopying Plaintiffs' trademarks and admit to selling reconditioned products without [\*\*16] labels on the products disclosing the condition of the products, which the Court finds supports a *prima facie* claim of trademark infringement and unfair competition under [\*Champion Spark Plug Co. v. Sanders, 331 U.S. 125, 129-30, 91 L. Ed. 1386, 67 S. Ct. 1136 \(1947\)\*](#), and the Lanham Act;
2. Plaintiffs have obtained stipulated permanent injunctions against most of the original defendants in *In re Circuit Breaker Litigation*;
3. Plaintiffs obtained preliminary injunctions against all three Defendants;
4. The Justice Department issued criminal indictments against three of the original defendants for the same conduct at issue in *In re Circuit Breaker Litigation*, leading to 2 guilty pleas; and
5. The jury in the Westinghouse trial found that Pencon/GMEW, GCB, and PBS's relabelling practices violated the Lanham Act. See [\*In re Circuit Breaker Litigation \(Circuit Breaker I\), 852 F. Supp. 883, 891-92 \(C.D. Cal. 1994\)\*](#), aff'd, [\*106 F.3d 894, 41 U.S.P.Q.2D \(BNA\) 1741 \(9th Cir. 1997\)\*](#).

While the Court notes Defendants' success on their affirmative defenses in the Westinghouse trial against Westinghouse's claims of trademark infringement and unfair competition, the Court also finds that Plaintiffs' [\*\*17] success thus far in this litigation indicates that the lawsuits are not "objectively baseless," which precludes a finding that *In re Circuit Breaker Litigation* constitutes "sham" petitioning. The district court in the Westinghouse trial noted that

for the most part, defendants and Westinghouse agree that the jury necessarily made certain findings of fact. They agree that, in finding liability on both the § 1114 and § 1125 claims, the jury necessarily found: 1) that defendants sold reconditioned breakers bearing the Westinghouse mark; 2) that they did not designate them as 'reconditioned'; 3) that they did so without Westinghouse's consent; and 4) that this practice was likely to cause confusion.

[\*In re Circuit Breaker Litig., 852 F. Supp. 883, 887 \(C.D. Cal. 1994\)\*](#), aff'd, [\*106 F.3d 894, 41 U.S.P.Q.2D \(BNA\) 1741 \(9th Cir. 1997\)\*](#).

This evidence is sufficient for the Court to find as a matter of law that Plaintiffs' lawsuits are immune from antitrust liability under *Noerr-Pennington*. Because the Court may find as a matter of law that Plaintiffs' lawsuits are not objectively baseless, it need not reach the issue of Plaintiffs' subjective intent.

## B. Plaintiffs' [\*\*18] Contacts with Government Investigators and Agencies

Defendants also allege that Plaintiffs violated [§ 1](#) of the Sherman Act by inducing the government to "commence investigations into the purchase, use and installation of reconditioned circuit breakers by falsely disparaging such breakers and the companies distributing such breakers and by falsely suggesting catastrophic safety problems resulting from their use in order to create undue fear and alarm and to induce prospective purchasers to boycott [Defendants'] products." (See GCB 2d Am. Countercls. P 15(c); PBS 2d Am. Countercls. P 19(c); Pencon/GMEW 1st Am. Countercls. P 21(3).)

**HN10**  *Noerr-Pennington* shields all communications with the government. A party's immunity for its efforts to influence public officials is lost only if it engages in "sham" petitioning. [\*USS-Posco Indus., 31 F.3d at 810\*](#). In order to deprive Plaintiffs of immunity for their contacts with government entities, Plaintiffs' contacts must be objectively baseless in the sense that no reasonable petitioner could realistically expect success on the merits. [\*Professional Real Estate Investors, Inc., 508 U.S. at 60-61\*](#). Furthermore, under *Allied Tube* [\*\*19] & [\*Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499-500, 100 L. Ed. 2d 497, 108 S. Ct. 1931 \(1988\)\*](#), and *Boone v. Redevelopment Agency of the City of San Jose, 841 F.2d 886, 894 (9th Cir. 1988)*, *Noerr-Pennington* even precludes antitrust liability based on the use of false statements to persuade the government to act.

It is undisputed that Plaintiffs, acting individually and through the National Electrical Manufacturers Association ("NEMA"), had contact with the Nuclear Regulatory Commission ("NRC") and other governmental organizations regarding rebuilt molded case circuit breakers. Defendants present evidence only in regard to Plaintiffs' effort to petition the Nuclear Regulatory Commission. The Court finds that Plaintiffs' contacts with the NRC and other governmental entities in 1988, to include the U.S. Department of Justice, the U.S. Department of Energy, NASA, and the U.S. Department of Defense, are immune from antitrust liability under *Noerr-Pennington*.

Plaintiffs present evidence that their contacts with the government in and around the institution of this lawsuit were reasonable in light of Plaintiffs' concerns about product safety, trademark infringement, [\*\*20] and unfair competition. For instance, the evidence indicates that on March 4, 1988, NEMA considered "undertaking to have laws enacted to require that rebuilt equipment be labeled as rebuilt and/or certified by an independent testing laboratory." (GCB Ex. 5.) NEMA cited that its concern was "based on safety and/or market mis-representation issues." (GCB Ex. 5.) The evidence also indicates that in April 1988, Pacific Gas & Electric Company discovered that it had bought rebuilt Square D circuit breakers for installation at the Diablo Canyon nuclear power plant. The evidence indicates that Square D tested these circuit breakers and reported to the NRC that they were rebuilt. (GCB Ex. 22.) The NRC responded by launching an investigation into purchases of reconditioned circuit breakers by nuclear power plant licensees. In the course of its investigation, the NRC solicited from Plaintiffs advice and guidance as to issues regarding molded case circuit breakers. (GCB Ex. 9.)

The evidence indicates that the NRC issued a bulletin on June 18, 1988, regarding the potential problems presented by rebuilt molded case circuit breakers. (GCB Ex. 19.) NEMA commented on NRC Bulletin 88-10, and was critical [\*\*21] of the NRC's proposed test program for rebuilt circuit breakers. (GCB Ex. 25.) On November 22, 1988, the NRC issued a formal version of its Bulletin, which disregarded in part the recommendations of UL and NEMA, requiring utilities to test circuit breakers that could not be traced to the original manufacturer. (GCB Ex. 26.) NEMA members believed that this standard did not appreciate the safety issues presented by rebuilt circuit breakers, and recommended further lobbying. (GCB Ex. 23.)

The Court finds that none of this evidence sustains Defendants' burden of demonstrating that Plaintiffs' contacts with the government constitutes "sham petitioning." The evidence indicates that Plaintiffs reasonably could have expected the government to have adopted strict inspection and testing standards for rebuilt molded case circuit breakers. There is no evidence that implies that the government was manipulated, no evidence that Plaintiff's lied to the government, and no evidence that Plaintiffs used false information in their petitioning activities.

Thus, the Court finds that Plaintiffs' contacts with the government in and around the institution of this lawsuit are protected by *Noerr-Pennington* [\*\*22].

## V. Liability for Non-Protected Activity

To prevail, Defendants must present evidence that their purported competitive injuries resulted from Plaintiffs' non-protected activities. [MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1161 \(7th Cir. 1983\)](#) ("If a plaintiff has suffered financial loss from the *lawful* activities of a competitor, then no damages may be recovered under the antitrust laws. It is a requirement that an antitrust plaintiff must prove that his damages were caused by the *unlawful* acts of the defendant.") (emphasis in original).<sup>5</sup> Defendants allege antitrust violations [\*1276] that fall outside of the scope of Plaintiffs' protected petitioning activities. The Court addresses each allegation in turn.

### [\*\*23] A. Group Boycott

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<sup>5</sup> The Court notes that the declarations of GCB and Pencor/GMEW's experts, Richard Smith and Roy Weinstein, do not account for injury that may have been caused exclusively by non-Noerr-Pennington protected activity. The Court also notes that PBS provides no evidence on the issue of antitrust injury to its business as a result of Plaintiffs' activities.

Defendants allege that Plaintiffs engaged in a "group boycott." [HN11](#)<sup>6</sup> Group boycotts are treated as *per se* violations of the Sherman Act only when the challenged activity "would almost always tend to be predominantly anticompetitive." [Bhan v. NME Hospo., Inc.](#), 929 F.2d 1404, 1411 (9th Cir.), cert. denied, 502 U.S. 994, 116 L. Ed. 2d 639, 112 S. Ct. 617 (1991);<sup>6</sup> [NCAA v. Board of Regents of Univ. of Okla.](#), 468 U.S. 85, 100, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984) ("A *per se* rule is applied when the [agreed upon] practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.") (internal quotations omitted).<sup>7</sup>

[\*\*24] The Court finds that none of Plaintiffs' non-immune actions are the type that "always tend to be predominantly anticompetitive." Thus, the Court finds that Plaintiffs' non-immune activities do not constitute a group boycott.

## B. Coercing Customers to Stop Doing Business with Defendants

Defendants also allege that Plaintiffs conspired to coerce Defendants' customers to stop doing business with Defendants in violation of [§ 1](#) of the Sherman Act. (See GCB 2d Am. Countercls. P 15(e); PBS 2d Am. Countercls. P 19(e); Pencon/GMEW 1st Am. Countercls. P 21(4).)

Because the Court finds that Plaintiffs' activities do not constitute a *per se* violation of the Sherman Act, the Court uses the "rule of reason" test in assessing the anti-competitive nature of Plaintiffs' non-immune activities. [HN13](#)<sup>8</sup> To prevail on a [§ 1](#) violation under the Sherman Act using the "rule of reason" test, a claimant must prove: "(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; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in [\*\*25] which the claimant is engaged (i.e., 'antitrust injury')."[Austin v. McNamara](#), 979 F.2d 728, 738-39 (9th Cir. 1992) (citing [McGlinch v. Shell Chem. Co.](#), 845 F.2d 802, 811 (9th Cir. 1988)). In addition, a claimant must show more than simply parallel behavior. [Reserve Supply v. Owens-Corning Fiberglas](#), 971 F.2d 37 (7th Cir. 1992) (conscious parallel behavior by itself is not enough to support an antitrust conspiracy claim).

The gravamen of Defendants' allegations is that Plaintiffs acted in concert. Collective action is the linchpin of antitrust liability. It is settled law that independent business decisions not to deal with a party do not violate the Sherman Act. [Monsanto Co. v. Spray-Rite Serv. Corp.](#), 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984).

Defendants present no evidence of any concerted action on the part of Plaintiffs, through NEMA or otherwise, to induce or persuade customers or distributors to stop doing business with Defendants. They rely instead on inferences drawn from simultaneous attempts by the individual Plaintiffs to deal with either their distributors or their internal subdivisions. [HN14](#)<sup>9</sup> Plaintiffs may discharge their initial summary [\*\*26] judgment burden by "proffering a 'plausible and justifiable' alternative interpretation of its conduct that rebuts [Defendants'] allegation[s] of a conspiracy."[T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n](#), 809 F.2d 626, 632 (9th Cir. 1987). If Plaintiffs meet this initial burden, Defendants must come forward with evidence that is capable of sustaining a rational inference of conspiracy and that tends [\*\*1277] to exclude the possibility that Plaintiffs acted independently. [American Ad Mgmt. v. GTE Corp.](#), 92 F.3d 781 (9th Cir. 1996); [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). However, "**antitrust law**" limits the range of permissible inferences from ambiguous evidence in a [§ 1](#) case." [Matsushita](#), 475 U.S. at 587-88. Thus, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of

<sup>6</sup> [HN12](#)<sup>10</sup> Activities that can constitute *per se* violations include price-fixing, group boycotts, tying arrangements, and horizontal territorial divisions.

<sup>7</sup> When this matter was originally filed in 1988, the law firm Munger, Tolles & Olson represented all four Plaintiffs, and filed nearly identical complaints on behalf of each Plaintiff. The Court finds that representation by one law firm is not grounds for antitrust liability. [Lemelson v. Bendix Corp.](#), 104 F.R.D. 13, 17-18 (D. Del. 1984).

antitrust conspiracy." *Id. at 588* (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)).

In order to prevail, Defendants must first present evidence that tends to exclude the possibility of independent action. Because of [\*\*27] the *Noerr-Pennington* protection afforded to Plaintiffs' petitioning activities, Defendants' evidence is limited to Plaintiffs' non-immune activities.

Defendants present evidence that Square D contacted its distributors in October 1988 and informed them of the lawsuit, Defendants' alleged activities, the preliminary and permanent injunctions obtained at the time, and Square D's intent to continue to investigate. (GCB Ex. 46.) Defendants present evidence that GE instituted a recall program on its circuit breakers in an effort to get GE circuit breakers that it had not rebuilt returned to it. (GCB Ex. 61.) The Court finds that this evidence does not sustain Defendants' burden and does not raise a genuine issue of material fact. Defendants provide no evidence that the other Plaintiffs knew about this recall program, nor evidence that they acted in concert with GE. Furthermore, this evidence is as consistent with legitimate business practice as it is with anti-competitive behavior, in that it exhibits a concern for liability and manufacturer warranty. Under such circumstances, it is reasonable for GE to have instituted a recall program to protect itself.

In order to prevail, Defendants [\*\*28] must also present evidence that their customers and distributors were induced by Plaintiffs to stop doing business with Defendants. The Court finds that Defendants have not sustained their burden on this issue. Defendants present no direct testimony from customers or distributors. In fact, Defendants present no evidence whatsoever implicating UL in the alleged effort to dissuade Defendants' customers and distributors. Defendants rely on the testimony of Rene Contreras to support the proposition that Plaintiffs induced Defendants' customers to stop doing business with Defendants. (R. Contreras Decl.; GCB Ex. 28.) However, Rene Contreras' declaration is conclusory and lacks supporting evidence. In addition, evidence presented by Plaintiffs indicates that customers and distributors either did not stop doing business with Defendants (Heronemus Dep. at 94), made an independent decision to stop doing business with Defendants (Mitchell Dep. at 26-35; Tulloch Dep. at 84-85, 103-04, 113, 116), or were Plaintiffs' subsidiaries (i.e., GESCO (GE's subdivision) and WESTCO (Westinghouse's subdivision)).<sup>8</sup>

[\*\*29] Thus, the Court finds that Defendants have not sustained their burden of demonstrating that Plaintiffs induced Defendants' customers to stop doing business with Defendants. The evidence indicates that Plaintiffs made reasonable, self-interested business decisions, or made decisions wholly within their own corporations not to buy rebuilt circuit breakers that could not be traced to the original manufacturers.

### C. Refusing to Implement a UL Standard for Reconditioned Circuit Breakers

Defendants allege that UL's decision not to create a certification program for rebuilt molded case circuit breakers was made in concert with the other Plaintiffs and that it constitutes an illegal restraint of trade in violation of § 1 of the Sherman Act. (See, e.g., Pencon/GMEW 1st Am. Countercls. P 21(7).)

**HN16** [↑] A standards-setting organization does not *per se* violate the antitrust laws by refusing to certify a product. *Consolidated* [\*1278] *Metal Prod. v. American Petroleum Inst.*, 846 F.2d 284, 292 (5th Cir. 1988). Rather, the "rule of reason" test applies to such conduct. Under this test, the question is whether an antitrust defendant's conduct "promotes competition or . . . suppresses competition." [\*\*30] *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978).

**HN17** [↑] "To state a claim against a standard-making organization such as UL [a claimant] must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anti-competitive and unreasonable." *ECOS Elec. Corp. v. Underwriters Labs.*

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<sup>8</sup> **HN15** [↑] Internally coordinated conduct between a corporation and an unincorporated division does not violate § 1 of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984).

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*Inc., 743 F.2d 498, 501 (7th Cir. 1984)* (citing *Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126, 129 (6th Cir.), cert. denied, 449 U.S. 826, 66 L. Ed. 2d 29, 101 S. Ct. 89 (1980)), cert. denied, 469 U.S. 1210, 84 L. Ed. 2d 327, 105 S. Ct. 1178 (1985).

### **1. UL's Decision Not to Create a Certification Program for Rebuilt Circuit Breakers was Neither Discriminatory or Unreasonable**

Defendants allege that UL violated § 1 of the Sherman Act by not granting UL Listing to Defendants and by not creating a UL certification program for rebuilt circuit breakers. Defendants allege that UL made its decision in concert with and at the behest of the manufacturing Plaintiffs. It is undisputed that UL considered, but did not adopt a certification program for rebuilt molded case circuit breakers. It [\*\*31] is undisputed that two Defendants applied for and were denied UL Listing.

UL is an organization that creates product standards and certifications. Products that meet UL's criteria are given a Listing. The Listing for molded case circuit breakers is UL 489. Since 1940, UL 489 has imposed a regimen of safety tests applicable to circuit breakers. According to UL, its safety certification system is premised on the testing of representative product samples. *Midwest Plastic Fabricators, Inc. v. Underwriters Labs. Inc.*, 906 F.2d 1568, 1569-70 (D.C. Cir. 1990). It is undisputed that many of the tests required by UL 489 are destructive. (Vogeler Decl. PP 15-18.)

UL presents evidence that its decision not to adopt a standard for rebuilt circuit breakers was reasonable, non-discriminatory, and based entirely on technical feasibility. UL presents evidence that it could not formulate a program for rebuilt breakers because rebuilt circuit breakers are not uniformly reconstructed and, accordingly, are not able to be subjected to destructive or sample testing. UL presents evidence that there is no uniformity in the rebuilding process, and that Defendants recondition circuit breakers based upon [\*\*32] "each individual circuit breaker's needs and the requests of the customer." (See GCB's Answers to GE's 2d Set of Interrogs.) UL also presents evidence that it could not trace the history of the parts used in the reconditioning process, because Defendants obtain their materials from "other than factory sources." (Contreras Letter, July 21, 1988, UL App. 190.) According to UL, this creates a problem, because UL considers destructive testing and traceability to be "two important parts of the [circuit breaker] program." (Vogeler Dep. at 127.)

In rebuttal, Defendants present no evidence that UL 489 discriminated against them in refusing to establish a certification program for rebuilt molded case circuit breakers. They present no evidence that UL 489 constitutes an unreasonable restraint of trade because it cannot be used to certify rebuilt circuit breakers. Defendants also present no alternative test program that could satisfy UL's destructive testing requirement, nor present any evidence as to how their rebuilding procedures could fit within the sampling requirements of UL 489.

Thus, the Court finds that Defendants do not sustain their burden.

### **2. UL Adequately Considered a [\*\*33] Rebuild Program**

Defendants also allege that UL's decision not to adopt a standard or certification program for rebuilt circuit breakers was (1) done in concert with the manufacturing Plaintiffs, (2) abrogated UL's own process for establishing certification programs, and (3) was an illegal restraint of trade in violation of the Sherman Act.

[\*1279] UL presents evidence that it acted alone and within its standard operating procedures in deciding against establishing a certification program for rebuilt molded case circuit breakers. UL admits that a reconditioning company requested a rebuild standard for circuit breakers. UL also admits that UL agreed to consider such a program. UL admits that in 1984 and 1988, the issue of a UL program for rebuilt molded case circuit breakers was discussed at meetings of the Industrial Advisory Council ("IAC"). (See PBS Ex. 17.)

However, UL presents evidence that it had its engineers evaluate the feasibility of such a program, and that UL decided that such a program was not feasible. (UL App. at 205-10.) UL also presents evidence that it uses IACs to help with its development of requirements, test methods, standards, and related product evaluation programs.

[\*\*34] (UL App. at 236).<sup>9</sup> UL presents evidence, however, that it bases the technical requirements of its programs on information gathered from a number of sources. (UL App. at 236.) UL points out that there is no evidence that UL's engineering department ever approved a certification program for rebuilt molded case circuit breakers.

In addition, UL admits that it asked the manufacturing Plaintiffs if they were interested in a rebuilt circuit breaker program from UL. However, UL presents evidence that this is routine, because the manufacturers are the industry likely to be affected by such a certification. Furthermore, UL points out that Defendants present no evidence that the manufacturing Plaintiffs caused UL to not adopt a rebuilt program, nor that UL [\*\*35] acted in concert with the manufacturing Plaintiffs when it made its decision not to adopt a rebuilt program.

Thus, the Court finds that Defendants do not sustain their burden of raising a genuine issue of material fact as to whether UL abrogated its own procedures in deciding against a rebuilt program against Defendants or that UL's decision was made in concert with the manufacturing Plaintiffs.

### **3. UL's Refusal to Implement Program Did Not Injure Defendants**

Defendants allege that UL's decision not to adopt a standard or certification program for rebuilt molded case circuit breakers is anti-competitive. The Court disagrees. UL presents evidence that its standards apply to all circuit breakers, regardless of the manufacturer, and that its refusal to create a certification program for reconditioned circuit breakers applies to circuit breakers rebuilt by either Defendants or Plaintiffs. UL also presents evidence that it is not the sole certification agency operating in the market, and that it did not coerce or induce any customers into refusing to buy non-UL Listed products. Defendants could seek certification for their rebuilt circuit breakers from another organization.

Thus, [\*\*36] the Court finds that Defendants do not sustain their burden of demonstrating injury to their businesses as a result of UL's decisions.

### **4. UL's Refusal to Implement Program Did Not Injure Market**

In *In re Appraiser Found. Antitrust Litig.*, 867 F. Supp. 1407, 1418 (D. Minn. 1994) (citing *Greater Rockford Energy & Tech. v. Shell Oil*, 998 F.2d 391, 404 (7th Cir. 1993)), aff'd, *National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisal Found.*, 64 F.3d 1130 (8th Cir. 1995), cert. denied, 517 U.S. 1189, 134 L. Ed. 2d 779, 116 S. Ct. 1676 (1996), the court held that a claimant's failure to present evidence proving a causal connection between the alleged anticompetitive conduct and the antitrust claimant's injuries was sufficient to justify summary judgment. In this case, Defendants present no evidence that any injury resulted from UL's refusal to implement a certification program. In fact, neither of Defendants' experts addresses the impact of UL's decision on the market.

Thus, the Court finds that UL's decision not to adopt a standard for rebuilt circuit breakers does not violate the Sherman Act. Defendants did not sustain their burden of [\*1280] presenting evidence that [\*\*37] UL acted in concert with the other Plaintiffs, that UL discriminated against Defendants, that UL's decision was anti-competitive, or that UL's decision caused Defendants any injury.

### **D. Plaintiffs' Alleged Media Campaign**

Defendants argue that Plaintiffs violated § 1 of the Sherman Act by "preparing, distributing, and developing false or misleading ads, statements, press releases and media articles." (See, e.g., PBS 2d Am. Countercls. P 19(f).) Their

<sup>9</sup> IACs consist of technical experts who have a familiarity with UL and its programs. (UL App. at 236.) If UL were considering a program such as a rebuilt circuit breaker certification or standard, it is not unusual for UL to raise the issue with an appropriate IAC.

argument is identical to the argument that Defendants presented on their trade libel and defamation counterclaims. (See PBS 2d Am. Countercls. Counts 3 & 4.)<sup>10</sup>

[\*\*38] The evidence shows that one Plaintiff(Square D) considered a publicity campaign (PBS Exs. 5-7), that articles were published in the press that quoted Plaintiffs and referred to some of the Defendants, and that Plaintiffs had the opportunity to review an article for "technical accuracy" prior to its publication. (PBS Ex. 11.) Based upon this evidence, the Court finds that Defendants do not sustain their burden of demonstrating that Plaintiffs acted in concert to prepare, distribute, or develop any media material in an anti-competitive manner.

Therefore, the Court finds that Defendants may not hold Plaintiffs liable for antitrust violations based upon allegations of trade libel or defamation to the extent that the Court has already ruled on them.

## E. NEMA

Defendants allege that Plaintiffs violated [§ 1](#) of the Sherman Act by "forming, through NEMA, a 'Task Force on Rebuilt Breakers,' an organization to suppress and eliminate the competition of reconditioned molded case circuit breakers," and "through NEMA, withdrawing testing standards applicable to molded case circuit breakers." (Pencon/GMEW 1st Am. Countercls. P 21(2), (6).)

The National Electrical Manufacturers Association [\*\*39] ("NEMA") is a trade association of which Westinghouse, GE, Square D, and other electrical manufacturers are members. UL is not a member of NEMA.

As stated above, [HN18](#)<sup>11</sup> under the "rule of reason" test, to establish a [§ 1](#) violation under the Sherman Act, a claimant must show: "(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; 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')." [Austin v. McNamara, 979 F.2d 728, 738-39 \(9th Cir. 1992\)](#) (citing [McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 \(9th Cir. 1988\)](#)). A claimant must prove that each antitrust defendant had a "conscious commitment to a common scheme designed to achieve an unlawful objective." [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#).

### 1. NEMA's Contacts with the Nuclear Regulatory Commission

In their opposition papers, Defendants allege that Plaintiffs, through NEMA, violated [§ 1](#) of the Sherman Act by undertaking to have [\*\*40] laws enacted requiring labeling and certification for reconditioned circuit breakers. Plaintiffs do not dispute that NEMA petitioned government agencies, to include the NRC, on the issue of rebuilt circuit breakers. However, the Court finds that NEMA's contacts with the government are immune under *Noerr-Pennington*.<sup>11</sup>

### 2. For Forming NEMA's Task Force on Rebuilt Circuit Breakers

<sup>10</sup> The evidentiary cornerstone of Defendants' claim is the article by Arthur Freund, entitled *Circuit Breakers--Boon or Bomb?*, which appeared in EC&M magazine in June, 1989. The Court already found that this article was not actionable against any of the Plaintiffs on either trade libel or defamation grounds. (See Order, dated February 24, 1997 (granting summary judgment in favor of Plaintiffs on Defendants' trade libel and defamation counterclaims)). The Court also found that Defendants did not sustain their burden on the issue of conspiracy. (See Order, dated February 24, 1997.)

<sup>11</sup> See *supra* at 6-10 (discussing *Noerr-Pennington* immunity).

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Defendants also allege that the mere formation of the Task Force violates the Sherman Act. Defendants allege that the formation of the Task Force was motivated by [\*1281] anticompetitive intentions to destroy competition in the rebuilt molded case circuit breaker market.

**HN19** [Footnote] "Attendance at trade association meetings and participation in trade association activities are not, in and of themselves, condemned or even discouraged by the antitrust laws." *Moore v. Boating Indus. Ass'n*, 819 F.2d 693, 712 (7th Cir.), cert. denied, 484 U.S. 854, 98 L. Ed. 2d 115, 108 (\*\*41) S. Ct. 160 (1984); *Greater Rockford Energy & Tech. v. Shell Oil*, 998 F.2d 391, 396-97 (7th Cir. 1993) (finding that common membership in trade association and standard-setting organization was not evidence of conspiracy); *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988).

The Court finds that, even taking the evidence in a light most favorable to Defendants, Defendants have not raised a genuine issue of material fact as to whether the formation of the Task Force violates the Sherman Act.

The Court also finds that Defendants do not sustain their burden of demonstrating antitrust injury caused by the formation of NEMA's Task Force. Defendants present no evidence tying NEMA's Task Force to any changes in the market, and no evidence tying NEMA's Task Force to any of Defendants' individual business losses. The Court finds that the opinions and conclusions made by their expert witnesses, Smith and Weinstein, and the declarations submitted by their employees, such as Rene Contreras, do not support a causal connection between the NEMA Task Force, on the one hand, and any injuries to Defendants or the market generally, on the other. See *In re* (\*\*42) *Appraiser Found. Antitrust Litig.*, 867 F. Supp. at 1418.

### 3. NEMA's Rescission of AB-2

Finally, Defendants allege that Plaintiffs violated [§ 1](#) of the Sherman Act by acting through NEMA to rescind AB-2.

NEMA promulgated AB-2 in 1984. In January 1989, after the commencement of this litigation, NEMA voted to rescind AB-2. Plaintiffs argue that NEMA's rescission of AB-2 cannot give rise to antitrust liability because NEMA's decision was motivated by legitimate safety concerns and not an intent to injure competition. Defendants have not presented evidence that the rescission of AB-2 injured competition in the reconditioned circuit breaker market.

According to Plaintiffs, AB-2 was a field test intended to be used to verify the performance of circuit breakers that had been in service for some time. Plaintiffs present evidence that AB-2 was a non-binding "authorized engineering information," which "consists of explanatory data and other engineering information of an informative character not falling within the classification of a NEMA Standard or Suggested Standard for Future Design." (NEMA Standardization Policies and Procedures, GE Ex. 32.) Plaintiffs note that NEMA's standards (\*\*43) and procedures do not carry the force of law, and NEMA has no means by which to coerce compliance with AB-2 or any other NEMA promulgation. Plaintiffs also present evidence that NEMA was concerned that reconditioning companies were using AB-2 as a certification test, and that the NRC had directed nuclear facilities to use the test to check their circuit breakers. (Heerlein Dep.; Baird Dep.)

The Court finds that the evidence submitted by Plaintiffs indicates that AB-2 was rescinded for legitimate technical reasons. The letters and deposition testimony focus on the issues of safety and manufacturer liability. Defendants present no evidence tending to show that AB-2 was rescinded for any reason other than NEMA's concern over safety.

In addition, Plaintiffs point out that Defendants present no evidence that they were injured by the rescission of AB-2, or that the market for reconditioned circuit breakers was in any way affected by the rescission of AB-2. There is no evidence that indicates that any Defendants advertised their products as AB-2 tested.

Based on the foregoing, the Court finds that the Plaintiffs' non-immune actions through NEMA do not constitute a violation of the Sherman (\*\*44) Act.

### III. Proving Antitrust Injury

The Ninth Circuit has stated that [HN20](#) proving antitrust injury is important in a [§ 1](#) case. *Austin v. McNamara, 979 F.2d 728, 739 [\*1282] (9th Cir. 1992)*. "Antitrust injury" is "injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged." *Id. at 738*. To establish antitrust injury, a claimant must show "not merely injury to himself as a competitor, but rather injury to competition." *Id. at 739*.

Defendants rely primarily on the declarations of two expert witnesses in an effort to sustain their burden as to antitrust injury. While the Court finds that these witnesses are qualified to provide expert testimony in an antitrust matter,<sup>12</sup> the Court does not believe that their testimony or findings are helpful to determining whether Plaintiffs' non-immune activities were anticompetitive or violative of the Sherman Act. First, the Court finds that their testimony is relevant only to Defendant GCB. Second, the Court finds that Defendants' experts' testimony is conclusory, and opines as to the ultimate fact at issue. This evidence does not assist the Court in assessing antitrust injury. [\[\\*\\*45\]](#) Third, the Court finds that the experts fail entirely to delineate between the injuries caused by Plaintiffs' immune activities and those activities not protected under the *Noerr -Pennington* doctrine.

Thus, the Court finds that Defendants have not sustained their burden of providing evidence of any "antitrust injury" that can be attributed to any of Plaintiffs' non-protected activities.

### Antitrust Conclusion

Based upon foregoing, the Court finds that Defendants have not sustained their burden of showing that there exists a genuine issue of material fact as to any of their Sherman Act counterclaims. Thus, the Court grants Plaintiffs' motions for partial summary judgment against Defendants as to all of their antitrust counterclaims.

### INTENTIONAL INTERFERENCE DISCUSSION

[\[\\*\\*46\]](#) In nearly identical language, Defendants counterclaim against Westinghouse, GE, and Square D for intentional interference with prospective economic advantage. (See PBS 2d Am. Countercls. PP 25-31; Pencon/GMEW 1st Am. Countercls. PP 45-51; GCB 2d Am. Countercls. PP 28-34.)<sup>13</sup> Defendants allege that the manufacturing Plaintiffs "induced and encouraged [distributors, contractors, industrial companies, and governmental entities] to cease doing business with or to significantly reduce the amount of business they do with [Defendants]." (GCB 2d Am. Countercls. P 31.) Defendants allege that Plaintiffs accomplished this "through threats of loss of distributorship, intimidation and false statements and other intentional conduct by employees, agents, managers, officers, and directors of [Plaintiffs]." (Pencon/GMEW 1st Am. Countercls. P 49.)

[HN21](#) To prevail on a claim of intentional interference with prospective [\[\\*\\*47\]](#) economic advantage, a claimant must provide evidence of: (1) an economic relationship between itself and third parties containing the probability of future economic benefit; (2) the defendant's knowledge of these relationships; (3) intentional, wrongful conduct on the part of the defendant designed to interfere with or disrupt the relationships; (4) actual disruption; and (5) resulting damage. *Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 380 n.1, 902 P.2d 740 (1995)*. The allegedly tortious conduct must be "wrongful by some legal measure other than the fact of interference itself." *Id. at 393*.

Defendants have the burden of demonstrating that Plaintiffs' conduct is wrongful in an actionable sense. They do not sustain their burden. Defendants present no evidence that Plaintiffs engaged in non-*Noerr-Pennington*-protected wrongful conduct that caused Defendants injury. To the extent that Defendants' claims for intentional

<sup>12</sup> The Court finds that the expert testimony of Smith and Weinstein is not objectionable under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*, and *Federal Rule of Evidence 702*.

<sup>13</sup> Pencon/GMEW counterclaims only against Westinghouse and GE. Pencon/GMEW settled its case with Square D.

interference are based on conduct protected by the *Noerr-Pennington* doctrine, such claims fail because the conduct cannot be found wrongful under a state tort law. Sessions [\*1283] [\*Tank Liners, Inc. v. Joor Mfg., Inc.\*, 17 F.3d 295, 301-02](#) [\*\*\*481] (*9th Cir. 1994*) (where a party is shielded from liability under *Noerr-Pennington* for certain conduct, it cannot be liable for intentional interference with prospective economic advantage for that same behavior). Thus, Defendants must establish injuries stemming from a disruption of a relationship, not the filing of *In re Circuit Breaker Litigation* or Plaintiffs' other petitioning activities.

To the extent that Defendants' claims for intentional interference with prospective economic advantage are based on allegedly defamatory statements, such claims also fail. [\*Blatty v. New York Times Co.\*, 42 Cal. 3d 1033, 1045-48, 232 Cal. Rptr. 542, 728 P.2d 1177](#) (1986) (where basis of an intentional interference allegation is the injurious falsehood of a statement, no claim exists if the statements are true or if they do not specifically refer to the party seeking recovery). The Court granted partial summary judgment in favor of Plaintiffs on Defendants' trade libel and defamation counterclaims, and as such, these allegations cannot constitute the requisite independent "wrongful conduct" under *Della Penna*.

In addition, Defendants fail to sustain their burden as to the extent of [\*\*\*49] their injuries suffered by Plaintiffs' non-protected and legal activities. Defendants present no evidence tying their injuries to conduct "wrongful by some legal measure other than the fact of interference itself." See [\*Della Penna\*, 11 Cal. 4th at 393](#). While Defendants' experts testify that Plaintiffs' activities injured Defendants, they do not establish by evidence the requisite causal connection between Plaintiffs' non-immune activities and Defendants' injuries. Like the evidence presented in support of their antitrust claims, Defendants are not able to tie injuries to actions. They and their experts instead rely on generalizations. In order to withstand this motion for summary judgment, Defendants needed to present evidence tying non-protected activities to business losses. They have not done this.

### **Intentional Interference Conclusion**

Based upon the foregoing, the Court finds that Defendants have not sustained their burden as to presenting evidence indicating (1) wrongful conduct or (2) injury. Thus, the Court grants partial summary judgment in favor of the Plaintiffs as to Defendants' counterclaims for intentional interference with prospective economic advantage.

### **[\*\*50] CONCLUSION**

Based upon the foregoing, the Court GRANTS Plaintiffs' motions for partial summary judgment against Defendants' antitrust and intentional interference counterclaims. The Court DENIES UL's motion to strike the declarations of Richard Smith and Roy Weinstein.

IT IS SO ORDERED.

Dated: 4/1/97

CONSUELO B. MARSHALL

UNITED STATES DISTRICT JUDGE



## *DiscoVision Assocs. v. Disc Mfg.*

United States District Court for the District of Delaware

April 3, 1997, Decided

Civil Action No. 95-21-SLR CONSOLIDATED Civil Action No. 95-345-SLR

### **Reporter**

1997 U.S. Dist. LEXIS 7507 \*; 42 U.S.P.Q.2D (BNA) 1749 \*\*

DISCOVISION ASSOCIATES, Plaintiff, v. DISC MANUFACTURING, INC., a Delaware Corporation, Defendant.  
DISC MANUFACTURING, INC., Plaintiff, v. PIONEER ELECTRONIC CORP., PIONEER ELECTRONICS (USA), INC., PIONEER ELECTRONICS CAPITAL, INC., and DISCOVISION ASSOCIATES, Defendants.

**Disposition:** [\*1] Pioneer Electronic Corp.'s, Pioneer Electronics (USA), Inc.'s, Pioneer Electronics Capital, Inc.'s, and DiscoVision Associates's motion to dismiss (D.I. 171) denied.

## **Core Terms**

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patents, alleges, technology, mastering, licensing, manufacturers, replication, markets, encoded, compact disc, monopolize, package, Sherman Act, competitors, tying arrangement, infringement, foreclosed, Cartwright Act, anticompetitive, continuation, horizontal, violations, antitrust claim, anti trust law, tactics, motion to dismiss, purchasers, antitrust, injection, molding

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

### **HN1** [] **Defenses, Demurrsers & Objections, Motions to Dismiss**

In ruling on a *Fed. R. Civ. P. 12(b)*, motion to dismiss, the court will consider primarily the allegations contained in the complaint. The court, may also consider matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint. The court must accept all factual allegations in the complaint as true. The court is also bound to give a plaintiff the benefit of every reasonable inference to be drawn from the complaint. The court must resolve any ambiguities concerning the sufficiency of the claims in favor of the plaintiff.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

### **HN2** [] **Defenses, Demurrsers & Objections, Motions to Dismiss**

The 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.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

### **HN3** Complaints, Requirements for Complaint

Fed. R. Civ. P. 8(a) requires a short and plain statement of the claim showing the pleader is entitled to relief. Plaintiffs are not required to plead all their evidence in order to avoid a dismissal under Fed. R. Civ. P. 12.

Patent Law > US Patent & Trademark Office Proceedings > Continuation Applications > Priority

Patent Law > US Patent & Trademark Office Proceedings > Continuation Applications > General Overview

### **HN4** Continuation Applications, Priority

A continuation application is a patent application that is entitled to the filing date of an earlier parent application. 35 U.S.C.S. § 120. A patent issued from a continuation application benefits from the earlier filing date for the purpose of determining its validity in view of prior art. A continuation application is an application whose specification is the same as that of the parent application, but whose claims may be the same or different from those of the parent application.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

### **HN5** Monopolies & Monopolization, Actual Monopolization

To form the basis of a 15 U.S.C.S. § 2, violation, conduct must be the type that actually monopolizes or dangerously threatens to do so.

Antitrust & Trade Law > Sherman Act > General Overview

### **HN6** Antitrust & Trade Law, Sherman Act

The Sherman Act directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

### **HN7** Monopolies & Monopolization, Actual Monopolization

The elements of the offense of monopolization are the possession of monopoly power in the relevant market and 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

## **[HN8](#)[] Monopolies & Monopolization, Attempts to Monopolize**

The elements of an attempted monopolization are exclusionary or anticompetitive conduct, a specific intent to monopolize, and a dangerous probability of achieving monopoly power.

Patent Law > US Patent & Trademark Office Proceedings > Continuation Applications > General Overview

## **[HN9](#)[] US Patent & Trademark Office Proceedings, Continuation Applications**

The Patent Act, which allows a patent applicant to file continuation applications, does not limit the number of applications. [35 U.S.C.S. § 120](#).

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

## **[HN10](#)[] Ownership & Transfer of Rights, Assignments**

A patent owner's right to license the patented invention is based on the Patent Act, [35 U.S.C.S. § 154](#), which grants a patent owner the right to exclude others from making, using, offering for sale, or selling its patented article or process during the life of the patent. [35 U.S.C.S. § 154](#).

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Patent Law > ... > Utility Patents > Product Patents > Compositions of Matter

Patent Law > ... > Utility Patents > Product Patents > General Overview

Patent Law > ... > Utility Patents > Product Patents > Machines

Patent Law > ... > Utility Patents > Product Patents > Manufactures

Patent Law > Utility Requirement > Proof of Utility

## **[HN11](#)[] International Commercial Arbitration, Arbitration**

The patent laws grant a monopoly for any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof for a varying term. [35 U.S.C.S. § 101](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

## [\*\*HN12\*\*](#) [blue icon] **Monopolies & Monopolization, Actual Monopolization**

The Sherman Act makes it a felony for every person who shall monopolize, or attempt to monopolize any part of trade or commerce. [15 U.S.C.S. § 2.](#)

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

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

## [\*\*HN13\*\*](#) [blue icon] **Misuse of Rights, Patent Misuse Defense**

If a patent holder seeks to expand the monopoly granted by the patent laws by misuse, agreement, or accumulation he may incur antitrust liability.

Patent Law > Ownership > Patents as Property

## [\*\*HN14\*\*](#) [blue icon] **Ownership, Patents as Property**

The mere accumulation of patents, no matter how many, is not in and of itself illegal.

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

## [\*\*HN15\*\*](#) [blue icon] **Tying Arrangements, Sherman Act Violations**

Under the Sherman Act, a tying arrangement is condemned if it can be shown that the tying arrangement foreclosed competition on the merits in the market for the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

## [\*\*HN16\*\*](#) [blue icon] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Antitrust liability for a tying arrangement is usually determined under the per se rule. Per se liability may be found without inquiry into actual market conditions. The per se rule is only appropriate if the existence of forcing is probable. In the absence of per se liability, the antitrust plaintiff has the burden of proving that the tying arrangement unreasonably restrained competition.

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN17\*\*](#) [blue icon] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

#### **[HN18](#)[] Tying Arrangements, Clayton Act**

See [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

#### **[HN19](#)[] Private Actions, Remedies**

The injury requirement of the Sherman Act is established by the necessity of having to make a choice among alternatives each of which has an adverse economic or financial impact.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

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

#### **[HN20](#)[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Agreements between competitors to allocate territories or customers in order to minimize competition are violations under the Sherman Act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

#### **[HN21](#)[] Public Enforcement, State Civil Actions**

Trust is defined by the California Cartwright Antitrust Act, [Cal. Bus. & Prof. Code § 16720 et seq.](#), as a combination of capital, skill or acts by two or more persons for any of the following purposes to create or carry our restrictions in trade or commerce, to make or enter into or execute or carry out contracts, obligations or agreements by which they agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale of any article or commodity, that its price might in any manner be affected. [Cal. Bus. & Prof. Code § 16720](#).

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

## **HN22[] Regulated Practices, Trade Practices & Unfair Competition**

The California Unfair Competition Act, [Cal. Bus. & Prof. Code § 17200 et seq.](#), prohibits unlawful, unfair or fraudulent business practices. An unlawful business practice includes anything that can properly be called a business practice and that at the same time is forbidden by law.

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**Judges:** Sue L. Robinson, United States District Judge

**Opinion by:** Sue L. Robinson

## **Opinion**

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### **[\*\*1751] MEMORANDUM OPINION**

Date: [\*2] April 3, 1997

Wilmington, Delaware

**Sue L. Robinson, District Judge**

### **I. INTRODUCTION**

Plaintiff DiscoVision Associates ("DiscoVision") filed Civil Action No. 95-21-SLR against defendant Disc Manufacturing, Inc. ("DMI") on January 17, 1995 alleging infringement of six DiscoVision patents relating to optical disc technology. (D.I. 1) Later that same day, DMI filed a complaint in the United States District Court for the Central District of California alleging violations of [§§ 1 and 2](#) of the Sherman Antitrust Act, [15 U.S.C. §§ 1, 2](#), the California Cartwright Antitrust Act, [Cal. Bus. & Prof. Code, §§ 16720 et seq.](#), and the California Unfair Competition Act, [Cal. Bus. & Prof. Code §§ 17200 et seq.](#). DMI's complaint names as defendants Pioneer Electronic Corporation ("Pioneer Japan"), Pioneer Electronics (USA), Inc. ("Pioneer USA"), Pioneer Electronics Capital, Inc. ("Pioneer Capital") (collectively referred to as "Pioneer") and DiscoVision. On July 13, 1995, DMI's antitrust complaint, Civil Action No. 95-345-SLR, was consolidated with DiscoVision's patent infringement action. (D.I. 42)

On September, 13, 1996, DMI sought permission from this court to file a First [\*3] Amended and Supplemental Complaint. (D.I. 133) Pursuant to this court's order, DMI's First Amended and Supplemental Complaint ("amended complaint") was deemed filed on October, 17, 1996. (D.I. 133, 166). Presently before this court is Pioneer's and DiscoVision's motion to dismiss portions of DMI's antitrust claims and corresponding affirmative defenses pursuant to [Federal Rule of Civil Procedure 12\(b\)](#). (D.I. 171, 172) For the reasons stated below, the court will deny Pioneer's and DiscoVision's motion to dismiss.

## II. BACKGROUND

This case involves optical discs, known as compact discs or "CD-ROM" discs ("CDs"). CDs can be "digitally encoded" to contain audio music or computer information. (D.I. 133, Ex. A at 9) Digitally encoded "industry standard" CDs are made under the Philips/Sony standard.<sup>1</sup> (D.I. 133, Ex. A at 11) In order to mass produce CDs, a "master disc" must be made. The master disc is used to create "stampers" which are then used in commercial injection molding equipment to "replicate" or mass produce the desired CD. (D.I. 171 at 4 n.4) According to DMI, there are three distinct technology markets<sup>2</sup> relating to CDs: (1) an encoded CD technology market (i.e. [\*4] a market for licenses under patents that cover industry standard CDs); (2) a CD replication technology market; and (3) a CD mastering technology market. (D.I. 133, Ex. A at 9-11)

DMI is a Delaware corporation engaged in the manufacture and sale of CDs. (D.I. 133, Ex. A at 2, 6) DMI has research and development operations (as well as a manufacturing facility) in Anaheim, California. [\*5] (D.I. 133, Ex. A at 2, 7) DMI provides mastering services for other CD manufacturers by supplying them with "stampers" made from a master disc. (D.I. 133, Ex. A at 10, 34) DMI is also attempting to make and sell CD mastering equipment of its own design. (D.I. 133, Ex. A at 10, 34) DMI participates in the CD replication technology market as a purchaser and user of injection molding equipment which embodies CD replication technology. (D.I. 133, Ex. A at 9) DMI participates in the CD mastering technology market as a manufacturer and seller of stampers made from master discs. (D.I. 133, Ex. A at 10) Finally, DMI participates in the encoded CD technology market as a licensee of Philips/Sony, which enables DMI to produce industry standard CDs. (D.I. 133, Ex. A at 11)

Pioneer Japan is a Japanese corporation and the parent company of Pioneer USA and Pioneer Capital. (D.I. 133, Ex. A at 7) Pioneer Japan has its principal place of business in Tokyo, Japan. (D.I. 133, Ex. A at 7) Pioneer USA and Pioneer Capital are Delaware corporations that are general partners in DiscoVision. (D.I. 133, Ex. A at 8) [\*\*1752] DiscoVision is a California partnership with its principal place of business in Irvine, California. [\*6] (D.I. 133, Ex. A at 8)

DiscoVision owns and manages a patent portfolio of approximately 150 United States patents and 1,300 patents worldwide. (D.I. 172 at 4) Included in DiscoVision's patent portfolio are patents relating to CDs. (D.I. 172 at 4) DiscoVision also owns patents relating to optical disc players, mastering equipment, and replication equipment.

In its amended complaint, DMI alleges that DiscoVision participates in the CD replication technology market as the purported owner of the Holmes 4,185,955 patent and the Gregg 4,500,484 patent ("Gregg '484 patent"). (D.I. 133, Ex. A at 10) DMI alleges that DiscoVision participates in the CD mastering technology market as the purported owner of the Dakin 4,228,326 patent, the Somers 4,190,860 patent, the De Romana 4,499,569 patent, and the Wilkinson 4,337,538 patent. (D.I. 133, Ex. A at 11) These patents allegedly cover equipment and processes for making master discs. (D.I. 133, Ex. A at 11) DiscoVision participates in the encoded CD technology market as the purported owner of the Gregg 4,893,297 patent ("Gregg '297 patent"), the Gregg 4,819,223 patent ("Gregg '223"), the Bailey 5,003,526 patent ("Bailey '526 patent"), the Bailey [\*7] 5,373,490 patent ("Bailey '490 patent), and the Bailey 5,375,116 patent ("Bailey '116 patent") (D.I. 133, Ex. A at 11) DMI claims that DiscoVision asserts that these patents cover digitally encoded CDs under the Philips/Sony CD standard. (D.I. 133, Ex. A at 11)

According to DMI, DiscoVision has monopoly power in the encoded CD technology market. (D.I. 133, Ex. A at 18) Specifically, DMI alleges that DiscoVision has licensed more than 80% of the CD manufacturers in the United

<sup>1</sup> Philips and Sony promulgated the industry standard for CDs. As a result, CD manufacturers must make CDs that substantially comply with the Philips/Sony standard. (D.I. 133, Ex. A at 18)

<sup>2</sup> A technology market has been defined as a market consisting of "the intellectual property that is licensed (the 'licensed technology') and its close substitutes -- that is, the technologies or goods that are close enough substitutes significantly to constrain the exercise of market power with respect to the intellectual property that is licensed." 1 William C. Holmes, "Intellectual Property and Antitrust Law," § 5.06, 3.2.2. (Feb. 1996).

States under the Bailey and Gregg patents allegedly covering CDs made according to the Philips/Sony industry standard. (D.I. 133, Ex. A at 17-18)

In its amended complaint, DMI alleges that DiscoVision and Pioneer are liable for violations of [§§ 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2](#) (count I); violations of the California Cartwright Antitrust Act, [Cal. Bus. & Prof. Code, §§ 16720 et seq.](#) (count II); and violations of the California Unfair Competition Act, [Cal. Bus. & Prof. Code, §§ 17200 et seq.](#) (count III). (D.I. 133, Ex. A) Counts II and III ("state claims") are based on the same allegations that form the basis for DMI's federal antitrust claims set forth in count I. Count I sets forth numerous [[\\*8](#)] factual allegations regarding DiscoVision's anticompetitive conduct. Although count I does not specifically identify how the factual allegations of anticompetitive conduct relate to specific antitrust violations, DMI's brief opposing the motion to dismiss organizes the allegations of count I as follows.

According to DMI, DiscoVision monopolized or attempted to monopolize the technology markets for encoded CDs, CD replication equipment, and CD mastering equipment by committing the following acts: (1) fraudulently obtaining patents that allegedly cover technology in the encoded CD and CD replication technology markets;<sup>3</sup> (D.I. 133, Ex. A at 11-17); (2) asserting objectively baseless lawsuits for infringement of these patents against CD manufacturers; (3) abusing the Patent and Trademark Office's ("PTO") continuation application provisions and/or employing improper delaying tactics in the PTO; (4) coercing CD manufacturers into a package license agreement for DiscoVision's entire patent portfolio of approximately 150 U.S. patents; (5) engaging in a market allocation licensing practice by only requiring licenses for the use and not the sale of CD mastering and replication equipment; (6) entering into an agreement with Philips, Sony, and Nimbus to authorize the sale of CD mastering and replication [[\\*9](#)] equipment without licenses from DiscoVision; and (7) improperly using its monopoly power in the encoded CD technology market to tie its patents in the encoded CD technology market to its patents relating to mastering and replication.

In its amended complaint, DMI sets forth specific allegations relating to DiscoVision's alleged acts of fraud before the PTO. During the prosecution of applications that led to the Gregg '484, 223, and '297 patents, DiscoVision is alleged to have purposefully withheld material prior art and made intentional misrepresentations to the PTO. (D.I. 133, Ex. A at 13-15) DiscoVision is also alleged to have purposefully withheld material prior art during the prosecution of applications that led to the Bailey '526, '680, '490, and '116 patents. (D.I. 133, Ex. A at 15-17)

[[\\*10](#)] DMI alleges that DiscoVision abused the PTO's continuation application provisions and engaged in improper delaying tactics by [[\\*\\*1753](#)] "filing a serial stream of continuation applications" in connection to the applications that led to the Gregg and Bailey patents. (D.I. 133, Ex. A at 21) DiscoVision also allegedly delayed the Gregg and Bailey patents through

misrepresentation and misleading statements to the patent examiners, by withholding material prior art and other essential information from patent examiners, by filing amendments introducing prohibited new matter, and through other violations of the Patent Office regulations and obligations of honesty, candor, and good faith.

(D.I. 133, Ex. A at 23 P 27(c)) According to DMI, "the issuance of the Gregg patents filed in 1968, were improperly delayed for over twenty years." (D.I. 133, Ex. A at 21) The Bailey patents were also allegedly delayed for more than 13 years after the original application was filed in 1980. (D.I. 133, Ex. A at 21) In 1993, DiscoVision is alleged to have added over 100 new claims for prosecution in connection with the Bailey application. (D.I. 133, Ex. A at 21) DMI specifically alleges that "the Patent [[\\*11](#)] Office explicitly stated that 'the only purpose' of a certain (DiscoVision) tactic 'was to delay the time at which the public would be entitled to the inventions['] free use.' [sic]" (D.I. 133, Ex. A at 21)

DMI alleges that the result of DiscoVision's "improper abuses of the patent system has been to obtain a large number of patents based on the same initial disclosure covering essentially the same subject matter." (D.I. 133, Ex.

<sup>3</sup> DMI's allegations of fraud relate to the prosecution of patent applications that resulted in the Gregg and Bailey patents which purportedly cover technology in the encoded CD and CD replication technology markets. (D.I. 133, Ex. A at 10-11) In its brief, DMI alleges that the allegations of fraud relating to the Bailey patents supports its claim that DiscoVision monopolized or attempted to monopolize the CD mastering technology market as well. (D.I. 197 at 10)

A at 21) DMI alleges that DiscoVision obtained a large number of patents from a single patent application in order to coerce CD manufacturers into accepting DiscoVision's entire package of patents. According to DMI, DiscoVision coerces CD manufacturers into accepting the package license by charging a 2% royalty for the use of each patent individually while charging a 3% royalty for a license on DiscoVision's entire patent portfolio. (D.I. 133, Ex. A at 22)

The allegation that DiscoVision coerces CD manufacturers into taking DiscoVision's package license is based on the following specific allegations:

- (1) DiscoVision makes it economically unreasonable to license a single patent. For example, a license under the seven asserted Gregg and Bailey [\*12] patents would require a royalty rate of 14%, whereas a license under DiscoVision's entire portfolio is only 3%. (D.I. 133, Ex. A at 28)
- (2) DiscoVision threatens and institutes infringement lawsuits (D.I. 133, Ex. A at 27)
- (3) DiscoVision exerts pressure on the customers of CD manufacturers to buy only CDs from a DiscoVision licensee. DiscoVision threatens infringement lawsuits against record labels, CD distributors, CD importers, and CD retail outlets unless these entities purchase CDs from a DiscoVision licensee. (D.I. 133, Ex. A at 29)

The alleged result of these activities is to "hinder and foreclose competition in the replication and mastering technology markets by eliminating the incentive to design around [DiscoVision's] mastering and replication patents." (D.I. 133, Ex. A at 28)

The allegations relating to DiscoVision's market allocation licensing practice is based on the following specific allegations:

[DiscoVision] has adopted a policy of not licensing the sale of compact disc manufacturing apparatus, but has tacitly authorized manufacturers of compact disc mastering and injection molding equipment to sell their equipment to compact disc manufacturers. [\*13] After the compact disc manufacturers are locked-in and heavily invested in the compact disc mastering and injection molding equipment, [DiscoVision] then seeks a per disc royalty on every disc manufactured using the purchased equipment. [DiscoVision] uses this market allocation practice in the compact disc replication technology market and the compact disc mastering technology market to illegally shift, and thereby magnify, royalty charges from equipment suppliers to equipment purchasers. (D.I. 133, Ex. A at 22)

In connection with these allegations, DiscoVision is alleged to have entered into agreements with Philips, Sony, and Nimbus relating to the "tacitly" authorized sale of mastering equipment.<sup>4</sup> (D.I. 133, Ex. A at 25) According to DMI, DiscoVision's "tacitly authorized sale" tactic has the anticompetitive effect in the downstream compact disc manufacturers' product market of wrongfully increasing marginal costs per disc and thereby reducing output." (D.I. 133, Ex. A at 25) DMI alleges that the effect of DiscoVision's contracts with Philips, Sony, and Nimbus is "that these manufacturers have no incentive to design around [\*\*1754] [DiscoVision's] patents because they are authorized [\*14] by [DiscoVision] to sell the mastering equipment without interference by [DiscoVision]." (D.I. 133, Ex. A at 25) According to DMI, these allegations amount to "an agreement among horizontal competitors in the mastering technology market to divide the market and reduce competition in the market." (D.I. 133, Ex. A at 25) In a properly functioning market, DMI alleges, the mastering suppliers would have an incentive to design around DiscoVision's patents. DMI alleges that DiscoVision's agreements with these equipment suppliers have "essentially eliminated any incentive to innovate and design around [DiscoVision's] patents in the [CD] mastering technology market, and thereby harmed and foreclosed significant competition in the market by reducing output." (D.I. 133, Ex. A at 26)

DMI also alleges that DiscoVision tacitly authorized manufacturers of injection molding machines to sell those machines [\*15] without requiring a license. (D.I. 133, Ex. A at 26) The alleged effect of this conduct is that it enables DiscoVision "to suppress competition in the CD injection molding technology market and the mastering technology market by chilling the competitive incentive by such equipment manufacturers to innovate and design around DiscoVision's patents." (D.I. 133, Ex. A at 26)

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<sup>4</sup> DMI alleges that Philips, Sony, and Nimbus are major suppliers of mastering equipment. (D.I. 133, Ex. A at 25)

According to DMI, DiscoVision's "tacitly authorized sale" tactic in the CD mastering and replication technology markets creates and exploits market imperfections which injure CD manufacturers and purchasers. As a result of this tactic, CD manufacturers and purchasers are the only entities threatened with infringement lawsuits and excessive royalty demands. (D.I. 133, Ex. A at 26) DMI alleges that CD manufacturers and purchasers are not as capable, informed, or motivated as the equipment manufacturers to evaluate DiscoVision's infringement charges or to design around DiscoVision's patents. (D.I. 133, Ex. A at 26)

Finally, DMI alleges that DiscoVision "improperly uses its monopoly power in the encoded disc technology market to tie its patents in the encoded disc technology market to [its] mastering patents and replication [\*16] patents as part of a package license." (D.I. 133, Ex. A at 27-30) DMI alleges that this "tying arrangement reduces and forecloses competition in the compact disc mastering and replication technology markets by eliminating the incentive to innovate and design around [DiscoVision's] patents in these markets." (D.I. 133, Ex. A at 30) DMI also alleges that this tying arrangement "improperly raises the cost of producing discs in the compact disc manufacturers' market." (D.I. 133, Ex. A at 30) The tying arrangement also allegedly discourages and/or forecloses CD manufacturers from licensing or obtaining mastering and replication equipment from other sources. (D.I. 133, Ex. A at 30)

DMI's § 1 claims allege (1) an unlawful tying of encoded disc patents with mastering and replication patents, (2) a horizontal agreement to allocate customers in the mastering technology market, and (3) an unlawful contract intended to raise the costs of a competitor. (D.I. 197 at 11) DMI's allegations regarding the unlawful tying arrangement and the horizontal agreement are based on the same allegations used to support DMI's § 2 monopolization claims. DMI also alleges that DiscoVision has an agreement with [\*17] Nimbus that requires DiscoVision "to sue DMI without reference to the merit of the suit." (D.I. 133, Ex. A at 30) DMI alleges that the purpose of this contract is to raise the cost of DMI as a competitor. (D.I. 133, Ex. A at 30)

DMI alleges that DiscoVision acted in all circumstances with the specific intent to acquire and/or maintain monopoly power over the three technology markets, as well as the CD manufacturers' product market. (D.I. 133, Ex. A at 35, 36) DMI alleges that there is a "dangerous probability that [DiscoVision] will successfully monopolize" these markets and that its activities have substantially injured competition. (D.I. 133, Ex. A at 37) DMI claims that its business has been injured by DiscoVision's activities by forcing DMI to defend itself against DiscoVision's patent infringement suits. (D.I. 133, Ex. A at 37)

### III. DISCUSSION

#### A. Standard for Dismissal Under Rule 12(b)

**HN1**[↑] In ruling on a Rule 12(b) motion to dismiss, the court will consider primarily the allegations contained in the complaint. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). The court, however, may also consider matters of public [\*18] record, orders, items appearing in the record of the case, and exhibits attached to the complaint. *Id.* The court must accept all factual allegations in the complaint as true. Cruz v. Beto, 405 U.S. 319, 322, 31 L. Ed. 2d 263, 92 S. Ct. 1079 (1972) (per curiam). The court is also bound to give a plaintiff the benefit of every reasonable inference to be drawn from the complaint. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 10 L. Ed. 2d 678, 83 S. Ct. 1461 (1963). Additionally, the court [\*\*1755] must resolve any ambiguities concerning the sufficiency of the claims in favor of the plaintiff. Hughes v. Rowe, 449 U.S. 5, 10, 66 L. Ed. 2d 163, 101 S. Ct. 173 (1980) (per curiam). **HN2**[↑] The "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).

#### B. Pleading Requirements for Antitrust Claims

The level of specificity required in pleading antitrust claims is regulated by the same standards as other causes of action. *Fusco v. Xerox Corp.*, 676 F.2d 332 (8th Cir. 1982); [\*19] see also Wright & Miller, Federal Prac. & Proc. § 1228 (Civil 2d ed. 1990). [HN3](#)<sup>5</sup> Federal Rule 8(a) requires a "short and plain statement of the claim showing the pleader is entitled to relief." *F.R.Civ.P. 8(a)*. Plaintiffs are not required to plead all their evidence in order to avoid a dismissal under [Rule 12](#). *Grid Systems Corp. v. Texas Instruments, Inc.*, 771 F. Supp. 1033, 1037 (N.D. Cal. 1991).

The parties dispute the manner in which the court should analyze DMI's "claims." DMI argues that "in approaching antitrust claims, the evidence must be analyzed as a whole, rather than in isolation." (D.I. 197 at 13) DiscoVision argues that the court should analyze "discrete antitrust claims independently." (D.I. 229 at 3) In arguing that the court should analyze "discrete antitrust claims," Pioneer and DiscoVision have moved to dismiss specific portions of DMI's amended complaint. (D.I. 229 at 3) Specifically, they have moved to dismiss DMI's allegations relating to DiscoVision's (1) abuses of the PTO's continuation applications, (2) delaying tactics in prosecuting patent applications, and (3) licensing practices, including DMI's tying claim. (D.I. 172 at 12-34) Based on the same arguments, [\*20] Pioneer and DiscoVision also seek dismissal of DMI's corresponding state claims.<sup>5</sup>

### C. DMI's [§ 2](#) Monopolization Claims

DMI has alleged that DiscoVision attempted to or has monopolized the three technology markets for encoded CDs, CD replication equipment, and CD mastering equipment. According to DMI, its monopolization claims are based on an "overall pattern of conduct." (D.I. 197 at 16) DiscoVision's alleged "pattern of conduct" to monopolize these three technology markets involves, *inter alia*, patent prosecution "abuses" and package licensing practices. DiscoVision is alleged to have "abused" the patent system by fraudulently [\*21] procuring patents and filing numerous continuation applications.<sup>6</sup> DiscoVision's alleged package licensing practice involves (1) tying licenses in the encoded CD technology market to licenses in the CD replication and mastering markets and (2) a market allocation among horizontal competitors to license only the use of the CD replication and mastering equipment, rather than its sale.

[HN5](#)<sup>5</sup> To form the basis [\*22] of [§ 2](#) violation, conduct must be the type that "actually monopolizes or dangerously threatens to do so." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993). This is consistent with the overall purpose of [HN6](#)<sup>6</sup> the Sherman Act, which "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Id. at 458*. [HN7](#)<sup>7</sup> The elements of the offense of monopolization are: "(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." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595 n.19, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)). [HN8](#)<sup>8</sup> The elements of an attempted monopolization are: (1) exclusionary or anticompetitive conduct; (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports*, 506 U.S. at 456. [\*23]

Pioneer and DiscoVision argue that DMI's allegations relating to the filing of [\*1756] numerous continuation applications and DiscoVision's licensing practices cannot, as a matter of law, form the basis of an antitrust violation.

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<sup>5</sup> Pioneer and DiscoVision have also moved to strike the corresponding affirmative defenses in DMI's answer to DiscoVision's patent infringement suit. (D.I. 172 at 11 n. 10, 35) At this time, Pioneer and DiscoVision do not seek the dismissal of DMI's allegations relating to (1) fraudulent actions in the PTO and (2) objectively baseless infringement suits. (D.I. 172 at 11 n.9)

<sup>6</sup> [HN4](#)<sup>9</sup> A continuation application is a patent application that is entitled to the filing date of an earlier "parent" application. See [35 U.S.C. § 120](#). See, generally, Schwartz, "Patent Law and Practice," Federal Judicial Center (2d ed. 1995) at 19-21. A patent issued from a continuation application benefits from the earlier filing date for the purpose of determining its validity in view of prior art. "A continuation application is an application whose specification is the same as that of the parent application, but whose claims may be the same or different from those of the parent application." *Id. at 20*.

<sup>7</sup> They argue that any anticompetitive effect based on DiscoVision's continuation applications or its licensing practices is only attributable to DiscoVision's rights under the patent laws.<sup>8</sup> (D.I. 172 at 12, 20; D.I. 229 at 11, 13-14)

[\*24] DiscoVision may lawfully exercise any rights it has under patent laws but, as DMI has argued, these rights are still subject to abuse and antitrust scrutiny. [Aspen Skiing, 472 U.S. at 601](#). (D.I. 197 at 18) As the Supreme Court stated in *Aspen Skiing*:

The word "right" is one of the most deceptive pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.

*Id.* (quoting [Lorain Journal Co. v. United States, 342 U.S. 143, 155, 96 L. Ed. 162, 72 S. Ct. 181 \(1951\)](#)). The court recognizes that "there is an obvious tension between the patent laws and the antitrust laws" since "one body of law protects monopoly power while the other seeks to proscribe it." [United States v. Westinghouse Electric Corp., 648 F.2d 642, 646 \(9th Cir. 1981\)](#) (citing [E. Bement & Sons v. Nat'l Harrow Co., 186 U.S. 70, 91, 46 L. Ed. 1058, 22 S. Ct. 747 \(1902\)](#)). [HN11](#) The patent laws grant a monopoly for "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" for a varying term.<sup>9</sup> [\*26] [35 U.S.C. § 101](#). [HN12](#) [Section 2](#) of the Sherman Act makes it a felony [\*25] for "every person who shall monopolize, or attempt to monopolize . . . any part of trade or commerce."<sup>10</sup> [15 U.S.C. § 2](#). Consequently, any anticompetitive effect giving rise to antitrust liability must extend beyond the anticompetitive effect implicit in the grant of a patent. See [Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 24, 12 L. Ed. 2d 98, 84 S. Ct. 1051 \(1964\)](#) (stating that the "patent laws . . . are *in pari materia* with the antitrust laws and modify them pro tanto); see also [USM Corp. v. SPS Technologies, Inc., 694 F.2d 505, 513 \(7th Cir. 1982\)](#) (stating that patent licensing agreements are sometimes struck down under the antitrust laws upon proof of an anticompetitive effect beyond that implicit in the grant of the patent).

As DiscoVision recognizes, a patent holder may be liable under antitrust laws if he "seeks to do more than enjoy the exclusive rights granted by the patent laws." [Westinghouse Electric Corp., 648 F.2d at 647](#). (D.I. 229 at 9) [HN13](#) If a patent holder "seeks to expand the monopoly granted by the patent laws by misuse, agreement, or accumulation" he may incur antitrust liability. *Id.*

According to DMI, DiscoVision's numerous continuation applications "created delayed or 'submarine' type patent claims which purportedly cover digitally encoded compact discs under the Philips/Sony standard."<sup>11</sup> (D.I. 133, Ex.

<sup>7</sup> DiscoVision acknowledges that DMI's allegations of fraud are sufficient to state a claim under [§ 2](#) of the Sherman Act. (D.I. 172 at 9, n.8)

<sup>8</sup> [HN9](#) [Section 120](#) of the Patent Act, which allows a patent applicant to file continuation applications, does not limit the number of applications. [35 U.S.C. § 120](#). [HN10](#) A patent owner's right to license the patented invention is based on [Section 154](#) of the Patent Act which grants a patent owner the "right to exclude others from making, using, offering for sale, or selling" its patented article or process during the life of the patent. [35 U.S.C. § 154](#).

<sup>9</sup> The GATT (General Agreement on Tariffs and Trade) implementing legislation altered the patent term from seventeen years from the date of issuance to the term that begins on the date the patent issues and ends twenty years from the date of the filing of the patent application or, under certain conditions, the date of an earlier filed applications that are referenced in the later filed application. See [35 U.S.C. § 154\(a\)](#) and [\(b\) \(Supp. 1996\)](#) (As amended by Pub. L. No. 103-465); see generally Schwartz, Herbert, "Patent Law and Practice," Federal Judicial Center, at 86 (1995). The term may also be extended under certain conditions. See [35 U.S.C. §§ 155, 156](#), and [157 \(Supp. 1996\)](#).

<sup>10</sup> DMI seeks treble damages for DiscoVision's antitrust violations pursuant to §§ 4 and 16 of the Clayton Act. [15 U.S.C. §§ 15, 26](#).

<sup>11</sup> Patents that remain "submerged" during a long *ex parte* examination process and then "surface" upon the grant of the patent have been labeled "submarine patents." A patent application may have a long examination period due to delays by the PTO and/or from continuation applications. A holder of a "submarine patent" may be able to demand high royalties from nonpatent

A at 23 P27(c)) DiscoVision is also alleged to have delayed the Gregg and Bailey patents by making misrepresentations and misleading statements to the patent examiners, withholding material prior art and other essential information, filing prohibited amendments, and committing other unspecified violations **[\*\*1757]** before the PTO. (D.I. 133, Ex. A at 23 P 27(c)) Because **[\*27]** of these alleged tactics, DiscoVision was able to "obtain a large number of patents based on the same initial disclosure covering essentially the same subject matter." (D.I. 133, Ex. A at 21)

#### HN14<sup>↑</sup>

The court recognizes that the "mere accumulation **[\*28]** of patents, no matter how many, is not in and of itself illegal." *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 834, 94 L. Ed. 1312, 70 S. Ct. 894 (1950), over ruled in part on other grounds by *Lear, Inc. v. Adkins*, 395 U.S. 653, 671, 23 L. Ed. 2d 610, 89 S. Ct. 1902 (1969). DMI's allegations, however, involve more than simply a complaint that DiscoVision has been accumulating "too many" patents. DMI has specifically alleged that DiscoVision committed fraud and misrepresentations in prosecuting its patents. DMI also alleges that DiscoVision committed these acts and filed continuation applications with the specific intent to monopolize or maintain its monopoly in the three CD technology markets. These allegations, if true, are sufficient to support the inference that DiscoVision's continuation applications had an anticompetitive effect beyond the grant of the patent. Consequently, the court finds that DMI's allegations relating to DiscoVision's continuation applications may form a basis for antitrust liability.

DMI's allegations relating to DiscoVision's package licensing practice involve the "submarine" patents that were allegedly obtained by fraud. By **[\*29]** engaging in a package licensing practice with these fraudulently obtained patents, DiscoVision is alleged to have "created and exploited lock-in, information-deficit, and motivation deficit market imperfections in the compact disc injection molding technology and compact disc mastering technology markets to increase its market power leverage in those markets and to coerce purchasers and users to enter into licenses under the Gregg '297 and Bailey '526 and '680 patents as part of a package license." (D.I. 133 Ex. A at 22) Given that DMI alleges that DiscoVision fraudulently obtained some of the patents used in its package licensing practice, the court concludes DMI's allegations relating to package licensing may form a basis for antitrust liability. See *Westinghouse Electric Corp.*, 648 F.2d at 647 (a monopoly based on a patent that was procured by fraud may violate the antitrust laws); see also *USM Corp.*, 694 F.2d at 514 (7th Cir. 1982) (commenting that if the patent was procured by fraud there may be more reason to find an anticompetitive effect of the licensing agreement).

#### D. DMI's Tying Claim

DMI alleges that DiscoVision "ties" its licenses in the encoded CD technology **[\*30]** market to licenses in the CD replication and mastering technology markets in violation of § 1 of the Sherman Act.<sup>12</sup> **[\*31]** Not all tying arrangements are condemned by the Sherman Act. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). HN15<sup>↑</sup> Under the Sherman Act, a tying arrangement is condemned if it can be shown that the tying arrangement foreclosed competition on the merits in the market for the tied product. *Id. at 21*. A seller may be able to foreclose competition in the market for the tied product if it has "market power" to "force a purchaser to do something that he would not do in a competitive market." *Id. at 13-14*. HN16<sup>↑</sup> Antitrust liability for a tying arrangement is usually determined under the *per se* rule. *Id. at 15-16*. *Per se* liability may be found "without inquiry into actual market conditions." *Id. at 15*.<sup>13</sup> The *per se* rule "is only appropriate if the existence of

holders who invested and used the technology not knowing that a patent would later be granted. In the GATT implementing legislation, Congress addressed the perceived problem of "submarine" patents by amending the patent term provision in the Patent Act. Pub. L. No. 103-465, codified at 35 U.S.C. § 154(a)(2). The amended section, however, does not apply to patentees of record as of June 7, 1995. *Id.*

<sup>12</sup> HN17<sup>↑</sup> Section 1 of the Sherman Act states in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared illegal . . ." 15 U.S.C. § 1.

forcing is probable." "In the absence of *per se* liability," the antitrust plaintiff "has the burden of proving that" the tying arrangement "unreasonably restrained competition." *Id. at 29*.

Pioneer and DiscoVision argue that DMI's tying claim must be dismissed because it has not alleged and cannot allege that competition in the tied markets (i.e., CD replication and mastering technology markets) has been foreclosed. Pioneer and DiscoVision also argue that DMI's tying claim fails because DMI has not been injured by the tying agreement and because DMI fails to allege that the DiscoVision actually conditions the licensing of its encoded CD patents on the licensing of its other patents.

## 1. Foreclosure of competition

DMI has alleged that DiscoVision has market power in the encoded CD technology market by entering into package license agreements with more than 80% of the CD manufacturers. (D.I. 133, [\*32] Ex. A at 17-18) According to DMI, "once a [CD] manufacturer has been forced to take a license **[\*\*1758]** under [DiscoVision's] mastering and replication patents as part of a package, that manufacturer no longer has any incentive to design around [DiscoVision's] mastering and replication patents, and no longer has the incentive to obtain mastering or replication technology from another source." (D.I. 197 at 27) DMI also alleges that DiscoVision has further foreclosed "design around" competition in the CD mastering technology market through its "agreements with the mastering equipment suppliers such as Sony, Philips, and Nimbus" not to license the sale of mastering equipment. DMI argues that absent the tying arrangement, "DMI and other compact disc manufacturers would independently develop alternative technology or use the technology of the other competitors in the compact disc replication and mastering technology markets, such as Philips, Sony, or Nimbus." (D.I. 197 a 28-29)

Pioneer and DiscoVision point out that "DMI has failed to allege that there are any competitors who, because of the alleged tie, have failed to make a sale of competing technology." (D.I. 229 at 15) In citing *Jefferson Parish Hosp. Dist. No. 2, 466 U.S. at 16*, they argue that "DMI must allege that competitors of DiscoVision have been foreclosed from competing against DiscoVision in the injection molding (replication) and mastering technology markets." (D.I. 229 at 15) The Supreme Court in *Jefferson Parish Hosp. Dist. No. 2*, however, did not explicitly hold that foreclosure of competition must be established based directly on a showing that other competitors were foreclosed from making sales of the tied product. In *Jefferson Parish Hosp. Dist. No. 2*, the Court defined "foreclosure of competition" as imposing "restraints on competition" or as impairing "competition on the merits." *Id. at 14*. The Supreme Court also stated that: "Any effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second market." *Id. at 16*.

Furthermore, the Supreme Court stated in *Eastman Kodak Co. v. Image Technical Serv., Inc.*, that:

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in **antitrust** **[\*34] law**. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed in the record."

[504 U.S. 451, 466-467, 112 S. Ct. 2072, 119 L. Ed. 2d 265 \(1992\)](#) (citations omitted). According to DMI, the tying arrangement forecloses competition in the CD replication and mastering markets by reducing the incentive to design around DiscoVision's technology and by reducing the demand for alternative technologies. In making all reasonable inferences in DMI's favor, the court finds that DMI has sufficiently alleged that the tying arrangement forecloses competition in the CD replication and mastering technology markets.

<sup>13</sup> The *per se* rule has been adopted "in part to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the cost of determining whether the particular case at bar involves anticompetitive conduct." *Jefferson Parish Hosp. Dist. No. 2, 466 U.S. at 16 n.25* (citation omitted).

## 2. Injury requirement

Pioneer and DiscoVision argue that DMI was not injured by the alleged tying claim because it did not enter into the tying arrangement with DiscoVision. DMI alleges that it has been injured by DiscoVision's package licensing practices because it is "forced to defend itself against DiscoVision's objectively baseless patent infringement claims." (D.I. 197 at 30; D.I. 133, Ex. A at 37) DMI specifically alleges that DiscoVision attempted to coerce it into accepting the package license agreement by threatening to sue DMI. For example, [\*35] DMI has alleged that:

38. [DiscoVision] has specifically directed its unlawful licensing scheme at DMI and DMI's customers. . . . [DiscoVision] has intimidated DMI's customers by threatening to institute infringement litigation unless these customers buy compact discs and stampers from a [DiscoVision] licensee.

41. [DiscoVision] filed but purposefully refrained from serving [a 1993 patent infringement complaint] as a coercive device to threaten infringement litigation. These tactics were part of [DiscoVision's] efforts to extract excessive royalty payments from DMI and to coerce DMI into accepting a license under [DiscoVision's] entire portfolio of patents. . . .

(D.I. 133, Ex. A at 32, 33)

**HN18** [↑] 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 . . ." [15 U.S.C. § 15](#) (emphasis added). DMI does not need to allege that it was injured directly by the tying arrangement. [Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 815 \(1st Cir. 1988\)](#). DMI has alleged that it has to defend itself against DiscoVision's law suit as [\*36] a result of its refusal to accept the package license. Based on this allegation, the court finds that DMI has sufficiently alleged an injury in its business or property "by reason of anything forbidden in the antitrust laws." [15 U.S.C. § 15](#).

## [\*\*1759] 3. Conditioning requirement

Pioneer and DiscoVision argue that DMI's allegations of "economic coercion" cannot, as a matter of law, "constitute the type of coercion that is cognizable under the Sherman Act. (D.I. 172 at 35) They argue that DMI's allegations of "economic coercion" are essentially a complaint about DiscoVision's royalty rates. According to Pioneer and DiscoVision, DMI has not and cannot allege that DiscoVision has expressly conditioned the availability of any of its patents to the license of any other patents.

The ability to compel a purchaser to do something he would not do in a competitive market is usually called "market power." [Jefferson Parish Hosp. Dist. No. 2, 466 U.S. at 14-15](#). DMI has specifically alleged that DiscoVision has market power in the encoded CD technology market by licensing more than 80% of CD manufacturers. (D.I. 133, Ex. A at 17-18) DMI also alleges that DiscoVision threatens prospective CD manufacturers [\*37] as well as the manufacturers' customers with law suits unless they accept the package license. In accepting these allegations as true, the court finds that DMI has sufficiently alleged the type of coercion necessary to state a tying claim under the Sherman Act. See [Dairy Foods, Inc. v. Dairy Maid Prod. Coop., 297 F.2d 805, 808 \(7th Cir. 1961\)](#) (stating that **HN19** [↑] the injury requirement is established by the "necessity of having to make a choice among alternatives each of which has an adverse economic or financial impact . . .").

## E. DMI'S Market Allocation Claim

DMI alleges that DiscoVision has entered into agreements with Philips, Sony, and Nimbus that have the net result of being "an agreement among horizontal competitors in the mastering technology market to divide the market and reduce competition in the market." (D.I. 133, Ex. A at 25) According to DMI, DiscoVision's agreements with Philips, Sony, and Nimbus result in the "tacitly authorized sale" of mastering equipment to CD manufacturers. (D.I. 133, Ex. A at 25) DMI alleges that this arrangement has "the anticompetitive effect in the downstream compact disc manufacturers' product market of wrongfully increasing marginal [\*38] cost per disc and thereby reducing output."

(D.I. 133, Ex. A at 25) According to DMI, this arrangement has also "essentially eliminated" the horizontal competitors' "incentive to innovate and design around" DiscoVision's patents. (D.I. 133, Ex. A at 25)

Pioneer and DiscoVision argue that DMI's market allocation claim must be dismissed because DMI has failed to allege a conspiracy among horizontal competitors. (D.I. 229 at 18) They argue that DMI has failed to sufficiently allege facts showing that DiscoVision is a horizontal competitor of Philips, Sony or Nimbus. Furthermore, Pioneer and DiscoVision argue that DMI has failed to allege that any equipment manufacturer actually competes with DiscoVision's technology; that DMI has failed to allege that DiscoVision agreed not to manufacture mastering or replication equipment; and that DMI has failed to allege that any equipment supplier agreed not to license the relevant technology. (D.I. 229 at 19)

**HN20**[<sup>↑</sup>] Agreements between competitors to allocate territories or customers in order to minimize competition are violations under the Sherman Act. See, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49, 112 L. Ed. 2d 349, 111 S. Ct. 401 (1990). [\*39] In determining whether DMI has plead sufficient facts to constitute a conspiracy claim by horizontal competitors, the court is mindful of the Supreme Court's warning that

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 . . . . "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

*Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962) (citations omitted). As stated above, DMI's factual allegations must be accepted as true and all reasonable inferences are to be drawn in its favor. *Cruz*, 405 U.S. 319, 31 L. Ed. 2d 263, 92 S. Ct. 1079; *Schermerhorn*, 373 U.S. 746, 10 L. Ed. 2d 678, 83 S. Ct. 1461. Given these principles, the court finds that DMI has sufficiently plead facts to establish a conspiracy among horizontal competitors.

## F. DMI'S State Claims

In its amended complaint, DMI also sets forth violations of the California Cartwright Act, Cal. Bus. & Prof. Cod, §§ 16720 [\*40] et seq. ("Cartwright Act") (count II) and the California Unfair Competition Act, *Cal. Bus. & Prof. Code* §§ 17200 et seq. ("Unfair Competition Act") (count III). As support for these claims, DMI relies entirely on the allegations used in its federal antitrust claims.

The Cartwright Act states: "Except as provided in this chapter, every trust is unlawful against public policy and void." *Cal. Bus. & Prof. Code* § 16726. **HN21**[<sup>↑</sup>] Trust is defined by the Cartwright Act as [\*\*1760]

a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry our restrictions in trade or commerce. . . .

(e) To make or enter into or execute or carry out contracts, obligations or agreements . . . by which they . . . agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale of any . . . article or commodity, that its price might in any manner be affected.

*Cal. Bus. & Prof. Code* § 16720. DMI does not address in either its amended complaint or its brief which claims specifically fall under the Cartwright Act. Like § 1 of the Sherman Act, the Cartwright Act "does not address unilateral conduct." [\*41] *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986), modified, 810 F.2d 1517 (9th Cir. 1987); cf. *State ex rel. Van de Kamp v. Texaco Inc.*, 46 Cal. 3d 1147, 252 Cal. Rptr. 221, 231-232, 762 P.2d 385 (Cal. 1988) (declining to directly address the issue but noting that there is no provision in the Cartwright Act that corresponds to § 2 of the Sherman Act). Combinations or conspiracies to monopolize "appear to fall within the general prohibitions of the Cartwright Act." *Dimidowich*, 803 F.2d at 1478. The Cartwright Act, however, does not expressly deal with monopolization or attempted monopolization claims. See *id.* (stating that no California statute deals with these claims). Consequently, the court finds that only DMI's § 1 claims can be properly brought under the Cartwright Act.

Claims based on the Cartwright Act are generally judged by the same standards as claims brought under the corresponding federal antitrust laws. See *Texaco, 252 Cal. Rptr. at 232*; *Gianelli Distributing Co. v. Beck & Co., 172 Cal. App. 3d 1020, 219 Cal. Rptr. 203 (Cal. Ct. App. 1985)*. For the same reasons this court found that DMI has stated § 1 Sherman Act claims sufficiently [\*42] to withstand a motion to dismiss, the court finds that DMI's § 1 claims properly state claims under the Cartwright Act.

**HN22**[] The Unfair Competition Act prohibits "unlawful, unfair or fraudulent business practices." *Cal. Bus. & Prof. Code §§ 17200 et seq.* An unlawful business practice "includes 'anything that can properly be called a business practice and that at the same time is forbidden by law.' *Samura v. Kaiser Found. Health Plan, Inc., 17 Cal. App. 4th 1284, 22 Cal. Rptr. 2d 20, 24 (Cal. Ct. App. 1993)* (citation omitted). Adequately plead violations of the Sherman Act are grounds for claims based on the Unfair Competition Act. *Sunbelt Television v. Jones Intercable, Inc., 795 F. Supp. 333 (C.D. Cal. 1992)*. Since this court has found that DMI has sufficiently plead claims of the Sherman Act and the Cartwright Act, the court finds that DMI has properly plead claims under the Unfair Competition Act.

#### IV. CONCLUSION

The court finds that DMI has properly plead claims based on the Sherman Act, Cartwright Act, and the Unfair Competition Act. Consequently, the court shall deny Pioneer's and DiscoVision's motion to dismiss. An order consistent with this memorandum opinion [\*43] shall issue.

#### ORDER

At Wilmington this 3d day of April, 1997, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that Pioneer Electronic Corp.'s, Pioneer Electronics (USA), Inc.'s, Pioneer Electronics Capital, Inc.'s, and DiscoVision Associates's motion to dismiss (D.I. 171) is denied.

Sue L. Robinson

United States District Judge

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## *In re Independent Serv. Orgs. Antitrust Litiq.*

United States District Court for the District of Kansas

April 8, 1997, Decided ; April 8, 1997, FILED, ENTERED ON THE DOCKET

CIVIL ACTION No. MDL-1021

### **Reporter**

964 F. Supp. 1479 \*; 1997 U.S. Dist. LEXIS 6672 \*\*; 1997-2 Trade Cas. (CCH) P71,900

IN RE: INDEPENDENT SERVICE ORGANIZATIONS ANTITRUST LITIGATION; This Document Applies To: CSU Holdings, Inc., et al. v. Xerox Corp. (D. Kan. No. 94-2102-EEO)

**Disposition:** **[\*\*1]** Both motions granted in part and denied in part.

## **Core Terms**

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patent, infringement, misuse, antitrust, counterclaims, patent infringement, monopoly, patent holder, silence, license, prices, damages, products, summary judgment, antitrust claim, reconsideration, antitrust violation, unilateral, invention, estoppel, laches, anti trust law, matter of law, holder's, monopoly power, patent misuse, calculation, markets, reasons, rights

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Patent Law > Infringement Actions > Burdens of Proof

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Patent Law > Infringement Actions > Defenses > General Overview

### **HN1 Misuse of Rights, Patent Misuse Defense**

To prevail on a defense of patent misuse, an alleged infringer must establish a sufficient nexus between the patent holder's alleged misconduct and the patents at issue in the litigation.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > General Overview

964 F. Supp. 1479, \*1479L 1997 U.S. Dist. LEXIS 6672, \*\*1

Patent Law > Infringement Actions > Defenses > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

## **HN2** Pleadings, Counterclaims

A defendant is not precluded from recovery on its patent infringement counterclaims based on the plaintiff's general evidence of "misuse in the air." The plaintiff bears the burden of establishing the requisite nexus between the patents at issue and the alleged misuse.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Patent Law > Infringement Actions > Defenses > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

## **HN3** Defenses, Bad Faith Enforcement

The patent statute, [35 U.S.C.S. § 271\(d\)\(3\)](#), precludes a finding of misuse when the patent holder seeks to enforce his patent rights against infringement. A finding of misuse is precluded, however, only if the patent infringement suit is brought in good faith.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

## **HN4** Noerr-Pennington Doctrine, Sham Exception

An infringement suit is immune from antitrust liability unless the defendant can establish that the suit is objectively baseless. For the sham exception under the Noerr-Pennington doctrine to apply, 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.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

## **HN5** Exemptions & Immunities, Noerr-Pennington Doctrine

There is no principled reason to distinguish the "sham" exception under the Noerr-Pennington doctrine from the "bad faith" exception under [35 U.S.C.S. § 271\(d\)\(3\)](#).

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

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## **HN6** Exemptions & Immunities, Noerr-Pennington Doctrine

Whether applying Noerr as an antitrust doctrine or invoking it in other contexts, evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

## **HN7** Exemptions & Immunities, Noerr-Pennington Doctrine

A patent holder's access to the courts is immunized unless his lawsuit is (1) objectively meritless and (2) brought in an attempt to interfere directly with the business of his competitor.

Patent Law > Infringement Actions > Burdens of Proof

Torts > ... > Duty > Affirmative Duty to Act > General Overview

Torts > ... > Standards of Care > Appropriate Standard > Objectivity

## **HN8** Infringement Actions, Burdens of Proof

The test of due care is whether, under all the circumstances, a reasonable person would prudently conduct himself with any confidence that a court might hold the patent invalid or not infringed. The duty of due care normally requires that a potential infringer obtain competent legal advice before infringing or continuing to infringe. The failure to obtain legal advice, however, is not determinative and constitutes only one factor in the willfulness determination.

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > Infringement Actions > Defenses > General Overview

## **HN9** Inequitable Conduct, Burdens of Proof

To establish estoppel in the patent infringement context, the alleged infringer must establish that (1) the patent owner, through conduct, positive statement, or misleading silence, represented to the infringer that its business would be unmolested by claims of infringement, (2) the alleged infringer relied on this communication, and (3) the infringer would be materially prejudiced if the patent owner is allowed to proceed with its infringement action.

Patent Law > Infringement Actions > Defenses > General Overview

## **HN10** Infringement Actions, Defenses

Silence alone is not sufficient affirmative conduct to give rise to estoppel in the patent infringement context. Rather, estoppel can be established by silence only if other factors are present.

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Patent Law > Infringement Actions > Defenses > General Overview

### **HN11** [] **Infringement Actions, Defenses**

An infringer cannot assert reliance on the patent owner's silence if the infringer did not even know of the potential patent problem.

Patent Law > Infringement Actions > Defenses > General Overview

### **HN12** [] **Infringement Actions, Defenses**

A successful laches defense bars damages only for conduct occurring prior to the filing of the lawsuit.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### **HN13** [] **Monopolies & Monopolization, Actual Monopolization**

To establish monopolization under § 2 of the Sherman Act, a plaintiff must prove that (1) the defendant possessed monopoly power in the relevant market and (2) the defendant willfully acquired or maintained that monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

### **HN14** [] **Infringement Actions, Exclusive Rights**

The patent statute, [35 U.S.C.S. § 154](#), allows a patent holder to exclude others from manufacturing, selling, or using his inventions.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

### **HN15** [] **Intellectual Property, Misuse of Rights**

See [35 U.S.C.S. § 271\(d\)\(4\)](#).

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Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

## **HN16** [blue icon] **Ownership & Transfer of Rights, Licenses**

The heart of the patentee's legal monopoly is the right to invoke the state's power to prevent others from utilizing his discovery without his consent. Of course, a patent holder cannot use his patent to justify anticompetitive conduct beyond the limit or scope of the patent grant. There are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee. The patent monopoly may not be used in disregard of the antitrust laws.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Patent Law > ... > Claims > Claim Language > Duplication & Multiplicity

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

## **HN17** [blue icon] **Monopolies & Monopolization, Attempts to Monopolize**

There is no prohibition from lawfully using a patent to acquire a monopoly in more than one relevant antitrust market. In other words, a single "patent monopoly" can be used to secure multiple "economic monopolies," that is, monopolies in more than one relevant antitrust market. The boundary of a patent monopoly is to be limited by the literal scope of the patent claims. The patent system, which antedated the Sherman Act by a century, is not an "exception" to the antitrust laws, and patent rights are not legal monopolies in the antitrust sense of that word.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

## **HN18** [blue icon] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Where a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the antitrust laws.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

964 F. Supp. 1479, \*1479L 1997 U.S. Dist. LEXIS 6672, \*\*1

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

#### **HN19** [💡] **Ownership & Transfer of Rights, Licenses**

The patent statute, [35 U.S.C.S. § 271\(d\)\(4\)](#), states that the unilateral refusal to license or use a patent shall not constitute misuse and shall not be deemed an illegal extension of the patent right.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Remedies > Damages > Increased Damages

#### **HN20** [💡] **Intellectual Property, Misuse of Rights**

A patent holder can continue to exercise his patent's exclusionary power even after achieving commercial success. To allow the imposition of treble damages based on what a reviewing court might later consider, with the benefit of hindsight, to be too much success would seriously threaten the integrity of the patent system. The result should be no different whether a patent holder's success (achieved by conduct expressly sanctioned by the patent statute) impacts one or more relevant antitrust markets.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > Ownership > Conveyances > General Overview

#### **HN21** [💡] **Ownership & Transfer of Rights, Assignments**

A demand for a price which is so high as to preclude acceptance of a license offer is, after all, not appreciably different from a refusal to license upon any terms.

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Ownership > Conveyances > General Overview

#### **HN22** [💡] **Conveyances, Royalties**

A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Ownership > Conveyances > General Overview

## **HN23** [blue icon] Conveyances, Licenses

The right to license a patent, exclusively or otherwise, or to refuse to license at all, is "the untrammeled right" of the patentee.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Patent Law > Ownership > Conveyances > General Overview

## **HN24** [blue icon] Regulated Practices, Price Discrimination

There is no antitrust prohibition against a patent owner's using price discrimination to maximize his income from the patent.

**Counsel:** For CSU HOLDINGS INC, Case Number: 94-2102-EEO - USDC for the District of Kansas, plaintiff: Eric D. Braverman, Employers Reinsurance Corporation, Overland Park, KS. P. John Owen, Lori R. Schultz, Morrison & Hecker, Kansas City, MO. Michael C. Manning, Morrison & Hecker, Phoenix, AZ. For COPIER SERVICES UNLIMITED, INC., Case Number: 94-2102-EEO - USDC for the District of Kansas, plaintiff: Eric D. Braverman, (See above). P. John Owen, (See above), Lori R. Schultz, (See above). Michael C. Manning, (See above). For COPIER SERVICE UNLIMITED OF ST. LOUIS, INC., Case Number: 94-2102-EEO - USDC for the District of Kansas, plaintiff: Eric D. Braverman, (See above). P. John Owen, (See above), Lori R. Schultz, (See above). Michael C. Manning, (See above). For ACQUISITION SPECIALISTS, INC, Case Number: 94-1285 - USDC for the Northern District of California - USDC for the District of Kansas 94-2502, plaintiff: James A Hennefer, San Francisco, CA. Maxwell M Blecher. For TECSPEC, INC, a Texas Corporation, Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas dba Atek, plaintiff: James A Hennefer, [\*\*2] (See above). Maxwell M Blecher. For CONSOLIDATED PHOTO COPY, INC., a Virginia corporation. Case Number: 94-1285 - UDDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For COPIER REBUILD CENTER, INC., a Maryland corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For CPO LTD, a California corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District Court of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For GRADWELL COMPANY, INC., an Alabama corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District Court of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For GRAPHIC CORPORATION OF ALABAMA, an Alabama corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For INTERNATIONAL BUSINESS EQUIPMENT, [\*\*3] INC, a California corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District Court of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For LASER RESOURCES INC, an Iowa corporation, Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District Court of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For LASER RESOURCES OF MINNESOTA, INC., a Minnesota corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For LASER SOLUTIONS, INC, a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the

District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For LASER SUPPORT AND ENGINEERING, INC., a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For MARATHON COPIER SERVICE, INC., a California corporation. Case Number: 94-1285 [\*\*4] - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For NATIONWIDE TECHNOLOGIES, INC., a Illinois corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For REPROGRAPHICS RESOURCES SYSTEMS, INC, an Iowa corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For RESOURCES SYSTEMS, INC, an Iowa corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). For SUNTONE INDUSTRIES, INC, a Florida corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For TECHNICAL DUPLICATION SERVICES, INC, a California corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District [\*\*5] of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For X-TECH SYSTEMS INC, a California corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For XER-DOX INC., a California corporation. Case Number 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher. For XEROGRAPHIC COPIES SERVICES, INC., a Texas corporation. Case Number: 94-1285 - USDC for the Northern District of California. 94-2502 USDC for the District of Kansas, plaintiff: James A Hennefer, (See above). Maxwell M Blecher.

For XEROX CORPORATION, Case Number: 94-2102-EEO - USDC for the District of Kansas and Case Number: 94-1285 USDC for the Northern District of California, defendant: Peter K Bleakley, Arnold & Porter, Washington, DC. Peter W Marshall, Xerox Corporation, Stamford, CT. Michael G. Norris, Norris, Keplinger & Logan, L.L.C., Overland Park, KS. C Larry O'Rourke, E Robert Yoches, Vincent P Kovalick, Leslie I Bookoff, Finnegan, Henderson, Farabow, Garrett & Dunner, [\*\*6] Washington, DC.

For XEROX CORPORATION, counter-claimant: Peter K Bleakley, Arnold & Porter, Washington, DC. Peter W Marshall, Xerox Corporation, Stamford, CT. Michael G. Norris, Norris, Keplinger & Logan, L.L.C., Overland Park, KS. C Larry O'Rourke, E Robert Yoches, Vincent P Kovalick, Leslie I Bookoff, Finnegan, Henderson, Farabow, Garrett & Dunner, Washington, DC.

For CSU HOLDINGS INC, counter-defendant: Eric D. Braverman, Employers Reinsurance Corporation, Overland Park, KS. P. John Owen, Lori R. Schultz, Morrison & Hecker, Kansas City, MO. Michael C. Manning, Morrison & Hecker, Phoenix, AZ. For COPIER SERVICES UNLIMITED, INC., counter-defendant: Eric D. Braverman, (See above). P. John Owen, (See above), Lori R. Schultz, (See above). Michael C. Manning, (See above). For COPIER SERVICE UNLIMITED OF ST. LOUIS, INC., counter-defendant: Eric D. Braverman, (See above). P. John Owen, (See above), Lori R. Schultz, (See above). Michael C. Manning, (See above). For ACQUISITION SPECIALISTS, INC, counter-defendant: James A Hennefer, San Francisco, CA. For TECSPEC, INC dba Atek, counter-defendant: James A Hennefer, (See above). For CONSOLIDATED PHOTO COPY, INC., counter-defendant: [\*\*7] James A Hennefer, (See above). For COPIER REBUILD CENTER, INC., counter-defendant: James A Hennefer, (See above). For CPO LTD, counter-defendant: James A Hennefer, (See above). For CREATIVE COPIER SERVICES, INC, counter-defendant: Jack M Bernard, Philadelphia, PA. For GRADWELL COMPANY, INC., counter-defendant: James A Hennefer, (See above). For GRAPHIC CORPORATION OF ALABAMA, counter-defendant: James A Hennefer, (See above). For INTERNATIONAL BUSINESS EQUIPMENT, INC, counter-defendant: James A Hennefer, (See above). For LASER RESOURCES INC, counter-defendant: James A Hennefer, (See above). For LASER RESOURCES OF MINNESOTA, INC., counter-defendant: James A Hennefer, (See above). For LASER SOLUTIONS, INC, counter-defendant: James A Hennefer, (See above). For LASER SUPPORT AND ENGINEERING, INC., counter-defendant: James A Hennefer, (See above). For MARATHON COPIER SERVICE, INC., counter-defendant: James A Hennefer, (See above). For NATIONWIDE TECHNOLOGIES, INC., counter-defendant: James A Hennefer, (See above). For REPROGRAPHICS RESOURCES SYSTEMS, INC, counter-defendant: James A Hennefer, (See above). For RESOURCES SYSTEMS, INC, counter-defendant: James A

Hennefer, (See above). For SUNTONE **[\*\*8]** INDUSTRIES, INC, counter-defendant: James A Hennefer, (See above). For TECHNICAL DUPLICATION SERVICES, INC, counter-defendant: James A Hennefer, (See above). For X-TECH SYSTEMS INC, counter-defendant: James A Hennefer, (See above). For XER-DOX INC., counter-defendant: James A Hennefer, (See above). For XEROGRAPHIC COPIES SERVICES, INC., counter-defendant: James A Hennefer, (See above).

**Judges:** EARL E. O'CONNOR, United States District Judge

**Opinion by:** EARL E. O'CONNOR

## **Opinion**

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### **[\*1482] MEMORANDUM AND ORDER**

This matter is before the court on defendant's motion for reconsideration of the order denying summary judgment on copyright infringement (Doc. # 581) and defendant's motion for reconsideration or certification pursuant to [28 U.S.C. § 1292\(b\)](#) of the order denying summary judgment on patent infringement and antitrust claims (Doc. # 583). After careful consideration of the parties' briefs and evidentiary materials and oral argument on the motions, the court is prepared to rule. For the reasons set forth below, both motions are granted in part and denied in part.

Defendant has included a supplemental statement of facts with its motion for reconsideration of the court's order regarding patent infringement **[\*\*9]** and antitrust claims. Given the additional factual issues raised in the motion, as well as some legal arguments that were not briefed specifically in the previous summary judgment motion, the court will construe defendant's motion as a renewed motion for summary judgment on patent infringement and antitrust claims or in the alternative certification of the court's March 19, 1997, order. The standards relating to summary judgment motions previously were set forth in the court's March 19, 1997, memorandum & order. The court incorporates that discussion by reference here.

### **I. Xerox's Renewed Motion For Summary Judgment On Its Patent Infringement Counterclaim.**

#### **A. Factual Background.**

For purposes of this opinion, the following is a brief summary of the material facts that are uncontested or deemed admitted, pursuant to [Federal Rule of Civil Procedure 56](#) and District of Kansas Rule 56.1.

This court previously found that CSU infringed Xerox's lawful patents either literally or under the doctrine of equivalents by CSU's use of the 97X0 fuser pressure roll, 97X0(w/MOD V) fuser heat roll, 97X0(w/o MOD V) fuser heat roll, 1090 family fuser heat roll, 1090 family dicrotron **[\*\*10]** w/ dag coating, 1090 family dicrotron w/o dag coating, and 1065 document handler belt. Mar. 19, 1997, Mem. & Order at 7.

Xerox seeks damages for CSU's infringement of patents since 1994 when Xerox filed its counterclaim. CSU has submitted an expert report with respect to its antitrust claims which identifies parts overcharge damages for the twenty-six most frequently purchased parts by CSU. Four of the twenty-six parts are among the patented parts at issue in Xerox's motion for summary judgment on its patent infringement counterclaims. From 1993 through 1997, the total overcharge calculated by CSU for these four parts is negative \$ 43,429. The other three patented parts at issue in Xerox's patent infringement counterclaim are not included as part of CSU's damage calculation and CSU has offered no evidence to establish that it was overcharged for these parts.

#### **B. CSU's Patent Misuse Defense.**

##### **1. Nexus Between Patents At Issue And Misuse.**

**HN1**[] To prevail on a defense of patent misuse, an alleged infringer must establish a sufficient nexus between the patent holder's alleged misconduct and the patents at issue in the litigation. See *Riker Laboratories, Inc. v. Gist-Brocades N.V.*, [\[\\*11\] 205 U.S. App. D.C. 64, 636 F.2d 772, 777 \(D.C. Cir. 1980\)](#); *Kolene Corp. v. Motor City Metal Treating, Inc.*, [440 F.2d 77, 84-85](#) (6th Cir.), cert. denied, 404 U.S. 886, 30 L. Ed. 2d 169, 92 S. Ct. 203 (1971); *McCullough Tool Co. v. Well Surveys, Inc.*, [395 F.2d 230, 238-39](#) (10th Cir.), cert. denied, 393 U.S. 925, 21 L. Ed. 2d 261, 89 S. Ct. 257 (1968). Xerox [**\*1483**] has offered additional factual support for its contention that CSU has failed to establish this requisite nexus. This additional evidence is properly considered with respect to Xerox's renewed motion for summary judgment on its patent infringement counterclaims.

Xerox sues only for infringement of its patents after it changed its parts policy in 1994 as a result of the R&D settlement. CSU claims that Xerox continued to misuse its patents after the R&D settlement by charging exorbitant prices for those products in an effort to eliminate ISO competition in the service market. CSU has failed to come forward with any evidence to substantiate this allegation with respect to the seven patented parts at issue.

As part of its antitrust case, CSU claims parts overcharge damages for only four of the seven patented [\[\\*12\]](#) parts at issue. According to CSU's expert, the total "overcharge" from 1993 through 1997 for these four parts is negative \$ 43,429. For two of the four parts, CSU pays less today than it claims is a "reasonable" price. For three of the four parts, CSU paid less than a reasonable price at some point in time between 1993 and 1997. For the remaining part, CSU pays approximately \$ 46 for the part while it claims that the reasonable price is approximately \$ 27. CSU has failed to prove that this price differential is sufficient to constitute misuse. Thus, with respect to the record evidence of the patented parts at issue, CSU actually paid near or less than a reasonable price for the parts.<sup>1</sup>

[\[\\*13\]](#) CSU claims that the omission of the other three patented parts from its damage calculation does not mean that the parts were not priced intentionally by Xerox to exclude competition. Yet, CSU has not offered any evidence of the actual price it paid for the three patented parts not included in its damage calculation.

**HN2**[] Xerox is not precluded from recovery on its patent infringement counterclaims based on CSU's general evidence of "misuse in the air." *Kolene*, [440 F.2d at 84](#). CSU bears the burden of establishing the requisite nexus between the patents at issue and the alleged misuse. Despite two opportunities, CSU has failed to come forward with any evidence to establish that Xerox's pricing of the seven patented parts at issue constitutes misuse. CSU argues that its damage calculation is conservative and that what it characterizes as a "reasonable price from Xerox" is often higher than the prices charged by third parties. CSU simply attempts to blur the fact that it has not offered any evidence that Xerox charged (or CSU paid) exorbitant prices for the seven patented parts at issue. The only record evidence on this point is the report of CSU's expert, which establishes that three [\[\\*14\]](#) of the seven parts are not included in CSU's parts overcharge calculation and that CSU paid less than what it characterizes as a reasonable price for the other four parts combined over the relevant time period. As for Xerox's prices, the evidence establishes that for all infringing parts as a whole, Xerox's prices are on average only 3% higher than the price CSU claims to be reasonable. The court finds that this evidence is insufficient as a matter of law to sustain CSU's patent misuse defense.

The parties have argued in their briefs whether the seven patented parts were included in Xerox's pre-1994 parts policy. To the extent any of the seven patented parts were included in Xerox's prior parts policy and arguably could constitute misuse, such misuse has been purged by the availability of patented parts since 1994 and CSU's ability to purchase the various parts at prices near or below what it characterizes as a "reasonable" price. CSU has failed to establish that Xerox misused its patents under the standard [\[\\*1484\]](#) of misuse that the court articulated in its March 19, 1997, memorandum and order.

<sup>1</sup> It is immaterial whether CSU purchased these parts at less than a reasonable price from Xerox or third parties. In either case, CSU cannot establish that Xerox's high prices were exclusionary and therefore constitute misuse. In addition, CSU has failed to come forward with specific evidence to establish its suppliers of each of the various patented parts (Xerox or third parties) and the price it pays for those parts. Even if the court reviewed what Xerox charged for the seven patented parts, rather than what CSU paid, the record evidence establishes that Xerox's prices as a whole were approximately 3% higher than what CSU claims is a reasonable price. This evidence is insufficient as a matter of law to establish patent misuse.

Even if CSU could establish the requisite nexus between the patents at issue and the alleged [\*\*15] misuse, the court finds below that Xerox's unilateral refusal to sell or license its patented parts (or pricing the products at "unreasonable" prices) cannot constitute misuse. See infra part II.

## 2. Filing Of Infringement Action As Misuse.

CSU also claims that Xerox's filing of its counterclaims in the instant action constitutes patent misuse. The court previously held that CSU's defense was not precluded as a matter of law because (1) the Noerr-Pennington<sup>2</sup> doctrine provides antitrust immunity, not patent or copyright misuse immunity, and (2) evidence of Xerox's intent in prosecuting its infringement counterclaims when viewed together with CSU's other evidence may constitute misuse. Mar. 19, 1997, Mem. & Order at 18. Based on the parties' supplemental briefing and further consideration of the parties' original briefing, the court finds that the filing of Xerox's patent infringement counterclaims cannot constitute misuse as a matter of law.

[\*\*16] HN3[<sup>↑</sup>] The patent statute precludes a finding of misuse when the patent holder seeks "to enforce his patent rights against infringement." 35 U.S.C. § 271(d)(3). A finding of misuse is precluded, however, only if the patent infringement suit is brought in good faith. See Glaverbel Societe Anonyme v. Northlake Mktg. & Supply, Inc., 45 F.3d 1550, 1558-59 (Fed. Cir. 1995). As this court noted previously, the Supreme Court has held HN4[<sup>↑</sup>] that an infringement suit is immune from antitrust liability unless the defendant can establish that the suit is objectively baseless. See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56-60, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993) ("PRE"). In discussing the sham exception under the Noerr-Pennington doctrine, the Supreme Court has stated that

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 [\*\*17] litigation is objectively meritless may a court examine the litigant's subjective motivation.

*Id. at 60.*

CSU effectively concedes that Xerox's patent infringement counterclaims cannot be characterized as objectively baseless. CSU also does not contest that Xerox's filing of its infringement counterclaims alone is insufficient to sustain a finding of misuse. On the other hand, CSU argues that Xerox's subjective intent in bringing its counterclaims is relevant to its misuse defenses. Given the court's finding above that CSU has not established the requisite nexus between the patents at issue and the alleged misuse, the court finds that the filing of Xerox's counterclaims alone is insufficient to support a finding of misuse.

The court finds that HN5[<sup>↑</sup>] there is no principled reason to distinguish the "sham" exception under the Noerr-Pennington doctrine from the "bad faith" exception under 35 U.S.C. § 271(d)(3). In PRE, the Supreme Court stated that

HN6[<sup>↑</sup>] whether applying Noerr as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity [\*\*18] into a sham.

*Id. at 59* (emphasis added); see Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 743-44, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983) (analogizing Noerr's sham exception to the "improperly motivated" lawsuit standard under the National Labor Relations Act); Computer Assocs. Int'l, Inc. v. American Fundware, Inc., 831 F. Supp. 1516, 1523 (D. Colo. 1993) [\*1485] (the Noerr-Pennington doctrine "is a constitutional, not an antitrust, doctrine.").

<sup>2</sup> See 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 of Am. v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965).

Indeed, the only authority offered by the parties on this point applied an identical analysis to determine whether a lawsuit constituted patent misuse or an antitrust violation. See [Glaverbel, 45 F.3d at 1558-59](#).

In addition, the court finds that the same [First Amendment](#) principles which protect a patent holder from antitrust violations also should protect a patent holder from assertion of a misuse defense. In either case, a patent holder would be penalized for seeking the protection of the courts which is "among the most precious of the liberties safeguarded by the [Bill of Rights](#)." [United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n](#), 389 U.S. 217, 222, 19 L. Ed. 2d 426, 88 S. Ct. 353 [\*\*19] (1967). [HN7](#) A patent holder's access to the courts therefore is immunized unless his lawsuit is (1) objectively meritless and (2) brought in an attempt to interfere directly with the business of his competitor. See [PRE](#), 508 U.S. at 60-61. As noted above, CSU has not offered any evidence to establish that Xerox's patent infringement counterclaim could be characterized as objectively meritless. Indeed, the court has granted summary judgment in favor of Xerox on this claim. A finding of misuse based on the filing of Xerox's patent infringement counterclaim therefore is precluded as a matter of law.

The court previously did not resolve the issues of willfulness, estoppel, laches, and statute of limitations based on the court's finding that CSU's misuse defense could not be precluded as a matter of law. The court now will address those issues.

#### C. Willfulness Of CSU's Infringement.

Xerox claims that CSU's infringement was willful because CSU had actual notice of Xerox's patent rights yet failed to exercise its affirmative duty of due care. See [Ryco, Inc. v. Ag-Bag Corp., 857 F.2d 1418, 1428 \(Fed. Cir. 1988\)](#) (citation omitted). [HN8](#) "The test [of due care] is whether, under all the [\*\*20] circumstances, a reasonable person would prudently conduct himself with any confidence that a court might hold the patent invalid or not infringed." [Id.](#) The duty of due care "normally requires that a potential infringer obtain competent legal advice before infringing or continuing to infringe." [Id.](#) The failure to obtain legal advice, however, is not determinative and constitutes only one factor in the willfulness determination. [Id.](#)

CSU contends that it "consulted with its antitrust counsel and, based on their advice, has asserted a misuse defense in good faith." Xerox, relying on [Lightwave Technologies, Inc. v. Corning Glass Works, 1991 U.S. Dist. LEXIS 543, 19 U.S.P.Q.2D \(BNA\) 1838 \(S.D.N.Y. 1991\)](#), argues that CSU has failed to meet the requirements of due care as a matter of law. In [Lightwave](#), the accused infringer obtained an opinion from its antitrust counsel that it had a "submissible antitrust case against Corning, and that a verdict for Lightwave on its antitrust claims would render the patent unenforceable." [Id.](#) at 1847. The jury found that the defendant had willfully infringed plaintiff's patents. The court refused to overturn the jury verdict, finding that [\*\*21] "given the complexity of [antitrust law](#), having a 'submissible antitrust case' is hardly a sound basis for proceeding with patent infringing activities." [Id.](#) at 1847-48. "Conclusory oral opinions do not discharge the duty of care." [Id.](#) at 1848. The court in [Lightwave](#) also found significant the fact that the accused infringer never articulated in clear, specific, and concrete terms its patent misuse claims and did not even raise the issue until the conclusion of the antitrust phase of trial. [Id.](#)

In this case, CSU timely raised the misuse defense and certainly articulated its misuse defense in response to Xerox's motion for summary judgment. In addition, the court is not aware of any case that requires an alleged infringer to receive advice from patent counsel, as opposed to antitrust counsel, in order to maintain a misuse defense in good faith. In fact, the misuse defense asserted in this case by CSU was based on an alleged antitrust violation. Therefore, antitrust counsel's advice was pertinent. Although counsel may not have predicted perfectly which patents Xerox would choose to enforce and whether the court ultimately would sustain the misuse defense, counsel's [\*1486] advice [\*\*22] was sufficient to raise an issue of fact as to whether CSU had a reasonable belief that it may not be liable to Xerox for patent infringement. The court accordingly denies Xerox's motion for summary judgment on the willfulness issue.

#### D. Estoppel.

[HN9](#) To establish estoppel in the patent infringement context, the alleged infringer must establish that (1) the patent owner, through conduct, positive statement, or misleading silence, represented to the infringer that its

964 F. Supp. 1479, \*1486-997 U.S. Dist. LEXIS 6672, \*\*22

business would be unmolested by claims of infringement, (2) the alleged infringer relied on this communication, and (3) the infringer would be materially prejudiced if the patent owner is allowed to proceed with its infringement action. See *ABB Robotics, Inc. v. GMFanuc Robotics Corp.*, 52 F.3d 1062, 1063 (Fed. Cir.), cert. denied, 133 L. Ed. 2d 211, 116 S. Ct. 306 (1995); *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1041-43 (Fed. Cir. 1992); *Adelberg Laboratories, Inc. v. Miles*, 921 F.2d 1267, 1272 (Fed. Cir. 1990). CSU contends that (1) Xerox has known since 1987 that CSU was obtaining parts from sources other than Xerox, (2) Xerox never indicated to CSU that Xerox believed CSU [\*\*23] was infringing on its valid patents, and (3) CSU expanded into other cities before Xerox filed its counterclaims in reliance on Xerox's silence. Xerox does not dispute any of these facts for purposes of the instant motion.

The first element of estoppel applicable to this case involves the patent owner's "misleading silence." CSU points only to Xerox's silence without explaining how Xerox's silence was misleading. The Federal Circuit has held that **HN10** [↑] "silence alone is not sufficient affirmative conduct to give rise to estoppel." *Meyers v. Asics Corp.*, 974 F.2d 1304, 1308 (Fed. Cir. 1992) (citations omitted). Rather, estoppel can be established by silence only if other factors are present. See *ABB Robotics*, 52 F.3d at 1064 ("Misleading action by the patentee may be silence, if such silence is accompanied by some other factor indicating that the silence was sufficiently misleading to amount to bad faith."); *A.C. Aukerman*, 960 F.2d at 1042 ("plaintiff's inaction must be combined with other facts respecting the relationship or contracts between the parties to give rise to the necessary inference that the claim against the defendant is abandoned"). For example, a patent owner's [\*\*24] silence may support an estoppel defense when the patent owner specifically objects to the alleged infringer's activities, but then remains silent for a long period of time before filing an infringement action. See *Meyers*, 974 F.2d at 1308-09; *A.C. Aukerman*, 960 F.2d at 1042. CSU has failed to show any alleged misconduct by Xerox besides its silence and, therefore, CSU's defense of estoppel cannot be supported.

CSU also cannot establish the second element of its defense, i.e., that it relied on Xerox's silence. **HN11** [↑] An infringer cannot assert reliance on the patent owner's silence if the infringer did not even know of the potential patent problem. See *A.C. Aukerman*, 960 F.2d at 1042-43. CSU cannot claim that it relied on Xerox's silence regarding the seven patents at issue when CSU has not presented any evidence that it was aware of the patents and the potential infringement.

Finally, CSU has not established that it would be materially prejudiced by allowing Xerox to proceed because CSU has not shown that it took any actions in reliance on Xerox's silence. CSU claims without any evidentiary support that it expanded to two cities from 1987 through 1994 based on Xerox's silence. [\*\*25] After Xerox filed its counterclaims in November 1994, CSU expanded to four cities in 1995 and one city so far in 1997. In light of CSU's expansion after Xerox filed its infringement counterclaims, CSU bears the burden of establishing that it would have altered its pre-November 1994 expansion if Xerox would have sued earlier. See *Meyers*, 974 F.2d at 1309. CSU has offered no evidence on this point. The record evidence suggests that CSU continued its expansion plans despite Xerox's filing of its infringement counterclaims. The court accordingly finds that CSU has presented insufficient evidence to establish that it took any actions in reliance on Xerox's silence. For each of the above reasons, the court grants summary [\*1487] judgment in favor of Xerox on CSU's estoppel defense.

#### E. Laches

**HN12** [↑] A successful laches defense bars damages only for conduct occurring prior to the filing of the lawsuit. See *Adelberg*, 921 F.2d at 1270 ("defense of laches bars the recovery of damages for any patent infringement occurring prior to the filing of the lawsuit"); *A.C. Aukerman*, 960 F.2d at 1041 ("laches bars damages for a patent defendant's pre-filing infringement but not for post-filing damages [\*\*26] or injunctive relief"); *Leinoff v. Louis Milona & Sons, Inc.*, 726 F.2d 734, 741 (Fed. Cir. 1984) (laches has "no effect on an action for post-filing damages or an injunction"). CSU contends that the laches doctrine is a defense to all damages and injunctive relief except for post-filing injunctive relief. Neither authority cited by CSU supports the proposition that post-filing damages are precluded by a successful laches defense. See *Union Shipbuilding Co. v. Boston Iron & Metal Co.*, 17 F. Supp. 318 (D. Md.), aff'd, 93 F.3d 781 (4th Cir. 1996); *Rajah Auto Supply Co. v. Belvidere Screw & Machine Co.*, 275 F. 761, 764 (7th

Cir. 1921). In this case, Xerox seeks only damages accruing after the filing of its patent infringement counterclaims. Thus, CSU's defense of laches fails as a matter of law.

#### F. Statute Of Limitations.

Xerox originally moved for summary judgment on CSU's statute of limitations defense to Xerox's patent infringement counterclaims. CSU did not respond to Xerox's contentions. Xerox seeks only prospective relief for its patent infringement counterclaims and, therefore, the statute of limitations is not a bar to its claims. CSU's statute of limitations **[\*\*27]** defense is invalid as a matter of law.

For the above reasons, the court grants summary judgment in favor of Xerox on its patent infringement counterclaim with respect to the seven parts identified in the court's March 19, 1997, memorandum and order. The only remaining issues on Xerox's patent infringement counterclaim, with respect to the seven patented parts previously referenced, are whether CSU willfully infringed Xerox's patents and the amount of damages.

## II. Xerox's Renewed Notion For Summary Judgment On CSU's Antitrust Claims.

HN13<sup>↑</sup> To establish monopolization under section 2 of the Sherman Act, CSU must prove that (1) Xerox possessed monopoly power in the relevant market and (2) Xerox willfully acquired or maintained that monopoly 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, 480, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) ("Kodak") (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)). For purposes of this motion only, Xerox does not contest that it has monopoly **[\*\*28]** power in the relevant parts and service markets. The disputed issues arise over whether Xerox's actions satisfy the conduct element of a section 2 claim. In particular, Xerox challenges the court's previous rulings that an antitrust claim may be based on (1) Xerox's refusal to sell patented products and (2) Xerox's pricing strategies relating to its patented products.<sup>3</sup>

#### A. Refusal To Sell Patented Products As An Antitrust Violation.

Xerox requests reconsideration or certification of the court's ruling that Xerox's refusal to sell its patented products may constitute an antitrust violation. This court in effect defined the scope of a patent holder's right to license or use its invention by the relevant antitrust market. This court's previously announced rule would limit a patent **[\*\*29]** holder from using its patent to lawfully acquire a monopoly in more than one antitrust market. The court's ruling was based on CSU's evidence that Xerox leveraged its **[\*1488]** monopoly power in the parts market to maintain or acquire its monopoly in the service market. Although CSU may have sufficient other evidence to support such a leveraging theory, the court finds now that Xerox's unilateral refusal to sell or license its patented parts cannot constitute patent misuse or unlawful exclusionary conduct under the antitrust laws.

HN14<sup>↑</sup> The patent statute allows a patent holder to exclude others from manufacturing, selling, or using his inventions. 35 U.S.C. § 154. HN15<sup>↑</sup> The patent statute also provides that "no patent owner otherwise entitled to relief for infringement . . . of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his . . . refusal to license or use any rights to the patent." 35 U.S.C. § 271(d)(4) (emphasis added). HN16<sup>↑</sup> "The heart of (the patentee's) legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent." SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1206 (2d Cir. **[\*\*30]** 1981) (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)), cert. denied, 455 U.S. 1016 (1982); see United States v. Westinghouse Elec. Corp., 648 F.2d 642, 647 (9th Cir. 1981) (right to exclude others is the essence of the patent monopoly). Of course, a patent holder cannot use his patent to justify anticompetitive conduct beyond the limit or scope of the patent grant. See Zenith.

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<sup>3</sup>The court notes that CSU's misuse and antitrust allegations regarding Xerox's refusal to sell and high pricing of its patented parts are based on the legal theory prohibiting monopoly leveraging. Kodak, 504 U.S. at 479 n.29.

395 U.S. at 136 ("But there are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee."); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230, 11 L. Ed. 2d 661, 84 S. Ct. 784 (1964) ("The patent monopoly may not be used in disregard of the antitrust laws."). For example, a patent holder generally cannot grant licenses on the condition that royalties are paid on unpatented products. See, e.g., Zenith, 395 U.S. at 135.

**HN17** [↑] There is no prohibition, however, from lawfully using a patent to acquire a monopoly in more than one relevant antitrust market. In other words, a single "patent monopoly" can be used to secure multiple "economic" [\*\*31] monopolies," i.e., monopolies in more than one relevant antitrust market. See Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 221, 65 L. Ed. 2d 696, 100 S. Ct. 2601 (1980) ("The boundary of a patent monopoly is to be limited by the literal scope of the patent claims."); American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1367 (Fed. Cir.) ("The patent system, which antedated the Sherman Act by a century, is not an 'exception' to the antitrust laws, and patent rights are not legal monopolies in the antitrust sense of that word."), cert. denied, 469 U.S. 821, 83 L. Ed. 2d 41, 105 S. Ct. 95 (1984). If the court held otherwise, then a patent holder rarely could refuse to license his product without fear that he had not properly defined the relevant antitrust market or considered how the relevant market may be defined in the future. For example, if Xerox obtained a patent for a part that could be used in either a copier or a printer, and a jury determined that there were separate antitrust markets for copiers and printers, then Xerox could refuse to license its product in only one of the relevant antitrust markets.<sup>4</sup> We do not think Congress intended such [\*\*32] limited patent protection or to require such perfect foresight by the patent holder in defining the relevant antitrust markets. A patent holder's rights should not fluctuate from day to day based on the changing relevant market definitions. Indeed, several courts have held that **HN18** [↑] "where a patent has been lawfully acquired, subsequent conduct permissible under the patent" [\*1489] laws cannot trigger any liability under the antitrust laws." SCM, 645 F.2d at 1206; see Miller Insituform, Inc. v. Insituform of North Am., Inc., 830 F.2d 606, 609 (6th Cir. 1987), cert. denied, 484 U.S. 1064, 98 L. Ed. 2d 988, 108 S. Ct. 1023 (1988); Servicetrends, Inc. v. Siemens Medical Sys., Inc., 870 F. Supp. 1042, 1056 (N.D. Ga. 1994); see also Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 24, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964) ("The patent laws which give a 17-year monopoly on 'making, using or selling the invention' are in pari materia with the antitrust laws and modify them pro tanto."); Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994) (recognizing, as part of copyright analysis, that section 271 of the patent statute may preclude all antitrust [\*\*33] claims and counterclaims premised on a refusal to license a patent). Thus, a patent holder "retains the power to exclude others from manufacturing, using, and selling his inventions without running afoul of the antitrust laws." Miller, 830 F.2d at 609; see SCM, 645 F.2d at 1209.

[\*\*34] CSU argues that a patent holder's unilateral refusal to sell is not legal when the patent holder exercises this right to extend its monopoly into another relevant antitrust market. Although a patent holder perhaps extends his "economic power" by this conduct, he has not expanded the scope of the patented "invention."<sup>5</sup> [\*\*36] Indeed, **HN19** [↑] the patent statute states that the unilateral refusal to license or use a patent shall not constitute misuse and shall not be deemed an "illegal extension of the patent right." 35 U.S.C. § 271(d)(4). The fact that Xerox has attempted to secure the full benefit of its "patent monopoly" by entering more than one market does not raise any antitrust concerns which have not already been considered and balanced by Congress in enacting the patent

<sup>4</sup> In addition, difficulties could arise if the relevant market definitions change over time. For example, the relevant market may include both parts and service at the time a patent holder researches and creates an invention for a copier part. A patent holder certainly would undertake his research with the expectation that he could exclude others from use of the invention in the relevant market which includes parts and service. If the relevant market changed after the patent holder marketed his invention so that parts and service became separate markets, then the patent holder's right to exclude would be severely diminished. In fact, the patent holder's right to exclude would be practically meaningless if the patent holder wanted to continue to compete in both markets.

<sup>5</sup> As Xerox correctly notes, "no patent states that it confers a monopoly in any relevant [antitrust] market. A patent only defines the invention. Because each use of that invention may be prevented by [the patent holder], the patent may have some anticompetitive effect in each market in which it is used [or not used]."

statute.<sup>6</sup> The Sixth Circuit has rejected the theory that a patent holder cannot realize the full value of its invention by entering more than one relevant antitrust market. See Miller, supra. The Sixth Circuit stated that

apparently, appellants' point is that assuming both the position of licensor and of competitor with its licensees renders INA potentially liable for antitrust violations. INA has recognized [\*\*35] this theory of appellants as charging "vertical integration," but persuasively argues that this theory is inapplicable to a patent monopolist. We agree. There is no adverse effect on competition since, as a patent monopolist, INA, from the start, had exclusive right to manufacture, use, and sell his invention.

Miller, 830 F.2d at 609; see Servicetrends, 870 F. Supp. at 1056 ("Although the Court need not decide the issue here, it appears that defendant is entitled to a so-called monopoly in the repair of its shocktube replacement part--a monopoly power that is inherent in its right to sell or refuse to sell the patented components."), amended on reconsideration, 1994 U.S. Dist. LEXIS 15997, 1994 WL 776878 (N.D. Ga. Jun. 24, 1994) (finding as a factual matter that the individual component parts of the shocktube were not patented).

CSU's reliance (and this court's previous reliance) on the Supreme Court's statement in Kodak is misplaced. In Kodak, the Court stated that it "has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to [antitrust] liability if 'a seller exploits his dominant position in one market to expand his empire into the next [market].'" Kodak, 504 U.S. at 479 n.29 (quoting Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 611, 97 L. Ed. 1277, 73 S. [\*\*37] Ct. 872 (1953)). The Court's statement simply is not applicable where a patent holder, exercising [\*1490] his unilateral right to refuse to license or use his invention, acquires a monopoly in two separate relevant antitrust markets. There is no unlawful leveraging of monopoly power when a patent holder merely exercises its rights inherent in the patent grant. In other words, Xerox did not exploit its dominant position in the parts market to obtain a monopoly in the service market. Rather, Xerox exploited its lawful patent to obtain a monopoly in both the parts and service markets. Xerox's power and right to exclude ISOs from the service market arose from its patented invention, not from its position in the parts market.

This court finds the Supreme Court's statement in Kodak inapplicable for other reasons as well. First, Kodak's refusal to sell patented parts was not at issue in the decision. The Supreme Court referred to patents only once to illustrate a method of lawfully acquiring monopoly power. We find nothing in Kodak which addresses the issue of whether a single patent can give its holder a monopoly in more than one antitrust market. Second, the statement in [\*\*38] Kodak, as evidenced by the cases cited by the Court, applied to concerted and contractual activity and was in the context of a tying claim. See Data General, 36 F.3d at 1185-86 n.63 (citing footnote 29 of Kodak for the proposition that concerted or contractual behavior is prohibited and not even referring to the same footnote when addressing whether a copyright holder's unilateral refusal to sell its copyrighted products is lawful). In contrast, Xerox has unilaterally refused to sell its patented parts.<sup>7</sup>

CSU complains primarily because Xerox achieved too much success by exercising its rights inherent in the patent grant. Of course, [\*\*39] HN20[] a patent holder can continue "to exercise his patent's exclusionary power even after achieving commercial success; to allow the imposition of treble damages based on what a reviewing court might later consider, with the benefit of hindsight, to be too much success would seriously threaten the integrity of the patent system." SCM, 645 F.2d at 1206. The court believes that the result should be no different whether a

<sup>6</sup> Courts also have struck the same balance between the patent and antitrust laws. See, e.g., SCM, 645 F.2d at 1205-06. Under CSU's interpretation of Kodak, inventors would have very little incentive to develop products useful in more than one relevant antitrust market because they could not exclude competitors in more than one market (assuming the patent holder competes in both markets). To preclude patent holders from realizing the full value of their inventions by unilaterally excluding others seems to stand the patent law on its head.

<sup>7</sup> CSU also fails to explain why the court should assume that Xerox's monopoly over the parts market was created first and then used as leverage to gain a monopoly over the service market. It appears that Xerox's monopoly in both markets may have been created simultaneously. In any event, it was Xerox's refusal to license its patented parts that created both monopolies.

patent holder's success (achieved by conduct expressly sanctioned by the patent statute) impacts one or more relevant antitrust markets. See [Miller, 830 F.2d at 609](#).

For the above reasons, the court grants partial summary judgment in favor of Xerox on CSU's antitrust claims. Xerox's unilateral refusal to sell or license its patented parts cannot give rise to antitrust liability. The court's ruling does not preclude a finding of antitrust liability against Xerox based on CSU's other allegations of exclusionary conduct.<sup>8</sup>

**[\*\*40] B. Pricing Of Products As An Antitrust Violation.**

Xerox also seeks reconsideration or certification of the court's ruling that Xerox's pricing of its patented products at an unreasonably high price or in a discriminatory manner can constitute an antitrust violation. The court essentially has resolved the first issue by finding that Xerox's exercise of its unilateral right to refuse to sell or license its patented products cannot constitute an antitrust violation. [HN21](#) [↑] A demand for a price which is "so high as to preclude acceptance of a license offer is, after all, not appreciably different from a refusal to license upon any terms." [W. L. Gore & Assocs. v. Carlisle Corp., 529 F.2d 614, 623 \(3d Cir. 1976\)](#). Thus, if Xerox could lawfully refuse to sell its patented parts, it certainly could price its parts at a price as high as it sees fit. See [Brulotte v. Thys Co., 379 U.S. 29, 33, 13 L. Ed. 2d 99, 85 S. Ct. 176 \(1964\)](#) [HN22](#) [↑] ("A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly.").

[\*1491] CSU also claims that Xerox charged higher prices to self-servicers (customers who self service their copiers and printers) than ISOs. Of course, [\*41] inherent in Xerox's patent grant is the right to license its product to some and not to others. [Westinghouse, 648 F.2d at 647](#) [HN23](#) [↑] ("The right to license that patent, exclusively or otherwise, or to refuse to license at all is 'the untrammeled right' of the patentee.") (citation omitted). Thus, Xerox has the right to price its patented products at different prices to different customers. See [USM Corp. v. SPS Technologies, Inc., 694 F.2d 505, 512-13 \(7th Cir. 1982\)](#) (criticizing shrimp peeler cases and finding that [HN24](#) [↑] "there is no antitrust prohibition against a patent owner's using price discrimination to maximize his income from the patent"), cert. denied, 462 U.S. 1107, 77 L. Ed. 2d 1334, 103 S. Ct. 2455 (1983); [Westinghouse, 648 F.2d at 647](#). CSU has not pointed to any authority holding that a patent holder cannot charge different prices to customers for a patented product.<sup>9</sup>

[\*\*42] For the above reasons, the court finds that Xerox's pricing of its patented parts cannot constitute exclusionary conduct under the antitrust laws.

### **III. Xerox's Motion For Reconsideration Of The Court's Copyright Summary Judgment Order.**

Xerox seeks reconsideration of this court's order denying Xerox summary judgment on its copyright infringement counterclaims. Xerox claims that CSU has not provided any evidence to establish any misuse by Xerox pertaining to its copyrighted manuals. Although Xerox previously did not distinguish plaintiff's evidence regarding diagnostic software from manuals, the court finds no record evidence establishing that Xerox charged an unreasonable or even a high price for its operator and service manuals after Xerox resumed sale of its manuals in 1994. of course, CSU has presented evidence that Xerox refused to sell operator and service manuals prior to April 1994.

<sup>8</sup> Among these other allegations, CSU claims that Xerox refused to sell unpatented parts to ISOs, implemented burdensome procedures for customers ordering parts, threatened to impose enormous costs for customers switching service between ISOs and Xerox, and cut service prices in an effort to eliminate ISO competition.

<sup>9</sup> Even if price discrimination by a patent holder could be illegal under the antitrust laws, the court doubts that the evidence presented by CSU in opposition to Xerox's summary judgment motion is sufficient. CSU's only evidence of price discrimination is a contract between the Navy and Xerox which does not appear to be comparable to a contract between CSU and Xerox. In addition, the [R&D](#) settlement specifically prohibited Xerox from charging its self-servicers a lower price than ISOs.

The same principles under the Noerr-Pennington doctrine discussed earlier apply equally to CSU's claim that the filing of Xerox's copyright infringement counterclaims constitutes misuse. CSU has failed to establish that Xerox's counterclaims are objectively meritless. The court issued **[\*\*43]** a preliminary injunction with respect to these copyright claims and has granted summary judgment in favor of Xerox on a large portion of its claims. CSU, therefore, is barred from asserting that the filing of Xerox's copyright infringement counterclaims can constitute misuse.

For the above reasons, the court grants summary judgment in favor of Xerox on CSU's misuse defense with respect to copyrighted manuals for the time period after April 1994.<sup>10</sup>

IT IS THEREFORE ORDERED that defendant's motion for reconsideration of the order denying summary judgment on copyright infringement (Doc. # 581) is granted in part and denied in part as discussed above.

IT IS FURTHER **[\*\*44]** ORDERED that defendant's motion for reconsideration or certification pursuant to 28 U.S.C. § 1292(b) of the order denying summary judgment on patent infringement and antitrust claims (Doc. # 583) is granted in part and denied in part.

Dated this 8th day of April, 1997, at Kansas City, Kansas.

EARL E. O'CONNOR

United States District Judge

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<sup>10</sup> CSU filed a motion for discovery sanctions against Xerox on March 13, 1997. CSU claims that Xerox should be estopped from denying CSU's laches and statute of limitations defenses because of Xerox's discovery conduct. The court accordingly will defer consideration of the merits of these defenses until CSU's pending motion for sanctions is decided.



## **Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.**

United States District Court for the District of Kansas

April 8, 1997, Decided ; April 8, 1997, FILED

No. 96-1336-JTM

### **Reporter**

1997 U.S. Dist. LEXIS 5881 \*; 1997-1 Trade Cas. (CCH) P71,829

WICHITA CLINIC, P.A., Plaintiff, vs. COLUMBIA/HCA HEALTHCARE CORPORATION; and HCA HEALTH SERVICES OF KANSAS, INC., Defendants.

**Disposition:** [\*1] Defendant's motion to dismiss (Dkt. No. 4) denied.

## **Core Terms**

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Clinic, market share, monopolization, monopoly, competitor's, hiring, anticompetitive conduct, anti trust law, monopoly power, antitrust, parties, physician's services, unfair competition, monopolistic, negotiations, probability, employees, markets, hospital service, antitrust claim, trade secret, alleges, complaint alleges, misappropriation, anticompetitive, confidentiality, courts, cases, letter of intent, Sherman Act

## **LexisNexis® Headnotes**

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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 > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

### **HN1[] Scope, Monopolization Offenses**

Under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), it is illegal for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce. This

section addresses either unilateral or joint action by a defendant. In contrast, [§ 1](#) of the Sherman Act focuses only on collusive or conspiratorial anticompetitive conduct between two or more parties. [15 U.S.C.S. § 1](#). In order to prevail on a [§ 2](#) claim, plaintiff must show (1) relevant geographic and product markets; (2) specific intent to monopolize; (3) anticompetitive conduct in furtherance of an attempt to monopolize; and (4) a dangerous probability of success.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

## [HN2](#) Private Actions, Standing

The Sherman Act does not confine its protection to consumers, or to purchasers, or to competitors. 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.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

## [HN3](#) Private Actions, Standing

A series of factors are relevant to the determination of standing under the Sherman Act, including the causal connection between the antitrust violations and plaintiff's injury; the defendant's intent; the nature of the plaintiff's injury; the directness or indirectness of the connection between the plaintiff's injury and the allegedly unlawful market restraint; the speculativeness of the plaintiff's damages; and the risk of duplicative recoveries or the danger of complex apportionment of damages.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

## [HN4](#) Regulated Practices, Market Definition

The validity of a market is generally a fact question for the jury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

## [HN5](#) Actual Monopolization, Claims

Under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), a single firm's conduct is actionable only if it threatens actual monopolization of a market. The Sherman Act does not address all forms of unseemly business activity. If a party does not have monopolistic control over a market, its unfair business conduct implicates the attempt provision of the antitrust laws only if that conduct threatens to create a monopoly. The plaintiff must show that there was a dangerous probability the defendant would achieve monopoly status as the result of the predatory conduct alleged by the plaintiff.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

## **HN6** **Regulated Practices, Monopolies & Monopolization**

The probability of a defendant successfully monopolizing a given market is typically evaluated by examining the defendant's share of the relevant market. Reformulated in terms of market share, the plaintiff must show that there was as dangerous probability that the defendant's conduct would propel it from a non-monopolistic share of the market to a share that would be large enough to constitute a monopoly for purposes of the monopolistic offense. The higher the firm's initial market share, the greater the likelihood that it will eventually gain monopolistic control over the market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

## **HN7** **Regulated Practices, Market Definition**

A high market share indicates that the defendant has the economic capacity to monopolize the market. However, while market share is relevant to the determination of the probable success of the attempted monopolization, market share by itself is insufficient to demonstrate market power. Proximity to monopolistic status is not enough; the defendant must also have the ability to propel itself to monopolistic control over the market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

## **HN8** **Monopolies & Monopolization, Attempts to Monopolize**

Because market share statistics sometimes overestimate a firm's market power, the court must also consider the firm's capacity to commit the offense, the scope of its objective, and the character of its conduct. Factors relevant to determining dangerous probability include, but are not limited to, a defendant's market share, whether the defendant is a multimarket firm, the number and strength of other competitors, market trends, and entry barriers. Also relevant is the persistence of a firm's ability to profitably charge monopoly prices.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

## **HN9** **Regulated Practices, Monopolies & Monopolization**

Market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

## **HN10** [L] Monopolies & Monopolization, Attempts to Monopolize

Both the size of the defendant's market share and the time it took to acquire it are factors to consider in determining a dangerous probability of successful monopolization.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

## **HN11** [L] Regulated Practices, Monopolies & Monopolization

A violation of § 2 of the Sherman Act, 15 U.S.C.S. § 2, occurs only if the anticompetitive conduct also creates a dangerous probability a monopoly will be created in the secondary market.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

## **HN12** [L] Actual Monopolization, Anticompetitive & Predatory Practices

Anticompetitive or exclusionary conduct under § 2 of the Sherman Act, 15 U.S.C.S. § 2, is conduct constituting an abnormal response to market opportunities. Predatory practices are illegal if they impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonably necessary for such competition, if the conduct appears reasonably capable of contributing significantly to creating or maintaining monopoly power.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

## **HN13** [L] Remedies, Damages

In order to show anticompetitive conduct, the plaintiff must show that an attempted monopolist's conduct threatened to create substantial and persistent changes in the marketplace may allow some unfair and potentially harmful methods of competition to go unpunished by the antitrust laws. But the antitrust laws are enacted for the protection of competition not competitors. The Sherman Act does not purport to afford remedies for all torts committed by or

against persons engaged in interstate commerce. The triple damage sanction of the Clayton Act is too harsh a remedy for unfair methods of competition that only threaten to have a transitory impact on the market place.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

#### **HN14** [ ] **Regulated Practices, Monopolies & Monopolization**

Any anticompetitive effect must be of a lasting nature. The antitrust court must, therefore, insist on significant and more-than-temporary harmful effects on competition.

Antitrust & Trade Law > Sherman Act > Claims

Torts > Procedural Matters > Commencement & Prosecution > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

#### **HN15** [ ] **Sherman Act, Claims**

Business torts by themselves and without proof of anticompetitive effect are insufficient to support a claim under the Sherman Act.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employees

#### **HN16** [ ] **Actual Monopolization, Anticompetitive & Predatory Practices**

The hiring of a competitor's employees is anticompetitive within the meaning of the Sherman Act only where the talent is hired not to use it but to deny it to possible rivals.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Trade Secrets Law > Civil Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Unfair Competition

#### **HN17** [ ] **Bad Faith, Fraud & Nonuse, Misappropriation**

Under [Kan. Stat. Ann. § 60-3326](#), the statutory protection against trade secret misappropriation expressly does not affect contractual remedies, whether or not based upon misappropriation of a trade secret.

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**Judges:** J. THOMAS MARTEN, JUDGE

**Opinion by:** J. THOMAS MARTEN

## Opinion

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### MEMORANDUM AND ORDER

The present case arises from unsuccessful negotiations between plaintiff Wichita Clinic and defendants Columbia/HCA Healthcare Corporation and HCA Health Services of Kansas, Inc.<sup>1</sup> These negotiations were directed at creating an "integrated health care delivery system" in the Wichita/Sedgwick County area. Columbia operates Wesley Hospital, allegedly the largest hospital in the area. Wichita Clinic is the largest provider of primary physician care services in the same market. After the failure of negotiations, Columbia entered the physician services market directly, hiring a number of physicians from Wichita Clinic.

[\*2] Wichita Clinic contends Columbia undertook these actions with the intent to monopolize health care services in the Wichita/Sedgwick County area and with the intent to drive it out of business. The clinic contends Columbia was able to take these actions by disclosing and misusing confidential information acquired during the course of negotiations. In addition to its claim of attempted monopolization under [Section 2](#) of the Sherman Act, the clinic raises six state law claims: (1) tortious interference with contract; (2) tortious interference with business relations; (3) misappropriation of trade secrets in violation of [K.S.A. 60-3320](#); (4) common law unfair competition; (5) breach of contract; and (6) fraud.

Columbia's pending motion to dismiss focuses primarily on the clinic's antitrust claim. [HN1](#) Under [Section 2](#), it is illegal for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." This section addresses either unilateral or joint action by a defendant. In contrast, [Section 1](#) of the Sherman Act focuses only on collusive or conspiratorial anticompetitive conduct between two or more [\*3] parties. [15 U.S.C. § 1](#).

In order to prevail on a [Section 2](#) claim, plaintiff "must show (1) relevant geographic and product markets; (2) specific intent to monopolize; (3) anticompetitive conduct in furtherance of an attempt to monopolize; and (4) a dangerous probability of success." [Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Public'n's](#), 63 F.3d 1540, 1550 (10th Cir. 1995), cert. denied, 133 L. Ed. 2d 659, 116 S. Ct. 702 (1996). See also [TV Comm. Network v. Turner Network Tel.](#), 964 F.2d 1022, 1025 (10th Cir.), cert. denied, 506 U.S. 999, 121 L. Ed. 2d 537, 113 S. Ct. 601 (1992).

### A. Standing

Columbia challenges Wichita Clinic's standing to present a claim of monopoly in the hospital services market based on a series of cases generally holding suppliers or distributors do not have standing to raise an antitrust complaint challenging defendant's conduct in a separate market. See, e.g., [G.K.A. Beverage Corp. v. Honickman](#), 55 F.3d

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<sup>1</sup> For convenience, the defendants will be identified herein as "Columbia."

762, 766 (2nd Cir. 1995); SAS of Puerto Rico v. Puerto Rico Tel. Co., 48 F.3d 39, 42 (1st Cir. 1995); Volasco Products v. Lloyd A. Fry Roofing, 308 F.2d 383 (6th Cir. 1962), cert. denied, 372 U.S. 907, 9 L. Ed. 2d 717, 83 S. Ct. 721 (1963).

Although Columbia's argument might otherwise appear to have some merit, as Wichita Clinic is not a hospital nor does it provide hospital services, controlling precedent prevents the court from dismissing the action for lack of standing. In Reazin v. Blue Cross, 899 F.2d 951 (10th Cir.), cert. denied, 497 U.S. 1005, 111 L. Ed. 2d 752, 110 S. Ct. 3241 (1990), Blue Cross challenged Wesley's standing to bring the antitrust claim, since it was neither a consumer nor a competitor in the market of health care financing. The Tenth Circuit rejected this argument, after first noting the Supreme Court has

specifically noted that HN2[<sup>1</sup>] "the statute does not confine its protection to consumers, or to purchasers, or to competitors . . ." [Blue Shield v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540,] 472, 102 S. Ct. [2540,] 2544 (quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236, 68 S. Ct. 996, 1006, 92 L. Ed. 1328 (1948)). "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' [\*5] that the claimed violations . . . would be likely to cause." McCready, 457 U.S. at 479, 102 S. Ct. at 2548 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. [477,] 489, 97 S. Ct. [690,] at 697 [(1977)].

#### Reazin, 899 F.2d at 962.

The *Reazin* court explained that while Wesley was not a "direct participant" in health care financing, it was nonetheless a perceived competitor of Blue Cross, and the district court had expressly found it was this perception which motivated Blue Cross's conduct. "In any event," the Tenth Circuit concluded, "Wesley's claimed injuries were an 'integral aspect' of the conspiracy to restrain trade in the health care financing market. Indeed, Wesley was the direct victim of Blue Cross' actions." Id. at 963. Although this section of the opinion addresses Wesley's Section 1 conspiracy claim, the court indicated this same conclusion would apply to create standing for Wesley's Section 2 attempted monopoly claim. Id. at 973.

In a note, the Tenth Circuit summarized HN3[<sup>1</sup>] a series of factors relevant to the determination of standing, including

the causal connection between the antitrust violations and plaintiff's injury; [\*6] the defendant's intent; the nature of the plaintiff's injury; the directness or indirectness of the connection between the plaintiff's injury and the allegedly unlawful market restraint; the speculativeness of the plaintiff's damages; and the "risk of duplicative recoveries . . . or the danger of complex apportionment of damages."

Reazin, 899 F.2d at 962 n.15 (quoting Associated Gen'l Contractors v. California St. Coun. of Carpenters, 459 U.S. 519, 544, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)).

Here, the complaint alleges a direct causal connection between Columbia's conduct and the alleged injuries to the Wichita Clinic. The complaint alleges antitrust injury through damage to Wichita Clinic's market, and alleges the conduct reflects a specific intent to monopolize and damage Wichita Clinic. There has been no showing that a finding of standing will interfere with antitrust policy, create a risk of duplicate recoveries, or pose a risk of complicated apportionment. As a result, the court holds the clinic has standing to pursue its antitrust claim.

#### B. Relevant Geographic and Product Markets

There is a great deal of confusion in the complaint about which specific [\*7] product markets and which geographic area Wichita Clinic contends Columbia has attempted to monopolize. In its response, the clinic narrows its claims down to "hospital services" market and "physician services" market alternatively in either the Wichita or Sedgwick County area. The court finds this is sufficient, since HN4[<sup>1</sup>] the validity of a market is generally a fact question for the jury. Syufy Enterprises v. American Multicinema, 793 F.2d 990, 994 (9th Cir. 1986), cert. denied, 479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876 (1987).

Although there are fleeting references throughout the complaint to other potentially applicable markets, e.g., managed health care services, the only markets expressly discussed by Wichita Clinic in its response to the motion to dismiss are the hospital and physician services market. Plaintiff has not attempted to support its suggestion that other markets might be implicated. Accordingly, the court will narrow the action by dismissing the complaint to the extent it would suggest the attempted monopolization of other, unclearly described markets. Further, the court will grant the motion to dismiss to the extent it seeks to premise a recovery on any [\*8] market other than the hospital or physician services market in the Wichita/Sedgwick County area.

#### C. Dangerous Probability of Success

**HN5** [↑] Under [Section 2](#), a single firm's conduct is actionable only if it threatens actual monopolization of a market. [\*Spectrum Sports Inc. v. McQuillan\*, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 255-256, 113 S. Ct. 884 \(1993\)](#). The Sherman Act does not address "all forms of unseemly business activity. If a party does not have monopolistic control over a market, its unfair business conduct implicates the attempt provision of the antitrust laws only if that conduct threatens to create a monopoly." [\*Colorado Interstate Gas v. Natural Gas Pipeline\*, 885 F.2d 683, 693 \(10th Cir. 1989\)](#) (citing [\*Indiana Grocery v. Super Valu Stores\*, 864 F.2d 1409, 1413 \(7th Cir. 1989\)](#)). "The plaintiff must show that there was a dangerous probability the defendant would achieve monopoly status as the result of the predatory conduct alleged by the plaintiff." [\*Colorado Interstate Gas\*, 885 F.2d at 693](#) (citing [\*Shoppin' Bag of Pueblo v. Dillon Co.\*, 783 F.2d 159, 162 \(10th Cir. 1986\)](#).

**HN6** [↑] The probability of a defendant successfully monopolizing a given market is

typically [\*9] evaluated by examining the defendant's share of the relevant market. [\*Shoppin' Bag\*, 783 F.2d at 161](#). Reformulated in terms of market share, the plaintiff must show that there was as dangerous probability that the defendant's conduct would propel it from a non-monopolistic share of the market to a share that would be large enough to constitute a monopoly for purposes of the monopolistic offense. The higher the firm's initial market share, the greater the likelihood that it will eventually gain monopolistic control over the market. [\*Id. at 162\*](#).

[\*Colorado Interstate Gas\*, 885 F.2d at 694](#).

**HN7** [↑] A "high market share indicates that the defendant has the economic capacity to monopolize the market." [\*Id.\*](#) (citing [\*Shoppin' Bag at 162\*](#)). However, while market share is relevant to the determination of the probable success of the attempted monopolization, market share by itself is insufficient to demonstrate market power. [\*Reazin\*, 899 F.2d at 967](#). "Proximity to monopolistic status is not enough; the defendant must also have the ability to propel itself to monopolistic control over the market." [\*Colorado Interstate Gas\*, 885 F.2d at 694](#) (citations omitted).

Thus, **HN8** [↑] because [\*10] "market share statistics sometimes overestimate a firm's market power," [\*Id. at 695\*](#), the court must also consider "the firm's capacity to commit the offense, the scope of its objective, and the character of its conduct." [\*Id. at 694\*](#). "Factors relevant to determining dangerous probability include, but are not limited to, a defendant's market share, whether the defendant is a multimarket firm, the number and strength of other competitors, market trends, and entry barriers. [\*Multistate Legal Studies\*, 63 F.3d at 1554](#) (citations omitted). Also relevant is the "persistence of a firm's ability to profitably charge monopoly prices." [\*Colorado Interstate Gas\*, 885 F.2d at 695](#).

In [\*Colorado Interstate Gas\*](#), the court stated: "While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%. [\*Colorado Interstate Gas\*, 885 F.2d at 694 n. 18](#) (citing 2 E. Kinter, [\*Federal Antitrust Law\*](#) § 12.6 (1980); Areeda & Turner, [\*Antitrust Law\*](#) P 803 [(1978)])".

Plaintiff relies in particular on the Tenth Circuit's decision in [\*Multistate Legal Studies\*](#) [\*11] to establish standards for determining if Columbia has a "dangerous probability" of achieving monopoly status. In that case, the court stated: "Because we are talking about probabilities, it is not necessary for a defendant to already possess monopoly power in the target market; indeed, if it did, the offense would be monopolization, not attempt." [\*63 F.3d at 1554\*](#). The court

recognized the higher the market share, the greater the chances of eventual monopolization. *Id.* (citing [Colorado Interstate Gas, 885 F.2d at 694](#)). However, the court also stated, "No specific minimum market share is universally accepted." *Id.*

Wichita Clinic places an exuberant, probably overly expansive reading on this comment interpreting it to mean "there is no minimum share in the target market required for an attempted monopolization claim." (Pltf.'s Response at 26.) This is not what the Tenth Circuit said in *Multistate Legal Studies*; it said no specific minimum market share was "universally accepted," not that the courts imposed no minimum market share. As noted earlier, the Tenth Circuit noted in *Colorado Interstate Gas* that "lower courts generally require a minimum market share of between [\*12] 70% and 80%."

Moreover, the comment in *Multistate Legal Studies* appears to be dicta. Immediately after its comment that no minimum market share is universally accepted, the court proceeded to state that the defendants had *stipulated* they had monopoly power in the full-service bar review market. The defendants were accused of leveraging this acknowledged monopoly to dominate the supplemental workshop. The defendants' share of this market rose from 2% to 70% of the market within a single year, while the plaintiff's share of the supplemental market dropped from 84% to 23% within the same time period.

However, the *Multistate Legal Studies* court does cite to two decisions in which claims were permitted to proceed even though the defendant had half or less of a particular market. See [Fiberglass Insulators, Inc. v. Dupuy, 1986-2 Trade Cas. \(CCH\) P67,316](#), No. 84-1244-1, 1986 WL 13356 (D.S.C. Sept. 30, 1986), denying summary judgment in a [Section 2](#) claim where the defendant's share of the market increased from 5% to 51% in four years; and [Indiana Grocery v. Super Valu Stores, 647 F. Supp. 254, 258 \(S.D. Ind. 1986\)](#), where the trial court refused to dismiss an attempted monopolization claim which alleged [\*13] that defendant used its extensive resources to enter a new market and obtain a 15% share within 18 months.

The most important case on the issue, and a stronger one for plaintiff's argument, is the Tenth Circuit's discussion in the antitrust action between Wesley Hospital and Blue Cross, [Reazin v. Blue Cross, supra](#). In *Reazin*, the court noted the disagreement among the courts about the market share level and the evidentiary impact of that level in establishing an antitrust violation. "Courts have not completely agreed on whether a particular market share should be given conclusive or merely presumptive effect in determining market or monopoly power, or whether market share is only a starting point in the inquiry into market or monopoly power." [Reazin, 899 F.2d at 967](#). After citing various cases setting different standards, the *Reazin* court also noted the comment in *Colorado Interstate Gas* that lower courts normally required a showing of 70-80% market share. Dismissing this comment as "dicta," the court stated:

We do not view *Colorado Interstate Gas* as establishing a firm market share percentage required before a finding of monopoly power can ever be [\*14] sustained. We prefer the view that [HNG](#)[] market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power.

[Id. at 967-68.](#)

In its reply, Columbia refers to a general "50% market threshold" which a plaintiff must demonstrate to show an antitrust violation. While there are certainly a number of decisions which have held the plaintiff failed to demonstrate a dangerous probability of success where the defendant had less than half a relevant market, e.g., [Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1432](#) (6th Cir.), cert. denied, 502 U.S. 808, 116 L. Ed. 2d 29, 112 S. Ct. 51 (1990), there are also, as noted in *Reazin*, cases supporting a finding of a likelihood of monopoly even though the defendant has much less than half the market.

In the present case, as noted earlier, Wichita Clinic has identified two relevant markets as the grounds for finding a dangerous probability of success in monopolization. First, there is the market for hospital services. Second, there is the market for physician services.

The complaint is not a model of antitrust pleading. The court has cobbled together [\*15] various comments made throughout the document to glean facts to support the antitrust claim. Read together, however, and extending to plaintiff the benefit of every inference, it is sufficient to set forth a claim under [Section 2](#). The complaint alleges that "Wesley is the largest hospital in Wichita as well as in the State of Kansas." (Complaint P 5.) It alleges "there is only one other tertiary care hospital competing with Wesley in the Wichita area." (*Id. at P 153.*)

With regard to physician services, the complaint alleges Columbia took a "large percentage" of the Wichita Clinic's physicians. (*Id.*) It alleges Columbia's market strength "is even greater than the market share percentages indicate" because of the small size of other physician groups, which have little or no market power. (*Id. at P 154.*)

The complaint alleges Columbia enjoys profits twice the industry average (*Id. at P 153.*) It alleges entry barriers exist which prevent the entry of new competition in the physician and hospital services market. (*Id. at PP 153-154.*) Finally, the complaint alleges Columbia is "the world's largest hospital corporation" with "approximately \$ 17.7 billion in revenues [\*16]" in 1995 and net income of \$ 961 million. (*Id. at P 23.*)

Taken together, these allegations allege size (both in terms of hospital market share and Columbia's general economic size), as well as additional economic barriers to entry and potential restraints on competition. As indicated in *Multistate Legal Studies*, [HN10](#) both the size of the defendant's market share and the time it took to acquire it are factors to consider in determining a dangerous probability of successful monopolization. Here, Columbia's entry in the physician services market has occurred relatively quickly.

There are several alleged facts which place the strength of the plaintiff's claim in doubt, however. The complaint alleges Columbia hired 13 (or 20%) of Wichita Clinic's primary care physicians. If this remains true, Wichita Clinic has retained 80% of its primary care physicians. It may well be that, if anything, Columbia's entry into the primary care physician services market has *increased* competition, by taking market share away from Wichita Clinic without acquiring a monopoly for itself. Moreover, as discussed below, it is unclear how Columbia's alleged actions threaten competition (as opposed to the [\*17] interests of a single competitor) any more than would have the joinder of Columbia and Wichita Clinic, which was the focus of the failed negotiations between the parties. It is not for the court, however, to determine the validity, or lack thereof, of the plaintiff's action at this point. At least in the context of a motion to dismiss, the complaint will survive under the relevant standards governing notice pleading.

One additional matter the court now addresses is the impact of the interconnection between the two markets. The clinic suggests even if Columbia does not have monopoly power in the physician services market, its use of anticompetitive conduct in connection with its monopoly of the hospital services market is sufficient to give rise to an antitrust claim. As the clinic notes (Pltf's. Response at 20 n. 10), there is a split of authority on the issue of whether anticompetitive conduct by a company with monopoly power in one market creates a [Section 2](#) violation, when the conduct is directed against a plaintiff in another market where the defendant has no monopoly. In this court's view, the better rule is [HN11](#) a [Section 2](#) violation occurs only if the anticompetitive conduct also [\*18] creates "a dangerous probability a monopoly will be created" in the secondary market. [Alaska Airlines v. United Airlines](#), 948 F.2d 536, 549 (9th Cir. 1991), cert. denied, 503 U.S. 977, 118 L. Ed. 2d 316, 112 S. Ct. 1603 (1992).

To support its leveraging argument, Wichita Clinic relies on the Tenth Circuit's decision in *Multistate Legal Studies*. There, however, plaintiffs claimed the defendants were "leveraging their monopoly power in a second market to gain a *new monopoly in the target market*." [63 F.3d at 1554 n. 13](#) (emphasis added). Merely alleging a monopoly in the hospital services market does not absolve the plaintiff from having to prove a dangerous probability of monopoly in the physician services market. However, this issue is not decisive here, since, as noted earlier, Wichita Clinic has standing under *Reazin* to challenge Columbia for anticompetitive conduct in the hospital services market.

#### D. Anticompetitive Conduct

The Sherman Act "was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, [\*19] of any form of market control of a commodity." [Apex Hosiery v. Leader](#), 310 U.S. 469, 512, 84 L.

Ed. 1311, 60 S. Ct. 982 (1940). Accordingly, not all illegal or unfair competition violates the antitrust laws. The Tenth Circuit has stated:

HN12[] Anticompetitive or exclusionary conduct under section 2 is "conduct constituting an abnormal response to market opportunities. Predatory practices are illegal if they impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonably necessary for such competition," if the conduct appears "reasonably capable of contributing significantly to creating or maintaining monopoly power."

Multistate Legal Studies, 63 F.3d at 1550 (quoting but omitting citations from Instructional Sys., 817 F.2d 639 at 649).

Columbia argues the various facts cited by Wichita Clinic constitute, at most, business torts which are not actionable under antitrust law. Columbia cites several cases where acts which may amount to unfair competition have nonetheless been held not to constitute a violation of the antitrust laws, since the acts did not damage competition. Thus, in Craig v. Sun Oil, 515 F.2d 221, 224 (10th Cir. 1975), cert. denied, 429 U.S. 829, 50 L. Ed. 2d 92, 97 S. Ct. 88 (1976), the court upheld an award of summary judgment against plaintiff's antitrust claim where the complaint "alleges only a business tort, if anything." Columbia also relies upon language in Northwest Power Products v. Omkar Industries, 576 F.2d 83, 89 (5th Cir. 1978), cert. denied, 439 U.S. 1116, 59 L. Ed. 2d 75, 99 S. Ct. 1021 (1979), where the court noted that "there is no federal law of unfair competition" and that "it is the elimination of the competition, by fair means or foul, that is the concern of the antitrust law, and it is only the unfair method on which the law of unfair competition focuses."

The Tenth Circuit also addressed the necessity of showing anticompetitive conduct in Colorado Interstate Gas, 885 F.2d at 697 (footnote omitted). The court recognized the requirement HN13[] the plaintiff must

show that an attempted monopolist's conduct threatened to create substantial and persistent changes in the marketplace may allow some unfair and potentially harmful methods of competition to go unpunished by the antitrust laws. But the Supreme Court, in a now oft quoted phrase, has stated [\*21] "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, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962)), cert. denied, 429 U.S. 1090, 97 S. Ct. 1099, 51 L. Ed. 2d 535 (1977). The Court has long recognized that the Sherman Act "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." Hunt v. Crumboch, 325 U.S. 821, 826, 65 S. Ct. 1545, 1548, 89 L. Ed. 1954 (1945). We believe the triple damage sanction of the Clayton Act is too harsh a remedy for unfair methods of competition that only threaten to have a transitory impact on the market place.

In the same decision, the court also quoted with approval from Professors Areeda and Turner to the effect that HN14[] any anticompetitive effect must be of a lasting nature:

[We] doubt that the torts and other activities described in this Paragraph would very often seriously impair the competitive opportunities of rivals in any significant or permanent way. We must beware [\*22] of the inclination to condemn a monopolist on the basis of antisocial behavior that could possibly give him an improper advantage in the market. . . . The antitrust court must, therefore, insist on . . . significant and more-than-temporary harmful effects on competition.

Colorado Interstate Gas, 885 F.2d at 697 n. 26 (quoting and adding emphasis to Areeda & Turner P 737b).

Ultimately, the cases Columbia cites do not support its contention that ordinary business torts cannot constitute anticompetitive conduct for antitrust purposes. Rather, these cases simply establish that HN15[] business torts by themselves and without proof of anticompetitive effect are insufficient to support a claim under the Sherman Act. For example, *Craig* ultimately turns on the conclusion the plaintiff failed to demonstrate any impact from the defendant's actions on competition. 515 F.2d at 224. Similarly, in *Northwest Power Products*, the court upheld dismissal of the action because the plaintiff had failed to show the defendants' actions had "adversely affected

competition." [576 F.2d at 90](#). The defendant had only 25% of the national market and faced a field of eight competitors, one of which [\*23] was as large as the defendant. Although the plaintiff pointed to evidence the plaintiff's market share had been reduced as a result of defendant's actions, the court stressed "that argument mistakes competitors for competition." [Id. at 91](#).

Similarly, in [Mid-West Underground Storage v. Porter, 717 F.2d 493, 499 \(10th Cir. 1983\)](#), the court held acts of unfair competition do not implicate the antitrust laws where there is "no showing that their conduct raised entry barriers, increased concentration, or otherwise led to the acquisition or exercise of market power."

In the present case, Wichita Clinic raises two potential forms of anticompetitive conduct on the part of Columbia. First, Columbia allegedly hired away from the clinic a number of its physicians. Second, Columbia allegedly misappropriated trade secrets to support its entry into the physician services market.

To the extent these actions occurred, and through their occurrence create a dangerous probability of monopolization, they may support the clinic's antitrust claim. However, the courts have examined more closely claims of anticompetitive hiring than other forms of anticompetitive conduct. The Tenth Circuit has [\*24] observed "the hiring of a rival's employees is not ordinarily exclusionary, even when done by a monopolist." [Midwest Underground, 717 F.2d at 496](#) (quoting 3 Areeda & Turner § 828b, at 323 (1978)).<sup>2</sup> Professors Areeda and Turner thus conclude that [HN16](#)[<sup>↑</sup>] the hiring of a competitor's employees is anticompetitive within the meaning of the Sherman Act only where the talent is hired "not to use it but to deny it to possible rivals." 3 Areeda & Turner, P 702b (1978).

This approach, which has found significant support in recent decisions, is grounded [\*25] on the policy of supporting the freedom of employees to work where they wish. In [International Distribution Centers v. Walsh Trucking, 812 F.2d 786, 795 n. 6 \(2d Cir. 1987\)](#), the Second Circuit observed:

As a general policy matter, one firm's hiring of its competitor's employees does not present a "compelling case for antitrust intervention." 3 P. Areeda & D. Turner, [Antitrust Law](#), P 702b at 109 (1978) (referring to monopolist's hiring of competitor's employees). A contrary analysis might constrict the freedom of employees to reap the full benefits of their abilities by discouraging them from moving to the employer offering the highest compensation, as well as by discouraging employers from bidding on a competitor's employees. *Id.*

See also [Adjusters Replace-A-Car v. Agency Rent-A-Car, 735 F.2d 884, 894 \(5th Cir. 1984\)](#) (concluding the hiring of a competitor's employees who would use their "skills and contacts" to create business for the new employer, even at the expense of the former employer, was not anticompetitive conduct within meaning of Sherman Act).

The Ninth Circuit has adopted a similar rule. In [Universal Analytics v. MacNeal-Schwendler Corp., 914 F.2d 1256, 1258 \(9th Cir. 1990\)](#) (per curiam), the court stated:

Unlawful predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor. Such cases can be proved by showing the hiring was made with such predatory intent, i.e., to harm the competition without helping the monopolist, or by showing a clear nonuse in fact. Absent either of those circumstances, according to Professors Areeda and Turner, employment should not be held exclusionary.

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<sup>2</sup> The clinic correctly notes there is some support for the conclusion that hiring can be predatory and anticompetitive. [Perryton Wholesale v. Pioneer Distrib'ng, 353 F.2d 618 \(10th Cir. 1965\)](#), cert. denied, [383 U.S. 945, 16 L. Ed. 2d 208, 86 S. Ct. 1202 \(1966\)](#). However, as Columbia also correctly notes, the continued validity of the early Perryton decision is questionable. See [Military Services Realty v. Realty Consultants, 823 F.2d 829, 831 \(4th Cir. 1987\)](#).

See also *Midwest Radio v. Forum Publishing*, 942 F.2d 1294 (8th Cir. 1991) (applying rule and holding use of employees hired from competing radio station was not anticompetitive, where the workers were used to improve defendant station's performance in the market, and thus supported by valid business purpose).

In the present case, Wichita Clinic alleges Columbia's hiring of the clinic's physicians, at excessive salaries, was predatory in nature with the purpose of destroying the clinic's business. The court will allow the action to go forward, providing the clinic an opportunity to prove these allegations.

#### E. State Claims

As noted earlier, Wichita [\*27] Clinic has also raised six state claims. In its motion to dismiss, Columbia targets three of these claims (trade secret misappropriation, common law unfair competition, and breach of contract), arguing that even if the antitrust claim is retained, the court should dismiss these elements of the case.

Columbia contends its right to use any confidential information was governed solely by the April 30, 1995 letter of intent. Thus, Columbia argues if its use of confidential information did not violate the letter of intent, its actions were neither breach of contract nor trade secret misappropriation nor unfair competition.

Columbia relies on paragraph 11 of the letter of intent, which provides:

This letter of intent incorporates and extends to April 30, 1995, the provisions as to confidentiality and exclusive dealings contained in the letter between the parties dated , 1994.

Columbia argues that under the terms of this provision, it no longer had an obligation to honor confidential information acquired from Wichita Clinic during the negotiations.

Wichita Clinic, however, cites the underlying August 23, 1994 agreement, which provides:

The parties recognize [\*28] the necessity of exchanging information which is confidential or contains business or trade secrets of the disclosing party. In consideration of this agreement, the negotiations hereunder, and the mutual exchange of such information, the parties do hereby agree to refrain from disclosing in any manner the information received from each other to any third party. The parties further agree to keep confidential the existence and nature of the negotiations hereunder and to refrain from any disclosure thereof to third parties.

*This agreement of confidentiality between the parties and the information exchanged by them shall survive the ninety-day exclusivity period herein contained, and shall continue in force and effect thereafter.*

(Aug. 23, 1994 Agreement at 1-2; emphasis added.)

By its express terms, the 1994 agreement creates two obligations. First, the parties create an exclusive dealings agreement, under which neither party will conduct negotiations with a third party for the development of an integrated health care delivery system. By its terms, the exclusive dealings portion of the agreement was limited in duration, and would be in force for 90 days from the date of the [\*29] agreement. Second, the parties agreed to maintain the confidentiality of information acquired during their negotiations. Unlike the exclusive dealings agreement, the confidentiality portion of the agreement is unlimited in scope.

In its reply, Columbia contends that consideration of the earlier 1994 agreement is barred under the parol evidence rule, citing *Pizza Management v. Pizza Hut*, 1989 U.S. Dist. LEXIS 4624, No. 86-1664- C, 1989 WL 46253 (D. Kan. Apr. 14, 1989). The parol evidence rule bars consideration of prior agreements where the parties have subsequently entered into a binding, fully integrated agreement. Columbia's argument fails, however, since paragraph 11 of the letter of intent explicitly "incorporates" the earlier 1994 agreement.

The only reasonable construction of the letter of intent is that the "extension" provided by paragraph 11 applies only to the exclusive dealings portion of the agreement. The confidentiality portion of the agreement, which was already of unlimited duration, would not be affected by such an "extension."

Columbia also argues the court should dismiss the plaintiff's claims for statutory trade secret misappropriation and unfair competition. In this context, Columbia [\*30] relies on the principle that "[a] party cannot have a tort duty

when the party's same duties and rights are specified by contract."<sup>17</sup> *Atchison Casting Corp. v. Dofasco, Inc.*, 889 F. Supp. 1445, 1461 (D. Kan. 1995) (quoting *Nature's Share, Inc. v. Kutter Products*, 752 F. Supp. 371, 385 (D. Kan. 1990)).

The court rejects Columbia's argument. <sup>17</sup> Under *K.S.A. 60-3326*, the statutory protection against trade secret misappropriation expressly "does not affect contractual remedies, whether or not based upon misappropriation of a trade secret." With regard to the unfair competition claim, it does not appear to be duplicative of the contract claim, since it includes the additional allegation that Columbia not only wrongfully disclosed confidential information, but it wrongfully used the information to support its anticompetitive actions as well.

IT IS ACCORDINGLY ORDERED this 8<sup>th</sup> day of April, 1997, that defendant's motion to dismiss (Dkt. No. 4) is hereby denied.

J. THOMAS MARTEN, JUDGE

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